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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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RUBEN LEE ALLEN
Appellant
v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 01-16-00768-CR
in the Court of Appeals, First District at Houston

Trial Court Cause No. 1487627
337th District Court of Harris County, Texas
Hon. Renee Magee, Judge Presiding

PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:	Hon. Renee Magee 337th District Court Harris County, Texas 1201 Franklin, 15th floor Houston, Texas 77002

TABLE OF CONTENTS

Identity of Parties and Counsel.....ii

Table of Contents..... iv

Index of Authorities..... vi

Statement of the Case 1

Statement of Procedural History..... 1

Statement Regarding Oral Argument..... 2

Grounds for Review..... 3

1. Whether the First Court of Appeals erred when it misinterpreted *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and failed to apply *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017) in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional because the court cost was for a direct expense incurred by the State even though the statute does not direct the funds collected to be used for a legitimate criminal justice purpose?

2. Whether the First Court of Appeals erred when it held that jurisdiction was properly vested in 337th District Court of Harris County because the indictment was presented to the Harris County District Clerk from the 230th District Court of Harris County?

Reasons for Review..... 3

Statement of Facts..... 4

Summary of the Argument..... 5

Argument..... 6

1. Whether the First Court of Appeals erred when it misinterpreted *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and failed to apply *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017) in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional because the court cost was for a direct expense

incurred by the State even though the statute does not direct the funds collected to be used for a legitimate criminal justice purpose? 6

A. The First Court of Appeals' opinion on rehearing. 6

B. The majority opinion erred when it misinterpreted *Peraza* and failed to apply *Salinas* in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional 8

C. The summoning witness/mileage fee is facially unconstitutional as the statute does not direct the funds collected from indigent criminal defendants to be used for a legitimate criminal justice purpose 14

2. Whether the First Court of Appeals erred when it held that jurisdiction was properly vested in 337th District Court of Harris County because the indictment was presented to the Harris County District Clerk from the 230th District Court of Harris County? 16

Prayer 20

Certificate of Service 21

Certificate of Compliance 21

Appendix

INDEX OF AUTHORITIES

Cases:

Aguillon v. State,
No. 14-17-00002-CR, 2017 Tex. App. LEXIS 6573 (Tex. App.—Houston [14th Dist.] July 28, 2017, pet. ref'd) (mem. op., not designated for publication) 17

Allen v. State,
No. 01-16-00768-CR, 2017 Tex. App. LEXIS 11015 (Tex. App.—Houston [1st Dist.] Nov. 28, 2017) 1-2

Allen v. State,
No. 01-16-00768-CR, 2018 Tex. App. LEXIS 7216 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. filed) (op. on reh'g) (designated for publication) ..... *passim*

Cannon v. State,
No. 05-13-01109-CR, 2014 Tex. App. LEXIS 7307 (Tex. App.—Dallas July 7, 2014, no pet.) (mem. op., not designated for publication)..... 17

Casas v. State,
524 S.W.3d 921 (Tex. App.—Fort Worth 2017, no pet.)..... 8

Dunbar v. State,
297 S.W.3d 377 (Tex. Crim. App. 2009) 18

Ex parte Carson,
159 S.W.2d 126 (Tex. Crim. App. 1942) (op. on reh'g).....7, 9, 10

Ex parte Port,
674 S.W.2d 772 (Tex. Crim. App. 1984) 16-17

Gallagher v. State,
690 S.W.2d 587 (Tex. Crim. App. 1985) 19

Hernandez v. State,
No. 01-16-00755-CR, 2017 Tex. App. LEXIS 7612 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, no pet. h.) (designated for publication) 15

Johnson v. State,
No. 14-16-00658-CR, 2018 Tex. App. LEXIS 2136 (Tex. App.—Houston [14th Dist.] March 27, 2018, no pet. h.) (designated for publication) 13

Peraza v. State,
467 S.W.3d 508 (Tex. Crim. App. 2015) 3, 7, 8, 9, 10, 11, 12, 13

Salinas v. State,
523 S.W.3d 103 (Tex. Crim. App. 2015) 3, 7, 8, 9, 11, 12, 13

Thorton v. State,
No. 05-14-00610-CR, 2014 Tex. App. LEXIS 4904 (Tex. App.—Dallas May 6, 2014, no pet.) (mem. op., not designated for publication)..... 17

Toomer v. State,
No. 02-16-00058-CR, 2017 Tex. App. LEXIS 9387 (Tex. App.—Fort Worth Oct. 5, 2017, pet. ref'd) (mem. op., not designated for publication) 7-8

Constitutions

Texas Constitution, Article V, § 12 16

Rules

Texas Rules of Appellate Procedure 66.3(b) 3

Texas Rules of Appellate Procedure 66.3(c) 3, 4

Statutes

Texas Code of Criminal Procedure Article 12.06..... 16

Texas Code of Criminal Procedure Article 19.07..... 17

Texas Code of Criminal Procedure Article 20.21..... 18

Texas Code of Criminal Procedure Article 102.011 .....3, 14, 16

Texas Code of Criminal Procedure Article 102.011(a) 8, 15

Texas Code of Criminal Procedure Article 102.011(b) 8, 15

Secondary Sources

TEX. ATT'Y GEN. OP. No. JM-530, 1986 Tex. AG LEXIS 73 (1986) 15

TEX. ATT'Y GEN. OP. No. JC-0158 (1999). 16

Texas Office of Court Administration, Study of the Necessity of Certain Court Coasts and Fees in Texas, September 21, 2014 15

Tex. S.B. 1908, 83d Leg., R.S. (2013) 15

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Ruben Lee Allen petitions this Court to review the First Court of Appeals' opinion and judgment affirming the judgment and sentence of the trial court:

STATEMENT OF THE CASE

On December 16, 2015, a Harris County grand jury returned an indictment charging the Appellant with the felony offense of aggravated robbery with a deadly weapon alleged to have occurred on or about September 11, 2015. (1 C.R. at 22). On September 15, 2016, a jury found the Appellant guilty of the offense of aggravated robbery. (1 C.R. at 125-126; 5 R.R. at 35). On September 16, 2016, the jury assessed Appellant's punishment at 25 years' confinement in the Texas Department of Criminal Justice – Institutional Division. (1 C.R. at 125-126; 7 R.R. at 186). No motion for new trial was filed. The trial court certified the Appellant's right to appeal. (1 C.R. at 128). Appellant timely filed his notice of appeal on September 20, 2016. (1 C.R. at 130-131).

STATEMENT OF PROCEDURAL HISTORY

On November 28, 2017, the First Court of Appeals issued an opinion on original submission affirming the judgment of the trial court, but held TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3) and (b) violated the State Constitution's Separation of Powers clause and modified the judgment to delete the $200.00 court cost for "summoning witness/mileage" assessed against the Appellant. *Allen v. State*, No. 01-

16-00768-CR, 2017 Tex. App. LEXIS 11015 (Tex. App.—Houston [1st Dist.] Nov. 28, 2017). (See Appendix C). The State filed a motion for *en banc* reconsideration on December 7, 2017. At the request of the Court, Appellant filed his response on January 29, 2018. On May 24, 2018, the State filed a supplemental brief for *en banc* reconsideration and the Appellant filed a response on May 29, 2018. The First Court of Appeals withdrew their opinion and judgment on June 12, 2018 while the State's motion for *en banc* reconsideration was being considered.

On August 30, 2018, the First Court of Appeals issued a published opinion on rehearing affirming the judgment of the trial court, rejecting Appellant's constitutional challenge to the summoning witness/mileage fee. See *Allen v. State*, No. 01-16-00768-CR, 2018 Tex. App. LEXIS 7216 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. filed) (op. on reh'g) (designated for publication).[1] (Appendix A). A published dissent was filed by Justice Jennings. *Id.* (Jennings, J., dissenting). (Appendix B). On that same date, the First Court of Appeals denied the State's motion for *en banc* reconsideration. No further motions for rehearing were filed.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument

[1] The panel that decided this case was composed of Jennings, Bland, and Brown, JJ., with Justice Brown signing the majority opinion.

GROUNDS FOR REVIEW

1. **Whether the First Court of Appeals erred when it misinterpreted *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and failed to apply *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017) in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional because the court cost was for a direct expense incurred by the State even though the statute does not direct the funds collected to be used for a legitimate criminal justice purpose?**

2. **Whether the First Court of Appeals erred when it held that jurisdiction was properly vested in 337th District Court of Harris County because the indictment was presented to the Harris County District Clerk from the 230th District Court of Harris County?**

REASONS FOR REVIEW

Appellant contends that this Court should grant discretionary review on his first ground for review because the First Court of Appeals has decided an important question of state law that has not been, but should be settled by this Court: whether the summoning witness/mileage fee under TEX. CODE OF CRIM. PROC. ART. 102.011 is facially unconstitutional in violation of the Separation of Powers clause of the Texas Constitution? See TEX. R. APP. P. 66.3(b). Furthermore, Appellant contends that this Court should grant discretionary review on his first ground for review as the First Court of Appeals has decided an important question of law in a way that conflicts with the applicable decisions of this Court, namely *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and *Salinas v. State*, 523 S.W.3d103 (Tex. Crim. App. 2017). See TEX. R. APP. P. 66.3(c)

Appellant further contends that discretionary review should be granted on his second ground for review because the First Court of Appeals has decided an important question of law in a way that conflicts with the applicable decisions of this Court. See TEX. R. APP. P. 66.3(c).

STATEMENT OF FACTS

On December 16, 2015, the grand jury impaneled by the 230h District Court of Harris County presented an indictment against Appellant. (1 C.R. at 22). On the heading of the indictment it states: Harris County District Court No: 337. (1 C.R. at 22). The signature of the foreman of the grand jury appears on the indictment along with the stamped notation – "Foreman 230th." (1 C.R. at 22). An entry for December 16, 2015 on the docket sheet states:

> GRAND JURY ACTION: Felony Indictment GJ COURT: 230
> OFFENSE: AGG ROBERY-DEADLY WPN 1st Degree Felony
> BOND AMOUNT: $0

(1 C.R. at 183)

The file-stamp notably does not indicate which particular "clerk of the court" made that stamp. (1 C.R. at 7, 16). No other activity in this case o-ccurred in the 230th District Court.

On September 18, 2016, the trial court found the Appellant indigent and appointed him counsel for purposes of his appeal. (1 C.R. at 129-131). The cost bill, filed on September 23, 2016, eight days after the judgment was filed, assessed $200 for a "Summoning Witness/Mileage" Fee. (1 C.R. at 127, 142-182).

SUMMARY OF THE ARGUMENT

In his first ground for review, Appellant agrees with Justice Jennings that the majority opinion went to great pains to distinguish this Court's holding in *Salinas* and "misinterpret[ed] [this Court's] decision in [*Peraza*], which pre-dates *Salinas*, and fail[ed] to apply the correct legal standard pronounced in *Salinas* to the [Appellant's] case." Appellant contends that under this Court's decisions in *Peraza* and *Salinas*, a court cost's constitutionality is measured by whether the cost is statutorily directed to be expended for criminal justice purposes regardless of whether or not the court cost is a court cost not directly related to a defendant's trial, or is a court cost that directly recoups money spent on the prosecution of a case. The constitutional infirmity in this case is the summoning witness/mileage fee statute's failure to direct the funds collected from indigent criminal defendants to be used in a manner that would make it a court cost; for something that is a criminal justice purpose. Thus, the summoning witness/mileage fee statute under TEX. CODE OF CRIM. PROC. ART. 102.011 is facially unconstitutional.

In his second ground for review, Appellant contends that The First Court of Appeals never determined that the indictment in this case was "presented" to the judge or clerk of the 230th District Court. Instead, the Court determined that the indictment was properly presented to the Harris County District Clerk ("clerk of the court") and to 337th District Court. However, without the indictment being "presented" to the judge or clerk of that particular court, personal jurisdiction was

never created over the Appellant by any district court in Harris County. Appellant contends that the grand jury of the 230th District Court failed to properly present the indictment to the judge or clerk of the 230th District court as mandated by Article 20.21 of the Texas Code of Criminal Procedure and instead presented the indictment directly to the 337th District Court. Thus, the 230th District Court never acquired jurisdiction to even transfer the case to the 337th District Court. Because of this, neither the 230th District Court nor the 337th District Court acquired personal jurisdiction of the Appellant's case.

ARGUMENT

1. **Whether the First Court of Appeals erred when it misinterpreted *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and failed to apply *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017) in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional because the court cost was for a direct expense incurred by the State even though the statute does not direct the funds collected to be used for a legitimate criminal justice purpose?**

A. The First Court of Appeals' opinion on rehearing.

In rejecting Appellant's facial challenge to the summoning witness/mileage fee found in Article 102.011, the majority determined that this Court in *Peraza* "suggest[ed] that a statue that requires a convicted defendant to reimburse the State for court costs that have already been 'incurred in the administration of the criminal justice in that prosecution remain proper and facially valid" when this Court concluded "that the *Carson* standard was 'too limiting' and expand[ed] the category of

costs that can be properly assessed." *Allen v. State*, No. 01-16-00768-CR, 2018 Tex. App. LEXIS 7216 *15 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. filed) (op. on reh'g), citing *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015). See also *Ex parte Carson*, 159 S.W.2d 126, 130 (Tex. Crim. App. 1942) (op. on reh'g). Based upon this, the majority "interpret[ed] *Peraza* as holding that at least two types of fees assessed as court costs are constitutionally permissible (1) court costs to reimburse criminal justice expenses incurred in connection with that criminal prosecution and (2) court costs to be expended in the future to off-set future criminal justice costs." *Id.* at *15-16, citing *Peraza*, 467 S.W.3d at 517-518.

The majority opinion also characterized this Court's opinion in *Salinas* as "explain[ing] that whether a future allocation relates to the administration of our criminal justice system depends on 'what the governing statute says about the intended use of the funds, not whether [the] funds are actually used for a criminal justice purpose." *Id.* at 16, citing *Salinas v. State*, 523 S.W.3d at 107, 109 fn. 26 (Tex. Crim. App. 2017). Due to the "comprehensive rehabilitation" account and the "abused children's counseling" account having "no connection to past incurred expenses in that particular prosecution or future criminal justice expenditures, the statute imposing the fees was held to be facially unconstitutional" in *Salinas* according to the majority. *Id.*, citing *Salinas*, 523 S.W.3d at 109 fn. 26; *Toomer v. State*, No. 02-16-00058-CR, 2017 Tex. App. LEXIS 9387 at *3 (Tex. App.—Fort Worth Oct. 5, 2017,

pet. ref'd) (mem. op., not designated for publication); *Casas v. State*, 524 S.W.3d 921, 927 (Tex. App.—Fort Worth 2017, no pet.); and *Peraza*, 467 S.W.3d at 517.

With these interpretations in mind, the majority concluded that *Salinas* did not apply to the Appellant's facial challenge to the summoning witness/mileage fee because "*Salinas* did not address reimbursement-based court costs" and the summoning witness/mileage fee was "an expense incurred by the State in the prosecution of this particular case and is unquestionably for a legitimate criminal justice purpose." *Id.* at *22. The majority ultimately concluded that Article 102.011(a)(3) and (b) is not facially unconstitutional even though it acknowledged that the statute was silent as to where the fees collected would be directed:

> We conclude that *Peraza*'s reasoning is more appropriately applied to this fee because the State is not relying on how the fee will be expended in the future, but, instead, on the recoupment of actual expenses incurred as part of this case. And *Salinas* does not purport to limit or modify *Peraza*'s focus on whether the fees are incurred as a direct result of or reasonably related to the "recoupment of costs of judicial resources," which this fee unquestionably was.

Id. at *22-23, citing *Peraza*, 467 S.W.3d at 517.

B. The majority opinion erred when it misinterpreted *Peraza* and failed to apply *Salinas* in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional.

"One way the Separation of Powers provision is violated is 'when one branch of government assumes or is delegated a power 'more properly attached' to another branch.'" *Salinas*, 523 S.W.3d at 106-107. "The courts are delegated a power more

properly attached to the executive branch if a statute turns the courts into 'tax gatherers,' but the collection of fees in criminal cases is a part of the judicial function 'if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes.'" *Id.* at 107. "What constitutes a legitimate criminal justice purpose is a question to be answered on a statute-by-statute/case-by-case basis." *Id.* "[T]he answer to that question is determined by what the governing statute says about the intended use of the funds, not whether funds are actually used for a criminal justice purpose." *Id.*

In *Peraza*, the defendant challenged the $250 DNA record fee as facially unconstitutional because the DNA fee was not a court cost that was "necessary" or "incidental" to "the trial of a criminal case." *Peraza*, 467 S.W.3d at 511. See also *Ex parte Carson*, 159 S.W.2d 126, 130 (Tex. Crim. App. 1942) (op. on reh'g). In *Peraza* this Court rejected the requirement "that, in order to pass constitutional muster, the statutorily proscribed court cost must be 'necessary' or 'incidental' to the 'trial of a criminal case'" and held:

> *if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gathers in violation of the separation of powers clause*. A criminal justice purpose is one that relates to the administration of our criminal justice system. Whether a criminal justice purpose is "legitimate" is a question to be answered on a statute-by-statute/case-by-case basis.

Peraza, 467 S.W.3d at 517-518 (emphasis added)

Thus, the important consideration in *Peraza* was whether a court cost was statutorily directed "to be expended for legitimate criminal justice purposes." *Id.* In rejecting *Carson's* "necessary" or "incidental" requirement, this Court reassessed the *Carson* test in light of modern realities:

> The terms "necessary" and "incidental" are commonly used and easily understood words; however, we find that they are too limiting to continue to be the litmus test. In the 73 years since *Carson* was decided, the prosecution of criminal cases and our criminal justice system have greatly evolved. Our legislature has developed statutorily prescribed court costs with the intention of reimbursing the judicial system for costs incurred in the administration of the criminal justice system. To require such costs to be "necessary" or "incidental" to the trial of a criminal case in order to be constitutionally valid ignores the legitimacy of costs that, although not necessary to, or an incidental expense of, the actual trial of a criminal case, may nevertheless be directly related to the recoupment of costs of judicial resources expended in connection with the prosecution of criminal cases within our criminal justice system.

