

COURT OF APPEALS OF TEXAS, HOUSTON (FIRST DISTRICT)

Peraza v. State

2014 WL 7476214 (Tex. App.—Houston [1st Dist.] Dec. 30, 2014) · No. Nos. 01-12-00690-CR and 01-12-00691-CR · Decided January 29, 2015

OPINION

PER CURIAM.

PD-0100&0101-15 January 29, 2015 PD _____ IN THE COURT OF CRIMINAL APPEALS
OF TEXAS _____ OSMIN PERAZA,
Appellant, v. THE STATE OF TEXAS, Appellee.
_____ On Petition for Discretionary Review
from the First Court of Appeals in Nos. 01-12-00690-CR and 01-12-00691-CR affirming the
conviction in cause numbers 1305483 and 1305439, From the 184th District Court of Harris
County, Texas _____ APPELLANT’S
PETITION FOR DISCRETIONARY REVIEW
_____ ORAL ARGUMENT NOT
REQUESTED ALEXANDER BUNIN Chief Public Defender Harris County, Texas JANI
MASELLI WOOD Assistant Public Defender Harris County, Texas TBN.

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(713) 368-9278 Counsel for Appellant January 25, 2015 TABLE OF CONTENTS PAGE Table of
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Wendell Hall, Hall’s Standard of Review in Texas, 42 St. Mary’s L.J. 3, 16 (2010). 9 iii STATEMENT REGARDING ORAL ARGUMENT Oral argument is not requested. STATEMENT OF THE CASE This is an appeal from two separate cause numbers: 1305438 and 1305439.1 Mr. Peraza pled guilty to two different felony offenses of aggravated sexual assault of a child. (C.R.1 at 59; C.R.2 at 61). See TEX. PENAL CODE § 22.021.		
The Court took the plea under advisement and a PSI hearing was held. (C.R.1 at 144; C.R.2 at 146). At the PSI hearing, Mr. Peraza sought to withdraw his guilty plea, but the court denied the request. (2 R.R. at 6-9).		
After the presentation of witnesses, the court sentenced Mr. Peraza to 25 years imprisonment on each case to run concurrently. (C.R.1 at 73; C.R.2 at 75; 2 R.R. at 39). Motions for new trial and motions in arrest of judgment were filed in both cases on August 13, 2012. (C.R.1 at 91, 116; C.R.2 at 94, 120).		
On August 16, 2012, the motions were presented and the court denied a hearing and denied the motions that same day. (C.R.1 at 113-15, 139-41; C.R.2 at 117-19, 143-45). Notice of appeal was timely filed. (C.R.1 at 78; C.R.2 at 80). 1 Cause Number 1305438 [01-12-00690-CR] will be designated as C.R.1 and Cause Number 1305439 [01-12-00691-CR] will be designated as C.R.2.		
There is only one reporter’s record for both cause numbers. -1- STATEMENT OF THE PROCEDURAL HISTORY In a published opinion, the First Court of Appeals affirmed Mr.		

Peraza's conviction, but modified the judgment as to certain court costs. Peraza v. State, No. 01-12-00690-CR, No. 01-12-00691-CR, 2014 WL 7476214 (Tex. App. – Houston [1st Dist.] December 30, 2014, no pet. history).

There was a concurring and dissenting opinion by Justice Brown concurring to the affirming of the conviction and dissenting to the modification of the judgment. Id. No motion for rehearing was filed. This petition is timely if filed on or before January 30, 2015. -2- GROUND FOR REVIEW The Court of Appeals erred in determining there was no evidence Mr. Peraza's guilty pleas were coerced.

The trial attorney stated on the record that Mr. Peraza was pressured into making his plea. Did the Court of Appeals err in holding that the trial court did not abuse its discretion in refusing to allow Mr. Peraza to withdraw his guilty plea? REASON FOR REVIEW The First Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States.

TEX. R. APP. P. 66.3(C). STATEMENT OF FACTS RELATIVE TO GROUND RAISED Mr. Peraza pled guilty to two different indictments - both alleging aggravated sexual assault of a child under 14. (C.R.1 2, 59; C.R.2 at 2, 75).

The docket sheets reflect that on May 3, 2012: Defendant waived arraignment and entered a plea of GUILTY. Defendant, appearing to be sane, is admonished by the Court of the consequences of said plea. Penalty recommendation of the State is: WITHOUT AN AGREED RECOMMENDATION/PSI HEARING.

The Court found sufficient evidence of guilt but made no finding of guilt. RESET FOR SENTENCING. (C.R.1 at 144; C.R.2 at 146). At the start of the PSI hearing, the following colloquy occurred: MS. DETOTO: On behalf of the defendant, Mr. Osmin Peraza, I am requesting that his guilty plea to the offenses be withdrawn. According to the Presentence report and my conversations with Mr. Peraza, Mr. Peraza was coerced into confessing to this offense.

He, according to the -3- offense report, did a polygraph; and they informed him that he failed. Immediately thereafter, coincidentally, he confesses to the offenses. It's my opinion that that -- the initial confession was coerced; and but for that act of coercion on the part of law enforcement, Mr. Peraza never would have pled guilty to the offense on the trial date.

If you looked at the date that his guilty pleas took place, it happened to be while the jury was on the way on the trial date, which leads further -- which is further evidence that his guilty pleas were coerced. And as further evidence that -- THE COURT: I'm sorry. You're saying that having the jury on the way is a form of coercion? MS. DETOTO: I am, Your Honor.

