

Constitutional Challenges
In Municipal Court and City Ordinances

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In municipal court often times there may be certain constitutional challenges regarding a city code violation or a traffic law violation requesting the court to declare the city ordinance, statute or process unconstitutional. Constitutional challenges (dependant on the facts of each case) may often allege vagueness, overbreadth, lack of due process, equal protection, or preemption violations. Although many points may be raised by a constitutional challenge, the following information will address only a few points for discussion and you are encouraged to become more familiar with the many possible constitutional challenges.

The first half of this paper is designed to give a brief overview of each type of challenge. The second half will discuss more specific issues pertaining to frequent challenges made in municipal courts and finally a recent case law update will be provided pertaining to constitutional issues in general.

I. General Constitutional Challenges

Due Process:

Due Process is defined as the exercise of government power under the rule of law with due regard for the essential and fundamental fairness of individuals. There are two

types of due process challenges, procedural and substantive, which are based on the Due Process Clauses of the 5th and 14th Amendments to the U.S. Constitution.¹

Generally, due process requires that an individual be given notice and an opportunity for a hearing before the state may permanently deprive someone of life, liberty, or property. Moreover, it has been held that an agency may not impose even a temporary suspension without providing the core requirements of due process: adequate notice and a hearing.

Nonetheless, the concept of due process is flexible with the particular situation; therefore, the procedural protection required by the Due Process Clause must be determined with reference to the rights and interests at stake in each particular case.

Procedural Due Process:

The intent of procedural due process is to ensure that the government acts in a way that is fair and reasonable when making decisions that affect private individuals and that its actions are not arbitrary. While the exact appropriate procedures are determined by the facts of each case, usually the more substantive the right, the more heightened the procedure to ensure the particular rights in question have not been violated. Therefore, it is important to remember that the fundamental requirement in any situation requires adequate notice, hearing and impartiality. Sufficient notice must be given in order to apprise interested parties of the importance of the action, afford them an opportunity to present objections, and enable them to determine what is being proposed and what must be done to protect their interest.

¹ This protection is guaranteed by the 5th Amendment to the United States Constitution made applicable to the states by the 14th Amendment.

Moreover, individuals can not be deprived of a property or liberty interest unless they are provided some form of hearing in which they will have the opportunity to be heard. Depending on the facts and issues of each case, this hearing may be conducted before an administrative judge or a magistrate. Further, in order to provide procedural due process, it is important that not only a hearing be provided, but that the court is not predisposed against the individual.²

For instance, before a city can permanently dispose of a vehicle which the city has classified and removed as a junk vehicle/public nuisance it must provide adequate notice to the owner of their right for a in order to provide proof that the vehicle is operable. If the proper procedures are not followed, the city may be in violation of depriving the owner of their right to due process.

Substantive Due Process:

The doctrine of substantive due process holds that the Due Process Clause not only requires basic procedural rights, but that it also protects substantive rights. These are general privileges that reserve the individuals the power to possess or to do certain things, which includes freedom of speech, religion, association, movement, and privacy. Substantive due process is intended to protect the public from arbitrary governmental action, regardless of the procedures used to implement it. Substantive due process is related to the concept of fairness beyond the constitution and is decided mostly through a Fundamental Rights/Compelling Need Test.

For example, a municipality in its zoning ordinance may desire to implement certain restrictions regarding specific types of enclosures a homeowner may place around

² Procedural rights dictate how the government can lawfully go about taking away a person's freedom, life or property, when the law otherwise gives them the power to do so. Procedural due process challenges are usually focused on procedural errors in the passage of a city ordinance.

his property in certain neighborhoods and or neighborhood developments. While the municipality may have a legitimate concern for its citizen safety and/or the architectural harmonious layout of its residential developments, the citizen's fundamental right to privacy should be weighed against the municipalities' interest to determine if the municipalities' interest is to such a degree that it has to infringe upon the right to privacy for the greater interest of its citizenry.

Vagueness:

The first step in evaluating whether a law is unconstitutionally vague is to determine if the statute provides adequate notice of what conduct is prohibited. The second step is to determine if the statute is drafted in a manner that fosters arbitrary or discriminatory enforcement. Legislation is not unconstitutionally vague if the law's prohibitions are such that an ordinary person exercising common sense is able to understand and comply. A regulation must be sufficiently clear to warn a party regarding what is expected of them before they can be sanctioned for failure to comply with the required regulation. It is best, therefore, to have clear and concise detailing of prohibited conduct written into the regulation or at least referred to in the regulation. Moreover, general references to a regulation's policy or underlying purpose will not provide fair notice as required by procedural due process. The language must be specific.