Peraza, 467 S.W.3d at 517.

Thus, this Court determined that "[b]ecause a portion of the DNA record fee collected is deposited into the criminal justice planning account, and the criminal justice planning account is statutorily required to reimburse monies spent collecting DNA specimens from offenders charged with certain offenses (including aggravated sexual assault of a child under 14), we hold that the statute allows for constitutionally permitted applications. The statutory scheme allocating these resources to the criminal justice planning account are required, via interconnected statutory provisions, to be expended for legitimate criminal justice purposes.

Therefore, they do not constitute a tax and thus do not violate the separation of powers clause." *Peraza*, 467 S.W.3d at 519. This Court also made a similar determination regarding the DNA record fee assigning revenue to the state highway fund. *Id.* at 520-521.

Peraza's holding was again emphasized two years later in this Court's opinion in *Salinas*:

> The issue is whether the fee in question is a court cost (which is allowed) or a tax (which is unconstitutional). That issue must be determined at the time the fee is *collected*, not at the time the money is spent. Accordingly, *Peraza* requires that the relevant statutes direct that the funds be used for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system. . .
>
> Because the constitutional infirmity in this case is the statute's failure to direct the funds to be used in a manner that would make it a court cost (i.e., for something that is a criminal justice purpose), the statute operates unconstitutionally on its face. The fact that some of the money collected may ultimately be spent on something that would be a legitimate criminal justice purpose if the legislature had directed its use in that fashion is not sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost.

Salinas, 103 S.W.3d at 109, fn. 26.

In *Salinas*, this Court found two court costs located within the Consolidated Court Cost fee, the "abused children's counseling" account and the "comprehensive rehabilitation" account, facially unconstitutional because they violated the separation of powers clause and were actually taxes unrelated to criminal justice purposes. *Id.* at 108-110. This Court explained that "the constitutional infirmity in [the] case [was] the

statute's failure to direct the funds to be used in a manner that would make it a court cost (i.e., for something that is a criminal justice purpose), the statute operates unconstitutionally on its face." *Id.* at 110, fn. 26. In addition, "[t]he fact that some of the money collected may ultimately be spent on something that would be a legitimate criminal justice purpose if the legislature had directed its use in that fashion [was] not sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost." *Id.*

As Justice Jennings noted in his dissent, the majority opinion went to great pains to distinguish this Court's holding in *Salinas* and "misinterpret[ed] [this Court's] decision in [*Peraza*], which pre-dates *Salinas*, and fail[ed] to apply the correct legal standard pronounced in *Salinas* to the [Appellant's] case." *Allen,* 2018 Tex. App. LEXIS 7216 at *38 (Jennings, J., dissenting). The majority "interpret[ed] *Peraza* as holding that at least two types of fees assessed as court costs are constitutionally permissible (1) court costs to reimburse criminal justice expenses incurred in connection with that criminal prosecution and (2) court costs to be expended in the future to off-set future criminal justice costs." *Allen*, 2018 Tex. App. LEXIS 7216 *15-16 (Jennings, J., dissenting). However, this Court in *Peraza* did no such thing. On multiple occasions throughout *Peraza*, this Court determined that "interconnected statutory provisions providing for the allocations of the funds collected as court costs pursuant to Article 102.020 allow[ed] for [the funds at issue in the case] to be expended for legitimate criminal justice purposes. *Peraza*, 467 S.W.3d at 519-521. This

Court's holding in *Peraza* was also not expressed in the dichotomy pronounced by the majority and is clearly understood as applying to all court cost statues regardless of whether or not the court cost is designed to reimburse for criminal justice expenses incurred in connection with that criminal prosecution. In other words, this Court in *Peraza* did not expressly divide court's costs into separate categories for purposes of determining a court cost statutes' facial constitutionality under the separation of powers provision of the Texas Constitution. See *Peraza*, 467 S.W.3d at 517 ("if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gathers in violation of the separation of powers clause.). This Court's holding in *Salinas* was similarly phrased in "broad language" as noted by Justice Jennings in his dissent. See *Allen*, 2018 Tex. App. LEXIS 7216 at *41 (Jennings, J., dissenting) ("Although the majority, here, would like to assert that *Salinas* is different from the instant case, it, by doing so, fails to recognize the court of criminal appeals' use of broad language in *Salinas* and the fact that the court did not limit its holding to the circumstances of the case.), citing *Johnson v. State*, No. 14-16-00658-CR, 2018 Tex. App. LEXIS 2136 (Tex. App.—Houston [14th Dist.] March 27, 2018, no pet. h.) (designated for publication) ("[T]he *Salinas* decision requires us to apply the legal standard in that case to all facial challenges based upon the [S]eperation-of-[P]owers to court-cost statutes."). Thus, Appellant contends that under *Peraza* and *Salinas*, a

court cost's constitutionality is measured by whether the cost is statutorily directed to be expended for criminal justice purposes regardless of whether or not it is a court cost not directly related to a defendant's trial, or is a court cost that directly recoup money spent on the prosecution of a case.

In his dissent, Justice Jennings wrote "after *Salinas*, to avoid being declared facially unconstitutional, in violation of the Separation of Powers clause of the Texas Constriction, a statute that imposes a court cost on a criminal defendant must direct "that the funds [collected pursuant to that statute] be used for something that is a legitimate criminal justice provision." *Allen*, 2018 Tex. App. LEXIS 7126 at *42 (Jennings, J., dissenting). Appellant couldn't agree more. Thus, the majority opinion failed to apply this correct legal standard in determining the constitutionality of the summoning witness/mileage statute under TEX. CODE OF CRIM. PROC. ART. 102.011.

C. The summoning witness/mileage fee is facially unconstitutional as the statute does not direct the funds collected from indigent criminal defendants to be used for a legitimate criminal justice purpose.

In the present case, Appellant was ordered to pay court costs totaling $539 including the $200 "Summoning Witness/Mileage" cost. (1 C.R. at 127). Texas Code of Criminal Procedure Article 102.011 provides, in pertinent part:

> (a) A defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by a peace officer:
>
> . . .
>
> (3) $5 for summoning a witness…
>
> (b) In addition to fees provided by Subsection (a) of this article, a defendant required to pay fees under this article shall also pay 29 cents

> per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service.

As acknowledged by the majority, the language of this statute does not direct the fees collected to any specific fund that has a legitimate criminal justice purpose. *Allen*, 2018 Tex. App. LEXIS 7126 at *22 ("Admittedly, the statue assessing these fees, like the statue in *Salinas*, does not require that the fee be deposited into a specific account for future criminal justice expenses."). There is also no interconnected statue that directs the funds from this statute to be used for a legitimate criminal justice purpose. In 2013, the 83rd Legislature mandated that the State Office of Court Administration prepare a report on court costs. Tex. S.B. 1908, 83d Leg., R.S. (2013). A review of the comprehensive report details that the fees for summoning witnesses "goes to the General Fund of the County or City." See Texas Office of Court Administration, Study of the Necessity of Certain Court Coasts and Fees in Texas, September 21, 2014, at page 12 of 64 in the Criminal Court Cost section (or page 102 of the PDF) - Fee No. 26.[2] "Money in a county's general fund can be spent for 'any proper county purpose.'" *Hernandez v. State*, No. 01-16-00755-CR, 2017 Tex. App. LEXIS 7612 *19 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, no pet. h.) (designated for publication), quoting TEX. ATT'Y GEN. OP. No. JM-530, 1986 Tex. AG LEXIS 73 (1986). The Attorney General's office has also stated that "court fees

[2] See http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf (last visited September 19, 2018).

that are used for general purposes are characterized as taxes." TEX. ATT'Y GEN. OP. No. JC-0158 (1999).

Without language in TEX. CODE OF CRIM. PROC. ART. 102.011, or language from an interconnected statute stating where the funds collected are directed, the funds are deposited to the general revenue fund of the State or the county. As Justice Jennings emphasized, "*This* is what renders the statute unconstitutional." *Allen*, 2018 Tex. App. LEXIS 7126 at *45, fn. 13 (Jennings, J., dissenting). Appellant urges this Court to grant discretionary review and declare the summoning witness/mileage fee statute facially unconstitutional as it violates the Separation of Powers clause of the Texas Constitution.

2. Whether the First Court of Appeals erred when it held that jurisdiction was properly vested in 337th District Court of Harris County because the indictment was presented to the Harris County District Clerk from the 230th District Court of Harris County?

The presentment of an indictment gives a trial court jurisdiction. TEX. CONST. ART. V, § 12. "An indictment is considered as 'presented' when it has been duly acted upon by the grand jury and received by the court.'" TEX. CODE OF CRIM. PROC. ART. 12.06. "[A] judge *qua* district judge is without power or authority to perform any judicial act within the subject matter jurisdiction granted the district court over which he presides – unless and until that jurisdiction is properly invoked in a criminal case by valid indictment or information on waiver of indictment, or in some other manner validly provided by statute." *Ex parte Port*, 674 S.W.2d 772, 779 (Tex. Crim. App.

1984). A grand jury is impaneled in a particular district court. See TEX. CODE OF CRIM. PROC. ART. 19.07. Each duly-impaneled grand jury is a separate tribunal. *Ex parte Port*, 674 S.W.2d at 779.

Appellant contended that the district court that tried and convicted him, the 337th District Court, *never acquired* personal jurisdiction over him because a grand jury from the 230th District Court presented the indictment directly to the judge or the clerk of the court of the 337h District Court.[3] The First Court of Appeals held that "one court may impanel a grand jury, and if an indictment is presented, the case may be filled in another court of competent jurisdiction within the same county"' *Allen*, 2018 Tex. App. LEXIS 7216 at *5, citing *Aguillon v. State*, No. 14-17-00002-CR, 2017 Tex. App. LEXIS 6573 (Tex. App.—Houston [14th Dist.] July 28, 2017, pet. ref'd) (mem. op., not designated for publication), *Cannon v. State*, No. 05-13-01109-CR, 2014 Tex. App. LEXIS 7307 (Tex. App.—Dallas July 7, 2014, no pet.) (mem. op., not designated for publication), and *Thornton v. State*, No. 05-13-00610-CR, 2014 Tex. App. LEXIS 4904 (Tex. App.—Dallas May 6, 2014, no pet.) (mem. op., not designated for publication).

The First Court of Appeals determined that the indictment was properly presented to the Harris County District Clerk ("clerk of the court") and to 337th

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[3] Harris County's direct filing system is described in the County's "Direct Filing Order." See https://www.justex.net/JustexDocuments/0/Criminal%20Direct%20Filing%20Order%202006.pdf (last visited September 19, 2018).

District Court. However, the First Court of Appeals never determined that the indictment in this case was "presented" to the judge or clerk of the 230th District Court. Without the indictment being "presented" to the judge or clerk of that particular court, personal jurisdiction was never created over the Appellant by any district court in Harris County. See *Dunbar v.* State, 297 S.W.3d 377 (Tex. Crim. App. 2009) (A personal jurisdiction challenge, unlike a procedural challenge, may be raised for the first time on appeal.). Appellant contends that the grand jury of the 230th District Court failed to properly present the indictment to the judge or clerk of the 230th District court as mandated by Article 20.21 of the Texas Code of Criminal Procedure and instead presented the indictment directly to the 337th District Court. Thus, the 230th District Court never acquired jurisdiction to even transfer the case to the 337th District Court. Because of this, neither the 230th District Court nor the 337th District Court acquired personal jurisdiction of Appellant's case.

The indictment itself does not mention being presented to the Harris County District Clerk, or the clerk of the 337th District Court and the indictment shows that the case was already assigned to the 337th District Court. (1 C.R. at 22). Nothing in the docket sheet indicates that the indictment was presented to the "clerk of the court" in the 230th District Court; only that particular grand jury issued the indictment, an indictment that already indicated that the case was assigned to the 337th District Court, and that it was filed with the Harris County District Clerk's Office. The file-stamp notably does not indicate which particular "clerk of the court"

made that stamp, as it is only a file-stamp indicating that the document was filed with the Harris County District Clerk. No other activity in this case occurred in the 230th District Court.

The totality of the circumstances demonstrate that the indictment was not presented to the clerk or judge of the 230th District Court as the case was always assigned to the 337th District Court and the docket sheet only shows that indictment was issued by the 230th District Court.. The totality of the circumstances also demonstrates that the indictment was presented to the 337th District Court of Harris County directly from the 230th District Court. Accordingly, Appellant's conviction would be void. See *Gallagher*, *v. State,* 690 S.W.2d 587, 589 fn. 1 (Tex. Crim. App. 1985).

PRAYER

Appellant, Ruben Lee Allen, prays that this Court grant this petition, set this case for submission, reverse the First Court of Appeals' judgment, and vacate the judgment and sentence of the trial court with instructions to dismiss the indictment. Alternatively, Appellant prays that this Court grant this petition, set this case for submission, reverse the First Court of Appeals' judgment, and declare the $200 fee for summoning witness/mileage fee facially unconstitutional in violation of the Separation of Powers clause under the Texas Constitution and delete this fee from the bill of costs. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Petition for Discretionary Review* was e-served upon the following on September 24, 2018:

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CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4, I certify that this computer-generated document complies with the typeface requirements of Rule 9.4(e). This document also complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i) because this petition contains 4279 words (excluding the items exempted in Rule 9.4(i)(1)).

/s/ Nicholas Mensch
Nicholas Mensch

NO. _____

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

RUBEN LEE ALLEN
Appellant
v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 01-16-00768-CR
in the Court of Appeals, First District at Houston

Trial Court Cause No. 1487627
337th District Court of Harris County, Texas
Hon. Renee Magee, Judge Presiding

APPENDIX

Majority Opinion and Judgment on Rehearing (August 30, 2018) ..... Appendix A

Dissenting Opinion on Rehearing (August 30, 2018).....Appendix B

Opinion on Original Submission (November 27, 2017) .....Appendix C

Majority Opinion and Judgment on Rehearing (August 30, 2018) ..... Appendix A

Opinion issued August 30, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00768-CR

RUBEN LEE ALLEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case No. 1487627

OPINION ON REHEARING[1]

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[1] The State filed a motion for en banc reconsideration of our opinion of November 28, 2017. We withdrew the earlier opinion and judgment. We issue this opinion and accompanying judgment in their stead.

A jury found Ruben Lee Allen guilty of the offense of aggravated robbery with a deadly weapon[2] and assessed punishment at 25 years' confinement. In two issues, Allen contends that the trial court lacked jurisdiction over this case and that a $200 "summoning witness/mileage" fee[3] assessed against him after his conviction is unconstitutional.

We affirm.

Background

K. Rajan is a pharmacist at the BZ Pharmacy in Harris County, Texas. While he was alone in the pharmacy, three men entered the store, and one of the men pointed a firearm at him as they robbed the pharmacy of money, mediations, and various items from the pharmacy safe. Fingerprints recovered during the police investigation were linked to Allen, who was later convicted of aggravated robbery with a deadly weapon. The jury assessed punishment at 25 years' confinement.

In the judgment of conviction, the trial court ordered Allen to pay court costs, which included a $200 charge for "summoning witness/mileage."[4] He appeals.

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2 *See* TEX. PENAL CODE § 29.03(a)(2).

3 *See* TEX. CODE CRIM. PROC. art. 102.011(a)(3), (b) (imposing $5 charge on defendant convicted of felony "for summoning [each] witness" and requiring defendant to pay "29 cents per mile for mileage required of an officer to perform a service . . . and to return from performing that service").

4 *See id.*

Jurisdiction

In his first issue, Allen argues that the trial court, the 337th District Court of Harris County, Texas, lacked jurisdiction over this case because the underlying indictment was presented to the grand jury of the 230th District Court of Harris County, Texas. The State asserts that Allen waived his complaint by not first raising this procedural matter in the trial court.

The Code of Criminal Procedure sets forth the organization and duties of a grand jury. *See* TEX. CODE CRIM. PROC. arts. 19.01–20.22. A trial court forms, impanels, and empowers a grand jury to inquire into indictable offenses, including aggravated robbery with a deadly weapon. *See* TEX. CODE CRIM. PROC. art. 20.09 ("The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person."); *Ex parte Edone*, 740 S.W.2d 446, 448 (Tex. Crim. App. 1987) ("Once formed and impaneled by the district judge, the grand jury shall inquire into all offenses liable to indictment" (internal quotations omitted)); *Davis v. State*, 519 S.W.3d 251, 254 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Because a grand jury's deliberations are secret, it retains a "separate and independent nature from the court." *Ex parte Edone*, 740 S.W.2d at 448.

After hearing testimony, a grand jury then votes concerning the presentment of an indictment.[5] *See* TEX. CODE CRIM. PROC. art. 20.19 ("After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of an indictment . . . ."); *Bourque v. State*, 156 S.W.3d 675, 678 (Tex. App.—Dallas 2005, pet. ref'd) (grand jury "hears all the testimony available before voting on whether to indict the accused").

If "nine grand jurors concur in finding the bill," the State prepares the indictment and the grand jury foreman signs it and delivers it to the judge or the clerk of the court. TEX. CODE CRIM. PROC. arts. 20.19–.21; *Bourque*, 156 S.W.3d at 678. An indictment is considered "'presented' when it has been duly acted upon by the grand jury and received by the court." TEX. CODE CRIM. PROC. art. 12.06; *see Henderson v. State*, 526 S.W.3d 818, 819 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Thus, presentment occurs when an indictment is delivered to either the judge or the clerk of the court. TEX. CODE CRIM. PROC. art. 20.21; *State v. Dotson*, 224 S.W.3d 199, 204 (Tex. Crim. App. 2007).

