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AROUND THE STATE

TCCA Celebrates Excellence at Annual Conference

Hon. Bonnie Townsend receives the Extraordinary Achievement Award from TCCA President Landra Solansky

The Texas Court Clerk's Association (TCCA) acknowledged the strong service of many at their recent annual conference banquet in Georgetown, where the organization celebrated their 30-year anniversary.

Hon. Bonnie Townsend, TMCEC Board President and Municipal Judge for the City of Luling, was presented with the Extraordinary Achievement Award. This award recognizes an individual in the court profession who has demonstrated extraordinary performance on behalf of the association that benefits the entire membership. The recipient may receive this award only once in a lifetime and must have previously received the Distinguished Service Award.

TCCA President Landra Solansky, who also serves as TMCEC Board Treasurer and Court Administrator for the City of Seguin, received the prestigious Lorna Nelson Lifetime Achievement Award. Ms. Solansky was on hand to distribute the plaques to this year's other award winners.

TMCEC Program Director Leandra Quick, received the Outstanding Achievement in Education Award. This award recognizes demonstrated commitment and extraordinary contributions to outstanding achievement in education through the development of a program, a task performed, or providing outstanding education that benefits the full membership of TCCA.

Pictured right, Ms. Quick holds her award next to Jennifer Bozorgnia, Director of Court Services, City of Irving, and TCCA Past-President Tammy King Odom, Court Administrator, City of Texas City. TCCA President Landra Solansky stands to her left. The award nomination was determined by the TCCA Certification and Education Committee.

2024 CASE LAW AND ATTORNEY GENERAL OPINION UPDATE

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

The following decisions and opinions were issued between the dates of October 1, 2023 and September 30, 2024. Acknowledgments: Special thanks to Judge David Newell and Elaine Riot.

I. Constitutional Issues

A. First Amendment

A public official who prevents someone from commenting on the official's social-media page engages in state action under Section 1983 only if the official both (1) possessed actual authority to speak on the State's behalf on a particular matter and (2) purported to exercise that authority when speaking in the relevant social-media posts.

Lindke v. Freed, 601 U.S. 187 (2024)

James Freed created a private Facebook profile before 2008, later converting it to a public page after becoming city manager of Port Huron, Michigan, in 2014. He frequently posted about his personal life and city-related issues, engaging with residents and soliciting feedback. During the COVID-19 pandemic, Freed posted about the situation but deleted comments from user Kevin Lindke, who criticized the city's approach, and ultimately blocked him from commenting.

Lindke sued Freed under Section 1983, alleging that Freed violated his First Amendment rights. The district court determined that because Freed managed his Facebook page in his private capacity, and because only state action can give rise to liability under Section 1983, Lindke's claim failed. The Sixth Circuit affirmed. Because the Sixth Circuit applied a different test than other circuits in determining state action in the social-media context, the Supreme Court granted certiorari.

Justice Barrett delivered the unanimous opinion of the Court. Section 1983 "provides a cause of action against '[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State' deprives someone of a federal constitutional or statutory right." It protects against acts attributable to a State, not those of a private person. However, the line between private conduct and state action can be difficult to draw. Whereas in past precedent, the Court grappled with whether a nominally private person engaged in state action for purposes of Section 1983, here the question is whether a state official engaged in state action or functioned as a private citizen. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights.

According to the Court, a close look is necessary in the context of a public official using social media. The Court notes that there are about 20 million state and local government employees in the U.S., with diverse roles from governors to teachers. Many use social media for both personal and official communication, often blurring the lines between the two. Additionally, social media includes various rapidly changing platforms, each with unique features for sharing and managing content. As in other contexts, the state-action doctrine demands a fact-intensive inquiry.

Based on principles articulated in the Court's precedent in analogous cases, a public official's social media activity constitutes state action under Section 1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media.

Under the first prong, for state action to exist, the official must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. Under the second prong, an official purports to speak on behalf of the State while speaking in his official capacity or fulfilling responsibilities pursuant to state law.

Social media pages may be clearly private or clearly official; however, some, like Freed's, are mixed or ambiguous. For those harder cases, the Court says categorizing posts is a fact-specific undertaking in which the post's content and function are the most important considerations. Also, hard-to-classify cases require awareness that an official does not necessarily purport to exercise his authority simply by posting about a matter within it. It is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts.

As a final point, the Court says the technology used affects the state-action analysis. Freed deleted Lindke's comments and blocked him, which raises different issues: deleting comments is straightforward, but blocking is broader and may affect Lindke's ability to comment on any post. This highlights the risks of using a mixed- use social media account, as blocking someone could inadvertently prevent comments on official posts, increasing potential liability for public officials who don't clearly separate personal and official content.

The Court vacated the Sixth Circuit's judgment and remanded the case for further proceedings consistent with the state-action test delineated in the opinion.

Commentary: Readers, please check your social media practices. Public officials, including judge and court personnel, should carefully distinguish between their personal and official social media accounts to avoid confusion over whether their actions represent state authority, minimizing the risk of legal challenges under Section 1983. They need to be mindful that engaging in discussions or taking actions involving their official roles could be considered state action, especially when addressing matters related to their duties. Blocking users or deleting comments on posts tied to official business could lead to First Amendment claims, so officials should exercise caution. Maintaining clear boundaries between personal and official content helps ensure transparency and neutrality in their online presence.

A. Second Amendment

An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.

U.S. v. Rahimi, 144 S. Ct. 1889 (2024)

In an opinion by Chief Justice Roberts, the Court, for the first time, applied its decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, which held that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction "is consistent with the Nation's historical tradition of firearm regulation."

The subject of the controversy was 18 U.S.C. § 922(g)(8), a federal law that prohibits possessing a firearm while subject to a domestic violence restraining order. Zackey Rahimi was under such an order when police found a pistol, rifle, and ammunition in his home during a search warrant executed while he was in custody for aggravated assault with a deadly weapon and suspected of involvement in five shootings. A prosecution under Section 922(g)(8) may proceed only if three criteria are met: (1) the defendant must have received actual notice and an opportunity to be heard before the order was entered; (2) the order must prohibit the defendant from either harassing, stalking, or threatening his intimate partner or his or his partner's child, or engaging in other conduct that would place the partner in reasonable fear of bodily injury to the partner or child; and (3) the order must either contain a finding that the defendant represents a credible threat to the physical safety of his intimate partner or his or his partner's child or by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against those individuals. Rahimi's restraining order met all three requirements.

Rahimi moved to dismiss his indictment based on a Second Amendment facial challenge to Section 922(g)(8). The district court denied his motion concluding that Fifth Circuit precedent foreclosed his challenge. Rahimi pled guilty. On appeal, he again raised his Second Amendment challenge. While his petition was pending, the Supreme Court issued the *Bruen* decision. A new panel reversed, concluding that Section 922(g)(8) does not fit within the tradition of firearm regulation. The Supreme Court granted certiorari.

The Court found that Section 922(g)(8) "fits comfortably" within the tradition of United States firearm laws since its founding, which included provisions preventing individuals who threaten physical harm to others from misusing firearms. According to the majority, the Fifth Circuit made two errors: (1) it read *Bruen* to require a "historical twin" rather than a "historical analogue;" and (2) it did not correctly apply the Court's precedents governing facial challenges. Instead of considering the circumstances in which Section 922(g)(8) was most likely to be constitutional, the panel focused on hypothetical scenarios where Section 922(g)(8) might raise constitutional concerns.

The majority identified two distinct historic legal regimes that specifically addressed firearms violence:

(1) surety laws, which authorized magistrates to require individuals suspected of future misbehavior, including spousal abuse and "go[ing] armed offensively," to post a forfeitable bond; and (2) "going armed laws," which

punished those who menaced or terrified others with firearms by forfeiture of the arms and imprisonment. The Court takes these two regimes together, finding Section 922(g)(8) "relatively similar" in both why and how it burdens the Second Amendment right. Specifically, Section 922(g)(8) restricts gun use to mitigate demonstrated threats of physical violence, applies only once a court has found that the defendant "represents a credible threat to the physical safety" of another, and is limited in duration.

Five concurring opinions were filed. Justice Thomas filed a dissenting opinion.

Justice Sotomayor, joined by Justice Kagan, wrote separately to highlight why the Court's interpretation of *Bruen* is correct instead of the dissent's. The majority's interpretation "permits a historical inquiry calibrated to reveal something useful and transferable to the present day, while the dissent would make the historical inquiry so exacting as to be useless, a too-sensitive alarm that sounds whenever a regulation did not exist in an essentially identical form at the founding." Rather than asking whether a present-day gun regulation has a precise historical analogue, courts applying *Bruen* should "conside[r] whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." (emphasis in original). Though neither the Government nor the majority identified a founding- era or Reconstruction-era law that specifically disarmed domestic abusers, according to this concurrence, they did not have to. The shared principle between Section 922(g)(8) and the surety and going armed laws is sufficient. Justice Sotomayor and Justice Kagan reiterate their preference for the means-end scrutiny the Court rejected in *Bruen*, under which they say the constitutionality of Section 922(g)(8) is "even more readily apparent."

Justice Gorsuch concurred, observing and explaining the important rationale of the Court's requirement in *Bruen* that the Government show, in at least some of its applications, that the challenged law "imposes a comparable burden on the right of armed self-defense" to that imposed by a historically recognized regulation and that the burden imposed by the current law "is comparably justified." Through these showings, the Court seeks to honor the fact that the Second Amendment "codified a pre-existing right" belonging to the American people, one that carries the same "scope" today that it was "understood to have when the people adopted" it. Though the dissent disagrees that Section 922(g)(8) is analogous to past practices originally understood to fall outside the Second Amendment's scope, there is agreement that the inquiry itself is the only proper one a court may ask. Though a difficult task, asking that question keeps judges in their proper lane.

Justice Kavanaugh's concurring opinion addressed other concurring opinions and the briefs of the parties and amici in the case, specifically related to questions about judicial reliance on text, history, and precedent in Second Amendment cases. He reviewed the proper roles of text, history, and precedent in constitutional interpretation. They are the "tools of the trade for an American judge" and, though not perfect, must remain paramount.

Justice Barrett issued a concurring opinion to identify the basic premises of originalism: "that the meaning of constitutional text is fixed at the time of its ratification and that the 'discoverable historical meaning ... has legal significance and is authoritative in most circumstances.'" She emphasized the struggle of lower courts to use history in the wake of *Bruen*, especially with the level of generality. Justice Barrett warns that a court must not read a principle at such a high level of generality that it waters down the right. Pulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be. However, Justice Barrett finds that the majority settled on just the right level of generality.