When reviewing an ordinance or statute to determine if it is vague, we must be mindful that the law does not require an explanation for every single word or phrase. The law only has to be clear enough to state that clear regulatory guidelines exist. When determining whether a regulation or law is vague, we must bring to the court's attention

that words are inherently imprecise, and therefore “mathematical certainty is unattainable.”³

In addition, the Supreme Court has held in a facial challenge to the vagueness of an enactment, a court must first determine whether it reaches a substantial amount of constitutionally protected conduct and if the enactment is impermissibly vague in all of its applications.⁴ Once a vagueness argument is made, the law is not automatically considered unconstitutional on its face unless the enactment is impermissibly vague in all of its applications. Whether one or two words are clearly defined is not the test, but rather whether the law in total provides adequate notice of the prohibited conduct.

Overbreadth:

Along with a vagueness challenge, there may be an argument that the ordinance or law in question is overly broad as it is written. A statute is usually said to be overly broad when its prospective reach includes constitutionally protected activity. Although a municipality may legitimately prohibit or regulate both unprotected and protected speech whose suppression is justified by a compelling governmental interest, the law forbids the drafting of statutes and/or ordinances so broadly that they also prohibit, or could prohibit substantial amounts of constitutionally protected expression.

Facial overbreadth claims have also been entertained where statutes aim to regulate the time, place, and manner of expressive or communicative conduct. Here, a municipality may regulate speech in a traditional or designed public forum such as a public street or sidewalk with content-neutral restrictions on the time, place, or manner of

³ *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L.Ed. 2d 222 (1972).

⁴ *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S. Ct. 1186, 71 L.Ed. 2d 362 (1982)

the speech. However, in order to justify such a regulation, the municipality must show that the restrictions are narrowly tailored to accomplish a significant governmental interest.

Therefore, whether the law is overbroad depends on the degree of its impact on protected versus unprotected speech. For example, municipal ordinances with time, place, and manner restrictions have been upheld where the government has shown a substantial or compelling interest in doing so and have been struck down as overly broad where such interest was not demonstrated or failed to give breathing room to First Amendment concerns.⁵

Equal Protection:

The Equal Protection Clause is part of the 14th Amendment to the U.S. Constitution that prohibits discrimination by state government institutions. The clause grants all people “equal protection of the laws,” which means that the states must apply the law equally and should not give preference to one person or class of persons over another unless it can meet the burdens established by law. Over recent decades, the Supreme Court developed a three-tiered approach to analyze the Equal Protection Clause and defined the levels of scrutiny as strict scrutiny, intermediate scrutiny, and rational-basis test.

Under the strict scrutiny test, the government must show that the challenged classification serves a compelling state interest and that the classification is necessary to serve that interest. Classifications which have traditionally been held to the strict scrutiny

⁵ *City of Ladue v. Gilleo*, 512 U.S. 43; 114 S.Ct. 2038; 129 L.Ed. 2d 36 (1994) and *Watchtower Bible v. Stratton*, 536 U.S. 150; 122 S.Ct. 2080; 153 L.Ed. 2d 205 (2002).

test include race, national origin, religion, alienage, denial or dilution of the vote, interstate migration, and access to the court.

Under the intermediate or middle-tier scrutiny, the government must show that the challenged classification serves an important state interest and that the classification is at least substantially related to serving that interest. Classifications in this category include gender and illegitimacy. Under the minimum or rational basis test, the government need only show that the challenged classification is rationally related to serving a legitimate state interest.⁶

For example, if a municipality passes an ordinance prohibiting individuals from soliciting employment in the public right-of-way and/or in any unauthorized location, the ordinance cannot be selectively enforced against certain individuals or class of individuals. It must be equally enforced against all persons committing the violation.

Preemption:

Preemption is a provision in state or federal law that eliminates the power of the local or state governments to regulate certain activities. Thus, when there is a conflict between a state law and federal law, the federal laws trumps or "preempts" the state law. The term is also used to refer to the displacing effect state laws might have on ordinances enacted by municipalities. Therefore, if there is a conflict between state law and local law, the state law will preempt the local law. For example, if a local municipality passes an ordinance exclusively governing the manufacture, sale, distribution, transportation, and possession of alcoholic beverages within its jurisdiction, such an ordinance may be

⁶ There is, arguably, a forth level of scrutiny for equal protection cases. In *United States v. Virginia*, 518 U.S. 515 (1996), Justice Ruth Ginsburg demanded that litigants demonstrate an exceedingly persuasive argument to justify gender discrimination. Whether this creates a new level of scrutiny has not yet been determined.

preempted by the Texas Alcoholic Beverage Code since the state specifically governs this issue through the Alcoholic Beverage Code unless otherwise specifically directed.

