

Nos. PD-0856-19 & PD-0857-19

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

BRYANT EDWARD DULIN,

Appellant

v.

THE STATE OF TEXAS

Appellee

Appeal from Burnet County
Nos. 03-18-00523-CR & 03-18-00524-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- * The parties to the trial court's judgment are the State of Texas and Appellant, Bryant Edward Dulin.
- * The trial judge was the Honorable Evan C. Stubbs, 424th District Court, Burnet County.
- * Counsel for the State at trial was Stacy M. Burke, 1701 East Polk, Suite 24, Burnet, Texas 78611.
- * Counsel for the State on appeal was R. Blake Ewing, 1701 East Polk, Suite 24, Burnet, Texas 78611.
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- * Counsel for Appellant on appeal is Justin B. Smith, 2106 Bird Creek Drive, Temple, Texas 76502.

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* * * * *

STATE’S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The “Time Payment Fee” should be deleted from the bill of costs because it was assessed prematurely. Alternatively, the constitutional striking down of court costs and fees infringes on the Legislature’s authority to establish uniform costs and fees and to enact the budget and interferes with the Governor’s role as chief budget officer. In the second alternative, the fee serves a criminal justice purpose by setting

a deadline for payment and disincentivizing untimely payment and failure to pay.

STATEMENT REGARDING ORAL ARGUMENT

The Court denied the SPA's request for argument.

STATEMENT OF THE CASE

Appellant was convicted of one count of indecency with a child, nine counts of aggravated sexual assault of a child, one count of continuous sexual abuse of a child under the age of 14, and one count of “super” aggravated sexual assault of a child. 1 CR 159-80. He was sentenced to 20 years' imprisonment and a \$5,000 fine, 60 years' imprisonment and a \$5,000 fine, 50 years' imprisonment, and 35 years' imprisonment and a \$5,000 fine, respectively. 1 CR 159-80. The first judgment reflects the trial court's intent to impose court costs and fees. 1 CR 159.

On appeal, Appellant mounted a facial challenge to the imposition of ninety percent of a \$25 “Time Payment Fee” authorized by TEX. LOC. GOV'T CODE § 133.103. *Dulin v. State*, 583 S.W.3d 351, 352-54 (Tex. App.—Austin 2019). The court of appeals agreed with the Fourteenth Court of Appeals in *Johnson v. State*, 573 S.W.3d 328 (Tex. App.—Houston [14th Dist.] 2019, pet. filed), that the fee is unconstitutional and thus modified the judgment by reducing it to \$2.50. *Dulin*, 583 S.W.3d at 354.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals struck ninety percent of the \$25 “Time Payment Fee” and affirmed the judgment as modified. *Id.*

ISSUES PRESENTED

- 1. 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?**
- 2. 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?**
- 3. 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?**

SUMMARY OF THE ARGUMENT

The “Time Payment” fee is a late fee to be imposed if payment of a fine, court costs and fees, or restitution has not been fully satisfied within 31 days of being assessed. Since the fee here was prematurely imposed, one-hundred percent of it should be struck from the judgment, not just the ninety percent as the lower court did. Further, prematurity cannot be deemed harmless or retroactively cured when the bill of costs remains unsatisfied because the trial court still has the discretion to waive it or impose an alternative. Deletion as a remedy in this case furthers the doctrine that courts avoid constitutional questions when possible.

Alternatively, this Court does not have the authority, when faced with a facial attack, to declare a cost or fee to be a tax unless there is absolutely no constitutional application. And in deciding constitutionality, this Court should not supplant its judgment as to what qualifies as a “legitimate criminal justice purpose” when the Governor and Legislature have expressly found otherwise. Absent extraordinary circumstances, modest costs and fees should be upheld because they indisputably support criminal justice. The costs and fees collected are less than State’s criminal justice expenses, which are funded through dedicated accounts and general revenue.

Finally, giving proper deference to the Legislature and Governor, this Court should hold that the “Time Payment Fee” is constitutional. The fee serves a criminal justice purpose because it imposes a time frame for payment and disincentivizes late payment and the failure to pay. Without timely satisfaction, the purpose of costs, fees, fines, and restitution will not be fulfilled.

ARGUMENT

I. Statute at Issue: TEX. LOC. GOV'T CODE § 133.103(a)-(b).

Texas Local Government Code § 133.103,¹ titled “Time Payment Fee,” states:

(a) A person convicted of an offense shall pay, in addition to all other costs, a fee of \$25 if the person:

(1) has been convicted of a felony or misdemeanor; and

(2) pays any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution.

(b) Except as provided by Subsection (c-1), the treasurer shall send 50 percent of the fees collected under this section to the comptroller. The comptroller shall deposit the fees received to the credit of the general revenue fund.

TEX. LOC. GOV'T CODE § 133.103(a)-(b). A county or municipality is entitled to ten percent of the fees collected “for the purpose of improving the efficiency of the administration of justice in the county or municipality.”² TEX. LOC. GOV'T CODE §

¹ The SPA is referring to the statute in effect at the time of Appellant's convictions and sentences. The time payment fee, effective January 1, 2020, is now codified in TEX. CODE CRIM. PROC. art. 102.030, and is categorized as a reimbursement fee. Acts 2019, 86th Leg., ch. 1352 (S.B. 346), § 2.54, eff. Jan. 1, 2020.