Justice Jackson concurred in the majority's decision but wrote separately to highlight the difficulty faced by "judges on the ground" to apply *Bruen*. She also expressed concern that lower courts appear to be diverging in both approach and outcome as they struggle to conduct the inquiry required by *Bruen*. According to Justice Jackson, courts, "which are currently at sea when it comes to evaluating firearms legislation, need a solid anchor for grounding their constitutional pronouncements."

In his dissent, Justice Thomas disagreed that the Government can strip the Second Amendment right of anyone subject to a protective order even if he has never been accused or convicted of a crime. According to the dissent, the Court and Government do not point to a single historical law revoking a citizen's Second Amendment right based on possible interpersonal violence. The Government has not borne its burden to prove that Section

922(g)(8) is consistent with the Second Amendment's text and historical understanding. According to Justice Thomas, Section 922(g)(8) strips an individual of his ability to possess firearms and ammunition without due process; rather, it is automatic and uncontestable. Also, a violation of Section 922(g)(9) is a felony punishable by up to 15 years of imprisonment and triggers a life-long permanent prohibition on possessing firearms and ammunition.

Justice Thomas opined that the founding generation addressed the same societal problem, the risk of interpersonal violence, as Section 922(g)(8) through the "materially different means" of surety laws. After providing sureties, a person kept possession of all his firearms, could purchase additional firearms, and could carry firearms in public and private. A breach of the peace resulted in the penalty of his sureties paying a sum of money.

To disarm him, the Government would have to take some other action, such as imprisoning him for a crime. Justice Thomas finds this fundamentally different than Section 922(g)(8), which has sweeping prohibitions that are criminally enforced and could result in a permanent lifelong inability to exercise Second Amendment rights. He also contrasts the going armed laws (or affray laws) with Section 922(g)(8). The former could only occur in a public place, were distinguished from private, interpersonal violence, and only prohibited carrying certain weapons (dangerous and unusual) in a certain manner ("terrifying the good people of the land"). Such laws also punished past behavior and required proof beyond a reasonable doubt, among other protections. Section 922(g)(8) revokes a person's Second Amendment right based on the suspicion that he may commit a crime in the future. The only process required is a hearing on the underlying court order, a civil hearing with fewer constitutional protections. Under Section 922(g)(8), a person need only be prohibited from threatening or using force or pose a "credible threat" to an "intimate partner or child." Thus, Justice Thomas found going armed laws off of the mark. He noted that the majority takes pieces from surety laws and going armed laws to "stitch together an analogue" for Section 922(g)(8).

Finally, he noted that states have a mechanism for disarming anyone who uses a firearm to threaten physical violence: criminal prosecution.

Commentary: Many paths, same destination. Eight of the nine justices reached the same conclusion for seemingly different reasons. This could signify difficulty consistently applying *Bruen*. It could also signify that the Bruen construct is complicated but workable. Notably, Justice Jackson expects divergent outcomes when lower courts apply *Bruen*. Stay tuned to see how the Court handles future applications of *Bruen*.

C. Fourth Amendment

Geofence warrants are unconstitutional.

U.S. v. Smith, 110 F.4th 817 (5th Cir. 2024)

Unless "location services" are disabled, cell phones almost constantly transmit Global Positioning System (GPS) data to cell towers. For example, when a cell phone user searches for restaurants, Google will suggest nearby options based on GPS data being sent by the phone at that moment. This "cell site location information" (CSLI) can be very useful in criminal investigations. When a suspect's identity is known, law enforcement agencies can often obtain a warrant to search for CSLI from the suspect's phone (*See Carpenter v. U.S.*, 585 U.S. 296 (2018)). This helps place the suspect at a specific place at a specific time. But what if the suspect's identity is not known?

Enter "geofence warrants." Such warrants outline a geographic area ("geofence") and specify a timeframe. The geofence and timeframe are determined by when and where a crime occurred. They seek a list of phones that transmitted GPS data from within the geofence and timeframe. While Google is not the only company that could receive a geofence warrant, they are a very popular option. Google maintains an enormous location history database, called the Sensorvault, for its users that have not opted out. As a result, Google now annually receives over 11,000 geofence warrants and has adopted a three-step process for responding to them:

Step 1: Google searches all 592 million accounts in the Sensorvault and creates an anonymized list of all responsive user records. Each record is accompanied by a specific time of day and exact location within the

geofence. Step 2: Law enforcement reviews the list and identifies records of interest. Law enforcement may also request additional information about any of the individual records. Step 3: Law enforcement compels Google to provide account-identifying information for the records that are "relevant to the investigation."

In this case, which happened in Mississippi, three individuals, including Smith, robbed a United States Postal Service route driver. Despite having video of the robbery, the Postal Inspection Service (PIS) was unable to positively identify any of the three individuals. In the video, one of the individuals was seen using what appeared to be a cell phone. PIS applied for a geofence warrant spanning one hour for a 98,192 square meter geofence covering the area of the robbery. PIS identified three records of interest. Google provided de-anonymized information for those records, which led to identifying two key suspects, both of whom were eventually indicted.

The Fifth Circuit ruled that the two suspects had a reasonable expectation of privacy in the data that their cell phones sent. Even though users can opt-out of data transmission, the process for doing so is complex and foreign to many users. It can hardly be seen as voluntarily providing data to a third party. Therefore, geofencing is a search that triggers Fourth Amendment protections.

The defense argued that geofence warrants are "general warrants." General warrants, which are "plainly unconstitutional," specify only an offense and allow those executing them to decide which persons should be searched. They were common in the colonial era when they authorized British officers to arbitrarily rummage through homes in search of evidence of criminal activity. The Fifth Circuit agreed that geofence warrants are general warrants and they present "the exact sort of 'general, exploratory rummaging' that the Fourth Amendment was designed to prevent." While it is true that the anonymized list generated is narrowly tailored to a specific location and time, the search itself is not: Google must go through 592 million user accounts in Step 1 of their geofence warrant process.

In this case, however, because of law enforcement's reasonable conduct and the novelty of geofence warrants, suppression was "unwarranted under the good-faith exception."

Commentary: In tackling the same issue, the Fourth Circuit found that there was no reasonable expectation of privacy—and thus geofencing is not a search implicating the Fourth Amendment—because users can opt-out of having their location data sent. Furthermore, the data implicated is not particularly revealing. *U.S. v. Chatrie*, 107 F.4th 319 (4th Cir. 2024). For now, geofence warrants are unconstitutional in Texas. But the U.S. Supreme Court could address this issue in the future. Stay tuned.

The "suspicious place" exception to the arrest warrant requirement was met when officers found a defendant at a gas station near the scene of a fatal collision.

State v. McGuire, 689 S.W.3d 596 (Tex. Crim. App. 2024)

In 2011, McGuire hit and killed a motorcycle operator with his truck in Richmond. McGuire subsequently drove to a nearby gas station and called two law enforcement friends. Officers investigating the collision were informed that McGuire was at the gas station, so they went there. Once there, they found evidence tying McGuire to the fatality: metal from the motorcycle on his fender and a statement from his wife (who was riding passenger) that he had "hit a person." Furthermore, McGuire had red glassy eyes and the odor of alcohol coming off his person.

He was arrested and a blood draw was performed. No search or arrest warrants were ever sought. McGuire was ultimately convicted of felony murder and failure to stop and render aid.

The First District Court of Appeals in Houston relied on *Swain v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005) in suppressing evidence stemming from McGuire's warrantless arrest. The court of appeals read *Swain* as requiring exigent circumstances in order for a warrantless arrest to be authorized under the "suspicious places" exception to the arrest warrant requirement in Article 14.03(a)(1) of the Code of Criminal Procedure. The court of appeals found no exigent circumstances and deemed the arrest unlawful. On discretionary review, the State urged the Court of Criminal Appeals to disavow *Swain* and remove the exigent circumstances requirement attached to Article 14.03(a)(1).

In a plurality opinion by Judge Richardson (joined by Judges Hervey, Newell, and Walker), the Court held that McGuire's warrantless arrest was authorized by Article 14.03(a)(1). First, the Court found no need to consider overturning *Swain* because exigent circumstances did exist in this case. There were only three officers investigating a complex homicide scene that spanned some 829 feet. The victim was thrown 214 feet from the point of impact and McGuire's truck dragged pieces of the victim's motorcycle all the way from the collision site to the gas station. It was dark and the officers had to record evidence (such as skid marks and vehicle fluid trails) using flashlights before it disappeared. And there was no guarantee that McGuire would cooperatively remain at the scene. As for the blood evidence, there was a need to capture it before it dissipated. (When the offense occurred in 2011, the Supreme Court had not yet decided *Missouri v. McNeely*, 569 U.S. 141 (2013), where they ruled that the natural dissipation of alcohol from one's blood is not a *per se* exigent circumstance negating the search warrant requirement in impaired driving cases.) The officers also detailed the unpredictability and difficulty of obtaining warrants in the middle of the night in Fort Bend County. Finally, the place where McGuire was found was a "suspicious place." The facts known to the officers at the time suggested that the perpetrator would be located at the gas station.

Judge Keel filed a concurring opinion joined by Judges Keller, Slaughter, and Yeary. In Judge Keel's view, there is no exigent circumstances requirement in Article 14.03(a)(1) and *Swain* does not create one. The Court should have taken this opportunity to address the issue and not sidestep it. In this case, the gas station's temporal and physical proximity to the crash site coupled with the motorcycle parts stuck to McGuire's truck were enough to satisfy Article 14.03(a)(1). No exigent circumstances analysis was necessary.

Judge McClure concurred without written opinion.

Commentary: In September 2024, the Court of Criminal Appeals granted petition for discretionary review on another suspicious place case: *State v. Newton*, 689 S.W.3d 397 (Tex. App.—Corpus Christi-Edinburg 2024, pet. granted). In *Newton*, an officer followed tire marks from the scene of a crash to a man's home and made a warrantless Driving While Intoxicated arrest. The Thirteenth District Court of Appeals in Corpus Christi-Edinburg determined that the man's home was a suspicious place. The court also concluded that *Swain* does not require exigent circumstances—a different stance from the First District Court of Appeals in Houston. Perhaps the Court of Criminal Appeals will use *Newton* as an opportunity to resolve whether *Swain* attaches an exigent circumstances requirement to the suspicious place exception to the arrest warrant requirement. Stay tuned.

It was a search when a narcotics sniffing dog poked his nose inside a vehicle's window during a traffic stop.