There are two situations where preemption claims may arise: express and implied preemption. Express preemption occurs where Congress expressly states within a statute that certain activity is preempted. Therefore, federal laws explicitly preclude state and local regulations. Implied preemption has, within itself, three sub-categories: conflicts preemption, preemption because state law impedes the achievement of a federal objective, and preemption because federal law occupies the field.

Conflicts preemption is where it is impossible to comply with both the federal statute and the state or local law. In this situation, the federal statute must be followed. The second type of preemption is preemption because state law impedes the achievement of a federal objective or goal Congress is trying to attain with a federal statute. The final type of implied preemption is preemption because federal law occupies the field. In this situation, one must look at Congress's intent, and whether the federal law was meant to be exclusive in that area. Express and implied preemption will also apply to circumstances involving conflicts between local and state laws.

As a general rule, there is a presumption in favor of the validity of state law; thus, courts will attempt to reconcile seemingly inconsistent state and federal laws where possible. If the laws are truly irreconcilable, then the federal law will generally preempt the state law only to the extent of the inconsistency. This presumption also holds true with conflicts between local and state laws.

II. Constitutional Challenges and Municipal Court

Municipal courts have original and exclusive jurisdiction over violations of city ordinances as well as concurrent jurisdiction with justice courts in misdemeanor cases occurring within the territorial limits and on property owned by the city in the city's extraterritorial jurisdiction that are punishable by fine and such sanctions, if any, as authorized by statute not consisting of confinement in jail or imprisonment.⁷ Trials in municipal courts generally are not of record, and therefore appeals at this level are handled by the county court, the county court at law, or the district court which results in a trial de novo (new trial).

During the course of preparing for trial, the most common constitutional challenge in municipal court is a due process challenge. Here, the defendant may allege a violation of due process if they do not receive the formal complaint regarding their citation before their first court appearance. This requirement under the Code of Criminal Procedure article 45.018(b), states a defendant is entitled to notice of a complaint against the defendant not later than the day before the date of any proceeding in the prosecution of the defendant under the complaint. The defendant may waive the right to notice granted by this subsection.

In order to counter this challenge, an argument should be made that the original written notice (citation) that is given to a defendant serves as the complaint unless the defendant pleads "Not Guilty" to the alleged offense in open court.⁸ Therefore, a formal complaint as required by article 45.019 of the Code of Criminal Procedure does not have

⁷ Article 4.14, Code of Criminal Procedure and §29.003, Government Code.

⁸ Code of Criminal Procedure Article 27.14(d)

to be fully satisfied until after the defendant pleads “Not Guilty” in open court. Until this occurs, the original citation received by the defendant serves as the defendant’s notice of the alleged violation.⁹

If the defendant objects to this position and the municipal court’s ruling in favor of this argument, another attempt, usually made by pro-se defendants, to challenge the authority of the court and continue the defendant’s due process challenge may come in the form of a mandamus¹⁰ action to the appropriate higher court. Mandamus is an extraordinary writ that should be issued only when the trial court clearly has abused its discretion and there is no adequate remedy by appeal.¹¹ If there is an adequate remedy by appeal mandamus is not warranted.

Further, case law clearly states that no court has jurisdiction to issue a writ of mandamus to control or correct incidental rulings of a trial judge in the municipal court when there is an adequate remedy by appeal for correction of any such ruling or judgment which may be erroneous.¹² Until there is a trial on the merits of defendant’s case in municipal court, defendant has suffered no harm and all pre-trial rulings on defendant’s motions are mere incidental rulings, which may be corrected on appeal during the course of defendant’s de novo hearing.

⁹ This argument would not apply to offenses of public intoxication because such offenses require a written complaint at all times according to article 45.019 of the Code of Criminal Procedure.

¹⁰ A writ of mandamus is issued by a superior court to compel a lower court or a government officer to perform a ministerial duty correctly.

¹¹ *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992).

¹² *Brady v. Fry*, 517 S.W.2d 304, (1974); and *Franklin v. Kyle*, 899 S.W.2d 405, (Tex.App.—Waco [10th Dist.] 1995).