And that's why Mr. Peraza felt pressured to make that decision. Thirdly, Your Honor, the PSI, in his version of the offense, he denies the offense; and so, that would be evidence that his guilty pleas were not freely and voluntarily made. So, I'm asking you for permission to withdraw his guilty pleas in both offenses. I note -- I have a feeling that somewhere down the road, if we do not do that today, a Motion for New Trial would be filed, alleging the very same things that I'm alleging.

We might have to have a hearing on that Motion for New Trial, and I would just hate for us to have to do this all over again, for the victim's sake. So, I'm respectfully asking that the guilty pleas be withdrawn. I have had cases that have lasted a lot longer than Mr. Peraza's case.

We just tried one in here, and I don't think that -- my request to withdraw the guilty pleas are not made for the purposes of delay, but so justice can be actually served in this case. He didn't get his day in court. I know hindsight is 20/20, but he has asked me to ask you to give him permission to withdraw the guilty pleas. THE COURT: Thank you very much.

Does the State wish to be heard on this? MS. BRUCHMILLER: Your Honor, he did get his day in court. The case was originally filed on May 7, 2011; and Mr. Peraza pled guilty to both cases on May 3, 2012. There was ample opportunity. If he wanted -4- to go to trial, he could have pled not guilty; and we could have had a trial. Both sides were ready on the day of trial.

He did meet with an officer when this case was being investigated back in May of 2012; and during the time with that officer, he confessed to committing this offense on two different occasions. I think he had counsel who had been with the case, I believe, from the beginning, for several months at least, who was working with us regarding our plans as far as whether or not we were going to go to trial.

There were several cases set that day; other defendants, as well. So, I don't believe there was any coercion on the part of the Court; and certainly I never talked to the defendant. But I feel like his plea was voluntarily made, and you asked him that during the -- sorry, sorry -- during the time of his plea. THE COURT: Thank you. I will note that I would not have taken his plea, Mr. Peraza's plea, if I had not believed at the time he was entering it freely and voluntarily.

Your motion is denied. (2 R.R. at 6-9). During this exchange, the prosecutor averred that Mr. Peraza had confessed to Officer Montoya. (2 R.R. at 10). The PSI report, which the court had a copy of, unequivocally stated Mr. Peraza denied the offense and stated the complainant was lying. (3 R.R. SX-1 PSI page 2, 5). During the PSI hearing, the father of the complainant testified he was very upset that Mr. Peraza had sexually assaulted his daughter.

(2 R.R. at 12-20). Mr. Peraza's wife testified she did not believe her husband committed the assaults and was a good man and good father. (2 R.R. at 26-29). The trial court sentenced Mr. Peraza to 25 years imprisonment on each case, to run concurrently. (2 R.R. at 39). -5-

ARGUMENT The Court of Appeals erred in determining there was no evidence Mr. Peraza's guilty pleas were coerced.

The trial attorney stated on the record that Mr. Peraza was pressured into making his plea. Did the Court of Appeals err in holding that the trial court did not abuse its discretion in refusing to allow Mr. Peraza to withdraw his guilty plea? Court of Appeals' Opinion The Court of Appeals held that despite there being no record of the guilty plea to support Mr. Peraza's case, there was sufficient evidence the plea was voluntarily made: The record, however, contains no evidence that anyone coerced appellant into pleading guilty.

Appellant voluntarily submitted to a polygraph test, and neither his failure of the polygraph test, nor the immediacy of a jury trial, constituted a threat, misrepresentation, or improper promise. Thus, appellant has not overcome the presumption that he knowingly and voluntarily entered his pleas. Peraza, 2014 WL 7476214, at *3.

The Court of Appeals determined the statements on the record by Mr. Peraza's trial attorney insufficient to support the contention that the pleas were involuntary. This is classically unfair when the absence of evidence to support the plea is disregarded. See Peraza, 2014 WL 7476214, at *2 (explaining "[h]ere, the absence of a recorded plea colloquy, alone, does not overcome the presumption that appellant was properly admonished and understood the consequences and nature of his pleas.). -6- Involuntary plea In *Brady v. United States*, 397 U.S. 742 (1970), "[t]he standard as to the voluntariness of guilty pleas" was set forth as follows: [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats,... misrepresentations (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecution's business (e.g., bribery).

See also, *Ex Parte Lewis*, 587 S.W.2d 697, 700 (Tex. Crim. App. 1979) (requirement of due course of law extends to guilty pleas). The likelihood of loss of liberty based on a plea of guilty "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969).

It is axiomatic that a guilty plea must be voluntary and intelligent to satisfy due process requirements. *Boykin*, 395 U.S. at 242-43. As the Court opined: a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension,... might be a perfect cover-up of unconstitutionality. *Boykin*, 395 U.S. at 242-43, 89 S.Ct. at 1712.

The test to determine the validity of a guilty or no contest plea is "whether the plea represents a voluntary and intelligent -7- choice among the alternative courses of action open to the

defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Due process requires that a defendant be both advised of and understand the direct consequences of a plea. *Brady*, 397 U.S. at 755.