The district clerk for each county "is *the* clerk of the court for all the district courts in that county." *Henderson*, 526 S.W.3d at 820 (quoting *Ex parte Alexander*,

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[5] An indictment is "a written instrument presented to a court by a grand jury charging a person with the commission of an offense." TEX. CONST. art. V, § 12(b); *see* TEX. CODE CRIM. PROC. art. 21.02 (setting out requirements of indictment).

861 S.W.2d 921, 922 (Tex. Crim. App. 1993), *superseded by statute on other grounds as stated in Ex parte Burgess*, 152 S.W.3d 123, 124 (Tex. Crim. App. 2004)). "The fact that a signed indictment features an original file stamp of the district clerk's office is strong evidence that a returned indictment was 'presented' to the court clerk within the meaning of Article 20.21." *Dotson*, 224 S.W.3d at 204 (because indictment "bears an original file stamp, that fact convincingly shows the presentment requirement was satisfied"). Once an indictment is presented, jurisdiction vests with the trial court. TEX. CONST. art. V, § 12(b); *Dotson*, 224 S.W.3d at 204.

All state district courts within the same county have jurisdiction over cases in that county, and criminal district courts have original jurisdiction over felony criminal cases in that county. *See* TEX. CODE CRIM. PROC. art. 4.05; TEX. GOV'T CODE § 74.094; *Henderson*, 526 S.W.3d at 820; *Davis*, 519 S.W.3d at 254. In counties having two or more district courts, the judges of the courts "may adopt rules governing the filing and numbering of cases, the assignment of cases for trial, and the distribution of the work of the courts as in their discretion they consider necessary or desirable for the orderly dispatch of the business of the courts." TEX. GOV'T CODE § 24.024; *see id*. § 74.093 (addressing adoption of local rules of administration to provide, in part, for assignment, docketing, transfer, and hearing of all cases); *Henderson*, 526 S.W.3d at 820; *Davis*, 519 S.W.3d at 255.

In multi-court counties, such as Harris County, a specific district court may impanel a grand jury, but it does not necessarily follow that all cases considered by that court's grand jury are assigned to that court. *See Henderson*, 526 S.W.3d at 820; *Davis*, 519 S.W.3d at 255 ("If a grand jury in one district court returns an indictment in a case, the case nevertheless may be then assigned to any district court within the same county."); *Hernandez v. State*, 327 S.W.3d 200, 204 (Tex. App.—San Antonio 2010, pet. ref'd); *Bourque*, 156 S.W.3d at 678; *Tamez v. State*, 27 S.W.3d 668, 670 n.1 (Tex. App.—Waco 2000, pet. ref'd) (noting that "the judges of the Harris County district courts exercising criminal jurisdiction have adopted a procedure by which indictments are filed in each court on a rotating basis without reference to the court which empaneled the grand jury presenting the indictments"); *see also Shepherd v. State*, No. 01-16-00748-CR, 2017 WL 2813165, at *1 (Tex. App.—Houston [1st Dist.] June 29, 2017, pet. ref'd) (mem. op., not designated for publication). In other words, one court may impanel a grand jury, and if an indictment is presented, the case may be filed in another court of competent jurisdiction within the same county. *See Aguillon v. State*, No. 14-17-00002-CR, 2017 WL 3045797, at *2 (Tex. App.—Houston [14th Dist.] July 18, 2017, pet. ref'd) (mem. op., not designated for publication); *Cannon v. State*, No. 05-13-01109-CR, 2014 WL 3056171, at *4 (Tex. App.—Dallas July 7, 2014, no pet.) (mem. op., not designated for publication);

Thornton v. State, No. 05-13-00610-CR, 2014 WL 2946457, at *3 (Tex. App.—Dallas May 6, 2014, no pet.) (mem. op., not designated for publication).

The 230th and 337th District Courts are both criminal district courts in Harris County, Texas. They both share the same clerk, i.e., the Harris County District Clerk, and have original jurisdiction in felony criminal cases. On November 6, 2015, the State filed in the 337th District Court a complaint, alleging that Allen committed the offense of armed robbery. A month later, the grand jury returned a true bill of indictment concerning the same conduct. *See* TEX. CONST. art. V, § 12(b); TEX. CODE CRIM. PROC. art. 21.02 (setting out requirements of indictment); *State v. Smith*, 957 S.W.2d 163, 164–65 (Tex. App.—Austin 1997, no pet.) (describing "constitutional requisites for an indictment"). That indictment was presented to the Harris County District Clerk, as demonstrated by the clerk's original file stamp, and filed in the 337th District Court, the trial court where the State's complaint was originally filed. *See Shepherd*, 2017 WL 2813165, at *1 ("After the grand jury votes concerning presentment of an indictment, the State can file in any court that has jurisdiction over the case.").

As additional evidence that the indictment was acted upon by the grand jury and presented to, or received by, the 337th District Court, the grand jury foreman signed the indictment, the trial court directed the State to read the indictment to Allen in open court pretrial, and it accepted Allen's plea of "not guilty." *See Henderson*,

526 S.W.3d at 820 ("Logically, [defendant]'s arraignment . . . could not have occurred in the 177th District Court if the trial court had not actually received the indictment."); *see also* TEX. CODE CRIM. PROC. art. 12.06 (stating presentment occurs when indictment "has been duly acted upon by the grand jury and received by the court"). Thus, the 337th District Court was properly vested with jurisdiction over Allen. *See* TEX. CODE CRIM. PROC. arts. 4.05, 4.16; *see also Aguillon*, 2017 WL 3045797, at *2 (although amended indictment signed by foreman of grand jury impaneled by 177th District Court, 184th District Count had jurisdiction when amended indictment refiled in 184th District Court, which had "first-filed related case"); *Helsley*, 2017 WL 931707, at *2 (stating that when evidence of presentment appears in record, trial court has jurisdiction to try defendant for charges encompassed by indictment); *Williams v. State*, No. 06-14-00224-CR, 2015 WL 4071542, at *4 (Tex. App.—Texarkana July 6, 2015, no pet.) (mem. op., not designated for publication) (although indictment was presented by grand jury impaneled by 291st District Court, case was first filed in 282nd District Court, which obtained jurisdiction); *Paz v. State*, No. 05-14-01127-CR, 2015 WL 6386424, at *10 (Tex. App.—Dallas Oct. 22, 2015, no pet.) (mem. op., not designated for publication) ("Jurisdiction over felony cases, such as this case, lies in the district court or criminal district court where the indictment is first filed.").

Allen argues that a grand jury impaneled by one trial court cannot present an indictment to a different trial court because a grand jury serves one particular court. However, this Court has expressly rejected this argument on at least four previous occasions. *See Henderson*, 526 S.W.3d at 819–21 (rejecting argument 177th District Court of Harris County, Texas never acquired jurisdiction over defendant because grand jury from 182nd District Court of Harris County, Texas presented indictment); *Shepherd*, 2017 WL 2813165, at *1; *Hernandez v. State*, No. 01-15-00837-CR, 2017 WL 1416877, at *2 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication) (rejecting argument that 263rd District Court of Harris County, Texas, lacked jurisdiction because grand jury of 184th District Court of Harris County, presented indictment); *Davis*, 519 S.W.3d at 254–56 (rejecting similar argument). We have repeatedly held that a trial court is not deprived of jurisdiction over a criminal defendant in these circumstances. *See, e.g.*, *Henderson*, 526 S.W.3d at 819–21; *Shepherd*, 2017 WL 2813165, at *1; *Hernandez*, 2017 WL 1416877, at *2; *Davis*, 519 S.W.3d at 254–56. Our sister court has likewise rejected this argument. *Johnson v. State*, No. 14-16-00658-CR, 2018 WL 1476275, at *2 (Tex. App.—Houston [14th Dist.] Mar. 27, 2018, no pet. h.); *see Hines v. State*, No. 05-17-00416-CR, 2017 WL 6276005, at *1 (Tex. App.—Dallas Dec. 11, 2017, no pet.) (same).

Moreover, Allen's arguments raise a procedural issue related to his indictment. *See Henderson*, 526 S.W.3d at 821; *Shepherd*, 2017 WL 2813165, at *1; *Hernandez*, 2017 WL 1416877, at *2; *Davis*, 519 S.W.3d at 254–56. Although a jurisdictional defect in an indictment may be challenged for the first time on appeal, a procedural deficiency may not. *See Cook*, 902 S.W.3d at 480; *Henderson*, 526 S.W.3d at 821; *Davis*, 519 S.W.3d at 256; *see also Mosley v. State*, 354 S.W.2d 391, 393–94 (Tex. Crim. App. 1962); *Lemasurier v. State*, 91 S.W.3d 897, 899–900 (Tex. App.—Fort Worth 2002, pet. ref'd) (holding defendant waived error regarding procedural deficiency with indictment by failing to timely file plea to jurisdiction). Allen did not object to the indictment or the proceedings in the trial court.

Accordingly, we hold that the trial court had jurisdiction over this case and Allen's failure to object to the indictment or the proceedings in the trial court constitutes a waiver of his right to challenge any procedural irregularity related to his indictment on appeal. *See Henderson*, 526 S.W.3d at 819–21; *Hernandez*, 2017 WL 1416877, at *2.

We overrule Allen's first issue.

"Summoning Witness/Mileage" Fee

In his second issue, Allen argues that the "summoning witness/mileage" fee assessed against him by the trial court is (1) facially unconstitutional because it violates the separation-of-powers clause of the Texas Constitution and

(2) unconstitutional as applied to him because it violates his constitutional rights to compulsory process and confrontation. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10 (rights to compulsory process and confrontation), TEX. CONST. art. II, § 1 (separation of powers); *see also* TEX. CODE CRIM. PROC. art. 1.05.

A. Reviewing a facial challenge

Whether a criminal statute is constitutional is a question of law we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013); *Maloney v. State*, 294 S.W.3d 613, 626 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). When reviewing a statute's constitutionality, we "presume that the statute is valid and that the legislature was neither unreasonable nor arbitrary in enacting it." *Curry v. State*, 186 S.W.3d 39, 42 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002) (stating that appellate court addressing challenge to statute's constitutionality must presume that statute is valid and legislature has not acted unreasonably or arbitrarily); TEX. GOV'T CODE § 311.021 (noting that courts presume "compliance" with Texas and United States Constitutions). We must uphold the statute if we can apply a reasonable construction that will render it constitutional. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979); *see Maloney*, 294 S.W.3d at 626 (if statute can be interpreted in two ways, one of which sustains its validity, we apply interpretation sustaining its

validity). The party challenging the statute has the burden to establish its unconstitutionality. *Rodriguez*, 93 S.W.3d at 69; *Maloney*, 294 S.W.3d at 626.

"A facial challenge is an attack on the statute itself as opposed to" its application under a particular set of circumstances. *Salinas v. State*, 523 S.W.3d 103, 106 (Tex. Crim. App. 2017). To prevail, the party asserting a facial challenge "must establish that the statute always operates unconstitutionally in all possible circumstances." *Rosseau*, 396 S.W.3d at 557; *see Horhn v. State*, 481 S.W.3d 363, 372 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). It is, therefore, "the most difficult challenge to mount successfully." *Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992); *Toledo v. State*, 519 S.W.3d 273, 279 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd).

If a statute can be reasonably interpreted in a manner that does not offend the constitution, a reviewing court must overrule a facial challenge to the statute's constitutionality. *Curry*, 186 S.W.3d at 42.

We first review Allen's facial challenge to Article 102.011

B. Facial constitutionality of the "summoning witness/mileage" fee

Upon his conviction, Allen was assessed a "summoning witness/mileage" fee of $200. Allen argues that the fee violates the separation-of-powers clause of the Texas Constitution and constitutes an impermissible tax collected by the judiciary because "the funds" received for the fee are "not directed by statute to be used for a

criminal justice purpose." Instead, he argues, "the funds" are "directed towards the general revenue fund of the county . . . in which the convicting court is located."

1. Fees collected by courts as tax gatherers are unconstitutional

Article II, section 1, of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1; *see Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987) (observing that this clause divides Texas government into legislative, executive, and judicial branches). "This division ensures that power granted one branch may be exercised by only that branch, to the exclusion of the others." *Ex parte Lo*, 424 S.W.3d at 28; *see Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001) ("The separation-of-powers doctrine prohibits one branch of government from exercising a power inherently belonging to another branch."); *Meshell*, 739 S.W.2d at 252 (stating that "any attempt by one department of government to interfere with the powers of another is null and void." (internal quotations omitted)).

The separation-of-powers clause is violated "when one branch of government assumes or is delegated a power more properly attached to another branch." *Ex parte*

Lo, 424 S.W.3d at 28 (internal quotations omitted); *see Salinas v. State*, 523 S.W.3d 103, 106–07 (Tex. Crim. App. 2017). Texas courts have addressed a number of separation-of-powers challenges to statutes that require trial courts to assess various fees as court costs as part of criminal convictions. *See, e.g.*, *Salinas*, 523 S.W.3d at 108–10; *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015); *Ex Parte Carson*, 159 S.W.2d 126 (Tex. Crim. App. 1942).

A court's assessment of fees as part of court costs in a criminal case violates the separation-of-powers clause when a court is delegated the executive branch's power to collect taxes. *Salinas*, 523 S.W.3d at 106–07; *Peraza*, 467 S.W.3d at 517. On the other hand, a court's assessment is a proper judicial function when "the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes." *Salinas*, 523 S.W.3d at 107, 109 n.26 (quoting *Peraza*, 467 S.W.3d at 517). In other words, a reviewing court must determine whether the fee is a disguised tax on a criminal defendant (which is unconstitutional) or a fee for a legitimate criminal justice purpose (which is constitutional). *See Casas v. State*, 524 S.W.3d 921, 925–27 (Tex. App.—Fort Worth 2017, no pet.) ("Although courts may not operate as tax gatherers, which is a function reserved to the executive branch of government, courts may collect fees in criminal cases as part of its judicial function if" the fees reflect "legitimate criminal justice purposes."). "What constitutes a

legitimate criminal justice purpose is a question to be answered on a statute-by-statute/case-by-case basis." *Salinas*, 523 S.W.3d at 107; *see Peraza*, 467 S.W.3d at 518.

Before *Peraza*, which was decided in 2015, the standard in Texas was that a court cost had to be "necessary" and "incidental" to the trial of a criminal case to withstand a facial challenge to its constitutionality. *See Peraza*, 467 S.W.3d at 517. The *Peraza* Court noted alternative formulations of the rule in other jurisdictions, including requiring that a court cost be "reasonably related to the costs of administering the criminal justice system," *id.* (discussing *State v. Claborn*, 870 P.2d 169 (Okla. Crim. App. 1994)), or that there "be a 'direct relationship' between the type of offense" underlying the conviction and the cost of court being assessed, *id.* (discussing *State v. Young*, 238 So. 2d 589 (Fla. 1970)).

The *Peraza* Court concluded that the existing Texas standard of necessary/incidental was "too limiting" because there can be legitimate costs incurred in the administration of the criminal justice system that are beneficial to the system and worthy of recoupment even if they do not qualify as "'necessary' or 'incidental' to the trial of a criminal case." *Id.* The *Peraza* Court rejected having a narrow requirement that the costs be "'necessary' and 'incidental' to the trial of a criminal case" because such a standard "ignores the legitimacy of costs that, although not necessary to, or an incidental expense of, the actual trial of a criminal

case, may nevertheless be directly related to the recoupment of costs of judicial resources expended in connection with the prosecution of criminal cases within our criminal justice system," given that "the prosecution of criminal cases and our criminal justice system have greatly evolved" to include advantageous processes that exceed the bare minimum of necessity. *Id.* at 517. Instead, the *Peraza* Court expanded the body of fees that could survive a facially unconstitutional challenge to include those assessed under a statute that "provides for an allocation . . . to be expended for legitimate criminal justice purposes" in the future, untied to the specific expenses incurred in "the actual trial of a criminal case." *Id.* (again, noting that legitimate criminal justice purpose is one that "relates to the administration of our criminal justice system").

Under *Peraza*'s broader rule, a statute that requires a convicted defendant to pay court costs that are "to be expended for legitimate criminal justice purposes" in the future is constitutional even if those costs do not arise out of that particular defendant's prosecution and have no direct relationship to that particular type of prosecution, so long as the costs are "directly related to the recoupment of costs of judicial resources expended in connection with the prosecution of criminal cases within our criminal justice system." *See id.*

By concluding that the *Carson* standard was "too limiting" and expanding the category of costs that can be properly assessed, *Peraza* suggests that a statute that

requires a convicted defendant to reimburse the State for court costs that have already been "incurred in the administration of the criminal justice system" in that prosecution remain proper and facially valid. *Id.* at 517; *see id*. at 510 (describing that appellant's constitutional challenge as focused on how assessed court costs "are to be disbursed"). We, therefore, interpret *Peraza* as holding that at least two types of fees assessed as court costs are constitutionally permissible: (1) court costs to reimburse criminal justice expenses incurred in connection with that criminal prosecution and (2) court costs to be expended in the future to off-set future criminal-justice costs. *Id.* at 517–18.

After *Peraza*, the Court issued *Salinas*, in which it explained that whether a future allocation relates to the administration of our criminal justice system depends on "what the governing statute says about the intended use of the funds, not whether [the] funds are actually used for a criminal justice purpose." 523 S.W.3d at 107, 109 n.26; *see Casas*, 524 S.W.3d at 926. In other words, the relevant statute must direct "that the funds be used for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system." *Salinas*, 523 S.W.3d at 109 n.26.

