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COURT OF CRIMINAL APPEALS
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COURT OF APPEALS CAUSE NO. 03-18-00523-CR and 03-18-00524-CR

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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

BRYANT EDWARD DULIN — Appellant

v.

STATE OF TEXAS — Appellee

Appeal from Burnet County

APPELLANT'S BRIEF

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TABLE OF CONTENTS

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INDEX OF AUTHORITIES

Texas Court of Criminal Appeals:

Texas Courts of Appeals:

Constitution/Statutes/Rules/Other:

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TO THE COURT OF CRIMINAL APPEALS
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Appeal from Burnet County

APPELLANT'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant offers this brief on the merits:

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from a conviction, following a jury trial, for aggravated sexual assault of a child under the age of six.[1] (I C.R. at 120-121).

Judge/Court: Judge Evan Stubbs, sitting for the 424th District Court, Burnet County. (I C.R. at 120-121).

Pleas: Not Guilty. (4 R.R. at 13) (I C.R. at 120).

[1] Tex. Pen. Code §22.021(a)(2)(B).

Trial Court Disposition: The jury found Appellant guilty, (8 R.R. at 83-84) (I C.R. at 120), and assessed his punishment at thirty-five years with a $5,000 fine. (9 R.R. at 71) (I C.R. at 120). The court sentenced Appellant, making his sentence run consecutively to Count 11 in Cause Number 46,489 (Appellate Cause No. 03-18-00523-CR). (9 R.R. at 74) (I C.R. at 120-121).

Appellate Court Disposition: The Austin Court of Appeals held that subsections (b) and (d) of the time payment fee statute were facially unconstitutional: "We conclude that the *Johnson* court correctly applied the constitutional analysis of *Salinas*. We therefore join the Fourteenth Court of Appeals and the Eleventh Court of Appeals in holding that subsections (b) and (d) of Texas Local Government Code section 133.103 are facially unconstitutional because they violate the separation of powers embodied in article II, section 1 of the Texas Constitution." *Dulin v. State*, 583 S.W.3d 351, 353 (Tex. App.—Austin 2019, pet. granted).

SUMMARY OF THE ARGUMENT FOR ISSUE ONE

ISSUE ONE: Should an improper and prematurely assessed nonobligatory "Time Payment Fee" that penalizes the failure to timely pay a court-cost, fee, or restitution be struck?

The State Prosecuting Attorney argues that the constitutionality of the time payment fee should not be reached because there is a narrower, non-constitutional ground providing a basis for striking the fee: the fact that it was entered prematurely.

Appellant did not raise this as an issue or point of error in his brief below, and for good reason: several courts of appeals have rejected, albeit in unpublished opinions, the very argument the SPA makes. The only court to accept the SPA's

argument did so for precise factual reasons in its record, and neither discussed nor refuted the other cases retroactively upholding the fee. Those cases are better reasoned, and should be followed.

Additionally, the SPA's argument is essentially an evidentiary challenge to a mandatory court cost—which is prohibited after this Court's 2014 *Johnson*[2] opinion.

And, there is a final reason not to take the SPA's invitation to strike the time payment fee on a non-constitutional ground. If the fee is deleted because it was prematurely imposed, nothing prevents the clerk from adding it again now that there is a factual basis for it. Nothing, indeed, prevents the clerk from adding it after Appellant no longer has a remedy on appeal. This would waste judicial resources since it would require Appellant to raise the same arguments in a different forum later,[3] even though he is plainly entitled to relief now.

ARGUMENT FOR ISSUE ONE

A. *Bullock*: Thirteenth Court of Appeals

In this case, the defendant argued that the time payment fee lacked a statutory basis because it was entered prematurely. *Bullock v. State*, 13-16-00549-CR, 2017

[2] *Johnson v. State*, 423 S.W.3d 385 (Tex. Crim. App. 2014).
[3] *See Perez v. State*, 424 S.W.3d 81, 87-89 (Tex. Crim. App. 2014) (Alcala, J., concurring) (discussing "five avenues for an alert defendant who believes that the court costs imposed against him are erroneous or should not be collected", four of which do not involve direct appeal).

WL 3306448, at *1-2 (Tex. App.—Corpus Christi Aug. 3, 2017, pet. ref'd) (mem. op., not designated for publication).

The Court of Appeals described the defendant's argument as follows:

> He argues that we should delete the fee because at the time the trial court signed the judgment and imposed the fee, the thirty-one-day deadline had not elapsed—that is, "the facts required by the statute to impose the fee had not obtained."
>
> *Id*. at *1.

The Court then described the State's argument and expressed its agreement with the same:

> The State responds that "[n]owhere in the record is there any indication that any attempt at payment of the fine or court costs was made by [Bullock].... The statutory period lapsed without payment. The time-payment fee is properly assessed against [Bullock]." We agree with the State.
>
> *Id*.

There were two bill of costs, including one from after the thirty-first deadline passed,[4] and the Court observed that "the record does not reflect that Bullock paid his court costs before the thirty-first day after the trial court entered the judgment." *Id*. at *2.

[4] A careful review of the Court's opinion shows that it contains scrivener's errors regarding the dates of the bill of costs. *See Bullock*, 2017 WL 3306448 at * 1 (giving dates of the bills of costs as June 17, 2016 and June 18, 2016) and *2 (giving dates of the bills of costs as June 17, 2016 and July 18, 2015). The plain intent of reciting the dates of the bills of costs is to show the statutory period had elapsed without payment, so the dates of the bills of costs should be interpreted accordingly.

Finally, the Court, mindful that it would err if it deleted the fee when there was a statutory basis for it, declined to delete the time payment fee even though it was prematurely imposed. *Id*.