State v. Organ, 697 S.W.3d 916 (Tex. App.—Houston [14th Dist.] 2024, pet. filed)

A driver was stopped for speeding. When the officer approached the vehicle, the driver began rapidly puffing a "cigarillo or a Swisher Sweet," which the officer believed was either due to nervousness or an effort to mask other smells. According to the officer, the vehicle also smelled like either seafood or Chinese food that had "that smell that most food has when it starts to deteriorate." The officer called for backup. They arrived with a narcotics sniffing dog, Jaks, who was trained to identify five illegal drugs. He performed an open-air sniff around the vehicle. At one point, Jaks stood on his hind legs, placed his paws on the passenger door, and put his nose in the passenger side window. He subsequently sat by the passenger side door, which meant he detected one of the drugs he was trained to detect. A subsequent search of the car produced several bags of drugs. The trial court initially declined to suppress the drug evidence after the defendant argued that this warrantless search violated the Fourth Amendment, but on rehearing granted the motion to suppress. The State appealed.

The court of appeals agreed with the trial court that Jaks's interior sniff of the car violated the Fourth Amendment. It is settled law that an open-air sniff of a vehicle's exterior is not a search for the purposes of the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405 (2005). This case, however, became a search once Jaks put his nose inside the defendant's vehicle. The court grounded this conclusion on the "physical-intrusion theory." *See Florida v. Jardines*, 569 U.S. 1 (2013); *U.S. v. Jones*, 565 U.S. 400 (2012). The physical-intrusion theory is a

straightforward property-based test: when the government physically occupies a person's personal property for the purpose of gathering information, it is a search. Because narcotics-detecting dogs are an "instrumentality of law enforcement," they are "the government" for the purposes of this test. The court provided no analysis on whether there was probable cause in this case—they deferred to the trial court's conclusion of law that there was none. Because there was no probable cause or consent, the search was illegal and the drug evidence was inadmissible.

Commentary: This was an issue of first impression in Texas state courts. At least six federal appellate courts, however, have decided virtually the same issue and each determined that it was not a search. *See U.S. v. Guidry*, 817 F.3d 997 (7th Cir. 2016); *U.S. v. Moore*, 795 F.3d 1224 (10th Cir. 2015); *U.S. v. Sharp*, 689 F.3d 616 (6th Cir. 2012); *U.S. v. Mostowicz*, 471 F. App'x 887 (11th Cir. 2012) (per curiam); *U.S. v. Pierce*, 622 F.3d 209 (3rd Cir. 2010); and *U.S. v. Lyons*, 486 F.3d 367 (8th Cir. 2007). It will be interesting to see whether the Court of Criminal Appeals decides to take a sniff at this issue in the future.

Blood evidence drawn pursuant to a warrant was admissible even though the magistrate did not include the date he signed the warrant and administered the oath.

Shackelford v. State, No. 14-22-00778-CR, 2024 WL 3898185 (Tex. App.—Houston [14th Dist.], August 22, 2024, no pet.) (mem. op., not designated for publication)

An officer electronically presented a blood search warrant application to a magistrate. The magistrate signed the warrant and emailed it back to the officer. He did not, however, include dates indicating when the warrant was signed or when the oath was administered. Blood was drawn revealing a blood alcohol content of .311 and the defendant was convicted of Driving While Intoxicated. The defendant appealed, arguing that the blood search warrant was defective under Article 18.04(4) of the Code of Criminal Procedure. Article 18.04(4) requires search warrants to be "dated…by the magistrate."

The court of appeals rejected the defendant's argument. In two cases, the Court of Criminal Appeals rejected similar arguments. In *Dunn v. State*, 951 S.W.2d 478 (Tex. Crim. App. 1997), a magistrate inadvertently neglected to sign just the arrest warrant portion of a 20-page packet of various affidavits and warrants. In *State v. Arellano*, 600 S.W.3d 53 (Tex. Crim. App. 2020), a magistrate signed a warrant with an illegible cursive signature. Nowhere on the warrant was his name typewritten. In both cases, the Court deemed evidence obtained pursuant to the defective search warrant admissible. The Court relied on the statutory good-faith exception in Article 38.23(b) of the Code of Criminal Procedure: if a law enforcement officer acts in "objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause," evidence obtained pursuant to it is admissible even if it was obtained in violation of state or federal law. In this case, the court of appeals relied on these two decisions to uphold the admissibility of the blood evidence. There was nothing in the record suggesting that the officer acted in bad faith or that the magistrate signed at any time other than immediately prior to when he emailed it back to the officer.

Reasonable suspicion existed to conduct a traffic stop even though a driver corrected his unlawful conduct—driving at night with no lights on—prior to the stop.

State v. Vinson, 695 S.W.3d 561 (Tex. App.—Houston [1st Dist.] 2023, no pet.)

A Houston police officer observed a vehicle with no lights on at night, which is an offense under Section 547.302(a)(1) of the Transportation Code. The officer followed the vehicle for 15-20 seconds and then the driver, Vinson, turned his lights on. After he turned the lights on, the officer initiated a traffic stop, which led to a Driving While Intoxicated (DWI) arrest. The defense argued that the stop was unreasonable because Vinson had his lights on when the traffic stop was initiated. The trial court agreed and granted the defense's motion to suppress the DWI evidence obtained during the stop.

The court of appeals rejected Vinson's argument. Correcting a traffic violation does not negate an officer's authority to detain a driver. If it did, many typical traffic stops would be unlawful. For example, when someone is speeding, they often immediately slow down when they see a police officer. It would be impractical to

require officers to initiate stops while an offense is in the process of occurring. Moreover, as the Court of Criminal Appeals articulated in *Cortez v. State*, 543 S.W.3d 198 (Tex. Crim. App. 2018), reasonable suspicion exists if an officer "reasonably suspects that a particular person *has engaged* or is…engaged in criminal activity" (emphasis added). The Court also noted that, in this case, the officer had both reasonable suspicion and probable cause when he witnessed every element of a crime with his own eyes.

There was probable cause to search a vehicle without a warrant when officers detected an odor of marijuana emanating from it, even though they could not tell the difference between the smell of illegal marijuana and legal hemp.

State v. Gonzales, 676 S.W.3d 261 (Tex. App.—Dallas 2023, no pet.)

As two City of Allen police officers were conversing with each other through the open windows of their vehicles, they detected an odor that they believed to be marijuana coming from a vehicle that drove past them. They followed the vehicle to a gas station and conducted a warrantless search. The search led to an arrest for felony possession of a firearm. The defense filed a motion to suppress the evidence asserting that the officers lacked probable cause to conduct the search. They argued that the officers did not properly establish probable cause for marijuana possession based on the odor because hemp is legal and its scent can easily be confused for marijuana. Both officers testified that they could not tell whether the substance they smelled was marijuana or hemp without a lab test. The trial court granted the defense's motion to suppress.

The court of appeals reversed the suppression. In its analysis, the court focused on reasonableness. There is leeway for reasonable mistakes to be made by an officer when determining probable cause. If a mistake is made, it does not automatically make the search unreasonable or illegal. To hold otherwise would render drug laws virtually unenforceable because it is impossible for an officer to know with 100% certainty that a substance is illegal prior to a search. If an officer, for example, sees white powder wrapped in plastic and duct tape and conducts a search because he believes it is cocaine, the decision to search is not retroactively deemed unreasonable if it is later determined through lab testing that the white powder was not cocaine. Therefore, It was not necessary for the City of Allen police officers to know with certainty that the smell was not legal hemp.

Probable cause does not require the elimination of all possible innocent explanations for conduct that leads to an arrest or search. Furthermore, Section 122.358(d) of the Agriculture Code, which was enacted in 2019, states that laws legalizing hemp do not "limit or restrict a peace officer from enforcing to the fullest extent the laws of [Texas] regulating [marijuana] and controlled substances…." Finally, both officers testified that they had never seen anyone smoking legal hemp whereas they regularly encountered people smoking illegal marijuana. This reasonably led them to believe that it was more than likely illegal marijuana emanating from the vehicle. For these reasons, probable cause was established and the gun that the officers discovered was admissible evidence.

D. Sixth Amendment

A defendant's Due Process Clause right to be present was violated when a judge muted him on several occasions during his deferred adjudication revocation hearing, which was held via teleconference.

Hughes v. State, 691 S.W.3d 504 (Tex. Crim. App. 2024)

Due to concerns about a defendant transmitting COVID-19 (he recently tested positive), a deferred adjudication revocation hearing was conducted via teleconference using Zoom. The defendant's defense counsel was present in the courtroom along with the judge, but all other parties connected through Zoom. The judge ordered the defendant to be muted—often mid-sentence—numerous times throughout the hearing. One example:

Judge: All right. Thank you both. I agree with the State wholeheartedly. This is a no-brainer. First you give him a false name, Mr. Hughes.

Defendant: I didn't give him a false name. I took…I take…

Judge: Please mute the defendant. Okay. You're muted. Please do not try and cause any more disruption.

The judge also informed the defendant that he could not leave the teleconference on multiple occasions because he was "in court."

On appeal, the defendant contended that his right to be present in the courtroom was violated. The Fourteenth Court of Appeals in Houston ruled that the defendant's Confrontation Clause-based rights were violated. Justice Wise issued a dissenting opinion where he opined that this case was about the defendant's right to be present under the Due Process Clause, not the Confrontation Clause.

The Court of Criminal Appeals agreed with Justice Wise's dissent: this was a case about the defendant's Due Process Clause right to be present. The majority opinion, authored by Judge Walker and joined by Judges Hervey, McClure, Newell, and Richardson, began by conceding that when everyone is physically present in the courtroom, judges regularly order disruptive parties to be quiet. When the judge in this case muted the defendant, however, the defendant was not physically next to defense counsel and could not have quietly talked to counsel, passed notes, or otherwise indicated that he had something to say. The Court wrote that "[e]ven a defendant that must be bound and gagged can still find a way to make his desire to talk to counsel known." But not so here. His "ability to communicate with counsel was lost when the trial court had him muted. [He] was reduced to a silent portrait of a man…he was effectively removed from the virtual courtroom and…became little more than a spectator in a proceeding that could—and in fact did—result in his loss of liberty." Simply being "present" is not enough to satisfy the Due Process Clause. The defendant must also be able to *participate*. The Court remanded the case to the trial court for further proceedings.

Judge Keller, joined by Judges Keel and Slaughter, dissented. In her view, the defendant "was not completely absent—he was present via [Zoom] and in fact participated in his trial." He pled, watched other witnesses testify, and testified himself. It was not as if he was muted for the entire proceeding. Because this was only a "partial infringement," the defendant was required to object to preserve his claim on appeal.

Judge Yeary also dissented. He wrote that the Court should not have had the power to resolve the due process issue at all and called the case's elevation to the Court of a Criminal Appeals a "procedural free-for-all."

Commentary: Because there is no general authorization or guidelines to conduct virtual court proceedings, appellate courts have been busy addressing numerous legal issues stemming from trial courts that perform them. Along with Hughes, the Court of Criminal Appeals also decided *McCumber v. State*, 690 S.W.3d 686 (Tex. Crim App. 2024). In *McCumber*, the Court ruled that a defendant's Confrontation Clause rights were not violated when a witness testified remotely via Zoom because the trial court made a specific necessity finding: the witness had a fear of retaliation if they showed up in person. Criminal law practitioners should expect more appellate decisions related to virtual proceedings as long as there are no guidelines or express authorization.