The Supreme Court, citing Judge Tuttle of the Fifth Circuit, stated the standard as to the voluntariness of guilty pleas: [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by... misrepresentation... 242 F.2d at page 115. (emphasis supplied).

Brady, 397 U.S. at 755. (footnotes omitted). In *Carranza v. State*, 980 S.W.2d 653, 656 (Tex. Crim. App. 1998), this Court reasoned:... if a defendant’s guilty plea is not equally knowing and voluntary, it has been obtained in violation of due process and is therefore void.

Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. (emphasis supplied). *Carranza*, 980 S.W.2d at 656.

The record is silent as to what Mr. Peraza was told or explain on the day of his plea. The record is not silent regarding his desire to withdraw his guilty plea before he was found guilty and sentenced. Constitutional protections such as this, while reviewed under an abuse of discretion, are far too valuable to disregard. -8- Mr. Peraza wanted to withdraw his guilty plea.

(2 R.R. at 6-9). The trial court’s summary dismissal of the request was an abuse of discretion. Standard of Review Where a defendant decides to withdraw his guilty plea after the trial judge takes the case under advisement or pronounces judgment, the withdrawal of such plea is within the sound discretion of the trial court. *McWherter v. State*, 571 S.W.2d 312 (Tex.

Crim. App.1978). The definition of an abuse of discretion encompasses myriads of cases and law reviews, but has been explained as: “The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court’s action.” Rather, a trial court abuses its discretion if its decision is “arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles” or is “so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.” (footnotes omitted).

W. Wendell Hall, *Hall’s Standard of Review in Texas*, 42 St. Mary’s L.J. 3, 16 (2010). In *Garner’s Dictionary of Legal Usage*, it is defined as: the phrase denoting a lenient standard of reviewing a lower court’s judgment, signifies “no single level of deference or scrutiny.” The “variability of the phrase is not hopeless. It just means that generalizations about the standard may not be helpful.

Abuse in this context is not pejorative; the word here is wholly unrelated to the meaning of the term when used in common parlance.” -9- Bryan A. Garner, *Garner’s Dictionary of Legal Usage*

10 (Oxford Univ. Press, 3d Ed. 2011)(1987).

The trial court's refusal to even consider the withdrawal based upon an unrecorded plea colloquy that occurred months earlier was unreasonable. The court's explanation that "I will note that I would not have taken his plea, Mr. Peraza's plea, if I had not believed at the time he was entering it freely and voluntarily" is stout, but unreasonable. (2 R.R. at 9).

The court failed to consider Mr. Peraza's assertion of innocence. The court failed to consider any reason for the withdrawal, merely relying upon a belief that the court never takes an involuntary plea. That reasoning is "without reference to [any] guiding [rules and] principles." The record is silent as to the plea colloquy.

The passing of a case for a PSI report is considered "[taking] the case under advisement." Jackson v. State, 590 S.W.2d 514, 515 (Tex. Crim. App. [Panel Op.] 1979). A judge is free to make any finding based on the evidence regardless of the plea; withdrawal of a guilty plea is not required even when evidence in a PSI raises an issue of a defendant's innocence.

Fisher v. State, 104 S.W.3d 923, 924 (Tex. App.-Houston [14th Dist.] 2003, no pet.). Typically, proper admonishments by a trial court establish prima facie proof that a guilty plea was entered knowingly and voluntarily. Martinez v. State, 981 S.W.2d 195, 197 (Tex. Crim. App.1998); Houston v. State, 201 S.W.3d 212, 217 (Tex. App.-Houston [14th Dist.] 2006, no pet.).

In the case sub judice, the plea was not taken by a court reporter. There is no evidence to support the plea colloquy was correct. What is present in the record is an attorney requesting that her client be able to withdraw his plea.

The attorney made an appropriate argument that Mr. Peraza felt coerced into pleading guilty. The PSI (despite the State's assertions of a confession) establish that Mr. Peraza repeatedly denied the offense. In this case, the burden has shifted to Mr. Peraza to show he pleaded guilty without understanding the consequences of his plea and, consequently, suffered harm.

Houston, 201 S.W.3d at 217. The PSI hearing supports the proposition that Mr. Peraza wished to withdraw his plea. And the voluntariness of a defendant's plea should never be so summarily dismissed with the statement by the court that the plea would not have been taken had it not been "freely and voluntarily" entered. (2 R.R. at 9). -11- PRAYER FOR RELIEF For the reasons states above, Mr. Peraza prays that this Court grant his petition.

Respectfully submitted, Jani Maselli Wood _____ JANI J. MASELLI WOOD Assistant Public Defender Harris County, Texas Jani.Maselli@pdo.hctx.net TBN. 00791195 1201 Franklin Street, 13th Floor Houston, Texas 77002 Phone: (713) 368-0016 Fax: (713) 368-9278 Attorney for Appellant Osmin Peraza -12- CERTIFICATE OF SERVICE Pursuant to Tex. R. App.

Proc. 9.5, this certifies that on January 26, 2015, a copy of the foregoing was emailed to Lisa McMinn, State Prosecuting Attorney, and the Harris County District Attorney's Office through texfile.com at the following address: Jessica Akins Assistant District Attorney 1201 Franklin Street, 6th Floor Houston, TX 77002 akins_jessica@dao.hctx.net Lisa McMinn Lisa.McMinn@SPA.texas.gov Jani Maselli Wood _____ JANI J. MASELLI WOOD -13- CERTIFICATE OF COMPLIANCE Pursuant to proposed Rule 9.4(i) (3), undersigned counsel certifies that this petition complies with the type-volume limitations of TEX. R. APP.