While a mandamus action is an incorrect attempt to challenge the court into issuing an order in the defendant's favor, it is important to bring to the court's attention (should such an action be filed) that no clear abuse of discretion has been committed by the municipal court. Under this position it should be clearly established that no clear abuse of discretion or a violation of any duty imposed by law exists and therefore, mandamus is neither appropriate nor warranted under the facts and law.

III. Constitutional Law Update

***Weatherford v. City of San Marcos* 157 S.W.3d 473 (Tex. App. 2004)**

Procedural Posture: Appellant property owner brought an action against appellees, the city, the city council, and his neighbors, claiming, inter alia, the denials of his rezoning requests violated his rights to due process and equal protection, constituted a regulatory taking, and were proprietary in nature and thus subject to estoppel. The 22nd Judicial District Court of Hays County, Texas, granted the city's motion for summary judgment. The owner appealed.

Overview: On review, the owner contended, inter alia, that the city's denials of his rezoning applications were arbitrary, capricious, and unreasonable; the city violated his equal-protection rights; the city violated the Texas Open Meetings Act, Tex. Gov't Code Ann. §§ 551.001-551.146 (2004), the denial of his applications was an unconstitutional taking, and the city was not entitled to governmental immunity. The appellate court disagreed, finding that the owner failed to plead a true equal protection claim, as he did not claim that he was treated any differently than any other landowner but only that he himself was treated differently at different times during his application process. Further, he had no vested property right in any particular zoning classification, as the approval process was a legislative act subject to the discretion of the city. And, the city's decisions to deny his applications were rationally related to the general welfare; namely, protecting residents from the negative impact of urbanization and maintaining quality of life. The owner had both notice and an opportunity to be heard and had no right to have any of his applications approved.

Constitutional Law: To comply with substantive due process, zoning decisions need only be rationally related to legitimate government interests. The appellate court should not set aside a zoning determination for a substantive due process violation unless the action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare. The non-movant in a no-evidence motion for summary judgment has the burden of overcoming the presumption of validity of the city's conduct in the exercise of its legislative authority and proving the city's conduct was unreasonable. If reasonable

minds could differ as to whether the city's zoning action had a substantial relationship to the public health, safety, morals or general welfare, the action must stand as a valid exercise of the city's police power.

***Pena v. State*, 166 S.W.3d 274 (Tex. App. 2005)**

Procedural Posture: Defendant was charged with possession of marijuana. Before trial, he requested an independent analysis of the evidence. Thereafter, it was discovered that the alleged marijuana had been destroyed and all records documenting the testing of the evidence were lost excepting a lab report. The 12th District Court of Leon County, Texas, denied defendant's motion to suppress the lab report, and he was convicted. Defendant appealed.

Overview: On review, defendant contended, inter alia, that the trial court erred by denying his motion to suppress the lab report. The appellate court agreed finding that although the record contained no evidence of bad faith on the part of the law enforcement officials involved in defendant's case, the due course clause of the Texas Constitution provided a greater level of protection with respect to lost or destroyed evidence than did the U.S. Constitution. The State breached its duty to preserve the plant material, which was the sole cause for defendant's arrest. Consequently, the lab report, exclusively relied upon at trial, was the only evidence recording that the destroyed plant material was tested, and it stood unsupported by documentation and unverified by human memory. Therefore, keeping in mind the fundamental fairness of the proceeding, the appellate court found that defendant was denied due course of law under the Texas Constitution.

Constitutional Law: Under the due course clause of the Texas Constitution, the State has a duty to preserve evidence that has apparent exculpatory value, encompassing both exculpatory evidence and evidence that is potentially useful to the defense. In either case, the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. The loss or destruction of such evidence results in a breach of this duty.

In the context of determining whether the destruction of exculpatory evidence deprived the defendant of due process, while the conduct of the State's agents is a relevant consideration, it is not determinative. Equally relevant is a consideration of the importance of the missing evidence, the availability of secondary evidence, and the sufficiency of the other evidence presented at trial.

***Bansal v. State*, 169 S.W.3d 371 (Tex. App. 2005)**

Procedural Posture: The County Court at Law, Orange County, Texas, refused to allow defendant to represent himself at his first trial and attempted to rectify the mistake by conducting a second trial wherein defendant did represent himself. Defendant was convicted of harassment and the trial court assessed his punishment at confinement for 180 days and a \$ 2000 fine. Defendant appealed.