In *Salinas*, the Court addressed two fees that were part of a "consolidated court cost" fee assessed by Local Government Code section 133.102. The collected fees were directed to two accounts: (1) the "comprehensive rehabilitation" account and

(2) the "abused children's counseling" account. The fees were not directly related to costs that had been incurred in that defendant's criminal matter. Nor were they limited in their future uses to costs to be incurred for criminal justice purposes. The Court held that the two fees violated the separation-of-powers clause of the Texas Constitution. 523 S.W.3d at 105, 108–110 & n.26.

In addressing these fees, which were collected for a future use untied to that particular criminal prosecution, the Court focused on how the statute required the fees to be spent. The portion of the statute concerning the "comprehensive rehabilitation" account did not, "on its face, appear to serve a legitimate criminal justice purpose." *Id*. at 108. It did not, for example, restrict rehabilitation services to "anything relating to criminal justice." *Id*. Nor did the statute require that the government agency provide rehabilitation services only to crime victims. *Id*. Similarly, the account into which the fees were deposited was not restricted to criminal justice. The fund's constitutionality was not saved by the fact that the physical injuries that might require rehabilitation services "could easily" be "caused by a crime." *Id*. The Court concluded that the account did not qualify as an allocation of funds "to be expended for legitimate criminal justice purposes." *Id*. at 109.[6]

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[6] Since *Salinas*, the Court has reiterated that the "comprehensive rehabilitation" court cost is unconstitutional. *See Johnson v. State*, 537 S.W.3d 929 (Tex. Crim. App. 2017).

The Court held similarly with regard to the funds allocated to the "abused children's counseling" account. *Id.* Monies from this account were deposited into the State's general revenue fund. *Id.* at 110. The Court refused to uphold the funding's constitutionality "on the basis of its name" given that, through legislative action, the collected fee no longer funded a counseling program for abused children and, instead, went directly to the state's "general revenue" account. *Id*.

With no connection to past incurred expenses in that particular prosecution or future criminal justice expenditures, the statute imposing the fees was held to be facially unconstitutional. *See id.* at 109 & n.26; *Toomer v. State*, No. 02-16-00058-CR, 2017 WL 4413146, at *3 (Tex. App.—Fort Worth Oct. 5, 2017, no pet. h.) (mem. op.); *Casas*, 524 S.W.3d at 927 (because "[n]either the statute authorizing the collection of the emergency-services cost nor its attendant statutes direct the funds to be used for a legitimate, criminal-justice purpose; . . . it is a tax that is facially unconstitutional"); *see also Peraza*, 467 S.W.3d at 517 (holding that, "if [a] statute under which court costs are assessed . . . provides for an allocation of . . . court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause").

Salinas did not involve court costs directly related to the trial of that particular case. And, while *Peraza* expanded the category of costs that would be facially

constitutional and *Salinas* explained the standard for concluding that a future allocation relates to the administration of our criminal justice system, neither case, individually or collectively, explicitly address whether a court cost linked to an expense incurred in the past in the criminal prosecution of the defendant and collected to reimburse the cost of actually expended judicial resources must also be specifically directed to a future use that is a criminal justice purpose. *Toomer*, 2017 WL 4413146, at *3–4. But that is the type of court cost being challenged here: a fee to recoup criminal justice expenses actually incurred during the prosecution of that particular criminal defendant.

Another distinguishable fee case is *Hernandez v. State*, No. 01-16-00755-CR, — S.W.3d —, 2017 WL 3429414 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, no pet. h.) (motion for rehearing pending). In *Hernandez*, a panel of this court held that a $25 "district attorney fee" was unconstitutional "to the extent it allocate[d] funds to the county's general fund because those funds allow[ed] spending for" any purpose. *Id.* at *7. The appellant argued that the $25 fee was unconstitutional because of the way it would be spent after its collection. The State, in its brief, likewise focused on the manner in which the fee would be spent in the future, arguing that "so long as the funds *can* be spent," at a later time, on a legitimate criminal justice purpose, the fee does not violate *Peraza*.

Neither party argued—and the *Hernandez* opinion did not analyze—whether the fee could survive a constitutional challenge looking back to the source of the fee versus looking forward to how the collected fee might be spent, but *Peraza* supports such an analysis: *Peraza* states that court costs are "intended by the Legislature" to allow for a "recoupment of the costs of judicial resources expended in connection with the trial of the case," *id.* at 517 (quoting *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009)), and it holds that permissible "court costs should be related to the recoupment of costs of judicial resources." *Id.* That language controls our analysis of the constitutionality of a "summoning witness/mileage" fee assessed to recoup out-of-pocket expenses incurred in the prosecution of the convicted defendant who was assessed the fee being challenged.

In sum, the parties in *Hernandez* focused solely on whether the $25 fee fell within the *Peraza* expansion covering fees that, "although not" involved in "the actual trial of a criminal case, may nevertheless be directly related to the recoupment of costs of judicial resources." Because the fee here is an actual recoupment of out-of-pocket expenses incurred in this particular case, it is different from the fee in *Hernandez*, and *Hernandez*, therefore, does not direct the outcome of this fee challenge.

2. The fee challenged in this appeal

The $200 fee Allen challenges was imposed under Article 102.011, which provides as follows:

> (a) A defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by a peace officer: . . . (3) $5 for summoning witness . . . and . . . .
>
> (b) . . . 29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service . . . .

TEX. CODE CRIM. PROC. art. 102.011(a)(3), (b).

3. The challenged fee is for a direct expense incurred by the State

Allen contends that the "summoning witness/mileage" fee assessed against criminal defendants, including Allen, pursuant to Texas Code of Criminal Procedure article 102.011(a)(3) and (b), is facially unconstitutional because *Salinas* holds that a statute that does not specifically identify a judicial purpose to which the fees are to be directed violates the separation-of-powers clause.

Admittedly the statute assessing these fees, like the statute in *Salinas*, does not require that the fee be deposited into a specific account for future criminal justice expenses. But unlike the fee in *Salinas*, the "witness summoning/mileage" fee is an expense incurred by the State in the prosecution of this particular case and is unquestionably for a legitimate criminal justice purpose. *See Salinas*, 523 S.W.3d at 107, 109 n.26. The *Salinas* Court refused to uphold the constitutionality of the

"abused children's counseling" fee that was not directly related to the particular criminal case on appeal from a conviction for assault of an elderly person. *Id.* at 105. And, unlike the "comprehensive rehabilitation" account, which did "not, on its face, appear to serve a legitimate criminal justice purpose," this "witness summoning/mileage" fee does.

Salinas did not address reimbursement-based court costs. For this reason, we conclude that *Salinas* does not apply to the "witness summoning/mileage" fee.[7] We conclude that *Peraza*'s reasoning is more appropriately applied to this fee because the State is not relying on how the fee will be expended in the future, but, instead, on the recoupment of actual expenses incurred as part of this case. And *Salinas* does not purport to limit or modify *Peraza*'s focus on whether the fees are incurred as a direct result of or reasonably related to the "recoupment of costs of judicial resources," which this fee unquestionably was. *Peraza*, 467 S.W.3d at 517.

Allen also relies on the Office of Court Administration's website which shows that, in regard to Article 102.011(a)(3) and (b), "100% of the money" collected from the "summoning witness/mileage" fee remains "with the county or city which the [c]ourt serves" and is directed to that county's or city's "General Fund." *See* Office

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[7] The Fourteenth Court of Appeals has reached a different conclusion and held the fee unconstitutional. *See Johnson v. State*, No. 14-16-00658-CR, 2018 WL 1476275, at *4 (Tex. App.—Houston [14th Dist.] Mar. 27, 2018, no pet. h.). *Johnson* is pending rehearing before that court.

of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 12, 51 in Criminal Court Costs Section (Fee No. 26, "Peace Officer Fee—Summoning a Witness"; Fee No. 118, "Peace Officer Fee—Mileage"), http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf. *Id.* And because the funds received from the "summoning witness/mileage" fee are "directed to the General Fund (at both the State and local level)," they "need not be spent only on law enforcement [purposes]." *Id.*

We are not persuaded that this report establishes that the statute imposing this fee is unconstitutional for two reasons. First, the *Salinas* Court emphasized the limited value of an OCA report that was not part of the record in the trial court.[8] Second, and more importantly, we have already held that the Legislature's failure to require that the monies be deposited into a segregated account does not make the courts tax gatherers when the fee is directly tied to reimbursement for past judicial expenses incurred in the case.

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[8] While the Court cited government websites in its discussion of the facial constitutionality challenge to the "abused children's counseling" fee, it specifically stated that it was not relying on the website but referring to it because it "simply illustrates the consequences of the Legislature's" failure to direct that the money "be used for a criminal justice purpose." *Salinas*, 523 S.W.3d at 110 n.36. Because courts in a facial constitutionality challenge must "consider the statute only as it is written, rather than how it [may operate] in practice," it is improper for us to consider the actual use of the funds.

We conclude that Article 102.011(a)(3) and (b) are not facially unconstitutional.

C. As-applied constitutionality of fee

Allen next argues that the $200 "summoning witness/mileage" fee is unconstitutional as applied to him because it violates his constitutional rights to compulsory process and confrontation. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10 (rights to compulsory process and confrontation); *see also* TEX. CODE CRIM. PROC. art. 1.05; TEX. R. APP. P. 47.1.

In an as-applied constitutional challenge, the challenger concedes the general constitutionality of the statute but asserts that the statute is unconstitutional as applied to his particular facts and circumstances. *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011). To prevail on this claim, it is not sufficient to show that the statute may be unconstitutional as to others; instead, it must be unconstitutional as applied to the challenger. *Id*. A reviewing court must review the particular facts and circumstances of the case based on the record from the trial court. *Id*. Arguments based on the statute's hypothetical application are not relevant to an as-applied challenge. *London v. State*, 526 S.W.3d 596, 599 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd).

We have previously rejected the same as-applied challenge in a similar case. *Id.* In *London*, we observed that the defendant failed to identify additional witnesses

he could or would have called or any reason the statute is unconstitutional as applied to him in particular. *Id.* The same is true here.

We overrule Allen's second issue.

Conclusion

We affirm the judgment.

Harvey Brown
Justice

Panel consists of Justices Jennings, Bland, and Brown.

Jennings, J., dissenting.

En banc reconsideration was requested. *See* TEX. R. APP. P. 49.7.

The en banc court has unanimously voted to deny the motion for en banc reconsideration.

En banc court consists of Chief Justice Radack and Justices Jennings, Keyes, Higley, Bland, Massengale, Brown, Lloyd, and Caughey.

Publish. TEX. R. APP. P. 47.2(b).

JUDGMENT

Court of Appeals

First District of Texas

NO. 01-16-00768-CR

RUBEN LEE ALLEN, Appellant

V.

THE STATE OF TEXAS, Appellee

Appeal from the 337th District Court of Harris County. (Tr. Ct. No. 1487627).

This case is an appeal from the final judgment signed by the trial court on September 16, 2016. This court issued an opinion in this matter on November 28, 2017, but later withdrew it. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court's judgment contains no reversible error. Accordingly, the Court **affirms** the trial court's judgment.

The Court **orders** that this decision be certified below for observance.

Judgment rendered August 30, 2018.

Panel consists of Justices Jennings, Bland, and Brown. Opinion delivered by Justice Brown.

Dissenting Opinion on Rehearing (August 30, 2018).....Appendix B

Opinion issued August 30, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00768-CR

RUBEN LEE ALLEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case No. 1487627

DISSENTING OPINION ON REHEARING

[O]ur clerks of court should not be made tax collectors for our state, nor should the threshold to our justice system be used as a toll booth to collect money for random programs created by the legislature.[1]

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[1] *State v. Lanclos*, 980 So. 2d 643, 651 (La. 2008) (internal quotations omitted) (holding $5.00 fee assessed against criminal defendants pursuant to Louisiana statute constituted "a tax collected by the courts, and thus a violation of the [S]eparation of [P]owers doctrine"); *see also LeCroy v. Hanlon*, 713 S.W.2d 335,

A jury found appellant, Ruben Lee Allen, guilty of the offense of aggravated robbery with a deadly weapon.[2] After finding true the allegation in an enhancement paragraph that he had previously been convicted of a felony offense, the jury assessed his punishment at confinement for twenty-five years. In the judgment of conviction, the trial court ordered appellant to pay court costs, "[a]s [a]ssessed," which included a $200 charge for "Summoning Witness/Mileage."[3] In his second issue, appellant contends that the "Summoning Witness/Mileage" fee assessed against him is unconstitutional.

Because the majority, on rehearing, errs in holding that appellant has not met his burden of establishing the unconstitutionality of Texas Code of Criminal Procedure article 102.011(a)(3) and (b), I respectfully dissent.

"Summoning Witness/Mileage" Fee

In his second issue, appellant argues that the $200 "Summoning Witness/Mileage" fee assessed against him, an indigent criminal defendant, by the

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342 (Tex. 1986) ("If the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general revenue through charges assessed to those who would utilize our courts." (internal quotations omitted)).

2 *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 2011).

3 *See* TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b) (Vernon 2018) (imposing $5 charge on criminal defendant convicted of felony "for summoning [each] witness" and requiring defendant to pay "29 cents per mile for mileage required of an officer to perform a service . . . and to return from performing that service").

trial court is (1) facially unconstitutional because it violates the Separation of Powers clause of the Texas Constitution and (2) unconstitutional as applied to him because it violates his constitutional rights to compulsory process and confrontation.[4] *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10 (rights to compulsory process and confrontation), TEX. CONST. art. II, § 1 (Separation of Powers clause); *see also* TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 2005).

We review the constitutionality of a criminal statute de novo as a question of law. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013); *Maloney v. State*, 294 S.W.3d 613, 626 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). When presented with a challenge to the constitutionality of a statute, we presume that the statute is valid and the legislature did not act unreasonably or arbitrarily. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002); *Maloney*, 294 S.W.3d at 626. The party challenging the statute has the burden to establish its unconstitutionality. *Rodriguez*, 93 S.W.3d at 69; *Maloney*, 294 S.W.3d at 626. We must uphold the statute if we can apply a reasonable construction that will render it constitutional. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979); *see also Maloney*, 294

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[4] A criminal defendant may challenge the imposition of mandatory court costs for the first time on direct appeal when those costs are not imposed in open court and the judgment does not contain an itemization of the imposed court costs. *See London v. State*, 490 S.W.3d 503, 506–07 (Tex. Crim. App. 2016); *see also Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Casas v. State*, 524 S.W.3d 921, 925 (Tex. App.—Fort Worth 2017, no pet.).

S.W.3d at 626 (if statute can be interpreted in two different ways, one of which sustains its validity, we apply interpretation sustaining its validity).

"A facial challenge to a statute is the most difficult challenge to mount successfully" because it is an attack on the statute itself, rather than a particular application of it. *Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992); *Toledo v. State*, 519 S.W.3d 273, 279 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). To prevail on a facial challenge to a statute, the challenging party must establish that no set of circumstances exists under which the statute would be constitutionally valid. *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013); *see also Horhn v. State*, 481 S.W.3d 363, 372 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

Appellant argues that the "Summoning Witness/Mileage" fee assessed against him, an indigent criminal defendant, by the trial court, violates the Separation of Powers clause of the Texas Constitution and constitutes an impermissible tax collected by the judiciary because "the funds" received from criminal defendants for the fee are "not directed by statute to be used for a criminal justice purpose." Instead, "the funds" are "directed towards the general revenue fund of the county" "in which the convicting court is located."

Article II, section 1, of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a

> separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1; *see also Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987) ("[This] single, tersely phrased paragraph, provides that the constitutional division of the government into three departments (Legislative, Executive and Judicial) shall remain intact, 'except in the instances herein expressly permitted.'" (quoting TEX. CONST. art. II, § 1)). "This division ensures that [the] power granted [to] one branch may be exercised by only that branch, to the exclusion of the others." *Ex parte Lo*, 424 S.W.3d at 28; *see also Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001) ("The [S]eparation-of-[P]owers doctrine prohibits one branch of government from exercising a power inherently belonging to another branch."); *Meshell*, 739 S.W.2d at 252 ("[A]ny attempt by one department of government to interfere with the powers of another is null and void." (internal quotations omitted)).

The Separation of Powers clause is violated "when one branch of government assumes or is delegated a power more properly attached to another branch." *Ex parte Lo*, 424 S.W.3d at 28 (internal quotations omitted); *see also Salinas v. State*, 523 S.W.3d 103, 106–07 (Tex. Crim. App. 2017). A court is delegated a power more properly attached to the executive branch, rather than to the judiciary, where a statute

turns the court into a "tax gatherer[]." *Salinas*, 523 S.W.3d at 107, 109 n.26 (quoting *Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015)) (explaining "[t]he issue is whether the fee in question is a court cost (which is allowed) or a tax (which is unconstitutional)").

However, the collection of fees by a court in a criminal case constitutes a judicial function, and thus does not violate the Separation of Powers clause of the Texas Constitution, where a "statute under which [a] court cost[] [is] assessed (or an interconnected statute) provides for an allocation of such [a] court cost[] to be expended for [a] legitimate criminal justice purpose[]." *Salinas*, 523 S.W.3d at 107, 109 n.26 (quoting *Peraza*, 467 S.W.3d at 517); *see also Casas v. State*, 524 S.W.3d 921, 925–27 (Tex. App.—Fort Worth 2017, no pet.) ("Although courts may not operate as tax gatherers, which is a function reserved to the executive branch of government, courts may collect fees in criminal cases as part of [their] judicial function if the statute under which [the] court costs are assessed (or an interconnected statute) provides for an allocation of such [court] costs to be expended for legitimate criminal justice purposes." (internal quotations omitted)).