In Appellant's case, the time payment fee was prematurely imposed, *cf.* (I C.R. at 159-180) (Trial Court Cause No. 46489) and (I C.R. at 120-121) (Trial Court Cause No. 46491) (judgments showing date sentences were imposed) *with* (II Suppl. C.R. at 3) (both cause numbers) (date of bills of costs), but was properly assessed because Appellant did not timely pay all costs, and we are well-beyond the statutory period. Hence, this case falls squarely within *Bullock*, and this Court would err to delete the time payment fee on the grounds that it was prematurely imposed, since there is a basis for the fee. *Bullock*, 2017 WL 3306448 at *2 (citing *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014) ("when a specific amount of court costs is written in the judgment, an appellate court errs when it deletes the specific amount if there is a basis for the cost").

B. *Edwards*: Sixth Court of Appeals

Likewise, in *Edwards* the defendant challenged the time payment fee on the grounds that it was prematurely imposed. *Edwards v. State*, 06-17-00009-CR, 2017 WL 3255255, at *2 (Tex. App.—Texarkana Aug. 1, 2017, no pet.) (mem. op., not designated for publication). As the Texarkana Court summarized:

> Since the judgment was entered on the same day as his conviction, Edwards reasons that the statutorily required

> condition for assessing the time payment fee had not accrued. Thus, he argues, there is no factual basis to assess that fee.
>
> *Id*.

The Court stated: "We disagree." *Id*.

After noting that more or less the same argument had been twice rejected by two other courts of appeals (*Perez* and *Davis*, discussed below), the Court observed that the defendant was ordered to pay court costs upon release from confinement, and a supplemental bill of costs[5] showed no payments had been made. *Id*. at *3. Therefore, the Court concluded: "We find that the assessment of the time payment fee has a factual basis in the record." *Id*.

Here, the record does not show that Appellant timely paid his fees. Thus, as in *Edwards*, there is a factual basis for the time payment fee, and as in *Johnson*, it would be error for this Court to delete the time payment fee on anything less than constitutional grounds. *Johnson*, 423 S.W.3d at 389.

C. *Perez*: Seventh Court of Appeals

Here, the defendant argued

> that because 31 days had not passed since the judgment was entered, and he could have paid the balance within that 31 day period, the record does not support assessment

[5] The *Edwards* Court stated: "Further, in determining whether there is a factual basis for the assessment of costs, we may request the district clerk to supplement the record with a current bill of costs." *Edwards*, 2017 WL 3255255 at *3. Appellant has requested a supplemental record in both of his cause numbers.

> of the $25 time payment fee. In his reply brief, he asserts the *Order to Withdraw Funds* signed a week after judgment "entails deleting the premature Time Payment Fee and refunding the appellant $55...."
>
> *Perez v. State*, 07-12-00451-CR, 2014 WL 2191995, at *3 (Tex. App.—Amarillo May 23, 2014, pet. ref'd) (mem. op., not designated for publication) (emphasis in original).

The Court rejected the claim, noting that evidentiary challenges may not be mounted against court costs, citing *Johnson*, and that "record clearly does not support his argument" because it "presupposes he would have paid the entire balance within the time allotted by section 133.103(a)(2)." *Id*.

Here, the SPA is likewise asking this Court to apply a prohibited evidentiary challenge to a legislatively-mandated court cost, *Johnson*, 423 S.W.3d at 390 ("As a result, we review the assessment of court costs on appeal to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost, and traditional *Jackson* evidentiary-sufficiency principles do not apply."), and the fact that Appellant did not timely pay his court costs belies the assumption that he would have paid the entire balance (which, in one case, is over $50,000,[6] and in the other, is over $5,000[7]) within the allotted statutory period. *Perez*, 2014 WL 2191995 at *3.

D. *Davis*: Fourth Court of Appeals

[6] (II Suppl. C.R. at 3) (PD-0856-19).
[7] (II Suppl. C.R. at 3) (PD-0857-19).

In *Davis* the defendant contended that

> this fee cannot be assessed against her until she pays part of her fine, court costs, or restitution on or after the 31 st day after judgment was entered against her.
>
> *Davis v. State*, 04-13-00413-CR, 2013 WL 5950128, at *1 (Tex. App.—San Antonio Nov. 6, 2013, no pet.) (mem. op., not designated for publication).

The Court stated: "We disagree." *Id*.

The Court observed that

> The Bill of Cost permits Davis to pay the court costs 120 days after her release from the Texas Department of Criminal Justice, and the record does not reflect that Davis paid her court costs before the 31 st [sic] day after the date the judgment was entered. Accordingly, Davis was properly assessed the time payment fee.
>
> *Id*.

Here, once again, Appellant did not pay all his court costs timely. Tex. Loc. Gov't Code §133.103(a)(2). Thus, as in *Davis*, there is a basis for the fee, and as in *Johnson*, this Court would err if it deleted the time payment fee on the ground that the State requests. *Johnson*, 423 S.W.3d at 389.

E. *Prescott and Progeny*: Second Court of Appeals

Against these cases, it appears only the Second Court of Appeals has struck, also in unpublished opinions, the time payment fee entirely when it was prematurely imposed. *See Prescott v. State*, 02-17-00158-CR, 2019 WL 2635559, at *5 (Tex. App.—Fort Worth June 27, 2019, no pet.) (mem. op., not designated for

publication); *Tinajero v. State*, 02-19-00040-CR, 2019 WL 5460675, at *2 (Tex. App.—Fort Worth Oct. 24, 2019, no pet.) (mem. op., not designated for publication); *Scott v. State*, 02-19-00283-CR, 2019 WL 6767813, at *3 (Tex. App.—Fort Worth Dec. 12, 2019, no pet. h.) (mem. op., not designated for publication). Neither *Tinajero* nor *Scott* considered whether the fee could be retroactively approved, straightforwardly-applying *Prescott* instead. *Tinajero*, 2019 WL 540675 at *2; *Scott*, 2019 WL 6767813 at *3. Therefore, Appellant will discuss *Prescott* only.