PROC. 9.4(I)(2)(D). 1. Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (I)(1), this petition contains 3393 words printed in a proportionally spaced typeface. 2. This petition is printed in a proportionally spaced, serif typeface using Garamond 14 point font in text and Garamond 14 point font in footnotes produced by Corel WordPerfect software. 3.

Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Tex. R. App. Proc. 9.4(j), may result in the Court's striking this brief and imposing sanctions against the person who signed it. Jani Maselli Wood _____ JANI J. MASELLI WOOD -14- Appendix A Opinion Peraza v. State Peraza v. State, --- S.W.3d ---- (2014) We modify the trial court's judgments and affirm as modified.

2014 WL 7476214 Only the Westlaw citation is currently available. NOTICE: THIS OPINION HAS NOT BEEN RELEASED Background FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO A Harris County Grand Jury issued a true bill of indictment, REVISION OR WITHDRAWAL. accusing appellant of committing two separate offenses of aggravated sexual assault of a child less than fourteen years OPINION of age.

After his arrest, appellant failed a polygraph test and then admitted to a police officer that he had committed the Court of Appeals of Texas, offenses. He subsequently pleaded guilty to committing the Houston (1st Dist. offenses.

In his plea papers, appellant admitted that he had intentionally and knowingly caused both the mouth of the complainant, a person younger than fourteen years of age, to Osmin Peraza, Appellant contact his sexual organ and the sexual organ of the v. complainant to contact his sexual organ.

In each case, The State of Texas, Appellee appellant also signed written admonishments, representing NO. 01-12-00690-CR, NO. 01-12-00691-CR | that he was mentally competent, understood the nature of the Opinion issued December 30, 2014 charge against him and the consequence of his plea, and freely and voluntarily pleaded guilty to the offense. Appellant's attorney signed the plea papers, affirming that she On Appeal from the 184th District Court, Harris

County, believed that appellant had executed his pleas knowingly, Texas, Trial Court Case Nos. 1305438 and 1305439 voluntarily, and after a full discussion of the consequences of his pleas.

The trial court found sufficient evidence of Attorneys and Law Firms appellant's guilt in both cases and that appellant had entered his guilty pleas freely, knowingly, and voluntarily. And it Jani Maselli, Assistant Public Defender, Houston, TX, for admonished appellant of his legal rights, accepted his guilty appellant. pleas, and ordered a presentence investigation in each case.

Devon Anderson, District Attorney, Jessica Akins, Assistant At the sentencing hearing, appellant moved to withdraw his District Attorney, Houston, TX, for State. guilty pleas, arguing that they had been coerced. After finding Panel consists of Justices Jennings, Sharp, and Brown. that appellant had pleaded guilty freely and voluntarily, the trial court denied his motion.

OPINION In its judgment of conviction in each case, the trial court ordered appellant to pay \$634 in court costs, including, as part of the "Sheriff's Fee," a \$50 charge for "serving capias"² Terry Jennings, Justice and a \$5 charge for an arrest without a warrant or capias.³ The trial court also included within the \$634 of court costs a \$250 *¹ Appellant, Osmin Peraza, without an agreed punishment "DNA Record Fee."⁴ Appellant then filed his motions for new recommendation from the State, pleaded guilty to two trial and in arrest of judgment, which the trial court denied separate offenses of aggravated sexual assault of a child less without a hearing. than fourteen years of age.¹ The trial court assessed his punishment at confinement for twenty-five years for each Withdrawal of Guilty Pleas offense, with the sentences to run concurrently.

In four issues, appellant contends that each judgment contains an erroneous *² In his first issue, appellant argues that the trial court erred and unsupported "Sheriff's Fee" and an unconstitutional in denying his motion to withdraw his guilty pleas because he "DNA Record Fee," the trial court erred in not permitting him did not enter the pleas voluntarily. to withdraw his guilty pleas, and it erred in denying him a hearing on his motions for new trial and in arrest of judgment.

A defendant may withdraw his guilty plea at any time before judgment is pronounced or the trial court takes the plea under advisement. Jackson v. State, 590 S.W.2d 514, 515 (Tex.Crim.App.1979); State v. Ellis, 976 S.W.2d 789, 792 © 2015 Thomson Reuters. No claim to original U.S. Government Works. 16 -16- Peraza v. State, --- S.W.3d ---- (2014) (Tex.App.–Houston [1st Dist.]

1998, no pet.). Once a plea has of his legal rights, affirmed that he was mentally competent been taken under advisement or guilt has been adjudicated, and understood the nature of the charges against him and the however, a request to withdraw the plea is untimely, and the consequences of his pleas, and agreed that he freely and withdrawal of the plea is within the sound discretion of the voluntarily pleaded guilty in each case.

Further, the plea trial court. Jackson, 590 S.W.2d at 515; Ellis, 976 S.W.2d at papers show that appellant's trial counsel and the trial court 792. After the trial court has admonished the defendant and both verified that appellant entered his guilty pleas freely, received the plea and evidence, the passage of the case for a knowingly, and voluntarily, after having fully discussed his presentence investigation constitutes taking the case under pleas and their consequences with counsel.