E. Eighth Amendment

The enforcement of generally applicable laws regulating camping on public property does not constitute "cruel and unusual punishment" prohibited by the Eighth Amendment.

City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024)

The City of Grants Pass, Oregon has a population of about 38,000 residents and 600 estimated homeless individuals. The City has a public-camping ordinance restricting encampments on public property. These laws can lead to fines and imprisonment for repeated violations. Johnson and Logan, two individuals experiencing homelessness, filed a suit against the City. In *Martin v. Boise*, the Ninth Circuit ruled that cities cannot enforce laws against homeless people if the number of homeless individuals exceeds available shelter beds. Based on this ruling, a class action was filed against the City, claiming its ordinances violated the Eighth Amendment. The district court sided with the plaintiffs, blocking the City from enforcing its laws, reasoning that the shelter beds available were insufficient, especially since the only local shelter had restrictive rules, such as banning smoking and requiring religious services.

The Ninth Circuit, in a divided ruling, affirmed that homeless individuals in Grants Pass are "involuntarily

homeless" because the City's homeless population exceeds the available shelter beds. Following circuit precedent, the court held that the Eighth Amendment prevented the City from punishing homeless people for public camping when there are not enough available shelter beds. Despite objections from 17 judges, the court denied a rehearing. The City filed a petition for certiorari.

In an opinion by Justice Gorsuch, the Supreme Court ruled that the Eighth Amendment does not prohibit the enforcement of public-camping ordinances. The Court explained that the Cruel and Unusual Punishments Clause is focused on the type of punishment imposed for criminal violations, not on whether certain behaviors should be criminalized. The punishments in question (fines, park bans, criminal trespass, and possible imprisonment for repeat offenses) are neither cruel nor unusual.

The plaintiffs argued that the ordinances punished a person's status in violation of *Robinson v. California*, 370 U.S. 660 (1962), where the Court ruled that criminalizing drug addiction was unconstitutional. However, the Court distinguished the City's ordinances from *Robinson*, noting that they punish conduct (public camping), not a status. The Court declined to extend *Robinso*n and held that decisions about addressing homelessness are public policy matters best handled by lawmakers, not the courts under the Eighth Amendment.

Justice Thomas concurred with the Court's decision but wrote separately to express his view that the Court should eventually overturn *Robinson*. He argued that *Robinson* was based on public opinion rather than the original meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause. Additionally, he pointed out that the Clause originally referred only to the punishment for crimes, not civil fines. Thomas rejected the idea that civil fines leading to criminal offenses implicate the Clause, calling it speculative and overly broad.

Justice Sotomayor, joined by Justices Kagan and Jackson, dissented, arguing that bans on public camping punish individuals without shelter for their status as homeless, which they deemed cruel and unusual. Sleep is a biological necessity, not a crime. For some people, sleeping outside is their only option. The City of Grants Pass jails and fines those people for sleeping anywhere in public at any time, including in their cars, if they use as little as a blanket to keep warm or a rolled-up shirt as a pillow. For people with no access to shelter, that punishes them for being homeless. That is unconscionable and unconstitutional.

Homelessness affects over half a million Americans on any given night, many of whom lack access to shelters and are forced to sleep in cars, sidewalks, and parks. This issue arises from various factors, including debt, stagnant wages, domestic abuse, disabilities, and rising housing costs amidst decreasing affordable housing. Local governments face significant challenges in addressing homelessness and need the authority to regulate how and where homeless individuals sleep in public for public health and safety reasons. While cities can enforce laws against behaviors like littering and obstruction, the question for the Court is whether it is constitutional to penalize homeless individuals without shelter for sleeping in public. The dissent referenced city council hearings and the ordinance's definition of "campsite" as a temporary living space, suggesting that the laws specifically target homelessness and contended that any related conduct reflects the status of being homeless, criticizing the majority opinion for not acknowledging this connection.

Commentary: Being homeless is neither a crime nor a legal exemption. For the past five years, advocacy groups have cited *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019) as an Eighth Amendment prohibition on enforcing public-camping ordinances against homeless individuals lacking "access to alternative shelter." Citing *Martin*, local governments have been barred from enforcing laws and ordinances to prohibit involuntary homeless individuals from sitting, lying, or sleeping on public property. This decision abrogates *Martin* and reminds us that the Eighth Amendment is not about what conduct is illegal, but rather what types of punishment are illegal.

In *Powell v. Texa*s, 392 U.S. 512 (1968) (criminalizing public intoxication did not constitute cruel and usual punishment), the Supreme Court declined to extend *Robinson v. California* because the defendant was not convicted for being a chronic alcoholic, but rather for dangerous conduct on a single occasion. Notably, the *Powell* case began in the Austin Municipal Court.

II. Substantive Law

A. Penal Code

The type-of-writing provisions in Section 32.21 of the Penal Code (the forgery statute) are subordinate to the value-ladder provision when the facts meet the requirements for the value-ladder.

State v. Green, 682 S.W.3d 253 (Tex. Crim. App. 2024)

The Court of Criminal appeals analyzed how to apply conflicting offense-classification provisions in Section 32.21 when an offense could fall under either the value ladder in subsection (e-1) (based on the defendant's intent to obtain property or services) or the type-of-writing provisions in subsections (d) and (e) (based on the type of writing involved), which result in different classifications and punishment ranges. This question arose in two cases before the Sixth Court of Appeals, where the defendants were charged with felonies under the type-of-writing provisions. Each defendant argued they should instead be prosecuted under the value ladder in subsection (e-1), which, if applied, would classify their offenses as Class C or B misdemeanors, based on the relatively low value of the property involved.

The Court concluded that Section 32.21 defines four forgery offenses in subsections (b), (d), (e), and (e-1), which the State can charge by following the relevant statutory language. However, subsections (d) and (e) are subject to subsection (e-1), meaning if the evidence shows the defendant committed forgery by attempting to obtain property or services, subsection (e-1) applies, even if the conduct could also fall under (d) or (e). Here, the defendants should be convicted and sentenced under the value-ladder provision in subsection (e-1), not the higher-level offenses in (d) or (e).

B. Transportation Code

Turn signals were required under Section 545.104(a) of the Transportation Code when a vehicle moved from a left-turn-only lane to a straight-only lane even though it did so in the middle of an intersection where there were no lane markers.

State v. Charles, 693 S.W.3d 825 (Tex. App.—Austin 2024, no pet.)

A driver, J. Charles, entered a left-turn-only lane, travelled into the middle of an intersection where there were no lane markers, and, while there, did not turn left but rather "moved over" and continued travelling straight. It was 2:50 a.m. and there were no other vehicles around him. An officer observed this maneuver (as well as other questionable driving behavior) and initiated a traffic stop. Charles was eventually charged with Driving While Intoxicated. The trial court determined that this was an illegal stop because, among other things, Charles changed lanes safely. The State appealed.

On appeal, one of the issues was whether, in this scenario, a turn signal was required under Section 545.104(a) of the Transportation Code. In arguing that there was no such requirement, the defense relied on *Mahaffey v. State*, 364 S.W.3d 908 (Tex. Crim. App. 2012). In *Mahaffey*, the Court of Criminal Appeals ruled that an operator did not "change lanes"—and thus did not need to use a turn signal—when his lane ended and merged into another lane. One of the key points in favor of Mahaffey's position was that he did not cross any lane dividers or markers: they were discontinued as the lane ended. When Charles moved over in the intersection, there were likewise no lane markers. Therefore, Charles argued that he did not execute a lane change.

The court of appeals ruled against Charles. His situation was distinguishable from *Mahaffey*. Vehicles in Mahaffey's lane had to merge into another lane of traffic prior to its termination—there were no alternatives other than to drive off the road. Conversely, the lane that Charles was in continued along the path of a left turn. But he did not turn left. He continued straight in a different lane. This constituted a lane change. Moreover, in *Mahaffey*, the Court addressed the absence of lane markers in intersections: "…[L]ane markings do not terminate at intersections of laned roadways; rather, they are briefly suspended immediately before the

intersection and reappear immediately after the intersection." Thus, even though Charles did not cross any visible lane markers, there were still two lanes. Finally, the court of appeals found no statutory or precedential exception to the turn signal requirement if a lane change can be made safely. Charles was required to use a signal and the officer was justified in stopping him for not doing so.

Commentary: In 2022, the Court of Criminal Appeals held that one of the required elements for a person to be convicted of failing to maintain a single lane under Section 545.060(a) of the Transportation Code is that the lane departure must be "unsafe." *State v. Hardin*, 664 S.W.3d 867 (Tex. Crim. App. 2022). This holding, however, has no impact on the turn signal offense that Charles was stopped for.

III. Procedural Law

A. Jurisdiction/Domestic Violence/Protective Orders

The court of appeals erred in holding that territorial jurisdiction is an independent jurisdictional requirement in Chapter 7B protective-order proceedings.

Goldstein v. Sabatino, 690 S.W.3d 287 (Tex. 2024)

Rachel Goldstein and James Sabatino dated for two years in Massachusetts before breaking up in 2017. After nearly three years of no contact, Sabatino began contacting Goldstein in March 2020, claiming to have found explicit photos from a previous relationship on a phone she had lent him, and refused to return the phone despite her requests. After sending a cease-and-desist letter, Goldstein obtained a protective order against Sabatino in May 2020, which he violated, resulting in his arrest. Afterward, Goldstein moved to Harris County, Texas, where Sabatino filed multiple small-claims lawsuits against her. In October 2020, Goldstein sought a protective order in Texas. The district court found jurisdiction and granted a lifetime protective order against Sabatino. On appeal, he challenged both personal and subject matter jurisdiction. The court of appeals upheld the district court's subject matter jurisdiction but ultimately dismissed the case due to a lack of territorial jurisdiction, as the relevant conduct occurred outside Texas.

The Supreme Court of Texas held that the court of appeals incorrectly applied a criminal jurisdictional requirement to Chapter 7B protective-order proceedings, which are civil matters. A court can hear a case only if it has both subject matter and personal jurisdiction over the parties. While criminal cases involve an additional "territorial jurisdiction" requirement for offenses occurring outside the state, this does not apply to civil protective-order proceedings.

However, the Court agreed with the court of appeals that the district court lacked personal jurisdiction over Sabatino, who did not enter a general appearance.

B. Bail

Under the Damon Allen Act, a public safety report must be reviewed by a magistrate when making a bail determination and appellate courts must review that report.