In *Prescott*, the Court agreed with the State that the fee should be struck entirely because it was prematurely imposed, but in reaching that conclusion did not discuss any of the four cases cited above. *Prescott*, 2019 WL 2635559 at *5. Although *Prescott* did decline to "retroactively approve the $25 time payment fee", *Id*. at n. 6, the Court reached that conclusion "in light of the inaccuracies in the bills of costs in the record". *Id*. Those inaccuracies included "costs assessed by the trial court are mischaracterized, set forth incorrect amounts, or are not justified on the facts of the case, including the $25 time payment fee." *Id*. at *5. As a result, the Court struck the fee entirely rather than reach its constitutionality. *Id*.

In light of the four cases discussed above, *Prescott* is an outlier, and did not pass upon whether a prematurely imposed time payment fee could ever be retroactively approved. It declined to do so based on the unusually deficient bills of costs it had before it, *Id*. at * 5, n. 6, but did not discuss or refute the reasoning of

the four other courts of appeals that have permitted the fee to stand notwithstanding its prematurity. At best, *Prescott* supports the conclusion that where the bill of costs contains numerous errors, taking the additional step of upholding a prematurely assessed fee is unwise, and further stands for the proposition that such a fee in such a case should be struck. Those are not our facts here. But *Prescott* does not stand for the general proposition that a prematurely imposed time payment fee should always be struck. Rather, the four cases cited above are better reasoned (and do not conflict with this Court's *Johnson* opinion, which prohibits evidentiary challenges to court costs), and should be followed.

F. *Dulin*: Third Court of Appeals

Although each of the four cases discussed at length above that retroactively approve the fee are unpublished,[8] they are helpful "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.–Amarillo 2003, pet. ref'd). And, more importantly, they are in accord with *Johnson*, which prohibits sufficiency of the evidence challenges to statutory court costs, while the State's argument, which is essentially an evidentiary challenge, is not.

Consequently, the Austin Court of Appeals properly followed the reasoning

[8] The first court to conclude that the time payment fee is partly facially unconstitutional rejected the State's argument, made for the first time in the SPA's motion for rehearing, that the fee should not have been declared partly unconstitutional, because it was prematurely assessed. *See* SPA's Motion for Rehearing in *Johnson v. State*. The Court did so after requesting a response from the appellant, which response should be eerily familiar to the reader who has persevered thus far.

of these unpublished opinions and concluded that a prematurely assessed time payment fee should not be struck where, as here, "more than 30 days have now elapsed since the date of the judgment, and nothing in the record before us indicates that Dulin has paid all his fines and costs." *Dulin v. State*, 583 S.W.3d 351, 353 n. 2 (Tex. App.—Austin 2019, pet. granted).

G. Additional reasons for not deleting the fee

If this Court deletes the fee on the ground that it was prematurely assessed, nothing prevents the district clerk from re-imposing the fee now that the factual basis for the fee is apparent. Thus, to follow the SPA's invitation will, or may, result in the very fee the Court deletes being imposed again—but this time without a remedy on direct appeal. While Judge Alcala has observed that there are four other ways a vigilant defendant can vindicate his complaints about court costs, *See Perez v. State*, 424 S.W.3d 81, 87-89 (Tex. Crim. App. 2014) (Alcala, J., concurring) (discussing "five avenues for an alert defendant who believes that the court costs imposed against him are erroneous or should not be collected", four of which do not involve direct appeal), why waste judicial resources by forcing Appellant to take one or more of those routes to raise the very same constitutional challenge[9] already made,

[9] If indeed a facial constitutional challenge may be made in those four other avenues, a fact unknown to this writer.

successfully, here? That is especially the case when there is no basis to delete the time payment fee except on constitutional grounds.

H. SPA's arguments in this Court

Before this Court, the SPA argues first that, in essence, error is still error even if facts develop that would justify the fee. *See* SPA's Brief at 7 (arguing that failing to timely pay "does not retroactively cure the premature assessment", and therefore, "any harmless-error-like argument must fail"). It is hard to understand why the fact that the time payment fee is now justified, although it was not at the time of its imposition, should *not* render its premature imposition harmless or moot: if the record shows that a defendant has been assessed a jury fee on the day before his jury trial, would anyone seriously entertain the contention that the fee should be struck because it was not factually authorized at the time of its imposition?

The second argument the SPA advances is that the time payment fee is not automatically imposed because it can be waived, even though "133.103's 'shall' text appears to be absolute". SPA's Brief, Page 7-8. But this argument is pure speculation: no one knows whether the time payment fee would have been waived upon request, or whether the clerk would have failed to impose it, or what. This Court "does not decide cases based on assumptions and estimates about the record." *Jenkins v. State*, 912 S.W.2d 793, 821 (Tex. Crim. App. 1993). Much less does it decide cases based on speculation about hypothetical future events with no

foundation, other than Appellant's indigency, in the record. And the SPA's argument proves, if anything, too much: *no* fee could ever be challenged on constitutional grounds because every fee could be waived. Finally, this author does not understand why the possible waiver of the fee means that the constitutional merits or demerits of the fee should not be evaluated: either the fee was or was not properly imposed, and its potential waiver has no bearing on whether, on this record, the fee was properly, albeit prematurely, imposed.

Which brings us to the third and final argument put forth by the SPA for not reaching the constitutional claim: the "judicial doctrine that courts should avoid ruling on constitutional questions when possible." SPA's Brief at 8. But this argument adds nothing. If the fee was properly assessed, then this is not a scenario where it is "possible", *Id*., to avoid the constitutional question. If the fee was not properly assessed, then the constitutional question simply cannot be reached even if the Court wants to reach it. But the "judicial doctrine" itself does not move this Court one way or the other: the propriety of the imposition of the time payment fee stands or falls independently of that doctrine.

I. Conclusion

The first thing the Austin Court of Appeals got right was to join the four courts

in concluding that a prematurely-imposed time payment fee is nevertheless proper where the record discloses the fee is now justified. This Court should overrule the SPA's first issue.