² One-hundred percent of the fees collected must be transferred to the Comptroller if, pursuant to an audit, the county or municipality is found to be noncompliant with TEX. CODE CRIM. PROC. art. 103.0033 and “is unable to reestablish compliance on or before the 180th day after the date the municipality or county receives written notice of noncompliance[.]” TEX. LOC. GOV'T CODE §

133.103(c).

II. An improper and prematurely assessed nonobligatory “Time Payment Fee” that penalizes the failure to timely pay a cost, fee, fine, or restitution should be struck.

1. The Premature Fee.

The “Time Payment Fee” appeared on the bill of cost the same day it was issued.³ 1 CR 40. It was therefore premature; no payment of costs or fees owed by Appellant could have possibly been late—let alone by thirty-one days. Because it was wrongly imposed, it should be stricken from the judgment. *Cf. Beedy v. State*, 250 S.W.3d 107, 113 (Tex. Crim. App. 2008) (remedy for unlawful cumulation order or condition of community supervision is deletion). Moreover, even assuming that it is partly (ninety-percent) unconstitutional, \$2.50 was still prematurely assessed.

133.103(c-1). Additionally, the “treasurer shall deposit the remainder of the fees collected under this section in the general revenue account of the county or municipality.” TEX. LOC. GOV’T CODE § 133.103(d). Under Appellant’s argument that deposit into the State’s general fund is determinative of a non-criminal justice purpose for ninety-percent of the fee, it is unclear how subsection (c) is enforced if the county percentage is deposited in the county’s general fund.

³ The fee was effective on June 19, 2018 (the date the judgment was entered), even though the bill of costs was not issued until the request from Appellant’s counsel in December 2018. 1 Second Supp. CR 2-3. If the Court finds that the actual date the bill of costs was issued is controlling here, then the late-fee was not premature.

2. It's Still Improper Even if it's Currently Past Due.

That Appellant had still, during the pendency of his appeal, failed to timely pay does not retroactively cure the premature assessment. So any harmless-error-like argument must fail. Section 133.103 is triggered on a lapse of thirty-one days, so without that condition precedent, it was improper.⁴ Not only is the premature assessment contrary to the statute's plain text, it is bad public policy to encourage courts to enter inapplicable fees (even assuming it's only the \$2.50 portion).

More importantly, even when a defendant fails to timely pay, the assessment of the fee on the 31st day or its endless enforcement is not a foregone conclusion. Though 133.103's "shall" text appears to be absolute, TEX. CODE CRIM. PROC. arts. 43.035 and 43.091 give a court the authority to waive payment of costs, fees,⁵ and fines or, in certain instances, impose an alternative. TEX. CODE CRIM. PROC. arts. 43.035⁶ (reconsideration of fine or cost upon the defendant's notification), 43.091

⁴ Logically, it is peculiar to justify a late fee on the failure to timely pay the complete bill when that bill already includes the fee.

⁵ See TEX. CODE CRIM. PROC. art. 43.015(3) ("cost" includes any fee) (eff. Jan. 1, 2020).

⁶ This provision, effective January 2020, requires a court to hold a hearing to determine undue hardship if the defendant notifies the court about a difficulty in making payment. Acts 2019, 86th Leg., ch. 1352 (S.B. 346), § 3.18, eff. Jan. 1, 2020 ("SECTION 3.16. Articles 43.035 and 45.0445, Code of Criminal Procedure, as added by this article, apply to a notification received by a court on or after the

(waiver of costs and fines); *see also* TEX. CODE CRIM. PROC. art. 43.05(a-1)⁷ (*capias pro fine* for failure to satisfy a fine cannot be issued unless a court holds a hearing to determine undue hardship). Thus, the outstanding or overdue status of a cost and fee is not a determinative factor. In this case, a waiver was and is not out of the question because Appellant was declared indigent after trial. 1 CR 189 (appointing counsel for appeal), 194 (order providing a free record).

Because the premature fee can neither be deemed harmless nor retroactively cured, it must be struck.

3. Avoidance of Constitutional Questions is Preferred.

Deletion of the fee is in line with the judicial doctrine that courts should avoid ruling on constitutional questions when possible. *Karenev v. State*, 281 S.W.3d 428, 431-32 (Tex. Crim. App. 2009). The remedy of vacating the lower court’s judgment and striking the fee would eliminate the need to rule on the facial validity of the fee. The SPA therefore requests that this Court vacate the lower court’s judgment and

effective date of this Act, regardless of whether the judgment of conviction was entered before, on, or after the effective date of this Act.”). The applicability clause makes it retroactive to costs, fees, etc. entered before its effective date.

⁷ The version of Article 43.05 in effect at the time the *capias* issues applies. Acts 2019, 86th Leg., ch. 1352 (S.B. 346), § 3.18, eff. Jan. 1, 2020 (“The change in law made by this article to Articles 43.05 and 45.045, Code of Criminal Procedure, applies only to a *capias pro fine* issued on or after the effective date of this Act.”).

delete the fee.

If the Court opts to delete the fee, the SPA asks that the Court address the legitimacy of the fee in a case in which it was not prematurely assessed. *See, e.g., Hutson v. State*, PD-0987-19 (filed Dec. 17, 2019).