Ex Parte Gayosso, 685 S.W.3d 100 (Tex. Crim. App. 2023)

Gayosso was arrested for continuous sexual abuse of a child and the trial court set his bond at $500,000. Gayosso filed a pretrial writ of habeas corpus seeking, in relevant part, to reduce his bond because he could not afford $500,000 and had been incarcerated for 90 days. The trial court denied habeas corpus relief but reduced his bond to $250,000. Gayosso appealed this ruling, in part, because he could not make the $250,000 bond either. On this issue, the court of appeals held, in an unpublished opinion, that the trial court did not abuse its discretion in setting bail at $250,000.

The majority opinion, written by Presiding Judge Keller, explains that: (1) the Damon Allen Act applied and required preparation of a public safety report for magistrate's consideration; (2) the Damon Allen Act exemption relieving magistrates of the need to consider public safety reports during bail consideration occurring before April 1, 2022 did not apply to reconsideration of bail decisions after that date, although the initial bail decision

was within the exemption period; and (3) the court of appeals was required to consider the public safety report and thus failed to consider the complete record that was before the trial court in determining whether the bail determination was an abuse of discretion.

In a dissenting opinion, Judge Newell, joined by Judges Hervey, Richardson, and Slaughter, argued that Gayosso's main claim was that the trial court improperly weighed statutory factors in its bail decision, not that it failed to comply with the Damon Allen Act. The dissent claims that the majority opinion unnecessarily complicates the case by addressing the Act on its own initiative and that remanding the case for the court of appeals to pursue a public safety report was inconsistent with established procedures requiring issues on appeal to be preserved in the trial court and supported by the record. The majority opinion seems to assume error from a silent record and introduces a "show your work" requirement into the Act. This could lead to unnecessary abatements in appellate courts to clarify the record, ultimately finding harmless or unpreserved errors. The dissenting members of the Court would have preferred to grant the State's motion, withdraw the Court's opinion, and deny discretionary review.

Commentary: This is the first instance of the Court of Criminal Appeals addressing the public safety report (Article 17.021 of the Code of Criminal Procedure). Though neither party raised it as an issue with the trial court or on appeal, here the Court makes it clear that it is imperative for an appellate court—in effectuating its duty to consider the complete record on appeal—to determine whether a trial court considered a public safety report in making a bail determination.

Since *Gayosso*, the Fort Worth Court of Appeals ruled that failing to consider the public safety report was harmless (*Ex parte Delong*, 2024). They also ruled that a defendant needed to preserve claims that the trial court did not review the public safety report for them to review it on appeal (*Ex parte Chavez*, 2024). In another case where the appellant failed to preserve complaints regarding admissibility, it amplified the Court of Criminal Appeals' explanation that the public safety report appears to be confidential (*Gonzalez v. State,* 2024). The Amarillo Court of Appeals assumed the issue was preserved but also found any error to be harmless (*Ex parte Segovia*, 2024).

C. Bond Forfeitures

In a bond forfeiture, a surety is generally liable for civil filing fees as court cost if the State wins. However, the surety is not liable for filing fees that the State itself is exempt from paying, unless a statute specifically requires the civil defendant to pay the fee if the State prevails.

Cont'l Heritage Ins. Co. v. State, 683 S.W.3d 407 (Tex. Crim. App. 2024)

A surety argued it should not pay civil filing fees because the bond forfeiture proceeding is simply docketed on the scire facias docket, claiming it is a continuation of the criminal prosecution rather than a separate case. The surety also contended that the term "rules" in Article 22.10 implies that only the Texas Rules of Civil Procedure apply, excluding other civil statutes.

The Court of Criminal Appeals disagreed, stating that the "scire facias" writ is not a continuation of the criminal prosecution but rather a separate bond-forfeiture proceeding. A bond can be forfeited before a conviction, and the writ enforces the judgment nisi, similar to contempt cases. In this context, the State is the plaintiff, and defendants (the criminal defendant and sureties) can file answers, resulting in default judgments if no response is made. Bond forfeiture judgments become final after trial or default, are separately appealable, and have a four-year limitations period.

The Court previously held in *Dees v. State*, 865 S.W.2d 461 (Tex. Crim. App. 1993) that civil court costs can be collected in bond forfeiture proceedings. While the Rules of Civil Procedure govern aspects of court costs, they do not prescribe them, making statutory fees a significant source of these costs. The Court concluded that trial-level filing fees are included in the court costs the surety must pay if they lose a bond forfeiture case.

D. Discovery

Article 39.14(a) of the Code of Criminal Procedure's mandate that "the state" produce discovery "as soon as practicable after receiving a timely request" includes discoverable items that are in the possession of law enforcement agencies even if the prosecution does not know about them.

State v. Heath, 696 S.W.3d 677 (Tex. Crim. App. 2024)

Heath was charged with injuring a child. His attorney requested discovery, which the State provided. The case was placed on the trial docket and the State announced ready for trial on three occasions. Days before the fourth jury trial setting, the prosecutor learned of a material recording of a 911 call for the first time and disclosed it to Heath's counsel. Heath moved to exclude the recording at trial, even though he did not request a continuance. The prosecutor argued that, without evidence of bad faith by the State, the proper remedy for the delayed disclosure was a continuance for the defense to review the evidence, not its exclusion. The trial court ruled in Heath's favor, finding that the State violated Article 39.14(a) of the Code of Criminal Procedure by failing to disclose the 911 call "as soon as practicable." At the State's request, the trial court entered written findings of fact and conclusions of law. On appeal, the court of appeals upheld the trial court's decision to suppress the call.

The Court of Criminal Appeals affirmed. The majority opinion by Judge Newell explains that the phrase "the state" in Article 39.14 includes not just prosecutors, but also law enforcement. Discoverable evidence in the possession of the state must be disclosed "as soon as practicable," meaning as soon as it can reasonably be produced. Interpreting "the state" to refer only to prosecutors would create unnecessary redundancy and conflict with other parts of the statute, particularly Article 39.14(h) and obligations under *Brady v. Maryland*. Including items in the possession of law enforcement is also consistent with Article 2.1397 of the Code of Criminal Procedure, which requires law enforcement agencies to document their compliance with the obligation to turn over discovery pursuant to Article 39.14(a).

The Court clarified that the Michael Morton Act does not require knowledge ("scienter") to trigger the obligation to disclose evidence. It only mandates that discoverable evidence be produced "as soon as practicable" after a timely discovery request. This means evidence must be disclosed as soon as reasonably possible and failing to use reasonable diligence can lead to delayed disclosure. In this case, law enforcement had the 911 call since the offense date, but the prosecutor only discovered it after meeting with the witness. Though disclosed promptly once discovered, this did not meet the "as soon as practicable" standard.

The Court held that the trial court had the inherent authority to exclude the 911 call due to a discovery violation. While a trial court is not required to exclude evidence without evidence of bad faith by the prosecution, it can do so if the prosecutor fails to search for the evidence. In this case, the trial court did not abuse its discretion in finding that the State's delay in inquiring about the evidence constituted a willful violation of its obligations under Article 39.14, even without bad faith.

Judge Keel, joined by Judges Keller and Yeary, dissented, arguing that "the state" in Article 39.14 should not include law enforcement, as the Legislature did not specify this. They contended that "the state" refers to the prosecution, and that law enforcement's role is to provide evidence to the prosecution, which then discloses it to the defense. The dissent raised concerns that the Court's interpretation could allow the defense to submit discovery requests directly to law enforcement and interfere with prosecutorial decisions. In this case, the prosecutor disclosed the 911 call as soon as it was discovered, fulfilling the "as soon as practicable" requirement.

Commentary: Simply stated, a trial court can suppress evidence for an inadvertent violation of Article 39.14. This decision hinges on statutory law, created by the legislature, not constitutional law or legal ethics. The application of *Heath* will similarly hinge on how the statute aligns with specific facts and circumstances. Caution is urged in further extrapolating from *Heath*. Discovery requests made prior to formal charging are decisions for trial court judges, not magistrates.

E. Deferral of Proceedings

A county court at law did not err in declining to consider deferred adjudication after a commercial driver's license holder pled not guilty and was later convicted of operating an overweight vehicle.

Tucker v. State, No. 12-23-00058, 2024 WL 274986 (Tex. App.—Tyler, January 24, 2024, no pet.) (mem. op., not designated for publication)

A citation was issued to a commercial driver's license holder, Tucker, for operating a log truck that was 16,520 pounds over the allowable gross weight. Tucker pled no contest in a justice of the peace court and subsequently appealed to a county court at law. He pled not guilty and asked the court to consider deferred adjudication. The court refused and Tucker was convicted. He appealed to the Twelfth Court of Appeals in Tyler where he argued that operating an overweight vehicle does not relate to "motor vehicle control," which makes it eligible for "deferred adjudication under Article 45.051 of the Code of Criminal Procedure."

The court did not address whether overweight vehicle offenses relate to "motor vehicle control" and resolved the case on other grounds. Specifically, Article 42.111 of the Code of Criminal Procedure, which states that if a defendant is convicted of a fine-only misdemeanor and appeals to county court, the defendant may enter a plea of guilty or no contest and the court may "defer further proceedings…in the same manner as provided for the deferral of proceedings…under Article 45.051…." Because Tucker pled not guilty in the county court at law, the court was not authorized to defer proceedings regardless of whether the offense was eligible.

Commentary: Alas, the wait for an appellate court to clarify the meaning of an offense related to "motor vehicle control" continues. The meaning and scope of this phrase in Article 45.051(f) continues to generally be within the judge's discretion.

Astute readers undoubtedly noticed an innocent mistake in *Tucker*: referring to deferred disposition as deferred adjudication. While it made no difference in this case, it is worth noting that criminal law practitioners still mix these two terms up. For a more thorough discussion on this common blunder, see Ryan Kellus Turner's article, *Deferred Adjudication is Not Deferred Disposition*, in the August 2002 issue of *The Recorder*.

F. Animal Control Issues

The municipal court did not violate a dog owner's due process rights by ordering her dogs euthanized because she received ample notice and opportunity to be heard and failed to comply with Section 822.042 of the Health and Safety Code.

Jaramillo v. City of Odessa Animal Control, No. 11-23-00117-CV, 2024 WL 3362927 (Tex. App.—Eastland July 11, 2024, no pet.) (mem. op., not designated for publication)

Jaramillo's dogs escaped and attacked several teenagers. She identified herself as the owner and signed over the dogs to the City of Odessa Animal Control. The City filed reports on the dogs' dangerousness, leading to a municipal court hearing where Jaramillo was ordered to comply with Section 822.042 of the Health and Safety Code before the dogs could be returned. After more than eleven days, a hearing determined the dogs' fate, revealing Jaramillo was aware her dogs were dangerous and had failed to meet the owner requirements under Section 822.042. Consequently, the court ordered the dogs to be euthanized. She appealed, but the county court affirmed the municipal court's decision.