SUMMARY OF THE ARGUMENT FOR ISSUE TWO

ISSUE TWO: In striking down court-costs and fees, does the judiciary violate separation of powers by infringing on the Legislature's power to enact costs, fees, and the state's budget and the Governor's budget power?

In this issue, the SPA's argument for giving (virtually) unassailable power to the legislature and governor in the sphere of court costs and fees is that striking down court costs and fees violates separation of powers. The SPA appears to be making a claim that this Court's facial constitutionality jurisprudence, with respect to court costs and fees, unduly interferes with the other two branches such that they cannot effectively exercise their constitutionally assigned powers regarding those costs and fees.

It is clear, however, from a consideration of the powers with which this Court is allegedly unduly interfering, that no such undue interference occurs. Indeed, the SPA makes no real effort to show that such undue interference occurs. Nor has the SPA demonstrated that this Court's relevant jurisprudence is poorly reasoned or unworkable such that it should be jettisoned. Consequently, the SPA's second issue should be overruled.

ARGUMENT FOR ISSUE TWO

Although the SPA faults this Court's facial constitutionality jurisprudence, as it applies to court costs,[10] for violating separation of powers, the SPA does not take issue with this Court's separation of powers jurisprudence itself. Accordingly, the SPA's challenge should be construed in light of the test enunciated by this Court.[11]

A. Separation of Powers

The SPA does not seem to be contending that this Court's jurisprudence has run afoul of separation of powers because thereby this Court "assumes, or is delegated, to whatever degree," a power more properly attached to another branch. *Vandyke v. State*, 538 S.W.3d 561, 571 (Tex. Crim. App. 2017). Indeed, the SPA complains that this Court's practice of striking down court costs "infringes" and "interferes" with the other branches, SPA's Brief at 9, which applies to the "undue influence" way that separation of powers is violated. *Vandyke*, 538 S.W.3d at 571, Therefore, Appellant will analyze the SPA's claim under the "undue influence" test.

---

[10] "The striking down of court costs and fees by courts violates separation of powers." SPA's Brief at 9. Unlike the State in *Allen*, the SPA does not explicitly ask this Court to overrule *Carson, Peraza,* and *Salinas, see Allen v. State*, --S.W.3d--, 2019 WL 6139077, at *8 (Tex. Crim. App. Nov. 20, 2019) ("The ground upon which we granted review asked this Court to consider overruling its precedent in *Carson, Peraza,* and *Salinas,* effectively eliminating all limitations on court costs stemming from separation of powers principles."), but that seems to be thrust of the SPA's "reverse-separation-of-powers argument". SPA's Brief at 9-10. Which makes it all the more puzzling that the SPA assures us that its principal of (virtually) "unassailable" deference to the legislature, SPA's Brief at 17, "furthers the rigorous facial-challenge standard of review, which requires a showing of no actual constitutional application of a cost or fee statute." *Id*.

[11] *Armadillo Bail Bonds v. State,* 802 S.W.2d 237, 239 (Tex. Crim. App. 1990); *Vandyke v. State,* 538 S.W.3d 561, 571 (Tex. Crim. App. 2017).

According to that test, separation of powers is "violated when one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers." *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (emphasis in original); *Vandyke*, 538 S.W.3d at 571 (same). This "undue influence test" navigates a "middle ground" between "rigid compartmentalization" and "those who would find no separation of powers violation until one branch completely disrupted another branch's ability to function." *Vandyke*, 538 S.W.3d at 571. Not all interference, however, is constitutionally impermissible:[12] only that which "*unduly*" interferes to such a degree that another branch cannot "*effectively* exercise its constitutionally assigned powers", *Armadillo Bail Bonds*, 802 S.W.2d at 239 (emphasis in original), violates separation of powers.

To determine whether one branch has violated another's "constitutionally assigned powers", we must first ascertain what those powers are. *See Armadillo Bail Bonds*, 802 S.W.2d at 239 ("Our inquiry must begin, then, with the nature of this [judicial] power and the extent to which the Legislature may inject itself into this arena."); *Vandyke*, 538 S.W.3d at 571 ("In order to determine whether the Legislature violated separation of powers, we must first determine the extent of the

[12] *Armadillo Bail Bonds*, 802 S.W.2d at 242 & n. 2 ("There are many instances where the Legislature may pass legislation that affects in some way how or when judicial power may be exercised.").

Executive's power to grant clemency and the extent of the Legislature's power to create and repeal laws.").

B. Powers at issue and application of the undue influence test

It is beyond dispute that the power to enact laws related to taxation is committed by our state constitution to the legislature, while the responsibility of enforcing those laws is committed by our state constitution to the executive branch. *See* Tex. Const. art. VIII, § 1 (legislature granted authority to provide for "equal and uniform" taxation); Tex. Const. art. VIII, § 3 ("Taxes shall be levied and collected by general laws[13] and for public purposes only."); Tex. Const. art. IV, § 10 (governor "shall cause the laws to be faithfully executed"). Consequently, this Court's "angst about courts becoming 'tax gatherers[]'"[14] has always been constitutionally well-grounded. Thus, this Court has properly observed that "courts are delegated a power more properly attached to the executive branch if a statute turns the courts into 'tax gatherers'". *Salinas v. State*, 523 S.W.3d 103, 107 (Tex. Crim. App. 2017). And, because separation of powers is violated "when one branch of government assumes or is delegated a power 'more properly attached' to another branch", *Id*. at 106-07 (quoting *Ex parte Lo*, 424 S.W.3d 10, 28 (Tex. Crim. App. 2014) (op. on State's

[13] "A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special". *Smith v. State*, 54 Tex. Crim. 298, 310, 113 S.W. 289, 294 (1908).
[14] *Allen*, 2019 WL 6139077 at *10 (Keel, J., concurring and dissenting).