III. Alternatively, the striking down of costs and fees by courts violates powers granted to the Legislature and Governor.

The striking down of court costs and fees by courts violates separation of powers. First, it infringes on the Legislature’s constitutional authority to establish uniform costs and fees and enact the state’s budget. *See* TEX. CONST. Art. III, §§ 46, 49a(b). Second, it interferes with the Governor’s exclusive role as the chief budget officer and his limited authority to modify the budget. *See* TEX. GOV’T CODE §§ 317.002-003 (Governor’s ability to make proposals about appropriated funds), 401.041 (“governor is the chief budget officer”).

Although the constitutional-avoidance principle may weigh against ruling on this broad issue, the general interest in conserving resources by eliminating or reducing court cost and fee litigation is arguably more important. This is true despite the recent substantive changes to the entire landscape by Senate Bill 346. The Legislature may decide that any re-categorization of costs and fees as reimbursement or fines is not in the State’s best interests. The reverse-separation-of-powers

argument presented by the SPA would apply to all costs and fees.

1. A Single-Branch Job: The Legislature’s Power to Establish Uniform Costs and Fees.

i. Presumptions Owed to the Legislature.

The Legislature has the exclusive power to set uniform costs and fees. TEX. CONST. Art. III, § 46. Chapter 102 of the Government Code and Chapter 133 of the Local Government Code are a valid exercise of that authority. TEX. GOV’T CODE §§ 102.021-142; TEX. LOC. GOV’T CODE § 133.001. Courts are “not empowered to substitute what [they] believe is right or fair for what the Legislature has written, even if the statute seems unwise or unfair.” *Vandyke v. State*, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017). Therefore, courts should automatically apply two presumptions:

1. that the Legislature determined that the costs and fees are necessary for the effective operation and administration of the criminal justice system, *i.e.*, the cost of doing business.⁸
2. that the enumerated modest rates are reasonable, not a burden, and were not enacted to be a source of non-tax revenue (with no restricted spending limit⁹).¹⁰

⁸ See *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002) (“we presume that the statute is valid and that the Legislature has not acted unreasonably or arbitrarily.”) (citing *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)).

⁹ Texas Legislative Budget Board, *Texas State Government Effectiveness and Efficiency Report: Selected Issues and Recommendations*, at 41-42 (Jan. 2013), available at <http://www.lbb.state.tx.us/Documents/Publications/GEER/Government%20Effecti>

ii. Due Diligence Demands Deference.

Laws are not enacted out of thin air. They are steeped in timely fact and policy. *See State v. Rhine*, 297 S.W.3d 301, 305-06 (Tex. Crim. App. 2009) (“The legislature also declares the public policy of the state and may depart from established public policy, reshape it, or reform it.”). Within the Legislature, there are numerous committees that cover every area of governance and affairs involving Texas;¹¹ they “study . . . any matter within its jurisdiction and of the instrumentalities of government administering or executing the matter” and “conduct investigations to

veness%20and%20Efficiency%20Report%202012.pdf.

¹⁰ *See Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (per curiam) (Oregon’s \$25 civil filing fee serves the State’s rational goal of offsetting operating costs); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 565, 573 (2012) (quoting 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2666, p. 203 (3d ed.1998)) (Congress enacted cost legislation to provide uniformity and eliminate “exorbitant” attorneys’ fees; “costs almost always amount to less than the successful litigant’s total expenses in connection with a lawsuit.”); *State ex. rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d 189, 196 (Tex. Crim. App. 2018) (recognizing that TEX. CODE CRIM. PROC. art. 26.05 requires county commissioners to adopt a reasonable fixed minimum and maximum fee schedule for appointed counsel). The amount of the fee has never been part of the controversy in this case.

¹¹ The Senate Committees are listed at <https://capitol.texas.gov/Committees/CommitteesMbrs.aspx?Chamber=S>. And the House Committees are listed at <https://capitol.texas.gov/Committees/CommitteesMbrs.aspx?Chamber=H>.

collect adequate information and materials necessary.”¹² TEX. GOV’T CODE § 301.014(a). These committees are the fact-gatherers, and any resulting legislation has been informed by the evidence they have formally vetted, considered, and then relayed to the full Senate and House. *See Vandyke*, 538 S.W.3d at 569 (courts should defer to the policy determinations of the law-making body); *cf. Manzi v. State*, 88 S.W.3d 240, 244 (Tex. Crim. App. 2002) (deference is given to the factfinder).

In the past decade, the Legislature has directed studies of costs and fees. The Legislative Budget Board (LBB) in 2013 submitted its “*Texas State Government Effectiveness and Efficiency Report: Selected Issues and Recommendations*” to the 83rd Legislature.¹³ The complexity of court costs and fees was among the four criminal-justice topics addressed.¹⁴ LBB explained the purpose of the costs and fees as follows:

Court costs are intended to help reimburse the state and local governments for the cost of administering a criminal justice system. Some of these court costs are directly related to the costs courts incur, but they

¹² During session, committees are required to meet regularly and, when not in session, when necessary. TEX. GOV’T CODE § 301.015.