The Eleventh Court of Appeals dismissed her claim that her due process rights were violated. The record showed she was notified of multiple hearings and had ample opportunity to demonstrate compliance before the court's euthanization decision. The court also affirmed the dangerous dog designation under Section 822.041(2).

Jaramillo claimed the municipal court erred in finding she did not comply with Section 822.042, arguing she was unaware her dogs were dangerous and was entitled to notification from the court or animal control. The court disagreed, stating that Section 822.042(g) only requires one applicable subsection to establish awareness

of a dog's dangerousness. Therefore, notification was not necessary, as Jaramillo was informed of her dog's unprovoked attacks, and she acknowledged their dangerousness when she signed the owner-surrender forms at the scene.

Commentary: Dangerous dog hearings are difficult. The hearings can be emotional and statutory law does not provide much guidance. There is also not an abundance of case law. Although *Jaramillo* is an unpublished opinion, its thorough treatment of procedures related to dangerous dogs earned a spot in the update. It is a good resource.

Section 821.025(e) of the Health and Safety Code, which bars further appeals from county court orders divesting ownership of cruelly treated animals, is not preempted by the federal Servicemembers Civil Relief Act (SCRA).

Holda v. City of Waco, No. 007-23-00341-CV, 2023 WL 8939230 (Tex. App.—Amarillo December 27, 2023, no pet.) (mem. op., not designated for publication)

Commentary: For more information on the SCRA, see Antonio L. Kosta, Jr., "Military Service and Municipal Courts," *Municipal Court Recorder* (March 2005).

G. Evidence

A trial court improperly admitted as evidence the defendant's rap videos, which were used to rebut the defendant's claim that he lacked sophistication, because the danger of unfair prejudice outweighed their probative value.

Hart v. State, 688 S.W.3d 883 (Tex. Crim. App. 2024)

In a murder trial, the defense painted a picture that the defendant, Hart, lacked sophistication and had trouble comprehending things. They argued that this lack of sophistication was the reason he unwittingly participated in a robbery orchestrated by his acquaintances. To both rebut the lack of sophistication claims and offer character evidence, the State moved to introduce as evidence rap videos purportedly created and performed by Hart. The videos were meant to show Hart's "ability to understand what people [were] communicating to him and form his own opinions about things." The first video was a song, *I Won't Tell*, that contained images of cartoon bottles of cough syrup. The second video depicted Hart rapping and making references to weapons, cough syrup, and being a "trap king" (drug dealer). Hart raised numerous objections, such as the State having never proved who wrote the lyrics or how long they took to write. The trial court nevertheless admitted the videos and Hart was eventually sentenced to life without parole. The court of appeals upheld the evidence's admissibility. The Court of Criminal Appeals granted review to determine whether the lower courts minimized the risk of prejudice in allowing the jury to view these videos.

Texas Rule of Evidence 403 excludes relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Appellate courts use the *Montgomery* factors in making Rule 403 analyses: (1) the strength of the evidence's probative value, (2) the potential for the evidence to "impress the jury in some irrational but nevertheless indelible way," (3) the amount of time required at trial to develop the evidence, and (4) the proponent's need for the evidence (*Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990)). Following application of the *Montgomery* factors, the Court ruled that the videos were improperly admitted. Judge McClure delivered the majority opinion joined by Judges Hervey, Newell, Richardson, and Walker.

Factor One: The Court deferred to the court of appeals, which concluded that "evidence of [Hart]'s ability to rap, lip sync, or post lyrics about crime is a 'small nudge' toward proving a 'fact of consequence'—specifically, [Hart]'s ability to comprehend, and to form intent…" In other words, the evidence's probative value was limited. The video, on its own, proved "very little" about his intellectual capabilities.

Factor Two: The Court noted that many other jurisdictions view rap videos as highly prejudicial due to the nature of the lyrics. Holding song lyrics to their literal meanings would lead to conclusions such as Bob Marley

having shot a sheriff, Freddie Mercury having killed a man, and Johnny Cash having shot a man just to watch him die. It is inherently difficult for a jury to view inflammatory lyrics as nothing more than creative expression. There is a significant risk that juries will conclude that a defendant was the same person at the time of the alleged offense as the person they conveyed themselves as in their artistic creations. This factor thus weighed "heavily" for exclusion.

Factor Three: The Court found that because 28% of Hart's testimony was spent addressing the videos, this factor favored exclusion.

Factor Four: The majority viewed the State's need for this evidence as weak because there were alternative ways to address Hart's mental state and intelligence.

Based on the factors analysis, the Court remanded the case for a new trial without the rap video evidence.

Judge Keller, joined by Judges Yeary, Keel, and Slaughter, dissented. In her view, the risk of unfair prejudice could have been minimized by giving the jury a limiting instruction. It was up to the defense to request such an instruction, which they did not.

Judge Yeary, joined by Judges Keller and Keel, also dissented. Judge Yeary felt that the majority did not give the trial court's decision enough deference and there was not enough to show that the trial court's decision was outside "the zone of reasonable disagreement." Furthermore, Judge Yeary wrote that "[w]hether [Hart] was rapping about true events is beside the point. The point is that the lyrics tended to show that [he] had the ability to communicate and understand sufficiently to form the intent to participate in the crime at issue." Judge Yeary expressed that he had faith that a jury would be able to view the videos with this in mind and without being unduly prejudiced.

Judge Keel, joined by Judges Keller and Yeary, issued a third dissent. According to Judge Keel, the fictional nature of most rap lyrics is "common knowledge." The videos were "too innocuous to provoke a contemporary jury to (a) convict regardless of the evidence of the crime, (b) disregard the logical probative force of the disputed evidence, or (c) labor under unfairly excited emotions.

H. Restitution

Restitution was improperly ordered as part of a defendant's conviction for failure to give certain information following a collision because the failure to give information did not cause the damage that the restitution was for.

Johnson v. State, 680 S.W.3d 616 (Tex. Crim. App. 2023)

After colliding with a utility pole and an antique truck, Johnson continued driving for over 1,000 feet before his vehicle became inoperable. He was ultimately convicted of attempted failure to perform his duty to give certain information after striking a structure (Section 550.025(b)(2), Transportation Code) and attempted failure to perform his duty to give certain information following a collision (Section 550.022(c)(2), Transportation Code). In addition to a $200 fine in each case, the jury ordered restitution under Article 42.037 of the Code of Criminal Procedure of $200 for damage to the pole and $10,000 for damage to the truck. On appeal, Johnson argued that restitution should not have been ordered because the damage to the pole and truck were not the result of the offenses he was convicted of. The court of appeals agreed that restitution was improper. The Court of Criminal Appeals granted the State's petition for discretionary review.

In a 7-2 decision, the Court of Criminal Appeals agreed with the court of appeals and Johnson that restitution should not have been ordered. Article 42.037(b)(1) permits a court to order restitution following conviction "[i]f the offense results in damage…." In the majority opinion written by Judge Keller, the Court stated that for restitution to be ordered under Article 42.037, "[i]t is not enough to show that the defendant caused the damage; the State must show that the *offense* for which the defendant was convicted caused the damage." Along with the plain language of the statute, the Court also relied on *Hanna v. State*, 426 S.W.3d 87 (Tex. Crim. App. 2014). In *Hanna*, the Court ruled that restitution could be ordered in a Driving While Intoxicated (DWI) case even

though the offense of DWI does not require a human "victim." The *Hanna* court went on to rule, however, that restitution was not proper because there was no evidence that the impaired driving caused the property damage. In the present case, the State did not establish a nexus between Johnson's attempted failure to give required information and the damage to the pole and truck. The property damage occurred prior to the commission of the offenses for which he was convicted. The Court did, however, offer a hypothetical for when restitution could be ordered in connection with either of these offenses: if the failure to give information delayed medical help, thus making a victim's injuries worse.

Judge Newell, joined by Judge Walker, dissented. In his view, limiting the scope of the "offense" to a person's failure to give information was incorrect: "the existence of the collision is the focus of the offense" and is a critical element. Judge Newell would have allowed the restitution because he "read[s] the reference to the 'offense' in Article 42.037 as a reference to the whole offense…."

Commentary: The municipal-court-specific restitution statute, Article 45.041(b)(2) of the Code of Criminal Procedure, contains slightly different—but practically the same—language than the restitution provision in Chapter 42: when a judgment is entered in a municipal court, the judge may, "if applicable," direct the defendant "to make restitution to any victim of the offense."

I. Appeals

In an appeal from a non-record municipal court, appellate jurisdiction can be substantially invoked by an appeal bond that does not comply with all statutory requirements.

Kleinman v. State, No. 03-23-00665-CR, 2024 WL 3355069 (Tex. App—Austin July 10, 2024, pet. granted)

Kleinman, proprietor of Planet K, a head shop, pled no contest in the Cedar Park Municipal Court to 42 complaints alleging Class C misdemeanors under the City's Code of Ordinances. The court ordered Kleinman to pay $38,757 in fines and court costs. Kleinman appealed his conviction to a county court at law for a trial de novo. However, he failed to personally sign his appeal bonds as required by Article 17.08(4) of the Code of Criminal Procedure. Rather, his bonds were signed by "attorney in fact" (a non-attorney, DeNoie). The municipal judge marked the bonds as "Not approved." The State filed a writ of procedendo, arguing the county court lacked jurisdiction due to the defective bonds. The county court dismissed the appeals and remanded the cases for enforcement, citing Article 45.0426(b) of the Code of Criminal Procedure, which requires remand if an appeal bond is not timely filed. Kleinman appealed.

The court of appeals reversed, citing Article 44.15, Code of Criminal Procedure, which allows an appellant to amend a defective bond. The court of appeals held that jurisdiction was not lost immediately upon identifying the defect and that Kleinman substantially complied with bond requirements. Accordingly, the county court judge was obligated to give Kleinman the chance to cure the defect, despite the municipal court's disapproval of the bonds. The court of appeals reversed the county court's order granting the State's application for writ of procedendo and remanded the case for further proceedings consistent with its opinion.

Commentary: The Court of Criminal Appeals granted petition for discretionary review in this case on October 23, 2024. Stay tuned!

A court of appeals does not have jurisdiction to consider a ruling from a county criminal court of appeals upholding a municipal court of record's finding that a city ordinance is facially unconstitutional.