motion for reh'g)), and because that violation happens when the assumption or delegations occurs "*to whatever degree*", *Armadillo Bail Bonds*, 802 S.W.2d at 239 (emphasis in original), this Court was rightly concerned that any court costs or fees imposed by the judiciary not violate separation of powers by turning courts into tax gatherers. *Salinas*, 523 S.W.3d at 106-107.[15]

In the face of this, the SPA maintains that the constitutional authority with which this Court is unduly interfering is the legislature's "constitutional authority to establish costs and fees and enact the state's budget", citing Article III, Sections 46 and 49a(b) of the Texas Constitution. SPA's Brief at 9; Tex. Const. art. III, § 46; Tex. Const. art. III, § 49a(b). With respect to the executive branch, the SPA principally cites statutes in the Texas Government Code, *Id*., but also presumably believes this Court's jurisprudence unduly interferes with the governor's ability to "present estimates of the amount of money required to be raised by taxation for all purposes" to the legislature, Tex. Const. art. IV, § 9, and his ability to "issue a line-

[15] Appellant will show that the facial constitutionality court cost cases do not violate the "undue influence" test. Accordingly, there is no occasion to decide the knotty question raised, implicitly, by the SPA's argument: which separation of powers test prevails in the event of a conflict, the "assumption or delegation" test (which *Salinas* applied) or the "undue influence" test (which the SPA maintains applies)? Because the former test results in a separation of powers violation when the assumption or delegation occurs "*to whatever degree*", *Armadillo Bail Bonds*, 802 S.W.2d at 239 (emphasis in original), while the latter test tolerates some degree of interference, *Id*. at 241 & n. 2, it seems that the latter test should give way to the former, because the former involves a more serious constitutional violation. Between upholding case law that may result in some interference with another branch, and upholding a law that delegates one branch's power to another, clearly the former is to be preferred and the latter eschewed.

item veto" with respect to "appropriations". SPA's Brief at 19-20 (citing *Ex parte Perry*, 483 S.W.3d 884, 900 (Tex. Crim. App. 2016) (citing Tex. Const. art. IV, § 14)).

1. Legislature

Beginning with the legislature's constitutional authority, what do the constitutional provisions upon which the SPA relies actually say? In relevant part, Section 46 of Article II provides:

> (b) This section applies only if the legislature enacts by law a program to consolidate and standardize the collection, deposit, reporting, and remitting of fees.
>
> (c) A fee imposed by the legislature after the enactment of the program described by Subsection (b) of this section is valid only if the requirements relating to its collection, deposit, reporting, and remitting conform to the program.
>
> Tex. Const. art. III, § 46.

In other words, if the legislature enacts a "program to consolidate and standardize" the "collection, deposit, reporting, and remitting of fees", a fee imposed after the program comes into being must comply with the program. *Id*. Requiring a fee to have a "legitimate criminal justice purpose" to avoid courts becoming "tax gatherers" has no impact, whatsoever, on whether the legislature can enact a "program" to "consolidate and standardize" fees. Requiring a fee to have a "legitimate criminal justice purpose" to avoid courts becoming "tax gatherers" has no impact, whatsoever, on whether a fee will comply with the program. *Carson*,

Peraza, and *Salinas* not only do not "*unduly*" interfere with the legislature, nor do so in a way that it cannot "*effectively* exercise its constitutionally assigned powers" under Article II, Section 46, *Armadillo Bail Bonds*, 802 S.W.2d at 239 (emphasis in original): they do not interfere at all with those powers. And even if they did interfere with the legislature's constitutional authority under Article III, Section 46, interference is not, of itself, problematic—only problematic is *undue* interference such that the legislature cannot *effectively* exercise its Article III, Section 46 power. *Id*. Indeed, *Armadillo Bail Bonds* itself recognized that "[t]here are many instances where the Legislature may pass legislation that affects in some way how or when judicial power may be exercised." *Id*. at 241, n. 2. Likewise, this Court may issue a case that does the same with respect to legislative power—as occurs in separation of powers cases. Appellant is at a loss to see how *Carson*, *Peraza*, and *Salinas* violate the rule from *Armadillo Bail Bonds*, nor does the SPA make any serious effort to show otherwise, referring instead to "infring[ing]" and "interfer[ing]", SPA's Brief at 9, neither of which is sufficient under *Armadillo Bail Bonds* and its line of cases, because *mere* interference is not enough to produce a separation of powers violation. *Armadillo Bail Bonds*, 802 S.W.2d 239.

What of the second constitutional provision the SPA fears is at risk? Article III, Section 49a(b) provides:

> Except in the case of emergency and imperative public necessity and with a four-fifths vote of the total

> membership of each House, no appropriation in excess of the cash and anticipated revenue of the funds from which such appropriation is to be made shall be valid. No bill containing an appropriation shall be considered as passed or be sent to the Governor for consideration until and unless the Comptroller of Public Accounts endorses his certificate thereon showing that the amount appropriated is within the amount estimated to be available in the affected funds. When the Comptroller finds an appropriation bill exceeds the estimated revenue he shall endorse such finding thereon and return to the House in which same originated. Such information shall be immediately made known to both the House of Representatives and the Senate and the necessary steps shall be taken to bring such appropriation to within the revenue, either by providing additional revenue or reducing the appropriation.
>
> Tex. Const. art. III, § 49a(b).

How does requiring a court cost or fee to be directed to a legitimate criminal justice purpose unduly interfere with the legislature's ability to pass legislation related to appropriations under the limitations required by this constitutional provision? Appellant cannot see how, nor does the SPA explain how. Is there anything objectionable about requiring the legislature to enact a constitutional court cost or fee statute? Surely not.

2. Executive Branch

As for the governor, the SPA principally complains that this Court "interferes" with the "Governor's exclusive role as the chief budge officer and his limited authority to modify the budget", SPA's Brief at 9, citing various Government Code

provisions regarding the budget process. *See Id*. at 9; 18-20. The SPA also references the constitutional provision regarding a line-item veto. SPA's Brief at 19-20. Does requiring a court cost to serve a legitimate criminal justice purpose "*unduly*" interfere with the governor's role as the budget officer and his limited authority to issue a line-item veto with respect to appropriations, such that he cannot "*effectively* exercise its constitutionally assigned powers"? *Armadillo Bail Bonds*, 802 S.W.2d at 239 (emphasis in original).