Overview: Prior to defendant's first trial, he requested that he be allowed to represent himself. The request was denied and he was convicted. Defendant then filed timely motions for new trial and a notice of appeal. Defendant went to trial again on the harassment charge before a second jury, which also found him guilty. Another appellate court found that the second trial was a nullity and voided the judgment. Defendant argued that the evidence was legally insufficient to support his conviction and that the trial court erred by denying his request to represent himself in the first trial. The appellate court noted that defendant made repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another; therefore, the evidence was legally sufficient to establish the elements of harassment. The appellate court held that the Sixth and Fourteenth Amendments guaranteed that an accused could dispense with counsel and represent himself and that defendant unequivocally requested to represent himself; thus, he was entitled to represent himself in the first trial and the trial court erred in not allowing him to do so.

***Fox v. State*, 175 S.W.3d 475 (Tex. App. 2005)**

Procedural Posture: Defendant appealed a judgment of the 336th Judicial District Court, Fannin County, Texas, which convicted him of aggravated sexual assault of a child. The jury assessed punishment at 40 years' imprisonment and a fine. Defendant was sentenced in accordance with the jury's verdict.

Overview: Defendant argued that the trial court erred in limiting his cross-examination and in denying his motion for new trial. He also claimed that he received ineffective assistance of trial counsel. In affirming, the court held that the trial court did not abuse its discretion by failing to sua sponte conduct a hearing to determine the victim's mental competency or in overruling defendant's motion for a mistrial. Defendant's own question to the State's expert of whether the victim's story appeared to be realistic induced the response that, in the witness' opinion, the victim was telling the truth. Defendant's complaint about being limited in his cross-examination of the victim's therapist failed to be specific enough to put the trial court on notice that he was making a Confrontation Clause argument. The trial court did not abuse its discretion in denying defendant's motion for new trial because the alleged "new evidence" developed at the hearing on that motion was known by defendant's trial counsel. Defendant did not receive ineffective assistance of counsel. The State did not suppress evidence, and defendant had full access to information he claimed was suppressed.

Constitutional Law: The Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated when a prosecutor fails to disclose evidence favorable to the accused that creates a probability sufficient to undermine confidence in the outcome of the proceeding. In order to establish a due process violation under Brady, a defendant must show: (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material to either guilt or punishment. The first element of Brady is present if the prosecution actively suppresses evidence or negligently fails to disclose it. However, the State is not required to facilitate the compilation of exculpatory material that could have been compiled by the defense.

Thus, without suppression, there is no Brady violation. There is no Brady violation if it is not shown that the defendant was denied access to the allegedly favorable material. If the defense has the opportunity to cross-examine concerning the allegedly exculpatory material and there is no showing the defense would have pursued a different trial strategy if he or she had known this information sooner, no Brady violation is shown.

***Flores v. State*, 172 S.W.3d 742 (Tex. App. 2005)**

Procedural Posture: After his motion to suppress evidence was denied, defendant pleaded guilty in the 183rd District Court, Harris County (Texas) to possession of marihuana weighing more than fifty pounds and less than two thousand pounds. Defendant appealed.

Overview: Defendant argued, inter alia, that the trial court erred by denying his motion to suppress because his consent was the result of coercive police tactics aimed at forcing him to consent to a search of his residence. The court of appeals agreed. The officers never made any attempt to corroborate the information provided in the tip; they did not conduct surveillance of the address or otherwise substantiate the tip. Because there was no independent corroboration of the tip to substantiate the presence of narcotics at the residence nor any information indicating that the tip had sufficient indicia of reliability, the officer's fear of weapons was unfounded, and, thus, the subsequent pat-down search of defendant was unjustified. In their haste to obtain defendant's consent to search his residence, the officers did not read defendant his Miranda rights. Finally, in an effort to obtain consent to search the house, and, while defendant was handcuffed in the back of the patrol car, the officers told him that if he did not consent, his mother and young son would be required to vacate the house while the officers secured the residence, despite the officers having no basis for doing so.

Constitutional Law: At the core of the Fourth Amendment is the fundamental concept that any governmental intrusion into an individual's residence or expectation of privacy must be strictly circumscribed. Under the Fourth and Fourteenth Amendments, a search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well-delineated exceptions. One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent, so long as the consent is voluntary. The validity of a consent to search is a question of fact to be determined from all the circumstances. The consent must not be coerced, by explicit or implicit means, by implied threat or covert force. By the same token, consent is not established by showing no more than acquiescence to a claim of lawful authority. In determining the meaning of a voluntary consent, two competing concerns must be accommodated--the legitimate need for such searches and the equally important requirement of assuring the absence of coercion. In Texas, the State is required to prove the voluntariness of consent by clear and convincing evidence based on the totality of the circumstances. The issue of consent does not turn upon an evaluation of credibility and demeanor, so it is subject to de novo review.