State v. Jivani, No. 05-23-00839-CR, 2023 WL 8946173 (Tex. App.—Dallas Dec. 28, 2023, pet. filed)

The State filed a complaint in the Dallas Municipal Court, a municipal court of record, charging Jivani with violating Section 31-27 of the Dallas Code by loitering in a public place "in a manner and under circumstances manifesting the purpose of inducing another to commit an act of prostitution." Jivani filed a motion to quash, arguing that the ordinance was unconstitutionally vague and overbroad. The municipal court agreed the ordinance was facially unconstitutional. The Dallas County Criminal Court of Appeals affirmed the municipal court. The State appealed. Applying Section 30.00027(a)(2) of the Government Code, the Dallas Court of

Appeals noted that a party has a right to review a case only when there is a constitutional issue "*on which a conviction is based.*" Here, because the motion to quash was granted by the municipal court, there was no conviction. Therefore, the court of appeals lacked jurisdiction to hear the case.

Justice Goldstein, in a dissenting opinion, explained that the State's right to an appeal is based on Article 44.01(a)(1) of the Code of Criminal Procedure, which provides that "[t]he state is entitled to appeal an order of a court in a criminal case if the order…dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint…." Section 30.00027 does not supersede the State's right to appeal under Article 44.01. For reasons Justice Goldstein similarly explained in *State v. Villa*, 673 S.W.3d 43 (Tex. App.—Dallas 2023, rev'd and remanded, No. PD-0756-23, 2024 WL 4757955 (Tex. Crim. App. Nov. 13, 2024)), the majority's holding produces an absurd result in which a county court of appeals becomes the final authority on the constitutionality of a municipal ordinance but leaves no recourse to be heard by the court of appeals.

Commentary: The Court of Criminal Appeals granted review in *Jivani*. This case stems from the core issue in the *Villa* decision: the State's right to appeal to a court of appeals when a case originates in a municipal court of record. *See* "Case Law and Attorney General Opinion Update," *The Recorder* (December 2023) at 28.

We remain perplexed that an unpublished opinion from the Fort Worth Court of Appeals, *State v. Pugh*, No. 02-21-00108-CR, 2022 WL 1793518 (Tex. App.—Fort Worth June 2, 2022, no pet.) (mem. op., not designated for publication), fueled the majority opinion in *Villa*, casting doubts on appellate jurisdiction where none had existed for over 25 years. Accordingly, TMCEC supported granting discretionary review in *Villa*. Echoing Justice Goldstein's dissent, the Court of Criminal Appeals, in an opinion by Presiding Judge Sharon Keller, reversed and remanded *Villa* on November 13, 2024. A similar outcome in *Jivani* now seems likely. We look forward to updating you on *Villa* and *Jivani* in the AY 26 Case Law Update.

IV. Court Costs and Administration

A court would likely conclude that a District Attorney's Office located in a stand-alone building with no other courts or court offices is not a building that houses the operations of a district, county, or justice court for purposes of an expenditure from the courthouse security fund.

Tex. Att'y Gen. Op. No. KP-0448 (2024)

Under Article 102.017(b) of the Code of Criminal Procedure, a county commissioners court may use funds for bulletproof glass in buildings that house district, county, or justice courts. However, courts are likely to determine that buildings without judicial functions, such as prosecutor's offices, do not qualify for the expenditure of courthouse security funds.

V. Local Government

A preliminary injunction against a city ordinance limiting the operating hours of sexually oriented businesses (SOBs) was deemed unwarranted. The city reasonably linked SOB operations from 2-6 a.m. to targeted violent crime, and the ordinance still allowed SOBs to operate for 20 hours a day, seven days a week.

Ass'n of Club Executives of Dallas, Inc. v. City of Dallas, Texas, 83 F.4th 958 (5th Cir. 2023)

The City of Dallas enacted an ordinance requiring licensed SOBs to close from 2:00 a.m. to 6:00 a.m., citing data linking late-night operations to increased crime. Plaintiffs, including SOBs and their trade association, challenged the ordinance on First Amendment grounds. The district court issued a preliminary injunction, claiming the City lacked reliable evidence and that the ordinance unduly restricted speech. However, the Fifth Circuit vacated the injunction, stating the district court applied an overly strict standard to the City's evidence. Under established Supreme Court precedent, the ordinance is likely constitutional, as the City demonstrated a reasonable connection between late-night SOB operations and crime while allowing ample opportunity for businesses to operate outside those hours.

A city attorney's written approval of an order of abatement was a formulaic way of explaining his acceptance of an order. The actions of the city attorney and municipal judge were therefore appropriate under Texas law.

Rhone v. City of Texas City, 111 F.4th 680 (5th Cir. 2024)

Rhone, the owner of three apartment buildings, appealed a nuisance abatement order issued by a municipal court of record. He filed claims under 42 U.S.C. § 1983 for inverse condemnation, denial of procedural due process, and unconstitutional seizure. Texas City subsequently removed the case to federal court.

The district court granted summary judgment in favor of the City. Rhone appealed. The Fifth Circuit Court of Appeals ordered a limited remand to investigate the role of the city attorney in finalizing the municipal court's abatement order and its implications for the independence of the municipal judge.

The district court determined that the city attorney's involvement was restricted to drafting the order, and that the municipal judge did not need the city attorney's approval to enter it. The phrase "approved as to form, substance, and entry" appearing under the city attorney's signature was found to be a standard legal formality rather than an indication of permission granted.

Rhone contended that the district court should consider broader systemic issues regarding the independence of municipal courts. The district court dismissed these arguments as beyond the scope of the remand. Subsequently, the Fifth Circuit upheld the district court's conclusion that the municipal judge acted independently and that the city attorney's role in drafting the abatement order was appropriate under Texas law.

Commentary: In *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012), the Supreme Court of Texas held that unelected municipal agencies cannot be effective bulwarks against constitutional violations in the context of nuisance determinations involving substandard structures. *Stewart* skirted addressing whether concerns regarding municipal agencies extended to municipal judges. In TMCEC's commentary to *Stewart*, we wrote that "[a]ny 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)." *The Recorder* (December 2012) at 24.

Twelve years later, *Rhone* illustrates how perception can be used to call into question the impartiality and independence of municipal courts and municipal judges. To capture the full flavor of this decision, read it in conjunction with the Fifth Circuit's earlier decision *Rhone v. City of Texas City, Texas,* 93 F.4th 762 (2024).

This case is ripe with teachable moments. Rhone contended that the contract of appointment between the judge and city attorney established a client relationship between the judge and the city. He further argued that Texas City's relationship with its judges was compromised because the judges were appointed by contract, which was between the city and the judge's law firm—not the judge personally. While these arguments failed on due process grounds, they still raise concerns about the appearance of impropriety.

VI. Dual Office Holding

A court would likely conclude that a municipal judge may not simultaneously serve as a constable.

Tex. Att'y Gen. Op. No. KP-0462 (2024)

Article XVI, Section 40, of the Texas Constitution prohibits one person from holding more than one office of emolument at the same time. An individual may not simultaneously serve as a compensated municipal judge and a constable.

The common-law doctrine of incompatibility prohibits the simultaneous holding of two offices with conflicting loyalties. As a peace officer, the constable's duties could require the constable to appear before the municipal

judge as magistrate, rendering the two positions incompatible. Moreover, such concurrent service implicates the concerns raised by the State Commission on Judicial Conduct. Accordingly, a court would likely conclude that a municipal judge may not simultaneously serve as a constable.

Under either Article XVI, Section 40 or common-law incompatibility, acceptance of a second office incompatible with the first office results in effective resignation from the first office. Thus, when the individual at issue accepted the incompatible office of municipal judge he effectively resigned from the office of constable.

VII. Statutory Interpretation

The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous. *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.* is overruled.

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024)

At issue in this case is a rule promulgated by the National Marine Fisheries Service (NMFS), which administers the Magnuson-Stevens Fishery Conservation and Management Act (MSA) under a delegation from the Secretary of Commerce. The Rule established an industry-funded program requiring observer coverage on 50% of trips for certain vessels. Before a trip, vessel representatives must notify NMFS of their intentions. If NMFS mandates an observer but does not provide one, the vessel must hire and pay for a certified third-party observer, costing up to $710 per day and potentially reducing annual returns for vessel owners by up to 20%.

Petitioners are family businesses who, in separate cases, challenged the Rule under the MSA, 16 U.S.C. § 1855(f). They argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. The lower courts deferred to NMFS's interpretation under *Chevron*. The Supreme Court granted certiorari to consider whether the *Chevron* doctrine should be overruled or clarified. It was overruled.

Chief Justice Roberts, writing for the Court, reviewed the history of *Chevron v. U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, decided in 1984 "by a bare quorum of six Justices," which triggered a marked departure from the traditional judicial approach of independently examining each statute to determine its meaning. The *Chevron* doctrine required courts to follow a two-step process for interpreting federal agency statutes. First, they assessed if Congress clearly addressed the issue. If so, that concluded the inquiry. If the statute was ambiguous, courts were required to defer to the agency's interpretation if it was a permissible construction. The Court noted that neither *Chevron* nor any subsequent decision of the Court attempted to reconcile its framework with the Administrative Procedure Act (APA), which was enacted by Congress in 1946 (and relevant to the cases at issue, was incorporated by the MSA). The APA prescribes procedures for agency action and delineates the basic contours of judicial review of such action. It codifies for agency cases the proposition reflected by judicial practice dating back to *Marbury v. Madison*: that courts decide legal questions by applying their own judgment. The APA specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action, even those involving ambiguous laws. According to the Court, the deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA. The Court clarified that by overruling *Chevron*, it did not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful, including *Chevron* itself.

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined Chief Justice Roberts. Justices Thomas and Gorsuch filed concurring opinions. Justice Kagan filed a dissenting opinion, joined by Justice Sotomayor and in part by Justice Jackson.

Commentary: *Loper* is a sea change in precedent and too significant to ignore in this year's update. It upends 40 years of precedent and what many of us were taught in law school. Although it is focused on federal agency deference, it could influence states by encouraging courts to reduce deference to state agencies and scrutinize state agency interpretations more closely.

Prosecutor Professionalism Program Inaugural Class AY 24

The Texas Municipal Courts Education Center (TMCEC) is proud to celebrate a major milestone in our continued effort to support and elevate the standard of municipal prosecution across Texas. In 2024, we recognize 17 members of the inaugural class of the TMCEC Prosecutor Professionalism Program—a group of dedicated professionals who have demonstrated a commitment to excellence in their field.

Launched as an initiative to enhance the proficiency and professionalism of municipal prosecutors, the TMCEC Prosecutor Professionalism Program acknowledges those current municipal prosecutors who invested in their professional growth by completing 20 hours of TMCEC specialized education within an academic year, including 16 hours at a Prosecutors Seminar and an additional 4 hours through TMCEC webinars or in-person or virtual training.