The SPA does not show, and makes no real effort to show, that it does. Following an illuminating explanation of the budget proposal process, SPA's Brief at 8-19, the SPA concludes that "it is indisputable that appropriations are grounded in firm, fact-based requirements and needs identified by the Governor and Legislature." *Id.* at 20. And then, without citation to any authority, the SPA asserts: "When courts second guess the well-informed budget determinations and fungible accounting protocols of the other two branches, they violate separation of powers." *Id*. Surely this is not the standard? Surely we could replace "second guess the well-informed budget determinations and fungible accounting protocols" with "second guess the well-informed determination to require prosecutors to prosecute defendants within a certain period",[16] or something similar, and see how that cannot

[16] "Because we are not aware of any other constitutional provision expressly granting the Legislature the power to control a prosecutor's preparation for trial, we must conclude that the

be the standard for whether separation of powers is violated? Indeed it is not the standard, which is why the SPA cites no authority to support its assertion. Nor can Appellant see any way the governor cannot *effectively* present a budget, or *effectively* issue a line-item veto, if this Court requires court costs and fees to serve a legitimate criminal justice purpose. Is there anything objectionable with requiring a budget to be based on constitutionally-permissible costs and fees only? Of course not.

C. Concluding thoughts

So, what is the SPA *really* arguing in Issue Two, and why? The "what" is simple: the SPA believes the legislature and governor are owed "super deference"—or, to borrow the SPA's own telling word,[17] "unassailable"[18] deference—in court cost matters. And this, despite no showing of "undue influence", nor any showing that *Carson*, *Peraza*, and *Salinas* were "poorly reasoned" or have "become unworkable".[19] Pause, then, over the fact that the SPA is asking this Court for a decision that gives the other two branches *unchallengeable*[20] power to impose and

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Legislature, by providing for such a right in the instant case, violated the separation of powers doctrine". *Meshell v. State*, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987).

[17] SPA's Brief at 17.

[18] The SPA does acknowledge that there could be an "exceptional case" in which there is "no constitutional application of a statute", *see* SPA's Brief at 18, but this concession is at some tension with its argument that a particular legislative "determination should be unassailable", as it is at tension with the whole thrust of the SPA's argument that the legislature and governor are owed exceedingly heightened deference. *See, e.g.*, SPA's Brief at 20 (courts should not "second-guess" the "well-informed budget determinations and fungible accounting protocols of the other two branches").

[19] *Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000) (*stare decisis* mandates that a prior decision not be "frivolously" overruled unless it is "poorly reasoned or is unworkable").

[20] *See* n. 18, *supra*.

collect court costs and fees, many of which are imposed on and collected from indigent criminal defendants.[21]

The "why" is more difficult to discern. Every statute, presumably, is carefully wrought, so why does the SPA encourage us to treat court cost and fee statutes differently? Is the budget, or funding for the criminal justice system,[22] really in danger from fees that are imperfectly-collected at best? Is the SPA deeply concerned about "conserving resources by eliminating or reducing court cost and fee litigation"? SPA's Brief at 9.[23] Or is it simply that "All things obey money"?[24] Perhaps it does not matter in the end, but it is quite puzzling that here we are asked to give total, unquestioning deference to the other two branches of government.

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[21] *Allen v. State*, 570 S.W.3d 795, 820 & n. 16 (Tex. App.—Houston [1st Dist.] 2018) (Jennings, J., dissenting), *aff'd*, PD-1042-18, 2019 WL 6139077 (Tex. Crim. App. Nov. 20, 2019).

[22] The SPA argues at length that the criminal justice system is, in fact, funded by general revenue. SPA's Brief at 20-24. This argument, of course, has no place in a facial challenge, where the legal inquiry focuses on what the statute says and not how the money is used. *Kremplewski v. State*, --S.W.3d--, 2019 WL 3720627, at *3 (Tex. App.—Houston [1st Dist.] Aug. 8, 2019, pet. filed) ("Instead of acknowledging section 133.103's language, the State claims that a significant portion of the 90 percent of the time-payment fee that is deposited into general revenue funds inevitably gets used for criminal-justice purposes because the State and its counties administer the criminal-justice system from their general revenues. The State does not identify any factual support for this claim. But even if the State had done so, its claim focuses on how the funds are ultimately spent instead of focusing on the proper legal inquiry, which is how section 133.103 says they are to be allocated."). The SPA would, of course, maintain that its general revenue argument shows why the facial challenge scheme is, as applied to court costs, "plainly wrong". SPA's Brief at 20. But the SPA's legal claim in this Court is that *separation of powers* is violated by this Court's facial challenge jurisprudence as applied to court costs. On that question, the actual use of the funds has nothing to say, and is but a red herring. Do not let it vex you.

[23] The reader and the SPA can rest easy that the number of *Anders* briefs will return to pre-*Peraza* and pre-*Salinas*, and perhaps pre-*Johnson* for that matter, levels soon enough.

[24] Saint Thomas Aquinas, *Summa Theologiae*, I-II, Q. 2, Art. 1, arg. 1 (quoting Ecclesiastes 10:19).

We may muse about the "why" another time. In the end, despite a great deal of facts and figures that no defendant would ever be able to cite in mounting a facial challenge,[25] the SPA has failed to show that this Court's facial constitutionality jurisprudence with respect to court costs and fees violates separation of powers. Consequently, the SPA's second issue should be overruled.

SUMMARY OF THE ARGUMENT FOR ISSUE THREE

ISSUE THREE: Is the "Time Payment Fee" proper because it imposes a time-frame for court-cost and fee payment and disincentivizes late payment and the failure to pay?