On this record, advisement. See Jackson, 590 S.W.2d at 514–15; Wissinger there is no evidence that appellant was not properly v. State, 702 S.W.2d 261, 262–63 (Tex.App.–Houston [1st admonished or failed to understand the consequence or nature Dist.] 1985, pet. ref d).

Because appellant did not request that of his pleas. his guilty pleas be withdrawn until after the trial court had taken his cases under advisement, we review the trial court's *3 In regard to appellant's assertion that his guilty pleas were denial of his motion to withdraw his pleas for an abuse of coerced, we note that “a plea is involuntary when it is discretion. ‘induced by threats, misrepresentations, or improper promises’ ” by the prosecutor, judge, or law enforcement officials.

Rios A trial court abuses its discretion when it acts arbitrarily, v. State, 377 S.W.3d 131, 136 (Tex.App.–Houston [1st Dist.] unreasonably, or without reference to any guiding rules or 2012, pet. ref'd) (quoting Kniatt v. State, 206 S.W.3d 657, principles. Lyles v. State, 850 S.W.2d 497, 502 664 (Tex.Crim.App.2006)).

Moreover, we presume the (Tex.Crim.App.1993); Montgomery v. State, 810 S.W.2d regularity of the judgments and proceedings, and appellant 372, 380 (Tex.Crim.App.1990). To show that the trial court has the burden of overcoming this presumption. Dusenberry, abused its discretion when it refused to allow appellant to 915 S.W.2d at 949. withdraw his guilty pleas, he must show that “the trial court's rulings lie outside the zone of reasonable disagreement.” Appellant presented no evidence that his guilty pleas were Jagaroo v. State, 180 S.W.3d 793, 802 (Tex.App.–Houston actually coerced.

At his sentencing hearing, appellant's trial [14th Dist.] 2005, pet. ref'd). counsel suggested that appellant was coerced into pleading guilty because the jury was “on the way” and appellant had Appellant first argues that there is no evidence that he failed a polygraph test immediately before admitting to a voluntarily entered his pleas because there is no record of the police officer that he had committed the sexual-assault trial court's oral discussion with him of his legal rights.

We offenses. The record, however, contains no evidence that consider the entire record in determining whether a plea was anyone coerced appellant into pleading guilty. Appellant entered voluntarily. Fimberg v. State, 922 S.W.2d 205, 207 voluntarily submitted to a polygraph test, and neither his (Tex.App.–Houston [1st Dist.] 1996, pet. ref'd). A prima facie failure of the polygraph test, nor the immediacy of a jury trial, presumption that a defendant voluntarily and knowingly constituted a threat, misrepresentation, or improper promise. pleaded guilty arises when the trial

court finds that the Thus, appellant has not overcome the presumption that he defendant was properly admonished.

See *Martinez v. State*, knowingly and voluntarily entered his pleas. 981 S.W.2d 195, 197 (Tex.Crim.App.1998); see also Tex.Code Crim. Proc. Ann. art. 26.13(b) (Vernon Supp.2014) When appellant requested to withdraw his guilty pleas, the (guilty pleas may not be accepted unless mentally competent trial court had taken his cases under advisement and reset defendant enters plea freely and voluntarily).

When the record them for a punishment hearing. Because the trial court had presents a prima facie showing that the plea was entered already admonished appellant of his legal rights and he had voluntarily and knowingly, “the burden shifts to the defendant already voluntarily pleaded guilty, his request to withdraw his to show that he entered the plea without understanding the pleas was untimely, and the trial court had discretion to accept consequences.” *Arreola v. State*, 207 S.W.3d 387, 391 or deny his motion.

See *Jackson*, 590 S.W.2d at 515. (Tex.App.–Houston [1st Dist.] 2006, no pet.). Accordingly, we hold that the trial court did not err in Here, the absence of a recorded plea colloquy, alone, does not denying appellant's motion to withdraw his guilty pleas. overcome the presumption that appellant was properly admonished and understood the consequences and nature of We overrule appellant's first issue. his pleas.

See *Dusenberry v. State*, 915 S.W.2d 947, 949–52 (Tex.App.–Houston [1st Dist.] 1996, pet. ref'd) (concluding guilty plea voluntary because defendant received written admonishments of legal rights). Although the plea colloquy Court Costs for Arrest was not recorded, appellant received written admonishments © 2015 Thomson Reuters. No claim to original U.S. Government Works.

17 -17- *Peraza v. State*, --- S.W.3d ---- (2014) In his second issue, appellant argues that the trial court's to correct and reform a trial court judgment ‘to make the judgments are invalid because they each contain an erroneous record speak the truth when it has the necessary data and and unsupported “Sheriff's Fee.” Appellant asserts that, “[a]t information to do so....’ ” (quoting *Asberry v. State*, 813 the very least, the \$50.00 Sheriff's Fee [for serving a capias] S.W.2d 526, 529 (Tex.App.–Dallas 1991, pet. ref'd))). should be removed” from the \$634 in court costs assessed against him in each judgment.

Because there is no basis in the record to support the \$50 charge for “serving capias” assessed against appellant as part A criminal defendant must pay certain statutorily mandated of the “Sheriff's Fee” in both of appellant's cases, we modify costs and fees, which vary depending on the type of offense, each judgment to delete the \$50 charge from the court costs. the underlying facts, and the procedural history of the case.