These trailblazing prosecutors have set the bar high for their peers and demonstrated a strong commitment to ongoing education and the pursuit of excellence in municipal prosecution. Their dedication ensures that justice in municipal courts is not only upheld but delivered with the highest level of competence and ethics. This achievement marks an important step for each member and represents their leadership in municipal prosecution.
Members of the inaugural class include:

Floyd M. Akers, Hearne
Carlos L. Armendariz, El Paso
Gary F. Beauchamp, Panorama Village
Andrew W. Hagen, Big Spring
Donald Kubicek, Portland
Pamela Liston, Decatur
Craig A. Magnuson, Lake Worth
William M. Mason, Odessa
Tracy A. Middleton, Meadows Place
David Overcash, Anna and Fate
Eric A. Robicheaux, Odessa
William L. Tatsch, Kerrville
Amar Thakrar, Grand Prairie
Tiffany L. Thomas, Bryan
Timothy Wells, Grand Prairie
Adam L. West, Victoria
Ashley P. Yates, Longview

Stronger Together: New Combined Grant Offers Enhanced Support for Courts

In AY 24, Municipal Traffic Safety Initiatives (MTSI) and Driving on the Right Side of the Road (DRSR) successfully merged into a single grant: MTSI. What can municipal courts expect from MTSI in AY 25?

Improved Webpage and Increased Social Media Presence

The MTSI grant staff will be prioritizing webpage improvements (tmcec.com/mtsi), updates to virtual resources (such as traffic safety Information Sheets), and layout improvements in AY 25. MTSI will also be bolstering its social media presence with even more content that is relevant to municipal courts. Follow us on Facebook, Instagram, and X (MTSI.tmcec on each platform). And please like and share posts! This helps MTSI achieve valuable match, which is vital to maintaining current funding levels.

MTSI Awards

It is award season! Applications for the 2025 MTSI traffic safety awards are due December 30, 2024. Please visit tmcec.com/mtsi/mtsi-awards to apply and for more information. Awards will be presented at the Waco MTSI Conference in April.

Physical Traffic Safety Materials

As of December 2024, TMCEC still has a limited supply of physical materials to distribute, such as Our Town maps, DUI Mock Trial book, posters, Sober Prom Cards, and children's traffic safety books in Spanish. Please visit tmcec.com/mtsi/resources-municipal-courts for more information.

Traffic Safety Outreach

As noted above, MTSI has been distributing fewer physical materials. Fortunately, the MTSI grant staff has been filling this void with more hands-on, personalized assistance for organizations seeking to promote traffic safety in their communities. For example, the grant staff provides practical tips on utilizing social media and digital MTSI resources. There are also numerous traffic safety resource-providing organizations, such as TxDOT and the Texas Transportation Institute, that MTSI puts municipal courts in touch with. Shoot the grant staff an email or stop by the MTSI exhibit table at an upcoming TMCEC seminar to discuss how your city can get out there and promote traffic safety!

Teacher Workshops

Summer 2025 MTSI teacher workshops are back! MTSI's premier teacher training opportunity, the Teacher Traffic Safety Academy, will be held at the AT&T Hotel and Conference Center in Austin from July 21-23, 2025. Once available, the full workshop schedule will be accessible at tmcec.com/mtsi/educators. If you know a teacher who would like free continuing education, encourage them to contact MTSI!

Judicial Training

As usual, TMCEC will be offering a series of special traffic-safety-related trainings in AY 25 for municipal judges, court personnel, and prosecutors. This year's three marquee events are:

Event	Participants	Dates	Location	Anticipated Credit
Teen Court Workshop	All municipal court personnel	February 24-35, 2025	Georgetown	Judicial Education, Clerk Certification, CLE
Municipal Trafffic Safety Initiatives Conference	All municipal court personnel	April 2-4, 2025	Waco	Judicial Education, Clerk Certification, CLE
Impaired Driving Symposium	Judges from all levels of the Texas judiciary	July 30-31, 2025	Denton	Judicial Education, CLE

Thanks to TxDOT's funding, travel reimbursement and free lodging are available for all Teen Court Workshop and Impaired Driving Symposium participants. To register for any of these events, please visit register.tmcec.com. Agendas will be posted to the links in the table above once they are available.

Contact Us

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

TMCEC, in collaboration with the National Center for State Courts, brought the Institute for Court Management back to Texas. Participants pictured below attended a leadership course as part of the ICM Certified Court Executive Program

TMCEC 4-HOUR VIRTUAL CLINICS

- Four more Live Virtual Clinics to be offered in AY 25
- Four Hours of live, continuous Judicial Education, Clerk Certification, or MCLE Credit for Attorneys
- Scheduled from 1-5 p.m.
- $100 Registration; $50 Optional CLE Reporting Fee

These Live Events will not be offered on demand.

Virtual clinics take a deep dive into one topic, providing four hours of continuous, live, online instruction. Taught by top presenters, virtual clinics, designed to add more flexibility to your educational options, will be hosted in the TMCEC Online Learning Center. To register, go to register.tmcec.com and login. Click the OLC tab and select the virtual clinic listed under Live Courses.

January 29, 2025
Fines, Fees, Costs, and Indigence Revisited

Join TMCEC Executive Director Ryan Kellus Turner and TMCEC Deputy Director Regan Metteauer for our second Virtual Clinic.

April 23, 2025
Court Security Clinic

June 4, 2025
Magistrate Duties

July 30, 2025
Court Efficiency: Records and Procedures

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TMCEC

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

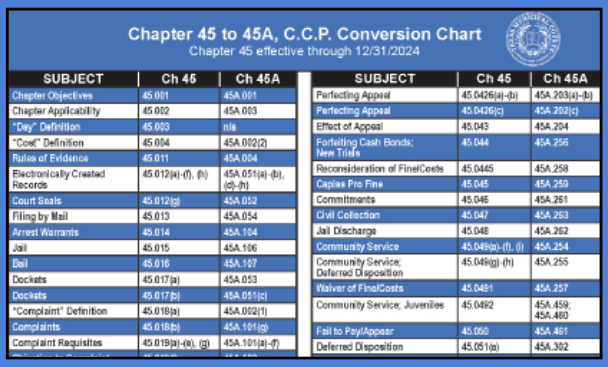
On January 1, 2025, most of Chapter 45 of the Texas C.C.P. will be replaced with Chapter 45A. To help with the transition, TMCEC has created the

45A Conversion Chart

A two-sided, 8.5"x14" laminated sheet with 45 to 45A corresponding provisions on one side and 45A to 45 provisions on the other

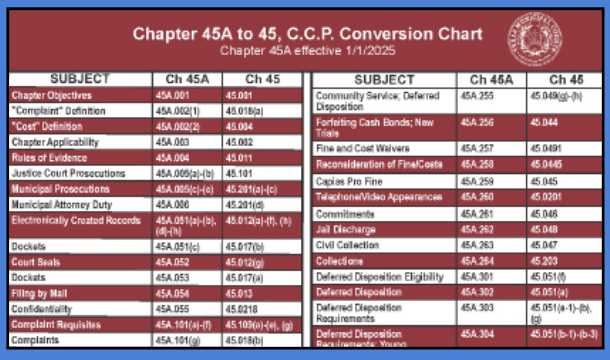
Quantity	Price per chart	S&H
1	$10	$4.87
2 - 4	$8	$4.87
5 or more	$6	$4.87

TMCEC Online Store



Chapter 45 to 45A, C.C.P. Conversion Chart
Chapter 45 effective through 12/31/2024

SUBJECT	Ch 45	Ch 45A
Chapter Objectives	45.001	45A.001
Chapter Applicability	45.002	45A.003
"Day" Definition	45.003	n/a
"Cost" Definition	45.004	45A.002(2)
Rules of Evidence	45.011	45A.004
Electronically Created Records	45.012(a)-(f), (h)	45A.051(a)-(b), (d)-(h)
Court Seals	45.012(g)	45A.052
Filing by Mail	45.013	45A.054
Arrest Warrants	45.014	45A.104
Jail	45.015	45A.106
Bail	45.016	45A.107
Dockets	45.017(a)	45A.053
Dockets	45.017(b)	45A.051(c)
"Complaint" Definition	45.018(a)	45A.002(1)
Complaints	45.018(b)	45A.101(g)
Complaint Requisites	45.019(a)-(e), (g)	45A.101(a)-(f)
Perfecting Appeal	45.0426(a)-(b)	45A.203(a)-(b)
Perfecting Appeal	45.0426(c)	45A.202(c)
Effect of Appeal	45.043	45A.204
Forfeiting Cash Bonds; New Trials	45.044	45A.256
Reconsideration of FineCosts	45.0445	45A.258
Capias Pro Fine	45.045	45A.259
Commitments	45.046	45A.261
Civil Collection	45.047	45A.263
Jail Discharge	45.048	45A.262
Community Service	45.049(a)-(f), (i)	45A.254
Community Service; Deferred Disposition	45.049(g)-(h)	45A.255
Waiver of FineCosts	45.0491	45A.257
Community Service; Juveniles	45.0492	45A.459; 45A.460
Fail to Pay/Appear	45.050	45A.461
Deferred Disposition	45.051(a)	45A.302



Chapter 45A to 45, C.C.P. Conversion Chart
Chapter 45A effective 1/1/2025

SUBJECT	Ch 45A	Ch 45
Chapter Objectives	45A.001	45.001
"Complaint" Definition	45A.002(1)	45.018(a)
"Cost" Definition	45A.002(2)	45.004
Chapter Applicability	45A.003	45.002
Rules of Evidence	45A.004	45.011
Justice Court Prosecutions	45A.005(a)-(b)	45.101
Municipal Prosecutions	45A.005(c)-(e)	45.201(a)-(c)
Municipal Attorney Duty	45A.006	45.201(d)
Electronically Created Records	45A.051(a)-(b), (d)-(h)	45.012(a)-(f), (h)
Dockets	45A.051(c)	45.017(b)
Court Seals	45A.052	45.012(g)
Dockets	45A.053	45.017(a)
Filing by Mail	45A.054	45.013
Confidentiality	45A.055	45.0218
Complaint Requisites	45A.101(a)-(f)	45.103(a)-(e), (g)
Complaints	45A.101(g)	45.018(b)
Community Service; Deferred Disposition	45A.255	45.049(g)-(h)
Forfeiting Cash Bonds; New Trials	45A.256	45.044
Fine and Cost Waivers	45A.257	45.0491
Reconsideration of FineCosts	45A.258	45.0445
Capias Pro Fine	45A.259	45.045
Telephone/Video Appearances	45A.260	45.0201
Commitments	45A.261	45.046
Jail Discharge	45A.262	45.048
Civil Collection	45A.263	45.047
Collections	45A.264	45.203
Deferred Disposition Eligibility	45A.301	45.051(f)
Deferred Disposition	45A.302	45.051(a)
Deferred Disposition Requirements	45A.303	45.051(a-1)-(b), (c)
Deferred Disposition Requirements; Young	45A.304	45.051(b-1)-(b-3)