Every court to evaluate the constitutionality of the time payment fee has struck it down with respect to its challenged subsections. Although in this Court the SPA advances two purposes that it contends are legitimate criminal justice purposes, both reduce to the time payment fee functioning as an offset of future criminal justice expenses—that is, to functioning as a *Salinas*-type cost to which *Salinas* applies. The SPA does not explain why the time payment fee is exempt from *Salinas*'

[25] *See, e.g.*, *Allen*, 570 S.W.3d at 807; *Moliere v. State*, 574 S.W.3d 21, 30 n. 5 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd); *Johnson*, 573 S.W.3d 328, 335 & n. 2 (Tex. App.—Houston [14th Dist.] 2019, pet. filed); *King v. State*, No. 11-17-00179-CR, 2019 WL 3023513, at *4 (Tex. App.—Eastland July 11, 2019, pet. filed) (mem. op., not designated for publication); *Townsend v. State*, No. 13-18-00049-CR, 2019 WL 6205470, at *6 (Tex. App.—Corpus Christi–Edinburg Nov. 21, 2019, pet. filed) (mem. op. not designated for publication); *Jackson v. State*, 10-17-00333-CR, 2020 WL 830822, at *3 (Tex. App.—Waco Feb. 19, 2020, no pet. h.) (mem. op., not designated for publication).

requirements, nor does the SPA address or even mention the numerous cases striking down the fee.

Instead, what the SPA really seems to want is for this Court to recognize a new category of permissible court costs: those that "advance" the interests of other legitimate court costs. Yet, besides citing no authority for this new category, the SPA's own argument makes it clear that the only way the time payment fee "advances" the interests of other court costs is by offsetting future criminal justice expenses—by operating, once again, as a *Salinas*-type cost to which *Salinas* applies.

Finally, this Court should not be misled by the SPA's argument about collected amounts being "fully consumed by the State's criminal-justice-related-obligations." This argument goes beyond the proper bounds a facial challenge, and thus fails to focus on the proper legal inquiry.

ARGUMENT FOR ISSUE THREE

Every court to pass upon the constitutionality of the time payment fee statute has found it facially unconstitutional with respect to the parts challenged. *See Johnson v. State*, 573 S.W.3d 328, 340 (Tex. App.—Houston [14th Dist.] 2019, pet. filed); *Kremplewski v. State*, --S.W.3d--, 2019 WL 3720627, at *2 (Tex. App.—Houston [1st Dist.] Aug. 8, 2019, pet. filed); *Ovalle v. State*, --S.W.3d--, 2020 WL 364140, at *3 (Tex. App.—Dallas Jan. 22, 2020, pet. filed); *Simmons v. State*, 590 S.W.3d 702, 712 (Tex. App.—Waco 2019, pet. filed); *Dulin v. State*, 583 S.W.3d

351, 353 (Tex. App.—Austin 2019, pet. granted); *Townsend v. State*, No. 13-18-00049-CR, 2019 WL 6205470, at *8 (Tex. App.—Corpus Christi–Edinburg Nov. 21, 2019, pet. filed) (mem. op. not designated for publication); *King v. State*, No. 11-17-00179-CR, 2019 WL 3023513, at *5–6 (Tex. App.—Eastland July 11, 2019, pet. filed) (mem. op., not designated for publication).[26] In the face of this overwhelming consensus, the SPA contends the statute is facially constitutional because it "serves two purposes: first, it acts as an enforcement mechanism by establishing a reasonable deadline for payment; and (2) disincentivizes untimely payment and the failure to pay." SPA's Brief at 24.

The SPA, however, does not explain how either purpose fits within the categories of permissible court costs delineated in *Allen v. State*, --S.W.3d--, 2019 WL 6139077, at *6-7 (Tex. Crim. App. Nov. 20, 2019). There, this Court taught that "*Peraza* implicitly recognized two types of constitutionally-permissible court costs: (1) those that reimburse criminal justice expenses incurred in connection with the defendant's particular criminal prosecution, and (2) those that are to be expended to offset future criminal justice costs." *Id*. at *6. This Court further explained that "*Salinas* held that a statute assessing costs for future expenses (or an interconnected statute) must expressly direct the collected fees to be expended for a legitimate

[26] Of course, there are numerous cases in which the appellate courts apply these opinions to future cases.

criminal justice purpose." *Id*. This requirement "applies only to the type of cost that was at issue in that case—a cost imposed to offset future criminal justice expenses." *Id*.

But a fee that functions as an "enforcement mechanism" to "disincentivize" tardy payments or non-payments does not "reimburse criminal justice expenses incurred in connection with the defendant's particular criminal prosecution".[27] *Id*. If it does anything, it "offset[s] future criminal justice expenses", *Id*., because, according to the SPA, "presumably, it costs money to send late fee notifications and to administer any installment-payment-plan." SPA's Brief at 25. If that is true,[28] then the real purpose of the time payment fee is to "offset future criminal justice expenses"—assuming, of course, that sending late fee notifications and administering installment payment plans are *criminal justice* expenses. If they are, and if the SPA is correct about its presumption, then the first court to conclude that the time payment fee was facially unconstitutional was correct: "we conclude *Salinas* is on point." *Johnson*, 573 S.W.3d at 340. And so was every other court,

[27] Not even the SPA argues the time payment fee falls within this category, for when it cites *Allen* it uses the "*Cf.*" signal.

[28] Arguably, the SPA's contention should be dismissed because the SPA "does not identify any factual support for this claim", *Kremplewski*, 2019 WL 3720627, at *3, a fact the SPA acknowledges by qualifying its assertion with the word "presumably". SPA's Brief at 25.

both before[29] and after *Allen*,[30] correct to have followed *Johnson*. And that, because the SPA argues in this Court that the time payment fee offsets the future collection and administration costs related to untimely payments of legitimate court costs, which is as much to say that the time payment fee is "a cost imposed to offset future criminal justice expenses"—the "only" type of cost "that was at issue" in *Salinas*. *Allen*, 2019 WL 6139077 at *6. The SPA does not explain why the time payment fee, although functioning as a *Salinas*-type cost, is exempt from the *Salinas* requirement. Nor does the SPA explain why any of the cases holding the time payment fee facially unconstitutional were wrongly decided, nor address any of the arguments those cases found persuasive, nor even mention the cases themselves.