"What constitutes a legitimate criminal justice purpose is a question to be answered on a statute-by-statute/case-by-case basis." *Salinas*, 523 S.W.3d at 107; *see also Peraza*, 467 S.W.3d at 518. "And the answer to that question is determined by what [a] governing statute says about the intended use of the funds [collected

from criminal defendants], not whether [the] funds are actually used for a criminal justice purpose." *Salinas*, 523 S.W.3d at 107, 109 n.26; *see also Casas*, 524 S.W.3d at 926. In other words, in order to not run afoul of the Separation of Powers clause of the Texas Constitution, a statute that imposes a court cost on a criminal defendant must direct "that the funds [collected pursuant to that statute] be used for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system." *Salinas*, 523 S.W.3d at 109 n.26.

As the Texas Court of Criminal Appeals has noted, "[w]hen a defendant is convicted in a criminal case, various statutes require [him to] pay[] [certain] fees as court costs." *Salina*s, 523 S.W.3d at 105; *see also Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014) ("Only statutorily authorized court costs may be assessed against a criminal defendant . . . ."). Relevant to the instant case, article 102.011(a)(3) and (b) require a defendant "convicted of a felony or misdemeanor" to pay fees for certain services "performed . . . by a peace officer," including "$5 for summoning [each] witness" and "29 cents per mile for mileage required of an officer to perform [the] service . . . and to return from performing that service." TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b) (Vernon 2018).

In *Salinas*, the court of criminal appeals held that Local Government Code section 133.102, which requires a person convicted of a criminal offense to pay a

"Consolidated Court Cost" fee,[5] violates the Separation of Powers clause of the Texas Constitution to the extent that it allocates funds received from criminal defendants to the "abused children's counseling" account.[6] 523 S.W.3d at 105, 109–110, 109 n.26 (internal quotations omitted). In doing so, the court explained that the funds received from criminal defendants for the "Consolidated Court Cost" fee that

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[5] *See* TEX. LOCAL GOV'T CODE ANN. § 133.102(a) (Vernon Supp. 2017) ("A person convicted of an offense shall pay as a court cost, in addition to all other costs: (1) $133 on conviction of a felony; (2) $83 on conviction of a Class A or B misdemeanor; or (3) $40 on conviction of a nonjailable misdemeanor offense, including a criminal violation of a municipal ordinance, other than a conviction of an offense relating to a pedestrian or the parking of a motor vehicle."); *see also Salinas v. State*, 523 S.W.3d 103, 105 (Tex. Crim. App. 2017) (under Local Government Code section 133.102, "[a] defendant pays a single fee, but the money from that fee is divided up among a variety of different state government accounts according to percentages dictated by the statute").

[6] The court also held that Local Government Code section 133.102 is unconstitutional, in violation of the Separation of Powers clause, to the extent that it allocates funds received from criminal defendants to the "[c]omprehensive [r]ehabilitation" account because such funds serve "[n]o criminal justice purpose." *Salinas*, 523 S.W.3d at 105, 107–09 (internal quotations omitted). Since *Salinas*, the court of criminal appeals has repeatedly held that the portions of the "Consolidated Court Cost" fee that allocate funds received for the fee to the "abused children's counsel" account and the "comprehensive rehabilitation" account are unconstitutional. *See, e.g.*, *Carter v. State*, No. PD-1449-16, 2018 WL 1101310, at *1–2 (Tex. Crim. App. Feb. 28, 2018); *Amie v. State*, Nos. PD-0253-16, PD-0254-16, 2017 WL 5476352, at *1 (Tex. Crim. App. Nov. 15, 2017); *Johnson v. State*, 537 S.W.3d 929, 929–30 (Tex. Crim. App. 2017); *Davis v. State*, No. PD-1314-15, 2017 WL 4410265, at *1 (Tex. Crim. App. Oct. 4, 2017); *Guerrero v. State*, Nos. PD-0665-15, PD-0666-15, 2017 WL 4410256, at *1 (Tex. Crim. App. Oct. 4, 2017); *Penright v. State*, 537 S.W.3d 916, 916–17 (Tex. Crim. App. 2017); *see also* Act of May 18, 2017, 85th Leg., R.S., ch. 966, § 1, 2017 Tex. Sess. Law Serv. 3917 (amending Local Government Code section 133.102 to remove the "abused children's counseling" account and "comprehensive rehabilitation" account identified by the court of criminal appeals as unconstitutional).

are allocated to the "abused children's counseling" account are actually "deposited in the [State's] General Revenue Fund." *Id.* at 110 (internal quotations omitted). Accordingly, the court concluded:

> We cannot uphold the constitutionality of funding [the "abused children's counseling"] account through court costs on the basis of its name or its former use *when all the funds in the account go to general revenue*. Consequently, the allocation of funds to the "abused children's counseling" account does not currently qualify as an allocation of funds "to be expended for legitimate criminal justice purposes." To the extent that § 133.102 allocates funds to the "abused children's counseling" account, it is facially unconstitutional in violation of the Separation of Powers provision of the Texas Constitution.

Id. at 110 (emphasis added).

Essentially, the court of criminal appeals, in *Salinas*, explained that there are "limits" to the types of fees that the legislature "c[an] require the courts to collect" and "it [was simply] not enough that some of the funds [collected pursuant to the 'Consolidated Court Cost' fee] may ultimately benefit someone who has some connection with the criminal justice system." *Id.* at 109 n.26. Instead, the court held that where a statute fails "to *direct* the funds [collected from criminal defendants] to be used in a manner that would make it a court cost (i.e., for something that is a criminal justice purpose), th[at] statute operates unconstitutionally every time the fee is collected, making the statute unconstitutional on its face." *Id.* at 109 n.26, 110 n.36 ("The fee is unconstitutional because the funds are not directed by statute to be used for a criminal justice purpose.").

This Court, relying on the court of criminal appeals' decision in *Salinas*, has since addressed the issue of whether the $25 "[P]rosecutor's fee" assessed against a criminal defendant, pursuant to Texas Code of Criminal Procedure article 102.008(a), is facially unconstitutional because it violates the Separation of Powers clause of the Texas Constitution. *See Hernandez v. State*, No. 01-16-000755-CR, --- S.W.3d ---, 2017 WL 3429414, at *6–7 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, no pet. h.).[7] In doing so, we noted that article 102.008(a) requires "a defendant convicted of a misdemeanor" to pay "a fee of $25 for the trying of [his] case by the district or county attorney." *Id.* at *6 (quoting TEX. CODE CRIM. PROC. ANN. art. 102.008(a) (Vernon 2018)). However, article 102.008(a) "does not [actually] state where the [funds received from criminal defendants for the] $25 ['Prosecutor's] fee['] [are] to be directed." *Id.*; *see* TEX. CODE CRIM. PROC. ANN. art. 102.008(a).

Instead, we noted that the Office of Court Administration's website shows that "100% of the money collected" for the "[P]rosecutor's fee" remains "with the [c]ounty (or the [c]ity)," which the court serves and "is directed to th[at] [c]ounty's (or [c]ity's) General Fund." *Hernandez*, 2017 WL 3429414, at *6 (quoting Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 6–7 in Criminal Court Costs Section (Fee No. 13,

[7] This case is currently before the Court on rehearing.

"Prosecutor's Fee"), http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf (purpose of study, ordered by Senate Bill 1908, to "identif[y] each statutory law imposing a court fee or cost in a court in this state" and "[d]etermine whether each identified fee or cost is necessary to accomplish the stated statutory purpose"))[8]; *see also Salinas*, 523 S.W.3d at 110 (noting, based on Texas Comptroller's website, funds collected pursuant to Local Government Code section 133.102 for "abused children's counseling" account "deposited in the [State's] General Revenue Fund"). And "[m]oney in a county's [or city's] general fund can be spent for 'any proper county [or city] purpose.'" *Hernandez*, 2017 WL 3429414, at *6 (quoting Tex. Att'y Gen. Op. No. JM-530 (1986)).

Thus, relying on *Salinas*, we explained that "the constitutional infirmity" in *Hernandez* was that article 102.008(a) did not "*direct* the funds [collected from criminal defendants for the '[P]rosecutor's fee'] to be used in a manner that would make it a court cost (i.e., for something that is a criminal justice purpose)."[9] *Id.* at

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[8] The study conducted by the Office of Court Administration identified several concerns, including the fact that "some fees and costs [ordered to be collected from criminal defendants] have no stated statutory purpose," "court fees and costs collected from [criminal defendants] are oftentimes used to fund programs outside of and unrelated to the judiciary," and "many court fees and costs are collected for a purpose but [are] not dedicated or restricted to be used exclusively for that intended purpose." *See* Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 2, http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf.

[9] The State, in its motion for rehearing in *Hernandez*, concedes that article 102.008(a) does not contain language directing the funds collected from criminal defendants

*7 (quoting *Salinas*, 523 S.W.3d at 109 n.26); *see also Johnson v. State*, No. 14-16-00658-CR, --- S.W.3d ---, 2018 WL 1476275, at *4–5 (Tex. App.—Houston [14th Dist.] Mar. 27, 2018, no pet. h.) (Texas Code of Criminal Procedure article 102.004, imposing $40 fee on criminal defendant convicted by jury, "on its face[,] violates [S]eparation-of-[P]owers provision because the statute does not direct that the funds collected be expended for something that is a legitimate criminal-justice purpose"). And we concluded that article 102.008(a) "operates unconstitutionally every time the ['Prosecutor's] fee['] is collected," making the statute unconstitutional on its face. *Hernandez*, 2017 WL 3429414, at *7 (quoting *Salinas*, 523 S.W.3d at 109 n.26). Further, we noted that although "some of the money collected" for the "[P]rosecutor's fee" "may ultimately be spent on something that would be a legitimate criminal justice purpose," this "is not sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost." *Id.* (quoting *Salinas*, 523 S.W.3d at 109 n.26).

Accordingly, we held that because article 102.008(a) does not direct that the funds received from criminal defendants for the $25 "[P]rosecutor's fee" be expended for a criminal justice purpose, the statute is unconstitutional in violation of the Separation of Powers clause, as "it allocates [the] funds [collected] to

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for the "[P]rosecutor's fee" to be expended for any legitimate criminal justice purpose.

the . . . general fund" of the county that the court serves and allows such funds to be spent "for purposes other than legitimate criminal justice purposes." *Id.*; *see also Salinas*, 523 S.W.3d at 109–10 ("We cannot uphold the constitutionality of funding th[e] ['abused children's counseling'] account . . . when all the funds in the account go to [the State's] general revenue [fund]."); *Peraza*, 467 S.W.3d at 518 n.17 (agreeing "court costs should [generally] relate to the recoupment of judicial resources"); *Johnson*, 2018 WL 1476275, at *4–5 (holding Code of Criminal Procedure article 102.004 unconstitutional, in violation of Separation of Powers clause, where it "fail[ed] to direct the funds collected to be used for something that is a legitimate criminal-justice purpose"); *Toomer v. State*, No. 02-16-00058-CR, 2017 WL 4413146, at *3 (Tex. App.—Fort Worth Oct. 5, 2017, pet. ref'd) (holding Code of Criminal Procedure article 102.0185 unconstitutional, in violation of Separation of Powers clause, because "[n]either the statute authorizing the collection of the emergency-services costs nor its attendant statutes direct the funds to be used for a legitimate, criminal-justice purpose"); *Casas*, 524 S.W.3d at 925–27 (holding Code of Criminal Procedure article 102.0185 unconstitutional, in violation of Separation of Powers clause, and noting "monies collected" from "emergency-services cost" allocated to general revenue fund); Tex. Att'y Gen. Op. No. JC-0158 (1999) ("Court fees that are used for general purposes are characterized as taxes, and a tax imposed on a litigant . . . violat[es] . . . the constitution.").

Accordingly, we modified the trial court's judgment to delete the $25 "[P]rosecutor's fee" from the costs assessed against the criminal defendant. *Hernandez*, 2017 WL 3429414, at *7.

Surprisingly, here, the majority concludes, unlike we did in *Hernandez*, that *Salinas* and its progeny are irrelevant to the instant case. And now, on rehearing, the majority strains to distinguish both *Hernandez* and *Salinas*[10] so that it may hold that Texas Code of Criminal Procedure article 102.011(a)(3) and (b) are not facially unconstitutional.[11] In doing so, the majority misinterprets the court of criminal

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[10] While the majority takes great pains to distinguish these cases and reconcile its opinion on rehearing with their controlling nature, I am not persuaded and "cannot join the [laborious effort] in which the majority engages by forcing a square peg into a round hole." *See Saunders v. Lee*, 180 S.W.3d 742, 746 (Tex. App.—Waco 2005, no pet.) (Gray, C.J., dissenting).

[11] It is imperative to remember that when the legislature oversteps its bounds and passes a statute that violates the Texas Constitution, there is no shame in a court saying so. *See LeCroy*, 713 S.W.2d at 339 (courts have "the power and duty to protect the . . . guaranteed rights of all Texans" and "[b]y enforcing [the] constitution, [courts] provide Texans with their full individual rights"). As Justice Franklin Spears has explained:

> [The legislature may not] force the judiciary into the role of a subordinate and supplicant governmental service—in effect, a mere agency. The judiciary is not an agency, but is a constitutionally established separate, equal and independent branch of government.
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> . . . .
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> . . . . The judicial power provides a check on the abuse of authority by other governmental branches. If the courts are to provide that check, they cannot be subservient to the other branches of government but must ferociously shield their ability to judge independently and fairly. This is the essence of our very existence; we owe the people of Texas no less than our unflinching insistence on a true tripartite

appeals' decision in *Peraza*, which pre-dates *Salinas*, and fails to apply the correct legal standard pronounced in *Salinas* to the instant case.

In *Peraza*, the Texas Court of Criminal Appeals addressed whether a $250 "DNA record fee" assessed against a criminal defendant pursuant to Texas Code of Criminal Procedure article 102.020 was "an unconstitutional tax that violate[d] the [S]eparation of [P]owers clause under the Texas Constitution." 467 S.W.3d at 510–12. In its opinion, the court of criminal appeals explained that "court costs should be related to the recoupment of costs of judicial resources . . . expended in connection with the prosecution of criminal cases within [the] criminal justice system." *Id.* at 517. And the court held that in order to determine whether a court cost assessed against a criminal defendant runs afoul of the Separation of Powers clause, the question is not whether "such costs [are] 'necessary' and 'incidental' to the trial of a criminal case," but rather whether a "statute under which [a] court cost[] [is] assessed (or an interconnected statute) provides for an allocation of such [a] court

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> government. It is the responsibility of this court to preserve this constitutional framework.
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> . . . . The judiciary may often be denominated as the "third" branch of government, but that does not mean it is third in importance; it is in reality one of three equal branches. As such, the judiciary is an integral part of our government and cannot be impeded in its function . . . .

Mays v. Fifth Court of Appeals, 755 S.W.2d 80–81 (Tex. 1988) (Spears, J., concurring) (internal footnotes and quotations omitted).

cost[] to be expended for [a] legitimate criminal justice purpose[].” *Id.* at 517–18. “A criminal justice purpose is one that relates to the administration of our criminal justice system,” and “[w]hether a criminal justice purpose is ‘legitimate’ is a question to be answered on a statute-by-statute/case-by-case basis.” *Id.*

Utilizing the above standard, the court of criminal appeals, in *Peraza*, went on to hold that the criminal defendant in that case had not met his burden of establishing that Texas Code of Criminal Procedure article 102.020, which imposes the “DNA record fee,” could not operate constitutionally under any circumstance. *Id.* at 521. Thus, the court held that article 102.020 was not facially unconstitutional in violation of the Separation of Powers clause of the Texas Constitution.[12] *Id.*

Following *Peraza*, the court of criminal appeals in *Salinas*, as previously discussed, addressed the constitutionality, under the Separation of Powers clause, of Local Government Code section 133.102, which assesses a $133 “Consolidated Court Cost” fee against criminal defendants. 523 S.W.3d at 105–10, 113. There, the court looked at whether “some of the funds [received] from the [‘C]onsolidated [Court Cost’] fee [were] statutorily apportioned to accounts[, namely, the

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[12] Certainly, what the court of criminal appeals did *not* do in *Peraza* was hold, as the majority now concludes, that under the Separation of Powers clause “at least two types of fees assessed as court costs are constitutionally permissible: (1) court costs to reimburse criminal justice expenses incurred in connection with that criminal prosecutions and (2) court costs to be expended in the future to off-set future criminal-justice costs.”

'comprehensive rehabilitation' account and the 'abused children's counseling' account] that d[id] not serve legitimate criminal justice purposes." *Id.* at 105–07 (noting "[t]he question here is whether the two accounts at issue ('abused children's counseling' and 'comprehensive rehabilitation') meet the requirement that the relevant statutes provide for the allocation of funds 'to be expended for legitimate criminal justice purposes'"). The court ultimately concluded that the funds collected from criminal defendants and allocated to the "comprehensive rehabilitation" account and the "abused children's counseling" account did not qualify as funds to be expended for legitimate criminal justice purposes; and, thus, the court held that, to the extent that Local Government Code section 133.102 allocates funds to those accounts, the statute is facially unconstitutional. *Id.* at 106–10, 113. Notably, in doing so, the court twice emphasized, using broad language, that section 133.102 was unconstitutional because the statute "*fail[ed] to direct the funds to be used in a manner that would make it a court cost (i.e., for something that is a criminal-justice purpose)*." *Id.* at 109 n.26, 110 n.36 (emphasis added).