¹³ Available at: <http://www.lbb.state.tx.us/Documents/Publications/GEER/Government%20Effectiveness%20and%20Efficiency%20Report%202012.pdf>.

¹⁴ *Texas State Government Effectiveness and Efficiency Report: Selected Issues and Recommendations*, at 294.

also fund services related to law enforcement, supervision, court-ordered treatments or actions, and a variety of other related items.¹⁵

The review went on to list the current costs and fees, describe the history of previous major legislative changes to the structure, and to recommend improvements.¹⁶ For improvements, LBB recommended consolidating costs and fees per offense class, compiling them in one statutory code, and implementing a cost-of-living increase every four years.¹⁷

The 83rd Legislature ordered the Office of Court Administration (OCA) to study the necessity of costs and fees.¹⁸ The OCA examined all costs and fees and identified several concerns for the Legislature to consider:

1) some fees and costs have no stated statutory purpose; 2) court fees and costs collected from users of the court system are oftentimes used to fund programs outside of and unrelated to the judiciary; and 3) many court fees and costs are collected for a purpose but not dedicated or restricted to be used exclusively for that intended purpose.¹⁹

¹⁵ *Id.* at 295.

¹⁶ *Id.* at 295-302.

¹⁷ *Id.*

¹⁸ Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas as Directed by Senate Bill 1908, 83rd Legislature*, at 1 (Sept. 2014), available at <https://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf>.

¹⁹ *Id.* at 1-6.

The OCA listed the costs and fees it believed had no stated or clear purpose, but it made no recommendation.²⁰ It concluded that it was impossible to opine on the ability to accomplish a purpose in the absence of such information.²¹ Notably, two fees on the OCA’s ambiguity list included the DNA testing fee, later upheld in *Peraza v. State*,²² and the time payment fee at issue here.²³

The Legislature took action based on the OCA’s study during the next session and repealed some costs and fees and amended others.²⁴ It did not, however, address the costs and fees that the OCA indicated had no stated or clear purpose.²⁵

Finally, the most recent reforms to costs and fees, which were sweeping and did resolve the OCA’s concerns while also taking *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017), into account, were made during the last legislative session in Senate Bill 346.²⁶

²⁰ *Id.* at 5.

²¹ *Id.*

²² 467 S.W.3d 508, 521 (Tex. Crim. App. 2015).

²³ *Study of the Necessity of Certain Court Costs and Fees in Texas as Directed by Senate Bill 1908 83rd Legislature*, at 5.

²⁴ Acts 2015, 84th Leg., ch. 1141 (S.B. 287), eff. Sept. 1, 2015.

²⁵ *Id.*

²⁶ Acts 2019, 86th Leg., ch. 1352 (S.B. 346), eff. Jan. 1, 2020.

The Legislature’s establishment of costs and fees after exercising due diligence merits deference with respect to need, purpose, and amount. As an independent branch of government, the justice system is recognized as being indispensable to the orderly functioning of our democratic society. But its ability to serve the public depends on funding. There is a cost to doing business within the court system. And in the criminal justice realm, there are also “costs to be expended for legitimate criminal justice purposes” that may go beyond the direct cost of a prosecution. *Peraza*, 467 S.W.3d at 517. Both interests are considered by the Legislature when deciding how to fairly apportion costs and fees. This is true even when a purpose may not be readily apparent to outsiders—even a judicial support agency. *See Peraza*, 467 S.W.3d at 521 (upholding DNA fee the OCA indicated lacked purpose).

ii. Considering the “Comprehensive Rehabilitation” Fee Anew.

A good example of an erroneous judgment as to the legitimacy of a legislative purpose is the striking of the “Comprehensive Rehabilitation” fee in *Salinas*. 523 S.W.3d at 106-09. Instead of focusing on the absence of a spending limitation to crime victims, *id.* at 108, this Court should have deferred to the need identified by the Legislature and presumed that the precise allocation of costs was tied to that need based on facts and data. The Legislature requires that the Health and Human Services Commission (HHSC) establish an advisory committee to study “rehabilitation,

including for persons with brain injuries.” TEX. GOV’T CODE § 531.012(a)(6). The Brain Injury Advisory Council issues its report to the HHSC, the Governor, and Legislature.²⁷ See TEX. GOV’T CODE § 531.012(d)(2) (written report). According to the report, in 2013,²⁸ 11.7% (2,748)²⁹ of traumatic brain injuries were caused by the victim being struck by something or against something, with 2.07% of the 11.7% resulting in death.³⁰ That statistic includes injury due to criminal conduct.³¹ The report also states that the lifetime cost of care for a person suffering from a traumatic

²⁷ The Texas Brain Injury Advisory Council 2018 Report Presented to the Governor of Texas, the Lieutenant Governor, the Speakers of the Texas House of Representatives, the Texas Legislature and the Executive Commissioner of the Health and Human Services Commission (hereinafter “2018 Brain Injury Report”), *available at* <https://hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2018/texas-brain-injury-advisory-council-report-dec-2018.pdf>.

²⁸ The SPA has chosen 2013 because that is the year used by the Texas Brain Injury Advisory Council in its 2016 and 2018 reports.