Instead, what the SPA really seems to want is for this Court to recognize a new category of permissible court costs: "a provision that advances" another legitimate court cost. SPA's Brief at Page 25. Besides citing no authority[31] to support the recognition of this novel[32] category, it is apparent from the SPA's own

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[29] *See Kremplewski*, 2019 WL 3720627, at *2; *Dulin*, 583 S.W.3d at 353; *Townsend*, 2019 WL 6205470, at *8; *King*, 2019 WL 3023513, at *5–6.

[30] *See Ovalle*, 2020 WL 364140, at *3; *Simmons*, 590 S.W.3d at 712; *Townsend*, No. 13-18-00049-CR, 2019 WL 6205470, at *8.

[31] Tex. R. App. P. 38.1(i) (argument must contain appropriate citations to authorities).

[32] Novel arguments are not exempt from the briefing rules. *Tong v. State*, 25 S.W.3d 707, 710 (Tex. Crim. App. 2000) ("This is not to say that appellant may not make a novel argument for which there is no authority directly on point. However, in making such an argument, appellant must ground his contention in analogous case law or provide the Court with the relevant jurisprudential framework for evaluating his claim. In failing to provide any relevant authority suggesting how the judge's actions violated any of appellant's constitutional rights, we find the issue to be inadequately briefed."). The closest the SPA comes is by citing authority to show that fines and restitution serve legitimate penal goals. SPA's Brief at 25. These goals, according to

argument that the time payment fee "advances" other legitimate court costs by offsetting future criminal justice expenses—a *Salinas*-category cost. *Allen*, 2019 WL 6139077, at *6; SPA's Brief at 25. The SPA, indeed, analogizes the time payment fee to the cost-offsetting purpose of "general private-industry" late fees. SPA's Brief at 25. Yet it was the time payment fee's nature as a late fee that led, first *Johnson*, then those following it, to reject the fee as facially unconstitutional. *See Johnson*, 573 S.W.3d at 340 ("It is simply a late fee assessed when a person convicted of a felony or a misdemeanor pays any fine, cost, or restitution more than thirty days after the judgment is entered assessing a court cost, fine, or restitution. Thus, we cannot uphold the time payment fee's constitutionality on the ground that its character 'recoups expenses necessary or incidental to a criminal prosecution.'") (quoting *Moliere v. State*, 574 S.W.3d 21, 29 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd).

Finally, it should be noted that although the SPA argues that "[a]s discussed above [in Issue Two], any amounts collected are fully consumed by the State's criminal-justice-related-obligations", and that without a $25 late fee the "balance of costs and fees" may be "unsatisfied", SPA's Brief at 25-26, this argument need not

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the SPA, "may be go unrealized" if a $25 late fee is not in effect. *Id.* But this hardly makes the next chain in the SPA's argument—"a provision that advances that interest is proper"—"grounded in analogous case law", nor does it "provide the Court with the relevant jurisprudential framework for evaluating" the SPA's claim. *Tong*, 25 S.W.3d at 710.

detain us. It finds no evidentiary support in the record and fails to focus on the proper legal inquiry for a facial challenge to the constitutionality of a court cost statute. *See Kremplewski*, 2019 WL 3720627, at *3 ("Instead of acknowledging section 133.103's language, the State claims that a significant portion of the 90 percent of the time-payment fee that is deposited into general revenue funds inevitably gets used for criminal-justice purposes because the State and its counties administer the criminal-justice system from their general revenues. The State does not identify any factual support for this claim. But even if the State had done so, its claim focuses on how the funds are ultimately spent instead of focusing on the proper legal inquiry, which is how section 133.103 says they are to be allocated.").[33] The SPA's assertion that "any amounts collected are fully consumed by the State's criminal-justice-related obligations", then, fails to recognize that in the face of a facial constitutional challenge "it is improper for us to consider the actual use of the funds." *Allen*, 570 S.W.3d at 808 n. 8.

[33] Suppose the SPA points out that, unlike the State in *Kremplewski*, it has identified factual support in this case. *See, e.g.*, SPA's Brief, n. 9, n. 11, n. 13-14, n. 18-21, n. 23, n. 27, n. 29, n. 30-33, n. 35, n. 36-41. First, this would not solve the SPA's failure to apply "the proper legal inquiry, which is how section 133.103 says [the funds] are to be allocated." *Kremplewski*, 2019 WL 3720627 at *3. Second, courts have routinely discountenanced reliance on extra-statutory sources, or refused to consider them, in mounting facial challenges to court costs, so it is unclear why the SPA should be allowed to do so in supporting the constitutionality of a court cost. *See, e.g.*, *Allen*, 570 S.W.3d at 807; *Moliere*, 574 S.W.3d at 30 n. 5; *Johnson*, 573 S.W.3d at 335 & n. 2; *King*, 2019 WL 3023513, at *4; *Townsend*, 2019 WL 6205470, at *6; *Jackson*, 2020 WL 830822, at *3.

The time payment fee, by the SPA's own admission, is a *Salinas*-type cost. As such, the *Salinas* requirement applies. As every intermediate court to consider the issue has held, the time payment fee statute fails, in part, to comply with *Salinas*. Accordingly, the SPA's third issue should be overruled.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant asks this Court to AFFIRM the judgments of the Court of Appeals.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that according to Microsoft Word's word count tool, the relevant portions of this document contain 8,119 words.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2020, a true and correct copy of Appellant's Brief is being forwarded to the counsel below by email and/or eservice:

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