Although the majority, here, would like to assert that *Salinas* is different from the instant case, it, by doing so, fails to recognize the court of criminal appeals' use of broad language in *Salinas* and the fact that the court did not limit its holding to the circumstances of that case. *See id.* 106–10, 109 n.26, 110 n.36; *see also Johnson*, 2018 WL 1476275, at *4 (recognizing "broad language" employed by *Salinas* court

and applying *Salinas* legal standard to "statute [that] is silent as to the allocation of the court costs collected" from criminal defendants). Instead, what is clear after the court of criminal appeals' decision in *Salinas* is that our Court must apply the legal standard utilized in that case (as well as *Peraza*) to appeals involving facial constitutional challenges to court-cost statutes based on violations of the Separation of Powers clause of the Texas Constitution. *See State ex rel. Vance v. Clawson*, 465 S.W.2d 164, 168 (Tex. Crim. App. 1971) ("The Court of Criminal Appeals is the court of last resort in this state in criminal matters. This being so, no other court of this state has authority to overrule or circumvent its decisions, or disobey its mandates." (internal quotations omitted)); *Johnson*, 2018 WL 1476275, at *4 ("[T]he *Salinas* decision requires us to apply the legal standard in that case to all facial challenges based on the [S]eparation-of-[P]owers provision to court-cost statutes."); *Cervantes-Guervara v. State*, 532 S.W.3d 827, 832 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (when court of criminal appeals "has deliberately and unequivocally interpreted the law in a criminal matter, [the courts of appeals] must adhere to its interpretation"). Thus, after *Salinas*, to avoid being declared facially unconstitutional, in violation of the Separation of Powers clause of the Texas Constitution, a statute that imposes a court cost on a criminal defendant must direct "that the funds [collected pursuant to that statute] be used for something that is a legitimate criminal justice purpose." *Salinas*, 523 S.W.3d at 109 n.26, 110 n.36; *see*

also Peraza, 467 S.W.3d at 517–18 ("[I]f [a] statute under which court costs are assessed . . . provides for an allocation of . . . court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the [S]eparation of [P]owers clause." (internal footnote omitted)). This the legal standard to be applied in the instant case.

Turning back to this case, the Court has been asked to determine whether the "Summoning Witness/Mileage" fee assessed against criminal defendants, including appellant, pursuant to Texas Code of Criminal Procedure article 102.011(a)(3) and (b), is facially unconstitutional because it violates the Separation of Powers clause of the Texas Constitution. *See* TEX. CONST. art. II, § 1. Article 102.011(a)(3) and (b) require a defendant "convicted of a felony or misdemeanor" to pay fees for certain services "performed . . . by a peace officer," including "$5 for summoning [each] witness" and "29 cents per mile for mileage required of an officer to perform [the] service . . . and to return from performing that service." *See* TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b). However, the statute *does not* actually state where the funds received from criminal defendants for the "Summoning Witness/Mileage" fee are to be directed. *See id.*; *see also* Tex Att'y Gen. Op. No. JC-0031 (1999) (noting "[a] myriad of statutes authorize district clerks to collect court fees in criminal and civil cases" and "[s]ome of these statutes earmark court

fees for deposit in specific state or county accounts," while "others are *silent* with respect to this issue" (emphasis added) (internal footnotes omitted)). Under such circumstances, the funds collected pursuant to article 102.011(a)(3) and (b) end up in the general fund of the county in which the convicting court serves or the general fund of the State. *Cf. Johnson*, 2018 WL 1476275, at *4 (Code of Criminal Procedure article 102.004, imposing $40 fee on criminal defendant convicted by jury, does not allocate jury fee to any specific fund; and, under such circumstances, defendant and State agreed funds collected were deposited in general fund); *Hernandez*, 2017 WL 3429414, at *6–7 (funds collected from criminal defendants pursuant to Code of Criminal Procedure 102.008(a), which is silent as to where such funds are directed, deposited in general fund of county or city court serves); *see also* Tex Att'y Gen. Op. No. JC-0031 (if fee provision is silent with respect to fee's proper disposition and fee is for official service performed by district clerk, then funds must be deposited in county treasury).

In fact, the Office of Court Administration's website even notes, in regard to article 102.011(a)(3) and (b), that "100% of the money" collected for the "Summoning Witness/Mileage" fee, including appellant's money, remains "with the county or city which the [c]ourt serves" and is directed to that county's or city's "General Fund." *See* Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 12, 51 in Criminal Court

Costs Section (Fee No. 26, "Peace Officer Fee – Summoning a Witness"; Fee No. 118, "Peace Officer Fee – Mileage"), http://www.txcourts.gov/media/495634/SB 1908-Report-FINAL.pdf; *see also Salinas*, 523 S.W.3d at 110 & n.36 (noting "[t]he [Texas] Comptroller's website says that the money collected for [the] [']abused children's counseling['] [account] is deposited in the General Revenue Fund"); *Hernandez*, 2017 WL 3429414, at *6. Further, the Office of Court Administration's website explains that if a "peace officer" is employed by the State then "the [c]ity or [c]ounty," which the court serves, "keeps 80% of the ['Summoning Witness/Mileage'] fee," which is then "direct[ed] . . . to the [c]ounty's (or [c]ity's) General Fund," while "[t]he [remaining] 20% of the money [collected for the 'Summoning Witness/Mileage' fee] is sent to the State for deposit in the State's General Revenue Fund."[13] *See* Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 12, 51 in

[13] Although the majority concludes that the Office of Court Administration's website has "limited value," the majority does not assert that the information from the website is inaccurate. *Cf. Salinas*, 523 S.W.3d at 110 n.36. Further, article 102.011(a)(3) and (b) are not facially unconstitutional because of the information contained on the Office of Court Administration's website. Instead, as explained above, in order to pass muster under the Separation of Powers clause of the Texas Constitution, article 102.011(a)(3) and (b), or an interconnected statute, must direct that the funds collected from criminal defendants for the "Summoning Witness/Mileage" fee be expended for something that constitutes a legitimate criminal justice purpose. Here, the statute simply does not do that; it does not state where the funds collected for the "Summoning Witness/Mileage" fee are to be directed. Accordingly, the funds collected pursuant to article 102.011(a)(3) and (b) are deposited in the county's general fund or the State's general fund to be used for any legal purpose. *This* is what renders the statute unconstitutional.

Criminal Court Costs Section (Fee No. 26, "Peace Officer Fee – Summoning a Witness"; Fee No. 118, "Peace Officer Fee – Mileage"), http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf; *see also Salinas*, 523 S.W.3d at 110 & n.36. And because the funds received for the "Summoning Witness/Mileage" fee are "directed to the General Fund (at both the State and local level)," they "need not be spent only on law enforcement [purposes]." *See* Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 12, 51 in Criminal Court Costs Section (Fee No. 26, "Peace Officer Fee – Summoning a Witness"; Fee No. 118, "Peace Officer Fee – Mileage"), http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf; *see also Salinas*, 523 S.W.3d at 110 & n.36 (noting "[t]he [Texas] Comptroller's website says that the money collected for [the] [']abused children's counseling['] [account] is deposited in the General Revenue Fund"); *Hernandez*, 2017 WL 3429414, at *6 (holding Code of Criminal Procedure article 102.008(a) unconstitutional, in violation of Separation of Powers clause, because "it allocates funds to the county's general fund" and those funds spent "for purposes other than legitimate criminal justice purposes"); *Casas*, 524 S.W.3d at 925–27 (Code of Criminal Procedure article 102.0185 unconstitutional, in violation of Separation of Powers clause, where funds collected from "emergency-services cost" allocated to general revenue fund); Tex. Att'y Gen. Op. No. JC-0158 ("Court fees

that are used for general purposes are characterized as taxes, and a tax imposed on a litigant . . . violat[es] . . . the constitution."); Tex. Att'y Gen. Op. No. JM-530 (money in county's general fund may be spent on "any proper county purpose").

Thus, in this case, as in *Salinas*, "the constitutional infirmity" is that article 102.011(a)(3) and (b) do not *direct* the funds collected from criminal defendants for the "Summoning Witness/Mileage" fee to be used in a manner that would make them a court cost (i.e., for something that is a legitimate criminal justice purpose).[14] *See* 523 S.W.3d at 109 n.26, 110 n.36; *see also Peraza*, 467 S.W.3d at 517–18 ("[I]f [a] statute under which court costs are assessed . . . provides for an allocation of . . . court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the [S]eparation of [P]owers clause." (internal footnote

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[14] It may be helpful to look at the necessary inquiry that we must make in this case as a two-step process. First, we must ask whether article 102.011(a)(3) and (b) direct the funds collected from criminal defendants for the "Summoning Witness/Mileage" fee to a particular "place." Second, if article 102.011(a)(3) and (b) do so direct the funds, we must ask whether that particular "place" fulfills a legitimate criminal justice purpose. As noted above, article 102.011(a)(3) and (b)'s fatal flaw is that they do not actually state where the funds received from criminal defendants for the "Summoning Witness/Mileage" fee are to be directed. *See* TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b); *Hernandez v. State*, No. 01-16-000755-CR, --- S.W.3d ---, 2017 WL 3429414, at *6–7 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, no pet. h.) ("The statute does not state where the $25 fee is to be directed."); *cf. Salinas*, 523 S.W.3d at 107–10 (after first noting "Consolidated Court Cost" fee statute directed funds collected to "abused children's counseling" account and "comprehensive rehabilitation" account, then considering whether funds contained in either account are used for legitimate criminal justice purposes).

omitted); *Johnson*, 2018 WL 1476275, at *4–5 ("Under *Salinas*, article 102.004(a)'s failure to direct the funds collected to be used for something that is a legitimate criminal-justice purpose makes the statute facially unconstitutional, in violation of article II, section I of the Texas Constitution."); *Toomer*, 2017 WL 4413146, at *3; *Hernandez*, 2017 WL 3429414, at *7; *Casas*, 524 S.W.3d at 927 (because "[n]either the statute authorizing the collection of the emergency-services cost nor its attendant statutes direct the funds to be used for a legitimate, criminal-justice purpose; . . . it is a tax that is facially unconstitutional"); Tex. Att'y Gen. Op. No. JC-0158 ("Court fees that are used for general purposes are characterized as taxes, and a tax imposed on a litigant . . . violat[es] . . . the constitution."). And this means that article 102.011(a)(3) and (b) operate unconstitutionally every time that the "Summoning Witness/Mileage" fee is collected. *See Salinas*, 523 S.W.3d at 109 n.26; *see also Johnson*, 2018 WL 1476275, at *4–5; *Hernandez*, 2017 WL 3429414, at *7.

Further, even if "some of the money collected" for the "Summoning Witness/Mileage" fee "may ultimately be spent on something that would [constitute] a legitimate criminal justice purpose," this would not be "sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost." *Salinas*, 523 S.W.3d at 109 n.26; *see also Johnson*, 2018 WL 1476275, at *4 ("That funds can be used for a legitimate criminal-justice purpose does not satisfy the *Salinas* legal standard . . . .").

Thus, as the court of criminal appeals concluded in *Salinas*, article 102.011(a)(3) and (b) do not direct the funds received from criminal defendants for the "Summoning Witness/Mileage" fee to be expended for a legitimate criminal justice purpose. 523 S.W.3d at 109–10, 109 n.26, 110 n.36; *see also Peraza*, 467 S.W.3d at 517–18 ("[I]f [a] statute under which court costs are assessed . . . provides for an allocation of . . . court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the [S]eparation of [P]owers clause." (internal footnote omitted)). Accordingly, I would hold that article 102.011(a)(3) and (b) are facially unconstitutional as they "allocate[] [the] funds" received for the "Summoning Witness/Mileage" fee to the general revenue fund of either the county or the State and allow such money to be spent for purposes other than legitimate criminal justice purposes in violation of the Separation of Powers clause of the Texas Constitution.[15] *See Salinas*, 523 S.W.3d at 109–10 ("We cannot uphold the

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[15] For reasons expressed in previous cases, I would also hold that Texas Code of Criminal Procedure article 102.011(a)(3) and (b) are unconstitutional as applied to appellant because the statute violates his constitutional right to confrontation. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10 (right to confrontation); TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 2005); *Castello v. State*, No. 01-16-00742-CR, --- S.W.3d ---, 2018 WL 2660520, at *7–13 (Tex. App.—Houston [1st Dist.] June 5, 2018, pet. filed) (Jennings, J., concurring); *London v. State*, 526 S.W.3d 596, 605–12 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (Jennings, J., dissenting). However, I recognize that this Court has already rejected the arguments presented by appellant. *See, e.g.*, *Castello*, 2018 WL 2660520, at *5–7; *Robles v. State*, No. 01-16-00199-CR, 2018 WL 1056482, at *6 (Tex. App.—Houston [1st Dist.] Feb. 27, 2018, pet. ref'd) (mem. op., not designated for

constitutionality of funding th[e] ['abused children's counseling'] account . . . when all the funds in the account go to general revenue."); *Peraza*, 467 S.W.3d at 518 n.17 (agreeing "court costs should [generally] relate to the recoupment of judicial resources").

I would sustain appellant's second issue and modify the trial court's judgment to delete the $200 "Summoning Witness/Mileage" fee from the assessed court costs. *See Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013) (holding proper remedy when trial court erroneously includes amounts as court costs is to modify judgment to delete erroneous amounts); *Hernandez*, 2017 WL 3429414, at *7. Further, I continue to urge the legislature to reevaluate the fee system currently in place in light of the enormous, and potentially unjustified, burden it too often

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publication); *Buford v. State*, No. 01-16-00727-CR, 2017 WL 6759199, at *6–7 (Tex. App.—Houston [1st Dist.] Dec. 28, 2017, pet. ref'd) (mem. op., not designated for publication); *Macias v. State*, 539 S.W.3d 410, 421–24 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *London*, 526 S.W.3d at 598–602, 604; *see also Benge v. Williams*, 472 S.W.3d 684, 738 (Tex. App.—Houston [1st Dist.] 2014) (Jennings, J., dissenting from denial of en banc reconsideration) (although "we are not free to disregard binding precedent," as appellate court justices, "we . . . are certainly free to point out any flaws in the reasoning of the [binding] opinions"), *aff'd*, 548 S.W.3d 466 (Tex. 2018); *Jones v. State*, 962 S.W.2d 96, 99 (Tex. App.—Houston 1997) (Taft, J., concurring) (noting although "we are bound by precedent . . . , we are not gagged" by it), *aff'd*, 984 S.W.2d 254 (Tex. Crim. App. 1998); *Precedent*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining precedent as "a decided case that furnishes a basis for determining later cases involving similar facts or issues").

imposes "on the poorest members of society ensnared in Texas' criminal justice system."[16]

Terry Jennings
Justice

Panel consists of Justices Jennings, Bland, and Brown.

Jennings, J., dissenting.

En banc reconsideration was requested. *See* TEX. R. APP. P. 49.7.

The en banc court has unanimously voted to deny the motion for en banc reconsideration.

En banc court consists of Chief Justice Radack and Justices Jennings, Keyes, Higley, Bland, Massengale, Brown, Lloyd, and Caughey.

Publish. TEX. R. APP. P. 47.2(b).

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[16] Matt Clarke, *Texas Criminal Court Fees are a Tax on Poor Defendants*, PRISON LEGAL NEWS (Mar. 15, 2014), https://www.prisonlegalnews.org/news/2014/mar/15/texas-criminal-court-fees-are-a-tax-on-poor-defendants/ (because "people who have been convicted of crimes elicit much less sympathy," "the myriad of criminal court fees and their misuses will most likely continue unabated"); *see also* Eric Dexheimer, *Hard-up Defendants Pay as State Siphons Court Fees for Unrelated Uses*, STATESMAN (Sept. 20, 2012), https://www.statesman.com/news/special-reports/hard-defendants-pay-state-siphons-court-fees-for-unrelated-uses/oNyf6HCFKbA4Nlq0UCLiRM/ ("'We're trying to squeeze more money from people who have a hard time getting jobs because they have a criminal record, or have mental illness problems or substance abuse problems' . . . . 'These fees are a tax on the poor.'" (quoting executive director of the Texas Criminal Justice Coalition)).

Opinion on Original Submission (November 27, 2017) .....Appendix C

Opinion issued November 28, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00768-CR

RUBEN LEE ALLEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case No. 1487627

O P I N I O N

A jury found appellant, Ruben Lee Allen, guilty of the offense of aggravated robbery with a deadly weapon.[1] After finding true the allegation in an enhancement

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[1] *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 2011).

paragraph that he had previously been convicted of a felony offense, the jury assessed his punishment at confinement for twenty-five years. In two issues, appellant contends that the trial court lacked jurisdiction over this case and the $200 "Summoning Witness/Mileage" fee[2] assessed against him is unconstitutional.

We modify the trial court's judgment and affirm as modified.

Background

Kannan Rajan, the complainant, testified that as the pharmacist at the BZ Pharmacy in Harris County, Texas, he was responsible for handling the money in the pharmacy's cash register, the prescription medications, and other property of the pharmacy. On September 11, 2015, while his assistant technician was on break and he was alone in the pharmacy, the complainant went to the restroom. When he came out, a black man, standing at the restroom's door, pointed a firearm at his head. The man told the complainant to "look down" and open the pharmacy's safe, which contained paperwork, certain narcotic medications, and money. The complainant did not see the face of the man with the firearm, but he saw the firearm and feared that he would die. The complainant noted that the man had two other people with him, but he was unable to see their faces because they were wearing hoods. After

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[2] *See* TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b) (Vernon Supp. 2016) (imposing $5 charge on defendant convicted of felony "for summoning [each] witness" and requiring defendant to pay "29 cents per mile for mileage required of an officer to perform a service . . . and to return from performing that service").

the complainant opened the pharmacy's safe, he laid down on the floor, while the man with the firearm "took some things from the safe" and asked the complainant for hydrocodone. Before leaving the pharmacy, the man took "some hydrocodone" and approximately $1,000 from the pharmacy's cash register.