See Tex. Gov't Code Ann. § 102.021 (Vernon Supp.2014) We sustain appellant's second issue. (listing court costs upon conviction); Tex. Loc. Gov't Code Ann.. § 133.102 (Vernon Supp.2014) (same). The district Constitutionality of “DNA Record Fee” court clerk must keep a record of each fee or cost charged for a service rendered in a criminal action or proceeding.

Tex. In his third issue, appellant argues that the trial court's Code Crim. Proc. Ann. art. 103.009(a) (1) (Vernon 2006). If judgments are invalid because they each assess an a criminal action is appealed, an officer of the court must unconstitutional \$250 “DNA Record Fee.” See Tex. Code certify and sign a bill of costs and send it to the appellate Crim. Proc.

Ann. art. 102.020(a)(1) (Vernon Supp.2014) court. Tex. Code Crim. Proc. Ann. art. 103.006 (Vernon (authorizing collection of \$250 from persons convicted of 2006). offenses listed in Texas Government Code section 411.1471(a)(1)). Appellant asserts that the fee required by Court costs do not constitute part of the guilt or sentence of a article 102.020 is facially unconstitutional under the criminal defendant—“they are ‘a nonpunitive recoupment of separation of powers clause of the Texas Constitution.

See the costs of judicial resources expended in connection with Tex. Const. art. II, § 1. the trial of a case.’ ” Johnson v. State, 423 S.W.3d 385, 390 (Tex.Crim.App.2014) (quoting Armstrong v. State, 340 Whether a statute is facially constitutional is a question of law S.W.3d 759, 767 (Tex.Crim.App.2011)).

Therefore, we that we review de novo. Ex Parte Lo, 424 S.W.3d 10, 14 review the assessment of court costs to determine whether (Tex.Crim.App.2013); Ma loney v. State, 294 S.W.3d 613, there is a basis for the cost; we do not undertake an 626 (Tex.App.–Houston [1st Dist.] 2009, pet. ref'd). When evidentiary-sufficiency review. Id. reviewing a constitutional challenge, we “presume that the statute is valid and that the legislature was neither unreasonable nor arbitrary in enacting it.” Curry v. State, 186 *4 Here, the trial court clerk's bills of costs each include a S.W.3d 39, 42 (Tex.App.–Houston [1st Dist.]

2005, no pet.); \$50 charge for “serving capias” as part of the “Sheriff's Fee” see also State v. Rosseau, 396 S.W.3d 550, 557 assessed against appellant. See Tex. Code Crim. Proc. Ann. (Tex.Crim.App.2013). If the statute can be construed in two art. 102.011(a)(2) (Vernon Supp.2014) (“A defendant different ways, one of which sustains its validity, we apply the convicted of a felony or a misdemeanor shall pay... \$50 for interpretation that sustains its validity.

Maloney, 294 S.W.3d executing or processing an issued arrest warrant, capias, or at 625. capias pro fine....”). They also include a \$5 charge for an arrest without a warrant/capias. See id. art. 102.011(a)(1) The party challenging the statute bears the burden of (authorizing \$5 charge for arrest without warrant).

The State establishing the statute's unconstitutionality. Rosseau, 396 agrees that the records do not support the \$50 charge for S.W.3d at 557; Curry, 186 S.W.3d at 42. “A facial challenge “serving capias.” And the records contain no basis to to a statute is the most difficult challenge to mount conclude that capiases were issued for appellant's arrest. successfully because the challenger must establish that no set of circumstances exists under which the statute will be The proper remedy for such an unsupported fee is for the valid.”Santikos v. State, 836 S.W.2d 631, 633 appellate court to modify the judgment, not to grant a new (Tex.Crim.App.1992); see also Rosseau, 396 S.W.3d at 557. trial as appellant has requested.

See Tex. R. App. P. 43.2(b); We “must uphold the challenged statute if it can be French v. State, 830 S.W.2d 607, 609 (Tex.Crim.App.1992) reasonably construed in a manner consistent with the (agreeing “appellate court has authority to reform a [trial legislative intent and is not repugnant to the Constitution.” court] judgment to... make the record speak the truth when Curry, 186 S.W.3d at 42. the matter has been called to its attention by any source”); see also Nolan v. State, 39 S.W.3d 697, 698 (Tex.App.–Houston [1st Dist.]

2001, no pet.) (“An appellate court has the power © 2015 Thomson Reuters. No claim to original U.S. Government Works. 18 -18- Peraza v. State, --- S.W.3d ---- (2014) *5 Article 102.020(a)(1), titled “Costs Related to DNA that are neither necessary nor incidental to the trial Testing,” provides that a defendant convicted of certain of a criminal case.” offenses, including aggravated sexual assault of a child less than fourteen years of age, “shall pay as a cost of court: \$250 By law, “[m]oney that is required to be used for [upon] conviction....” Tex. Code Crim.

Proc. Ann. art. public roadways by the Texas Constitution or federal 102.020(a)(1). Thirty-five percent of the revenue received law and that is deposited in the state treasury to the from this “DNA Record Fee” is dedicated to the state credit of the state highway fund,... may be used highway fund, while sixty-five percent of the revenue is only: (1) to improve the state highway system; (2) to dedicated to the general revenue fund of the criminal justice mitigate adverse environmental effects that result planning account.