²⁹ The same number was reported in the Council’s 2016 report. See The Texas Brain Injury Advisory Council 2016 Report, at 4 (Dec. 2016) (hereinafter “2016 Brain Injury Report”), *available at* <https://hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2016/texas-brain-injury-advisory-council-report-dec2016.pdf>.

³⁰ 2018 Brain Injury Report, at 7-8; 2016 Brain Injury Report, at 5.

³¹ The HHSC lists “[v]iolence, such as domestic or gang violence, assault or shaken baby syndrome” as common causes of traumatic brain injury. <https://hhs.texas.gov/services/disability/acquired-brain-injury/learn-about-acquired-brain-injuries>.

brain injury is between \$600,000 and \$1,875,000.³² Of the \$283,047,000 collected in court costs by the Comptroller in 2013, only .0002% could cover the lowest estimated cost of a single person over a lifetime.³³ After considering the type of evidence known to the Legislature in setting the fee, it is clear that it dedicated an itty-bitty portion of the consolidated court costs and fees to fulfill a much larger existing, proven—and forever evolving—societal need. This determination should be unassailable because the fee does not actually suffer from any real lack of direction to a criminal justice purpose. *See W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 582 (Tex. 2003) (“it is outside the scope of judicial authority to review the Legislature’s policy choices in determining what constitutes an adequate education, . . .”).

iii. Summary

Deferring to the Legislature’s determination of the cost of operating the criminal justice system on a micro and macro level furthers the rigorous facial-challenge standard of review, which requires a showing of no actual constitutional application of a cost or fee statute. *See Peraza*, 467 S.W.3d at 514-15 (for a

³² 2018 Brain Injury Report, at 10.

³³ A History of State Taxes and Fees in Texas, 1972 to 2018, at 89, *available at* <https://comptroller.texas.gov/transparency/revenue/sources.php>.

successful facial challenge, a statute must operate unconstitutionally in all applications). Only in an exceptional case will there be no constitutional application of a statute. *See Salinas*, 523 S.W.3d at 119 (Newell, J., dissenting) (if a statute specifically prevents the use of costs or fees for any legitimate criminal justice purpose, it would be unconstitutional in all applications).

2. The State’s Budget: A Biennium Affair Among Two Branches.

The Legislature’s power to enact costs and fees must be considered within the context of the State’s budget. The budget is controlled by the Governor and the Legislature. *See, generally*, Appendix A (State’s Strategic Planning and Budget Cycle Graph). The Governor is chief budget officer and prepares, with the Legislative Budget Board (LBB),³⁴ a uniform budget. TEX. GOV’T CODE §§ 401.041, 401.042(a)-(b). Part of the budget process is based on the strategic plans submitted by executive-branch agencies, in even numbered years, which include, among other things: (1) the mission and goals; (2) output and outcome measures; (3) identity of those served; (3) an analysis of resources; and, (4) expected changes in services. TEX. GOV’T CODE §§ 2056.001-002. Additionally, all state agencies must prepare a

³⁴ *See* TEX. GOV’T CODE § 316.002 (defining duties of the LBB).

Legislative Appropriations Request (LAR) to present to the LBB and Governor.³⁵ The Governor may hold public hearings and require state agency heads to testify about the request. TEX. GOV'T CODE § 401.043. The Governor may hold, with the LBB, joint public hearings on the biennial appropriation budget. TEX. GOV'T CODE § 401.044. Thus, the budget is compiled by the Governor and Legislature through information submitted in budget estimate forms and that obtained from “public hearings, from inspections, and from other sources.” TEX. GOV'T CODE § 401.0445.

After the budget is submitted to the Legislature, TEX. GOV'T CODE §§ 316.021-022, the Senate Finance and House Appropriations Committees hold public hearings, where the head of any agency may appear to discuss the appropriations request. TEX. GOV'T CODE § 316.022. Agency heads must justify a request for funding with evidence and documentation.

Finally, with appropriations, the Governor may issue a line-item veto, which can be overridden by a two-thirds vote from the Senate and House. *Ex parte Perry*,

³⁵ See, e.g., 2020-2021 Legislative Appropriations Request, Detailed Instructions for Agencies for the Biennium Beginning September 2019, available at <http://www.lbb.state.tx.us/documents/instructions/lar/legislative%20appropriations%20detailed%20instructions%20for%20state%20agencies,%20institutions%20and%20agencies%20of%20higher%20education.pdf>; Governor's June 22, 2018 Directive for LAR Submission, available at http://www.lbb.state.tx.us/documents/instructions/lar/lar_policy_letter.pdf.

483 S.W.3d 884, 900 (Tex. Crim. App. 2016) (citing TEX. CONST. Art. IV, § 14); *see Jessen Associates, Inc., v. Bullock*, 531 S.W.2d 593, 596, 599-600 (Tex. 1975) (Governor can line-item only funds set aside for a specified purpose).

Again, taking into account the complex budget process, it is indisputable that appropriations are grounded in firm, fact-based requirements and needs identified by the Governor and Legislature. Criminal-justice-related state and local requirements and needs are among the many matters of public affairs addressed in the budget. As discussed above, these factors, in turn, inform the apportionment of costs and fees in criminal cases. When courts second guess the well-informed budget determinations and fungible accounting protocols of the other two branches, they violate separation of powers.