***Smith v. State*, 149 S.W.3d 667 (Tex. App. 2004)**

Procedural Posture: The District Court of Travis County, 147th Judicial District (Texas), denied defendant's motion to quash the jury array. Subsequently, a jury for the trial court found defendant guilty of delivery of a controlled substance, for which he was sentenced to five years' imprisonment. Defendant appealed.

Overview: Before voir dire, pursuant to Tex. Code Crim. Proc. Ann. art. 35.07 (1989), defendant moved to quash the jury array based on the low percentage of minority representation relative to the population of the county and the use of the Internet in the collection of juror information sheets, claiming that the use of the Internet in the process resulted in the under representation of minority and economically disadvantaged people in the array. The appellate court found that art. 35.07 did not violate his constitutional right to equal protection because he did not show that defendants and the prosecution were similarly situated individuals who were being treated differently under the statute or that the legislature lacked a rational basis that defendants had to file a signed affidavit before filing a motion to quash the jury array but that the prosecution did not. Additionally, defendant made no showing that the officer summoning the jury willfully summoned jurors with a view to securing a conviction and no showing that the use of the Internet was intended to exclude any distinct group within the community; thus, the trial court did not err by denying his motion to quash the jury array.

Constitutional Law: In an equal protection claim, a statute is evaluated under strict scrutiny if it implicates a fundamental right or discriminates against a suspect class. A statutory classification that does not discriminate against a suspect class need only be rationally related to a legitimate governmental purpose to survive an equal protection challenge. A claimant must establish clearly that the statute is arbitrary and irrational before an equal protection violation will lie. Those attacking the rationality of a legislative classification have the burden to negate every conceivable basis that might support it.

***State v. Seibert*, 156 S.W.3d 32 (Tex. App. 2004)**

Procedural Posture: Prior to trial, defendant filed two motions to dismiss his indictment for stalking, in violation of Texas Penal Code Ann. § 42.072 (2003). The County Criminal Court No. 7, Dallas County, Texas, denied those motions, but four days into trial, it granted the original motion and dismissed the jury. The State appealed.

Overview: Among other acts, defendant allegedly followed the complainant without her knowledge, surreptitiously videotaping her as she went about her day. He discovered that the dates alleged in the indictment were the dates that he allegedly left the videotapes at complainant's home, not the dates he created the tapes. He filed a motion to quash the indictment, alleging, in part, that the word "following" as used in the statute was too vague to be constitutional. The court disagreed, finding that the stalking statute was not unconstitutionally vague because a person who knew or reasonably believed his conduct would be regarded as threatening bodily injury or death was put on notice that his conduct was prohibited. The term "following" alleged in the indictment was not so broad as to encompass non-criminal activities. The court also held that quashing the indictment

after trial began was not error where defendant had filed his motions before trial commenced, and the record did not show that the trial court considered anything other than the indictment as a pleading.

Constitutional Law: When reviewing the constitutionality of a statute, the court presumes the statute is valid and that the legislature has not acted unreasonably or arbitrarily in enacting it. The burden rests on the party challenging the statute to establish its unconstitutionality. The court upholds the statute if it can determine a reasonable construction that will render it constitutional and carry out the legislative intent.

To pass a vagueness challenge, a criminal statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Also, the law must establish determinate guidelines for law enforcement. A statute is not rendered unconstitutionally vague merely because words or terms are not specifically defined.

***State v. Howard*, 172 S.W.3d 190 (Tex. App. 2005)**

Procedural Posture: Defendant, a dancer at an adult cabaret, was charged with violating the "no touch" provision of the Dallas City Code regulating sexually oriented businesses and the conduct of their employees, Dallas, Tex., Code § 41A-18.1(a) (2000). The County Criminal Court No. 9, Dallas County, Texas, granted defendant's motion to quash or dismiss the information. The State appealed.