Id. art. 102.020(h). directly from construction or maintenance of a state highway by the department; or (3) by the Appellant argues that the “DNA Record Fee” is an Department of Public Safety to police the state impressible tax collected by the judiciary, rather than a highway system and to administer state laws relating legitimate court cost, because revenue from this fee is to traffic and safety on public roads.” Tex. Transp. dedicated to the state highway fund and criminal justice Code Ann. § 222.001(a) (Vernon 2011) (emphasis planning account and, thus, used for services that are neither added).

Section 222.002 supplements this instruction necessary nor incidental to the trial of a criminal case. In and provides that “[m]oney in the state highway fund support of his argument, appellant principally relies on Ex that is not required to be spent for public roadways Parte Carson, 143 Tex.

Crim. 498, 159 S.W.2d 126 (1942). by the Texas Constitution or federal law may be used for any function performed by the department.” In Carson, the Texas Court of Criminal Appeals considered Id. § 222.002 (Vernon 2011) (emphasis added). whether it was constitutionally permissible to impose a \$1 fee “[T]he department” referenced in section 222.002 is as a court cost in all cases filed in counties with more than the Texas Department of Transportation eight district courts or more than three county courts at law. (“TxDOT”).

Id. § 201.001(a)(2) (Vernon 159 S.W.2d at 127. The revenue collected from the \$1 fee Supp.2014); see also State v. Montgomery Cnty., was directed to the “County Law Library Fund” and 338 S.W.3d 49, 56 (Tex.App.–Beaumont 2011, pet. “available to be used for certain costs and expenses in denied) (noting “ ‘[d]epartment’ means the acquiring, maintaining and operating a law library available Department of Transportation”). to the judges of the courts and to the attorneys of litigants.” Id. The court held that the fee constituted an unconstitutional *6 Here, the “DNA Record Fee” revenue dedicated tax, not a legitimate court cost, because it was “neither to the state highway fund does not constitute money necessary nor incidental to the trial of a criminal case.” Id. at that is required, by either the Texas Constitution or 127, 130.

The court cautioned that to hold otherwise, federal law, to be used for public roadways. See Tex. Code Crim. Proc. Ann. art. 102.020(a)(1); Tex. would lead into fields of expenditures which Transp. Code Ann. § 222.001(a).

Therefore, may as well include the cost of the court pursuant to section 222.002, such money may be houses, the automobiles which officers use to used for any function of TxDOT. See Tex. Transp. apprehend criminals and even the roads upon Code Ann. §§ 201,001, 222.002. which they ride. If something so remote as a law library may be properly charged to the The stated mission of TxDOT is to “[w]ork with litigant on the theory that it better prepares the others to provide safe and reliable transportation courts and the attorneys for the performance of solutions for Texas.”⁵ Inside TxDOT: Mission, Goals their duties, it occurs to us that we might as and Values, Tex. Dep’t Transp., logically tax an item of cost for the education <http://www.txdot.gov/inside-txdot/contact-us/missi> of such attorneys and judges and even the on.html (last visited Dec.

16, 2014); see also Glenn endowments of the schools which they attend. T. Hasler, Dangerous Distractions: The Problematic Use of Wireless Communication Devices While Id. at 127. Driving, 12 Tex. Tech. Admin. L.J. 155, 168 (2010) (“TxDOT’s purpose is to facilitate effective movement throughout the state by providing safe, Appellant, likening the “DNA Record Fee” to the efficient transportation systems.”); Kyle R. Baum, law library fee in Carson, first asserts that the Comment, Rollin’ on Down the Rail: Can Texas portion of the “DNA Record Fee” dedicated to the Lead the Nation in Developing Efficient High–Speed state highway fund “is used... [to] provide services Rail this Time Around?, 45 Tex. Tech.

L.Rev. © 2015 Thomson Reuters. No claim to original U.S. Government Works. 19 -19- Peraza v. State, --- S.W.3d ---- (2014) Online 1, 2 (2013) (TxDOT's "core mission is to may be assessed against a defendant. 159 S.W.2d at 'provide safe and efficient movement of people and 127, 130.

As discussed above, the responsibilities of goods, enhance economic viability and improve the TxDOT, which under the Code of Criminal quality of life for people that travel in the state of Procedure is entitled to use thirty-five percent of the Texas by maintaining existing roadways and revenue collected by the "DNA Record Fee," do not collaborating with private and local entities to plan, relate to the trial of a criminal case.

Instead, the design, build and maintain expanded transportation responsibilities of TxDOT are far more remote from infrastructure' "). a criminal trial than the county law libraries which were to be used by the judges and attorneys for trial TxDOT is divided into twenty-two divisions, ranging preparation in Carson.

Thus, it cannot be reasonably from aviation to maritime to public transportation concluded that the portion of the revenue collected and rail, which are tasked with handling the through the "DNA Record Fee" and dedicated to the responsibilities of the department. See Tex. Transp. state highway fund constitutes a proper court cost to Code Ann. § 201.202(a) (Vernon Supp.2014) ("The be assessed against appellant or any other criminal commission shall organize the department into defendant. divisions to accomplish the department's functions... including divisions for: (1) aviation; (2) highways Accordingly, we hold that the portions of articles and roads; and (3) public transportation."); Inside 102.020(a)(1) and 102.020(h) requiring the TxDOT: Divisions, Tex. Dep't Transp., [http:// collection of the "DNA Record Fee" from appellant www.txdot.gov/inside-txdot/division.html](http://www.txdot.gov/inside-txdot/division.html) (last to be dedicated the state highway fund constitute an visited Dec.