3. General Revenue: Where Criminal Justice Gets Funded.

In operation, it is plainly wrong to hold that a legislatively mandated cost or fee is a tax if it is deposited into the State's general fund. *Cf. Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 (Tex. 1997), *as supplemented on denial of reh'g* (Oct. 9, 1997) (whether a fee is an occupation tax or regulatory is not controlled by whether it goes into a special fund or into the State's general revenue" because money is fungible.). To say that the inquiry into the legitimacy of a cost or fee is determined solely by the statute's text, as opposed to

whether the funds are actually used for a criminal justice purpose, begs the following: how is something a tax when indisputable evidence proves that those funds (in a fungible, practical sense) are actually used for a criminal justice purpose? Costs and fees can truly be a tax only if no criminal justice purpose is actually served. As demonstrated below, in *Salinas* this Court created a false distinction between direction at the time of collection and spending after collection. 523 S.W.3d at 109 n.26. Spending after collection actually verifies the existence of direction to a criminal justice purpose at the time of collection.

For a complete understanding, the State's dedicated funds provide a good starting point. The court costs and fees collected by the Comptroller include those dedicated to specific accounts that are expressly criminal-justice-related.³⁶ Even before *Salinas*, those accounts received and held the majority of those costs and fees.³⁷

³⁶ A History of State Taxes and Fees in Texas, 1972 to 2018, at 88.

³⁷ Comptroller's Report on Use of General Revenue Dedicated Accounts, 84th Legislature 2015, available at <https://comptroller.texas.gov/transparency/reports/use-of-general-revenue-dedicated/>.

Dedicated Accounts	Estimated Revenue FY 2016-17 ³⁸
Commission on Law Enforcement 0116	\$18,193,000
Criminal Justice Planning 0421	\$44,972,000
Crime Stoppers Assistance 5012	\$924,000
Breath Alcohol Testing 5013	\$1,973,000
Bill Blackwood Law Enforcement Management Institute 0581	\$7,768,000
Center for Study and Prevention of Juvenile Crime and Delinquency 5029	\$4,400,000
Fair Defense 5073	\$52,400,000
Correctional Management Institute and Criminal Justice Center 5083	\$4,048,000
EMS, Trauma Facilities, Trauma Care Systems 5108	\$8,000,000
Emergency Radio Infrastructure 5153	\$614,000
Total	\$143,292,000

In 2016, the Comptroller reported \$265,054,000 collected from costs and fees.³⁹ In 2017, it was \$253,705,000.⁴⁰ Only the remaining funding (less than half) (\$265,054,000 - \$143,292,000 = \$121,762,000 and \$253,705,000 - \$143,292,000 = \$110,413,000) could have been used towards the other general-revenue-supported criminal justice expenses.

Dedicated funds are only a small part of the picture. The lion's share of governmental expenses are paid for through the general revenue fund.⁴¹ This is true

³⁸ *Id.* at 1-3.

³⁹ A History of State Taxes and Fees in Texas, 1972 to 2018, at 89.

⁴⁰ *Id.*

⁴¹ The SPA is referring to the 2018-2019 Biennium Budget (hereinafter Budget), at ix, available at http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2018-2019.pdf.

with respect to many of the state and local entities that are an integral part of the criminal justice system. General revenue enables our large and diverse criminal justice system to function. Comparing the costs and fees collected in 2017 and 2018 (\$253,705,000 and \$251,386,000, respectively), even without subtracting the dedicated funds mentioned above, with criminal-justice-related funding establishes that the money used to support the latter far exceeds the amount collected. *See* Appendix B (Table of Criminal Justice Expenses Funded by General Revenue). Indeed, the total annual costs and fees collected could not even cover the cost of incarcerating felons—\$2,725,349,173 and \$2,737,468,689—or the Department of Public Safety’s efforts to enhance public safety—\$274,841,043 and \$261,561,140. *See* Appendix B (Table of Criminal Justice Expenses Funded by General Revenue); *compare with LeCroy v. Hanlon*, 713 S.W.2d 335, 341, 341 n.9 (Tex. 1986) (filing fee deposited in the general fund proven to be used outside the judiciary based on a comparison between amount collected and the very small percentage of state funding going to the judiciary).

In sum, the State’s budget reflects the criminal justice requirements and needs of Texas. And these change with each biennium. From biennium to biennium, the Governor and Legislature must have flexibility when it comes to making these ad hoc determinations. Deposit in the general fund does not mean that the funds are

divorced from serving our criminal justice system because the funding used to support the criminal justice system surpasses the court costs and fees collected. *Cf. Texas Boll Weevil Eradication Found., Inc.*, 952 S.W.2d at 461 (“The critical issue is whether the assessment is intended to raise revenue in excess of that reasonably needed for regulation.”). Unless and until the amount collected exceeds the State’s criminal justice operating costs, there is no actual taxation conversion and violation of separation of powers. *See Allen v. State*, __ S.W.3d __, PD-1042-18, 2019 WL 6139077, at *9-11 (Tex. Crim. App. 2019) (Keel, J., concurring and dissenting). Lastly, the modest amounts imposed when compared with the operating cost of criminal justice shows that the Legislature has not implemented an unjust-enrichment-tax-scheme.