While watching the pharmacy's surveillance videotape, admitted into evidence at trial as State's Exhibit 4, the complainant explained that the videotape shows a silver truck driving into the pharmacy's parking lot and parking close to the pharmacy. Although one person remained in the truck, three other people exited the truck and entered the pharmacy. Two of the people who got out of the truck wore "hoodies pulled over their heads," and a third man wore a black shirt and white pants. The videotape next shows the three people entering the pharmacy and the man with the black shirt and white pants standing next to the restroom. As the complainant exits the restroom, the man with the black shirt and white pants "[p]ut[s] [a] gun" to the complainant's head, and the complainant, as instructed, "look[s] down" and "g[ets] down on [his] knees." After the complainant opens the pharmacy's safe, the man with the black shirt and white pants takes from out of the safe a white object, which he then carries into the pharmacy's "prescription medication area" and leaves on the floor of the pharmacy.

Houston Police Department Officer O. Baldwin testified that while on duty on September 11, 2015, he was dispatched to investigate the aggravated robbery.

Upon arriving at the BZ Pharmacy, Baldwin spoke to the complainant who told him that "three black males with ski masks on came into [the] shop and pulled a gun on him and got him out of the restroom." One of the men then "took him to the [pharmacy's] safe," "made him open [it]," and "get . . . stuff out." Baldwin noted that he viewed the pharmacy's surveillance videotape, State's Exhibit 4, which shows a man wearing a black shirt and white pants holding a firearm and "grabb[ing] a [white] bag out of the [pharmacy's] safe." The man then leaves the white bag on the floor of the pharmacy. Baldwin noted that he collected the white bag, admitted into evidence at trial as State's Exhibit 7, from the floor of the pharmacy.

Laurissa Pilkington, a latent print technician for the Houston Forensic Science Center ("HFSC"), testified that she tested three items related to the case, including State's Exhibit 7, the white bag found on the pharmacy's floor. From the white bag, Pilkington recovered two latent fingerprints.

Darren Jewkes, a senior latent fingerprint examiner for HFSC, testified that he analyzed the two latent fingerprints that Pilkington had recovered from State's Exhibit 7, the white bag. He opined that the first fingerprint "corresponds to the right middle finger" of appellant, and the second fingerprint "belong[s] to the right ring finger" of appellant. In other words, the "two latent [finger]prints" recovered from the white bag "belonged to" appellant.

After finding appellant guilty of the offense of aggravated robbery with a deadly weapon, and finding true the allegation in an enhancement paragraph that he had previously been convicted of a felony offense, the jury assessed appellant's punishment at confinement for twenty-five years. In the judgment of conviction, the trial court ordered appellant to pay court costs, "[a]s [a]ssessed," which included a $200 charge for "Summoning Witness/Mileage."[3]

Jurisdiction

In his first issue, appellant argues that the trial court, the 337th District Court of Harris County, Texas, lacked jurisdiction over this case because the underlying indictment was presented to the grand jury of the 230th District Court of Harris, County, Texas. The State asserts that appellant waived his complaint by not first raising this procedural matter in the trial court.

The Texas Code of Criminal Procedure sets forth the organization and duties of a grand jury. *See* TEX. CODE CRIM. PROC. ANN. arts. 19.01–20.22 (Vernon 2015 & Supp. 2016). A trial court forms, impanels, and empowers a grand jury to inquire into indictable offenses, including aggravated robbery with a deadly weapon. *See* TEX. CODE CRIM. PROC. ANN. art. 20.09 ("The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible

[3] *See id.*

person."); *Ex parte Edone*, 740 S.W.2d 446, 448 (Tex. Crim. App. 1987) ("Once formed and impaneled by the district judge, the grand jury shall inquire into all offenses liable to indictment" (internal quotations omitted)); *Davis v. State*, 519 S.W.3d 251, 254 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *Bourque v. State*, 156 S.W.3d 675, 678 (Tex. App.—Dallas 2005, pet. ref'd). Because a grand jury's deliberations are secret, it retains a "separate and independent nature from the court." *Ex parte Edone*, 740 S.W.2d at 448.

After hearing testimony, a grand jury then votes concerning the presentment of an indictment.[4] *See* TEX. CODE CRIM. PROC. ANN. art. 20.19 ("After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of an indictment . . . ."); *Ex parte Edone*, 740 S.W.2d at 448; *Davis*, 519 S.W.3d at 254; *Bourque*, 156 S.W.3d at 678 (grand jury "hears all the testimony available before voting on whether to indict the accused").

"[I]f nine members concur in finding the bill," the State prepares the indictment and the grand jury foreman signs it and delivers it to the judge or the clerk of the court. TEX. CODE CRIM. PROC. ANN. arts. 20.19–.21; *Bourque*, 156

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[4] An indictment is "a written instrument presented to a court by a grand jury charging a person with the commission of an offense." TEX. CONST. art. V, § 12(b); *see also* TEX. CODE CRIM. PROC. ANN. art. 21.02 (Vernon 2009) (setting out requirements of indictment).

S.W.3d at 678. An indictment is considered "'presented' when it has been duly acted upon by the grand jury and received by the court." TEX. CODE CRIM. PROC. ANN. art. 12.06 (Vernon 2015); *see also Henderson v. State*, 526 S.W.3d 818, 819 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Thus, presentment occurs when an indictment is delivered to either the judge or the clerk of the court. TEX. CODE CRIM. PROC. ANN. art. 20.21; *State v. Dotson*, 224 S.W.3d 199, 204 (Tex. Crim. App. 2007).

The district clerk for each county "is *the* clerk of the court for all the district courts in that county." *Henderson*, 526 S.W.3d at 820 (quoting *Ex parte Alexander*, 861 S.W.2d 921, 922 (Tex. Crim. App. 1993), *superseded by statute on other grounds as stated in Ex parte Burgess*, 152 S.W.3d 123, 124 (Tex. Crim. App. 2004)); *Aguillon v. State*, No. 14-17-00002-CR, 2017 WL 3045797, at *1 (Tex. App.—Houston [14th Dist.] July 18, 2017, pet. ref'd) (mem. op., not designated for publication). "The fact that a signed indictment features an original file stamp of the district clerk's office is strong evidence that a returned indictment was 'presented' to the court clerk within the meaning of Article 20.21." *Dotson*, 224 S.W.3d at 204 (because indictment "bears an original file stamp, that fact convincingly shows the presentment requirement was satisfied"). Once an indictment is presented, jurisdiction vests with the trial court. TEX. CONST. art. V, § 12(b); *Dotson*, 224 S.W.3d at 204; *Cook v. State*, 902 S.W.2d 471, 476 (Tex. Crim. App. 1995).

All state district courts within the same county have jurisdiction over the same cases, and criminal district courts have original jurisdiction in felony criminal cases. *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon 2015); TEX. GOV'T CODE ANN. § 74.094 (Vernon 2013); *see also Aguillon*, 2017 WL 3045797, at *2; *Henderson*, 526 S.W.3d at 820; *Davis*, 519 S.W.3d at 254. In counties having two or more district courts, the judges of the courts "may adopt rules governing the filing and numbering of cases, the assignment of cases for trial, and the distribution of the work of the courts as in their discretion they consider necessary or desirable for the orderly dispatch of the business of the courts." TEX. GOV'T CODE ANN. § 24.024 (Vernon Supp. 2016); *see also* TEX. GOV'T CODE ANN. § 74.093 (Vernon Supp. 2016) (addressing adoption of local rules of administration to provide, in part, for assignment, docketing, transfer, and hearing of all cases); *Henderson*, 526 S.W.3d at 820; *Aguillon*, 2017 WL 3045797, at *2; *Davis*, 519 S.W.3d at 255.

Thus, in multi-court counties, such as Harris County, although a specific district court may impanel a grand jury, it does not necessarily follow that all cases considered by that court's grand jury are assigned to that court. *See Henderson*, 526 S.W.3d at 820; *Aguillon*, 2017 WL 3045797, at *2; *Shepherd v. State*, No. 01-16-00748-CR, 2017 WL 2813165, at *1 (Tex. App.—Houston [1st Dist.] June 29, 2017, pet. ref'd) (mem. op., not designated for publication); *Davis*, 519 S.W.3d at 255 ("If a grand jury in one district court returns an indictment in a case, the case

nevertheless may be then assigned to any district court within the same county."); *Hernandez v. State*, 327 S.W.3d 200, 204 (Tex. App.—San Antonio 2010, pet. ref'd); *Bourque*, 156 S.W.3d at 678; *see also Tamez v. State*, 27 S.W.3d 668, 670 n.1 (Tex. App.—Waco 2000, pet. ref'd) (noting "the judges of the Harris County district courts exercising criminal jurisdiction have adopted a procedure by which indictments are filed in each court on a rotating basis without reference to the court which empaneled the grand jury presenting the indictments"). In other words, one court may impanel a grand jury, and if an indictment is presented, the case may be filed in another court of competent jurisdiction within the same county. *See Aguillon*, 2017 WL 3045797, at *2; *Cannon v. State*, Nos. 05-13-01109-CR, 05-13-01110-CR, 2014 WL 3056171, at *4 (Tex. App.—Dallas July 7, 2014, no pet.) (mem. op., not designated for publication); *Thornton v. State*, Nos. 05-13-00610-CR, 05-13-00611-CR, 05-13-00612-CR, 2014 WL 2946457, at *3 (Tex. App.—Dallas May 6, 2014, no pet.) (mem. op., not designated for publication).

The 230th and 337th District Courts are both criminal district courts in Harris County, Texas. They both share the same clerk, i.e., the Harris County District Clerk, and have original jurisdiction in felony criminal cases. On November 6, 2015, the State filed in the 337th District Court a complaint, alleging that "on or about September 11, 2015," appellant "did then and there unlawfully[,] while in the course

of committing theft of property owned by [the complainant], and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and place [the complainant] in fear of imminent bodily injury and death," and appellant "did then and there use and exhibit a deadly weapon, namely, a firearm." (Emphasis omitted.) On December 16, 2015, the grand jury returned a true bill of indictment concerning the same conduct. *See* TEX. CONST. art. V, § 12(b); TEX. CODE CRIM. PROC. ANN. art. 21.02 (setting out requirements of indictment); *State v. Smith*, 957 S.W.2d 163, 164–65 (Tex. App.—Austin 1997, no pet.) ("The constitutional requisites for an indictment . . . are satisfied by a written instrument accusing a person of the commission of a criminal offense with enough clarity and specificity to identify the penal statute under which the State intends to prosecute . . . ."). That indictment was presented to the Harris County District Clerk, as demonstrated by the clerk's original file stamp, and filed in the 337th District Court, the trial court where the State's complaint was originally filed. *See Shepherd*, 2017 WL 2813165, at *1 ("After the grand jury votes concerning presentment of an indictment, the State can file in any court that has jurisdiction over the case.").

Here, there is further evidence in the record that the indictment was acted upon by the grand jury and presented to, or received by, the 337th District Court. *See Henderson*, 526 S.W.3d at 820. Specifically, the grand jury foreman signed the indictment, the trial court directed the State to read the indictment to appellant in

open court prior to trial, and it accepted appellant's plea of "not guilty." *See id.* ("Logically, [defendant]'s arraignment . . . could not have occurred in the 177th District Court if the trial court had not actually received the indictment."); *Helsley v. State*, No. 07-15-00350-CR, 2017 WL 931707, at *1 (Tex. App.—Amarillo Mar. 8, 2017, pet. ref'd) (mem. op., not designated for publication); *see also* TEX. CODE CRIM. PROC. ANN. art. 12.06 (stating presentment occurs when indictment "has been duly acted upon by the grand jury and received by the court"). Thus, the 337th District Court was properly vested with jurisdiction over appellant. *See* TEX. CODE CRIM. PROC. ANN. arts. 4.05, 4.16 (Vernon 2015); *see also Aguillon*, 2017 WL 3045797, at *2 (although amended indictment signed by foreman of grand jury impaneled by 177th District Court, 184th District Count had jurisdiction when amended indictment refiled in 184th District Court, which had "first-filed related case"); *Helsley*, 2017 WL 931707, at *2 (when "[e]vidence of 'presentment'" appears in record, "it is clear that the trial court had jurisdiction to try [defendant] for the charges encompassed by the indictment"); *Williams v. State*, No. 06-14-00224-CR, 2015 WL 4071542, at *4 (Tex. App.—Texarkana July 6, 2015, no pet.) (mem. op., not designated for publication) (although indictment presented by grand jury impaneled by 291st District Court, record shows case first filed in 282nd District Court, which obtained jurisdiction); *Paz v. State*, No. 05-14-01127-CR, 2015 WL 6386424, at *10 (Tex. App.—Dallas Oct. 22, 2015, no pet.) (mem. op.,

not designated for publication) ("Jurisdiction over felony cases, such as this case, lies in the district court or criminal district court where the indictment is first filed.").

Appellant argues that "[a] grand jury impaneled by one [trial] court cannot present an indictment to a different [trial] court" because "a grand jury serves [one] particular court." However, this Court has expressly rejected this argument on at least four previous occasions. *See Henderson*, 526 S.W.3d at 819–21 (rejecting argument 177th District Court of Harris County, Texas never acquired jurisdiction over defendant because grand jury from 182nd District Court of Harris County, Texas presented indictment); *Shepherd*, 2017 WL 2813165, at *1; *Hernandez v. State*, No. 01-15-00837-CR, 2017 WL 1416877, at *2 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication) (defendant argued trial court, 263rd District Court of Harris County, Texas, lacked jurisdiction because grand jury of different court, 184th District Court of Harris County, presented indictment); *Davis*, 519 S.W.3d at 254–56 (rejecting argument 184th District Court of Harris County, Texas did not acquire jurisdiction over defendant because grand jury from 178th District Court of Harris County, Texas presented indictment). And we have repeatedly held that a trial court is not deprived of jurisdiction over a criminal defendant in circumstances such as those presented in the instant case. *See, e.g.*, *Henderson*, 526 S.W.3d at 819–21; *Shepherd*, 2017 WL

2813165, at *1; *Hernandez*, 2017 WL 1416877, at *2; *Davis*, 519 S.W.3d at 254–56.

Further, we have previously explained that, at best, appellant's arguments present a procedural issue related to his indictment. *See Henderson*, 526 S.W.3d at 821; *Shepherd*, 2017 WL 2813165, at *1; *Hernandez*, 2017 WL 1416877, at *2; *Davis*, 519 S.W.3d at 254–56. And although a jurisdictional defect in an indictment may be challenged for the first time on appeal, a procedural deficiency in regard to an indictment may not. *See Cook*, 902 S.W.3d at 480; *Henderson*, 526 S.W.3d at 821; *Hernandez*, 2017 WL 1416877, at *2; *Davis*, 519 S.W.3d at 256; *see also Mosley v. State*, 354 S.W.2d 391, 393–94 (Tex. Crim. App. 1962); *Lemasurier v. State*, 91 S.W.3d 897, 899–900 (Tex. App.—Fort Worth 2002, pet. ref'd) (holding defendant waived error regarding procedural deficiency with indictment by failing to timely file plea to jurisdiction); *Tamez*, 27 S.W.3d at 670–71 (holding defendant waived appellate complaint indictment filed in district court other than district court which impaneled grand jury because such defect "concern[ed] a procedural irregularity which [the defendant] should have raised in a pre-trial motion"). Here, appellant did not object to the indictment or the proceedings in the trial court.

Accordingly, we hold that the trial court had jurisdiction over this case and appellant's failure to object to the indictment or the proceedings in the trial court prior to trial constitutes a waiver of his right to challenge any procedural irregularity

related to his indictment on appeal. *See Henderson*, 526 S.W.3d at 819–21; *Hernandez*, 2017 WL 1416877, at *2.

We overrule appellant's first issue.

"Summoning Witness/Mileage" Fee

In his second issue, appellant argues that the $200 "Summoning Witness/Mileage" fee[5] assessed against him, an indigent criminal defendant, by the trial court is (1) facially unconstitutional because it violates the Separation of Powers clause of the Texas Constitution and (2) unconstitutional as applied to him because it violates his constitutional rights to compulsory process and confrontation.[6] *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10 (rights to compulsory process and confrontation), TEX. CONST. art. II, § 1 (separation of powers); *see also* TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 2005).

We review the constitutionality of a criminal statute de novo as a question of law. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013); *Maloney v. State*, 294

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[5] *See* TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b) (imposing $5 charge on defendant convicted of felony "for summoning [each] witness" and requiring defendant to pay "29 cents per mile for mileage required of an officer to perform a service . . . and to return from performing that service").

[6] Although the State does not challenge appellant's preservation of his second issue for appeal, we note that a defendant may challenge the imposition of mandatory court costs for the first time on direct appeal when those costs are not imposed in open court and the judgment does not contain an itemization of the imposed court costs. *See London v. State*, 490 S.W.3d 503, 506–07 (Tex. Crim. App. 2016); *see also Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Casas v. State*, 524 S.W.3d 921, 925 (Tex. App.—Fort Worth 2017, no pet.).

S.W.3d 613, 626 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). When presented with a challenge to the constitutionality of a statute, we presume that the statute is valid and the legislature has not acted unreasonably or arbitrarily. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002); *Maloney*, 294 S.W.3d at 626. The party challenging the statute has the burden to establish its unconstitutionality. *Rodriguez*, 93 S.W.3d at 69; *Maloney*, 294 S.W.3d at 626. We must uphold the statute if we can apply a reasonable construction that will render it constitutional. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979); *see also Maloney*, 294 S.W.3d at 626 (if statute can be interpreted in two different ways, one of which sustains its validity, we apply interpretation sustaining its validity).