Overview: Defendant was charged with "recklessly" rubbing her breasts against a customer's head. The Dallas City Code, however, specifically made a violation of the no-touch provision a strict liability offense, criminalizing conduct based on touching alone, regardless of any culpability. In affirming the decision to dismiss the indictment, the court found that the no-touch provision violated the First and Fourteenth Amendments because it was not drawn narrowly to do only what was necessary to prevent the "secondary effects" of adult cabarets. Criminalizing the touching of a customer without requiring any culpable mental state criminalized accidental or inadvertent touching and thus was a greater restriction on free expression than was essential to further the city's interests.

Constitutional Law: Although a governmental entity may regulate protected expression through content-neutral ordinances, its authority to regulate is not unfettered and the ordinance must fall within the bounds of the U.S. Constitution. The court will find a content-neutral regulation to be constitutional, despite its adverse impact on the exercise of First Amendment rights, if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the asserted governmental interest is unrelated to the suppression of free expression; and (4) the incidental restrictions on alleged First Amendment freedoms are no greater than is essential to the furtherance of that interest.

***Leonard v. Abbott*, 171 S.W.3d 451 (Tex. App. 2005)**

Procedural Posture: Appellant citizen challenged orders of the District Court of Travis County, 200th Judicial District (Texas), which declared him a vexatious litigant pursuant to Tex. Civ. Prac. & Rem. Code Ann. §§ 11.001-11.055 (2002), and which dismissed his lawsuit against appellees, the attorney general, a county, an agency, and a city, after he failed to furnish court-ordered security.

Overview: The citizen had a long history of filing lawsuits and appeals to contest the issuance and approval of bonds in the county related to the construction of new sports arenas in that locale. In affirming, the court held that the vexatious litigant statute was not unconstitutionally vague because it sufficiently outlined a standard of conduct and because a core of prohibited activity was well defined therein. Furthermore, the statute did not implicate the citizen's constitutional right to equal protection. The citizen's own pleadings belied his claim that he could not have known he was at risk of being held to be a vexatious litigant. He acknowledged that his underlying lawsuit asserted the same request for relief that had been included in one unsuccessful lawsuit or another continuously from 1998 through 2003 and should have known that there was no reasonable probability of success. The restrictions placed on the citizen were not unreasonable when balanced with the significant costs of defending his likely frivolous lawsuits in the future. The court disagreed with the citizen's claim that appellees failed to show there was no reasonable probability that he would prevail in his suit.

Constitutional Law: The vagueness doctrine is a component of the Constitution's due process guarantee. A statute prohibiting conduct that is not sufficiently defined is void for vagueness. Moreover, an equal protection claim is not limited to members of a large class, but can be brought by a "class of one," where the plaintiff alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. The purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

***Griffin Indus. v. State*, 171 S.W.3d 414 (Tex. App. 2005)**

Procedural Posture: Defendant challenged a decision from the County Court at Law No. 5 of Harris County (Texas), which convicted it of the offense of unauthorized discharge.

Overview: Defendant, a corporation, was transporting chicken waste when some spilled. Defendant's employees washed the waste into a storm drain. After defendant was convicted of unauthorized discharge under Tex. Water Code Ann. § 7.147 (2000), it sought review. In affirming, the court determined that § 7.147 was not unconstitutionally vague as applied. The definition of "to discharge" in Tex. Water Code Ann. § 26.001 was sufficient to apprise a person of reasonable intelligence of fair notice of what was prohibited. The term "to discharge" adequately conveyed that the legislature intended to criminalize the release of water or pollutants into or near water in Texas. Moreover, the court did not consider a vagueness challenge based on the discretion given to law

enforcement because that was merely a hypothetical situation. Next, the court held that there was sufficient evidence to sustain the conviction based on the acts of the employees and the evidence that the water was contaminated with the waste. Finally, the trial court did not err by refusing to instruct the jury on causation under Tex. Penal Code Ann. § 6.04 since the employees were involved in washing the waste into the drain.

Constitutional Law: A statute is not vague or indefinite merely because its words or phrases are not specifically defined. If a statute is challenged for vagueness and no First Amendment rights are involved, the reviewing court need only scrutinize the statute to determine whether it is impermissibly vague as applied to the challenging party's specific conduct.

A facial challenge to a statute on the basis of vagueness will be upheld only if the statute is impermissibly vague in all its applications. A facial challenge is the most difficult because the challenger must establish that no set of circumstances exists under which the statute would be valid. When challenging the constitutionality of a statute, a defendant must first make a showing that the statute is unconstitutional as applied to him, that it may be unconstitutional as to others is insufficient. When analyzing a statute for vagueness, hypothetical situations are not utilized; instead, courts must examine the statute to determine whether it is impermissibly vague as applied to the challenging party's specific conduct.