IV. The “Time Payment Fee” is Legitimate.

In the second alternative, the “Time Payment Fee” should be upheld on its own merit because it serves a legitimate criminal justice purpose. The one-time \$25 fee is assessed when other properly assessed statutory costs and fees are unpaid “on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution.” TEX. LOC. GOV’T CODE § 133.103(a)(2). 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.

Further, presumably, it costs money to send late fee notifications and to administer any installment-payment-plan. *Cf. Allen*, 2019 WL 6139077, at *7-8 (fee that reimburses “for expenses directly incurred in connection with a defendant’s prosecution,” is constitutionally permissible). Therefore, the late fee is consistent with general private-industry billing principles. *See BMG Direct Marketing, Inc. v. Peake*, 178 S.W.3d 763, 766 (Tex. 2005) (“Companies enter into late-fee agreements with their customers because the precise damages that will result from their customers’ untimely payments is generally difficult if not impossible to ascertain.”).

Payment of fines and restitution is important for numerous reasons. A fine is part of punishment and, tailored to fit the defendant, serves the penal goals of retribution and deterrence. *See Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (noting fines are employed to meet penal goals). Restitution is also part of punishment and assists with rehabilitation and is a deterrence; it has the added benefit of helping to restore the victim to the status quo before the offense. *Burt v. State*, 445 S.W.3d 752, 756 (Tex. Crim. App. 2014). Without a deadline or a penalty for failure to timely pay, the interests served by restitution or a fine may go unrealized.

Moreover, if other legitimate costs and fees serve the criminal justice system, as the Legislature has determined, then a provision that advances that interest is proper. No criminal justice purpose can be served when the balance of costs and fees

is unsatisfied. As discussed above, any amounts collected are fully consumed by the State's criminal-justice-related-obligations.

PRAYER FOR RELIEF

The court of appeals' decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 4,937, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

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State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on January 29, 2020, via email or certified electronic service provider to:

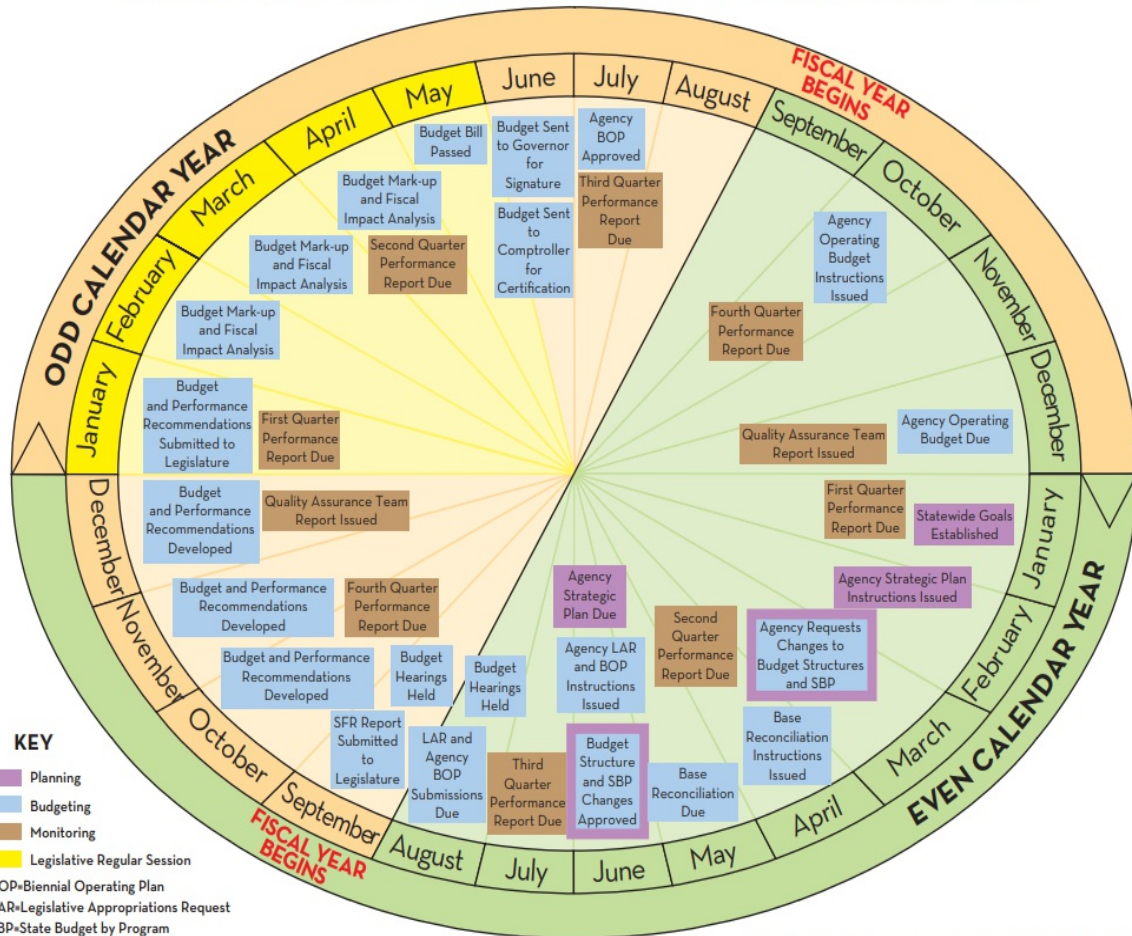
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Appendix A