"A facial challenge to a statute is the most difficult challenge to mount successfully" because it is an attack on the statute itself, rather than a particular application of it. *Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992); *Toledo v. State*, 519 S.W.3d 273, 279 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). To prevail on a facial challenge to a statute, the challenging party must establish that no set of circumstances exists under which the statute would be constitutionally valid. *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013); *see also Horhn v. State*, 481 S.W.3d 363, 372 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

Appellant argues that the $200 "Summoning Witness/Mileage" fee assessed against him, an indigent criminal defendant, by the trial court, violates the Separation of Powers clause of the Texas Constitution and constitutes an impermissible tax collected by the judiciary because "the funds" received for the fee are "not directed by statute to be used for a criminal justice purpose." Instead, "the funds" are "directed towards the general revenue fund of the county" "in which the convicting court is located."

Article II, section 1, of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1; *see also Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987) ("[This] single, tersely phrased paragraph, provides that the constitutional division of the government into three departments (Legislative, Executive and Judicial) shall remain intact, 'except in the instances herein expressly permitted.'" (quoting TEX. CONST. art. II, § 1)). "This division ensures that [the] power granted [to] one branch may be exercised by only that branch, to the exclusion of the others." *Ex parte Lo*, 424 S.W.3d at 28; *see also Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001) ("The

separation-of-powers doctrine prohibits one branch of government from exercising a power inherently belonging to another branch."); *Meshell*, 739 S.W.2d at 252 ("[A]ny attempt by one department of government to interfere with the powers of another is null and void." (internal quotations omitted)).

The Separation of Powers clause is violated "when one branch of government assumes or is delegated a power more properly attached to another branch." *Ex parte Lo*, 424 S.W.3d at 28 (internal quotations omitted); *see also Salinas v. State*, 523 S.W.3d 103, 106–07 (Tex. Crim. App. 2017); *Hernandez v. State*, No. 01-16-000755-CR, --- S.W.3d ---, 2017 WL 3429414, at *6 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, no pet. h.). Relevant to the instant case, a court is delegated a power more properly attached to the executive branch, rather than to the judiciary, where a statute turns the court into a "tax gatherer[]"; however, the collection of fees by a court in a criminal case constitutes a judicial function where "the statute under which [the] court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for [a] legitimate criminal justice purpose[]." *Salinas*, 523 S.W.3d at 107, 109 n.26 (quoting *Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015)) (explaining "[t]he issue is whether the fee in question is a court cost (which is allowed) or a tax (which is unconstitutional)"); *Hernandez*, 2017 WL 3429414, at *6; *see also Casas v. State*, 524 S.W.3d 921, 925–27 (Tex. App.—Fort Worth 2017, no pet.) ("Although courts may not operate as tax

gatherers, which is a function reserved to the executive branch of government, courts may collect fees in criminal cases as part of its judicial function if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such costs to be expended for legitimate criminal justice purposes." (internal quotations omitted)).

"What constitutes a legitimate criminal justice purpose is a question to be answered on a statute-by-statute/case-by-case basis." *Salinas*, 523 S.W.3d at 107; *see also Peraza*, 467 S.W.3d at 518. "And the answer to that question is determined by what [a] governing statute says about the intended use of the funds, not whether [the] funds are actually used for a criminal justice purpose." *Salinas*, 523 S.W.3d at 107, 109 n.26; *see also Casas*, 524 S.W.3d at 926. In other words, the relevant statute must direct "that the funds be used for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system." *Salinas*, 523 S.W.3d at 109 n.26.

As the Texas Court of Criminal Appeals has noted, "[w]hen a defendant is convicted in a criminal case, various statutes require [him to] pay[] [certain] fees as court costs." *Salina*s, 523 S.W.3d at 105. Article 102.011(a)(3) and (b) require a defendant "convicted of a felony or misdemeanor" to pay fees for certain services "performed . . . by a peace officer," including "$5 for summoning [each] witness"

and "29 cents per mile for mileage required of an officer to perform [the] service . . . and to return from performing that service." TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b) (Vernon Supp. 2016).

In *Salinas*, the court of criminal appeals recently held that Local Government Code section 133.102, which requires a person convicted of a criminal offense to pay a "Consolidated Court Cost" fee,[7] violates the Separation of Powers clause of the Texas Constitution to the extent that it allocates funds received from the fee to the "abused children's counseling" account.[8] 523 S.W.3d at 105, 109–110 & n.26 (internal quotations omitted). In doing so, the court explained that the funds received

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[7] *See* TEX. LOCAL GOV'T CODE ANN. § 133.102(a) (Vernon Supp. 2016) ("A person convicted of an offense shall pay as a court cost, in addition to all other costs: (1) $133 on conviction of a felony; (2) $83 on conviction of a Class A or B misdemeanor; or (3) $40 on conviction of a nonjailable misdemeanor offense, including a criminal violation of a municipal ordinance, other than a conviction of an offense relating to a pedestrian or the parking of a motor vehicle."); *see also Salinas v. State*, 523 S.W.3d 103, 105 (Tex. Crim. App. 2017) (under section 133.102, "the defendant pays a single fee, but the money from that fee is divided up among a variety of different state government accounts according to percentages dictated by the statute").

[8] The court also held that section 133.102 is unconstitutional to the extent that it allocates funds received from the fee to the "[c]omprehensive [r]ehabilitation" account because such funds serve "[n]o criminal justice purpose." *Salinas*, 523 S.W.3d at 107–08 (internal quotations omitted). Since *Salinas*, the court of criminal appeals has repeatedly held that the portions of the "Consolidated Court Cost" fee that allocates funds received from the fee to the "abused children's counsel" account and the "comprehensive rehabilitation" account are unconstitutional. *See Johnson v. State*, No. PD-1254-15, --- S.W.3d ---, 2017 WL 4414026, at *1 (Tex. Crim. App. Oct. 4, 2017); *Davis v. State*, No. PD-1314-15, 2017 WL 4410265, at *1 (Tex. Crim. App. Oct. 4, 2017); *Guerrero v. State*, Nos. PD-0665-15, PD-0666-15, 2017 WL 4410256, at *1 (Tex. Crim. App. Oct. 4, 2017); *Penright v. State*, --- S.W.3d ---, 2017 WL 4169069, at *1 (Tex. Crim. App. Sept. 20, 2017).

from the "Consolidated Court Cost" fee that are allocated to the "abused children's counseling" account are actually "deposited in the [State's] General Revenue Fund." *Id.* at 110 (internal quotations omitted). Accordingly, the court concluded:

> We cannot uphold the constitutionality of funding [the "abused children's counseling"] account through court costs on the basis of its name or its former use when all the funds in the account go to *general revenue*. Consequently, the allocation of funds to the "abused children's counseling" account does not currently qualify as an allocation of funds "to be expended for legitimate criminal justice purposes." To the extent that § 133.102 allocates funds to the "abused children's counseling" account, it is facially unconstitutional in violation of the Separation of Powers provision of the Texas Constitution.

Id. at 110 (emphasis added). Essentially, the court of criminal appeals explained that there are "limits" to the types of fees that the legislature "c[an] require the courts to collect" and "it is [simply] not enough that some of the funds [received from the "Consolidated Court Cost" fee] may ultimately benefit someone who has some connection with the criminal justice system." *Id.* at 109 n.26.

Recently, this Court, relying on the court of criminal appeals' decision in *Salinas*, addressed the issue of whether the $25 "[P]rosecutor's fee" assessed against a defendant, pursuant to Texas Code of Criminal Procedure article 102.008(a), is unconstitutional because it violates the Separation of Powers clause of the Texas Constitution. *See Hernandez*, 2017 WL 3429414, at *6–7. In doing so, we explained that article 102.008(a) requires "a defendant convicted of a misdemeanor" to pay "a fee of $25 for the trying of [his] case by the district or county attorney." *Id.* at *6

(quoting TEX. CODE CRIM. PROC. ANN. art. 102.008(a) (Vernon 2006)). However, "[t]he statute does not [actually] state where the [funds from the] $25 [Prosecutor's] fee [are] to be directed." *Id.*

Instead, the Office of Court Administration's website shows that "100% of the money collected" from the "[P]rosecutor's fee" remains "with the [c]ounty (or the [c]ity," which the court serves, and "is directed to the [c]ounty's (or [c]ity's) General Fund." *Id.* at *6 (quoting Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 6–7 in Criminal Court Costs Section (Fee No. 13, "Prosecutor's Fee"), http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf (purpose of study, ordered by Senate Bill 1908, to "identif[y] each statutory law imposing a court fee or costs in a court in this state" and "[d]etermine whether each identified fee or cost is necessary to accomplish the stated statutory purpose"))[9]; *see also Salinas*, 523 S.W.3d at 110 (noting, based on Texas Comptroller's website, funds collected for "abused children's counseling" fee "deposited in the [State's] General Revenue

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[9] The study conduct by the Office of Court Administration identified several concerns, including the fact that "some fees and costs [ordered to be collected from criminal defendants] have no stated statutory purpose," "court fees and costs collected from [criminal defendants] are oftentimes used to fund programs outside of and unrelated to the judiciary," and "many court fees and costs are collected for a purpose but [are] not dedicated or restricted to be used exclusively for that intended purpose." *See* Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 2, http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf.

Fund"). "Money in a county's [or city's] general fund can be spent for 'any proper county [or city] purpose.'" *Hernandez*, 2017 WL 3429414, at *6 (quoting Tex. Att'y Gen. Op. No. JM-530 (1986)).

Thus, relying on *Salinas*, we explained that "the constitutional infirmity" in *Hernandez* was article 102.008(a)'s "failure to *direct* the funds [received from the "[P]rosecutor's fee"] to be used in a manner that would make [the fee] a court cost (i.e., for something that is a criminal justice purpose)." *Id.* at *7 (quoting *Salinas*, 523 S.W.3d at 109 n.26). And article 102.008(a) "operates unconstitutionally every time the fee is collected, making the statute unconstitutional on its face." *Id.* (quoting *Salinas*, 523 S.W.3d at 109 n.26). Further, we noted that although "some of the money collected" from the "[P]rosecutor's fee" "may ultimately be spent on something that would be a legitimate criminal justice purpose," this "is not sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost." *Id.* (quoting *Salinas*, 523 S.W.3d at 109 n.26).

Accordingly, we concluded that article 102.008(a) does not direct the funds from the $25 "[P]rosecutor's fee" to be expended for a criminal justice purpose. *Id.* And we held that article 102.008(a) is unconstitutional because "it allocates funds to the . . . general fund" of the county that the court serves, thereby allowing such funds to be spent "for purposes other than legitimate criminal justice purposes in violation

of the [S]eparation of [P]owers [clause] of the Texas Constitution." *Id.*; *see also Salinas*, 523 S.W.3d at 109–10 ("We cannot uphold the constitutionality of funding th[e] ["abused children's counseling" account . . . when all the funds in the account go to [the State's] general revenue."); *Peraza*, 467 S.W.3d at 518 n.17 (agreeing "court costs should [generally] relate to the recoupment of judicial resources"); *Casas*, 524 S.W.3d at 925–27 (holding Code of Criminal Procedure article 102.0185 unconstitutional where "monies collected" from "emergency-services cost" allocated to general revenue fund); Tex. Att'y Gen. Op. No. JC-0158 (1999) ("Court fees that are used for general purposes are characterized as taxes, and a tax imposed on a litigant . . . violat[es] . . . the constitution."). Accordingly, we modified the trial court's judgment to delete the $25 "[P]rosecutor's fee" from the costs assessed against the defendant. *Hernandez*, 2017 WL 3429414, at *7.

Although, in the instant case, we do not address the constitutionality of the "[P]rosecutor's fee," we must determine whether the "Summoning Witness/Mileage" fee assessed against criminal defendants, including appellant, pursuant to Texas Code of Criminal Procedure article 102.011(a)(3) and (b), is facially unconstitutional because it violates the Separation of Powers clause of the Texas Constitution. *See* TEX. CONST. art. II, § 1. And the rationale utilized by this Court in *Hernandez* and by the court of criminal appeals in *Salinas* applies.

As we noted in *Hernandez*, although article 102.011(a)(3) and (b) require a defendant "convicted of a felony or misdemeanor" to pay fees for certain services "performed . . . by a peace officer," including "$5 for summoning [each] witness" and "29 cents per mile for mileage required of an officer to perform [the] service . . . and to return from performing that service," "[t]he statute does not [actually] state where the [funds received from the] fee [are] to be directed." *See* TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(3), (b); *Hernandez*, 2017 WL 3429414, at *6.

Instead, the Office of Court Administration's website shows that, in regard to article 102.011(a)(3) and (b), "100% of the money" collected from the "Summoning Witness/Mileage" fee, including appellant's money, remains "with the county or city which the [c]ourt serves" and is directed to that county's or city's "General Fund." *See* Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014), at 12, 51 in Criminal Court Costs Section (Fee No. 26, "Peace Officer Fee – Summoning a Witness"; Fee No. 118, "Peace Officer Fee – Mileage"), http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf. Further, the Office of Court Administration's website explains that if a "peace officer" is employed by the State then "the [c]ity or [c]ounty," which the court serves, "keeps 80% of the ["Summoning Witness/Mileage"] fee," which is then "direct[ed] . . . to the [c]ounty's (or [c]ity's)

General Fund," while "[t]he [remaining] 20% of the money [collected from the "Summoning Witness/Mileage" fee] is sent to the State for deposit in the State's General Revenue Fund." *Id.* And because the funds received from the "Summoning Witness/Mileage" fee are "directed to the General Fund (at both the State and local level)," they "need not be spent only on law enforcement [purposes]." *Id.*; *see also Hernandez*, 2017 WL 3429414, at *6 ("Money in a county's [or city's] general fund can be spent for 'any proper county [or city] purpose.'" (quoting Tex. Att'y Gen. Op. No. JM-530 (1986))); *Casas*, 524 S.W.3d at 925–27 (article 102.0185 unconstitutional where funds collected from "emergency-services cost" allocated to general revenue fund); Tex. Att'y Gen. Op. No. JC-0158 (1999) ("Court fees that are used for general purposes are characterized as taxes, and a tax imposed on a litigant . . . violat[es] . . . the constitution.").

Thus, in this case, as in *Hernandez* and *Salinas*, "the constitutional infirmity" is article 102.011(a)(3) and (b)'s "failure to *direct* the funds [received from the "Summoning Witness/Mileage" fee] to be used in a manner that would make [them] a court cost (i.e., for something that is a criminal justice purpose)." *Hernandez*, 2017 WL 3429414, at *7 (quoting *Salinas*, 523 S.W.3d at 109 n.26); *see also Peraza*, 467 S.W.3d at 517 ("[I]f [a] statute under which court costs are assessed . . . provides for an allocation of . . . court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render

the courts tax gatherers in violation of the [S]eparation of [P]owers clause."); *Toomer v. State*, No. 02-16-00058-CR, 2017 WL 4413146, at *3 (Tex. App.—Fort Worth Oct. 5, 2017, no pet. h.) (mem. op.); *Casas*, 524 S.W.3d at 927 (because "[n]either the statute authorizing the collection of the emergency-services cost nor its attendant statutes direct the funds to be used for a legitimate, criminal-justice purpose; . . . it is a tax that is facially unconstitutional"); Tex. Att'y Gen. Op. No. JC-0158 (1999) ("Court fees that are used for general purposes are characterized as taxes, and a tax imposed on a litigant . . . violat[es] . . . the constitution."). And this means that article 102.011(a)(3) and (b) operate unconstitutionally every time that the "Summoning Witness/Mileage" fee is collected. *See Salinas*, 523 S.W.3d at 109 n.26; *see also Hernandez*, 2017 WL 3429414, at *7.

Further, even if "some of the money collected" from the "Summoning Witness/Mileage" fee was "ultimately [to] be spent on something that would [constitute] a legitimate criminal justice purpose," this would not be "sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost." *Hernandez*, 2017 WL 3429414, at *7 (quoting *Salinas*, 523 S.W.3d at 109 n.26).

We conclude, as we did in *Hernandez*, that article 102.011(a)(3) and (b) do not direct the funds received from the "Summoning Witness/Mileage" fee to be expended for a criminal justice purpose. *Id.*; *see also Salinas*, 523 S.W.3d at 109–

10; *Peraza*, 467 S.W.3d at 517 ("[I]f [a] statute under which court costs are assessed . . . provides for an allocation of . . . court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the [S]eparation of [P]owers clause.") Accordingly, we hold that article 102.011(a)(3) and (b) are facially unconstitutional as they "allocate[] [the] funds" received from the "Summoning Witness/Mileage" fee to the general revenue fund of either the county or the State and allow such money to be spent "for purposes other than legitimate criminal justice purposes in violation of the [S]eparation of [P]owers [clause] of the Texas Constitution." *Hernandez*, 2017 WL 3429414, at *7; *see also Salinas*, 523 S.W.3d at 109–10 ("We cannot uphold the constitutionality of funding th[e] ["abused children's counseling"] account . . . when all the funds in the account go to general revenue."); *Peraza*, 467 S.W.3d at 518 n.17 (agreeing "court costs should [generally] relate to the recoupment of judicial resources"). We modify the trial court's judgment to delete the $200 "Summoning Witness/Mileage" fee from the assessed court costs. *Hernandez*, 2017 WL 3429414, at *7; *see also Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013) (holding proper remedy when trial court erroneously includes amounts as court costs is to modify judgment to delete erroneous amounts).

We sustain appellant's second issue.[10]

Conclusion

We affirm the judgment as modified.

Terry Jennings
Justice

Panel consists of Justices Jennings, Bland, and Brown.

Publish. TEX. R. APP. P. 47.2(b).

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[10] Having held that article 102.011(a)(3) and (b) are facially unconstitutional in violation of the Separation of Powers clause of the Texas Constitution, we need not address appellant's arguments that the $200 "Summoning Witness/Mileage" fee is unconstitutional as applied to him because it violates his constitutional rights to compulsory process and confrontation. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10 (rights to compulsory process and confrontation); *see also* TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 2005); TEX. R. APP. P. 47.1.