***Long v. Tanner*, 170 S.W.3d 752 (Tex. App. 2005)**

Procedural Posture: After the 13th District Court, Navarro County, Texas, affirmed appellant inmate's conviction for manufacturing methamphetamine, he filed suit against appellee, the lead investigator in the case, alleging fraud, violation of equal protection and due process, perjury, and aggravated perjury. The trial court dismissed the inmate's lawsuit as frivolous. The inmate appealed.

Overview: The inmate argued that the trial court erred by dismissing his lawsuit. The appellate court noted that a claim was frivolous under Tex. Civ. Prac. & Rem. Code Ann. § 14.003(b)(2) (2002) if it had no arguable basis in law or in fact. The appellate court found that the inmate did not allege that the investigator made any representations to him and did not allege that he relied on any representations the investigator made; thus, his petition did not state an arguable claim for fraud. The appellate court also found that the inmate did not assign any constitutionally impermissible bases for the investigator's decision to arrest him and not attempt to arrest the other person on the premises; therefore, the inmate's failure to do so was fatal to his equal protection claim. The appellate court held that the inmate contended that his criminal conduct was justified and did not deny his involvement; therefore, as a matter of law he had not alleged an arguable claim that his right to due process had been violated. The appellate court concluded that Texas did not recognize a civil cause of action for perjury or aggravated perjury.

Constitutional Law: To successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were motivated by

improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right. It must be shown that the selective enforcement was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

A person may assert a private cause of action under 42 U.S.C.S. § 1983 for a due process violation due to the manner in which a criminal investigation was conducted in very limited circumstances. A cause of action exists only where the state law violation is so extreme that it rises to the level of a due process violation, such as when the state law violation creates a serious risk of convicting an innocent person. Violations of state entrapment laws do not necessarily create such a risk because the defense of entrapment is an excuse for, not a denial of, crime, and thus does not bear on innocence.

***Harris County Bail Bond Bd. v. Pruett*, 177 S.W.3d 260 (Tex. App. 2005)**

Procedural Posture: Appellants, a local bail bond board and two insurance companies that issued bonds, sought review of a judgment of the 125th District Court, Harris County (Texas), which granted appellee licensee's motion for summary judgment and denied the joint motion of the board and the insurance companies. The trial court permanently enjoined the board from enforcing bail bond rules and giving any effect to a suspension of the licensee's bail-bonding license.

Overview: The unexecuted-warrant rule, Harris County, Tex., Bail Bond R. 24, prohibited solicitation of bail bond business from a person with an outstanding arrest warrant. The 24-hour rule, Harris County, Tex., Bail Bond R. 25, prohibited solicitation within the first 24 hours after arrest and, after that time expired, prohibited unsolicited contact between the hours of 9 p.m. and 9 a.m., Monday through Saturday and before noon on Sunday. Both rules created an exception if there was a prior or existing business relationship. The court held that the board adopted its rules within the authority of Tex. Occ. Code Ann. § 1704.101(3), (4) (2004). The unexecuted-warrant rule was not an unconstitutional restriction on commercial speech as it went no further than necessary to accomplish the goal of preventing offender flight and increasing officer and victim safety in connection with arrests. The prohibition of bondsmen who had no prior or existing business relationships with individuals requiring a bond from soliciting bond sales during the initial 24 hours after arrest was an unconstitutional prior restraint on free speech. The board presented no valid reason to justify the differentiation.

Constitutional Law: The United States Supreme Court has provided a four-part analysis for determining the validity of restrictions on commercial speech: (1) whether the speech is concerning a lawful activity and is not misleading; (2) whether the restriction seeks to implement a substantial governmental interest; (3) whether the restriction directly advances the governmental interest; and (4) whether the restriction reaches no further than necessary to accomplish the objective. Under the Central Hudson test, the governmental body bears the burden of justifying the challenged restriction as furthering its substantial interest.

The governmental body has the burden of showing that its regulation directly and materially advances the government interests. Mere speculation or conjecture will not satisfy that burden; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. A regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.

In imposing a restriction on commercial speech, the government is not required to employ the least restrictive means conceivable, but must demonstrate narrow tailoring of the challenged regulation to the asserted interest--a fit that is not necessarily perfect, but reasonable. Under the fourth prong of the Central Hudson test, the government is required to show that the regulation reaches no further than necessary to accomplish its objective.