TEXAS' STRATEGIC PLANNING, PERFORMANCE BUDGETING, AND PERFORMANCE MONITORING SYSTEM TWO-YEAR CYCLE



Appendix B

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Attorney General	Crime Victims' Compensation	\$220,056,253	Criminal Prosecutions Division ²
	AG Law Enforcement Account	\$225,603,213	Criminal Appeals Division ³
	Sexual Assault Program ¹		Juvenile Crime Intervention ⁴
Governor	Criminal Justice Planning Sexual Assault Program	\$195,423,008	Anti-Gang Programs ⁶
	Crime Stoppers Assistance	\$57,166,771	Behavioral Health ⁷
	Drug Court		Bullet-Resistant Vests ⁸
	Prostitution Prevention Programs		Criminal Justice ⁹
	Child Sex Trafficking Unit ⁵		(2018: \$38,471,220) ¹⁰

¹ Budget, at I-3.

²

<https://www.texasattorneygeneral.gov/divisions/criminal-justice/criminal-prosecutions>.

³

<https://www.texasattorneygeneral.gov/divisions/criminal-justice/criminal-appeals>.

⁴

<https://www.texasattorneygeneral.gov/divisions/criminal-justice/gangs-juvenile-justice>.

⁵ Budget, at I-52-53, I-58, I-59.

⁶ Budget, at I-58.

⁷ Budget, at I-59.

⁸ Budget, at I-59.

⁹ There are over twenty criminal justice programs in the Governor's Office. <https://gov.texas.gov/organization/cjd/programs>.

¹⁰

<https://gov.texas.gov/uploads/files/organization/financial-services/Operating-Budget-FY2018.pdf>, at 16.

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Court of Criminal Appeals	Judicial and Court Personnel Training Fund ¹¹	\$6,535,680 \$6,285,681	State court of last resort for all criminal cases ¹²
Courts of Appeals	1 st COA 2 nd COA 3 rd COA 4 th COA 5 th COA 6 th COA 7 th COA 8 th COA 9 th COA 10 th COA 11 th COA 12 th COA 13 th COA 14 th COA	FY18 45% of 4,380,427=\$1,971,192 FY18 45% 3,365,590=\$1,514,515 FY18 45% 2,830,454=\$1,273,704 FY18 45% 3,363,979=\$1,513,790 FY18 45% 6,007,149=\$2,703,217 FY18 45% 1,563,862=\$703,737 FY18 45% 1,942,356=\$874,060 FY18 45% 1,561,866=\$702,839 FY18 45% 1,944,049=\$874,822 FY 18 45% 1,613,505=\$726,077 FY18 45% 1,562,875=\$703,293 FY18 45% 1,560,977=\$702,439 FY18 45% 2,816,011=\$1,267,204 FY18 45% 4,386,229=\$1,973,803 Total: \$17,504,692	Criminal cases filed in FY18 (only) comprised 45% of the COAs' docket ¹³

¹¹ Budget, at IV-3.

¹² TEX. CONST. Art. V, § 5.

¹³ Office of Court Administration, Annual Statistical Report for the Texas Judiciary, Fiscal Year 2018, at p.15, available at <https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf>.

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
State Prosecuting Attorney	N/A	\$405,627 \$405,627	Represents the State before the Court of Criminal Appeals ¹⁴
Professional Prosecutor Salaries ¹⁵	N/A	\$100,236,099 \$100,644,101	District and Criminal District Attorney Compensation ¹⁶ (\$741,727) Professional Prosecutor Compensation ¹⁷ (\$21,797,968) Felony Prosecutor Compensation ¹⁸ (\$340,535)
Special Prosecution Unit ¹⁹	N/A	\$3,782,646 \$3,630,646	Criminal Division \$1,926,933 \$1,847,551
Department of Criminal Justice	N/A	\$3,073,562,787 \$3,097,832,771	Provide Prison Diversions ²⁰ (\$248,317,931; 246,301,993) Incarcerate Felons ²¹ (\$2,725,349,173; \$2,737,468,689) Operate Parole System ²² (\$183,859,324; \$183,913,308)

¹⁴ TEX. GOV'T CODE § 42.001.

¹⁵ This is included in the Comptroller's Judiciary Section. Budget, at IV-33-34.

¹⁶ TEX. GOV'T CODE § 41.013.

¹⁷ TEX. GOV'T CODE §§ 46.002-005.

¹⁸ TEX. GOV'T CODE §§ 44.220, 45.175, 45.280.

¹⁹ Budget, at IV-36.

²⁰ Budget, at V-6.

²¹ Budget, at V-6.

²² Budget, at V-6.

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Department of Public Safety	Motorcycle Education	\$937,112,823	Combat Crime and Terrorism ²³ (\$148,092,365; \$148,071,465)
	Sexual Assault Program	\$906,203,652	
	Breath Alcohol Testing		Enhance Public Safety ²⁴ (\$274,841,043; \$261,561,140)
	Emergency Radio Infrastructure		

²³ Budget, at V-46.

²⁴ Budget, at V-46.