16, 2014) ("From rail crossings to right unconstitutional tax. See Carson, 159 S.W.2d at 127, of way, traffic cameras to travel maps, and bridge 130. But see O'Bannon v. State, 435 S.W.3d 378, inspections to bid opportunities, TxDOT's divisions 380–82 (Tex.App.–Houston [14th Dist.] 2014, no handle a diverse range of services for the agency."). pet.). TxDOT is responsible for developing a statewide We note that our dissenting colleague would not transportation plan for addressing all modes of hold that the portion of the "DNA Record Fee" transportation, including highways and turnpikes, revenue dedicated to the state highway fund is an aviation, mass transportation, railroads, high-speed unconstitutional tax.

In doing so, he relies on Texas railroads, and water traffic. See Tex. Transp. Code Government Code section 411.145(c), which Ann. § 201.601(a) (Vernon Supp.2014); Robbins v. provides that "[a] fee collected under this section Limestone Cnty., 114 Tex. 345, 268 S.W. 915, 920 shall be deposited in the state treasury to the credit (1925) (agency created to "formulate and execute of the state highway fund, and money deposited to plans and policies for the location, construction

and the state highway fund under this section and under maintenance of a comprehensive system of state Articles 42.12 and 102.020(h), Code of Criminal highways and public roads”); see also Tex. Transp.

Procedure, may be used only to defray the cost of Code Ann. §§ 201.6011–622 (Vernon 2011 & administering [chapter 411, subchapter G] and Supp.2014) (listing plans and projects of TxDOT); Section 411.0205.” Tex. Gov’t Code Ann. § Brian K. Carroll, *The Road Goes on Forever* and the 411.145(c) (Vernon 2012); see also id. § 411.0205 Claims Process Never Ends: An Approach for (Vernon Supp.2014) (crime laboratory accreditation Success in Handling Texas Department of process).

Because “[s]ubchapter G governs the Transportation Construction Claims, 13 Tex. Tech. collection and management of DNA samples, Admin. L.J. 233, 234 (2012) (“The projects range including [a]ppellant’s, by [the Texas Department of from small landscaping and guardrail projects to Public Safety (“DPS”)]” and “[s]ection 411.0205 major interchanges.... TxDOT also supervises the regulates the accreditation of forensic crime construction of buildings for rest areas, area laboratories by DPS,” our dissenting colleague engineer’s offices, district offices, visitor’s centers, concludes that “the portion of the DNA Record Fee and other special purpose buildings....”). credited to the state highway fund is used to defray the costs associated with collecting, storing, and testing DNA samples” and, thus, “paying for DNA *7 The court in Carson, which constitutes binding sampling and crime-lab accreditation is a valid, precedent on this Court,⁶ held that fees which are constitutional use of the DNA Record Fee under “neither necessary nor incidental to the trial of a Carson.” criminal case” are not legitimate courts costs that © 2015 Thomson Reuters.

No claim to original U.S. Government Works. 20 -20- Peraza v. State, --- S.W.3d ---- (2014) The criminal justice planning account is In reaching his conclusion, however, our dissenting administered by the Criminal Justice Division colleague fails to consider the entire breadth of (“CJD”) of the Governor’s Office. See Tex. Gov’t subchapter G. For instance, the “DNA Database” Code Ann. § 772.006(a)(2) (Vernon 2012). provided for in chapter 411, subchapter G is used for Appellant asserts that the CJD’s “mission is to create a wide variety of purposes, including “assisting in and support programs that protect people from the recovery or identification of human remains from crime, reduce the number of crimes committed, and a disaster or for humanitarian purposes,” “assisting to promote accountability, efficiency, and in the identification of living or deceased missing effectiveness within the criminal justice system.” He persons,” “establishing a population statistics notes that it “focuses on the enhancement of database,” “assisting in identification research, Texas[’s] capacity to prevent crime, provide service forensic validation studies, or forensic protocol and treatment options, enforce laws, train staff and development,” and “retesting to validate or update volunteers, and the restoration of crime victims to the original analysis or assisting in database or DNA full physical, emotional and

mental health.” laboratory quality control.” Id. § 411.143(c) (Vernon Appellant argues that because “the courts [are] never 2012).

And the database contains DNA records from mentioned” as part of the CJD's mission or focus, the a whole host of individuals, such as “an unidentified revenue collected via the “DNA Record Fee” is not missing person or unidentified skeletal remains or used by the CJD for services that are necessary or body parts,” “a close biological relative of a person incidental to the trial of a criminal case. who has been reported missing,” and “a person at risk of becoming lost, such as a child or a person The Texas Government Code reveals that the CJD declared... mentally incapacitated.” Id. § 411.142(g) was established to: (Vernon 2012).

Notably, none of the above statutory purposes or the individual records in the DNA (1) advise and assist the governor in developing Database relate to appellant's criminal trial, despite policies, plans, programs, and proposed the fact that thirty-five percent of the revenue legislation for improving the coordination, collected via the “DNA Record Fee” may be utilized administration, and effectiveness of the criminal by DPS to “defray the cost of administering” chapter justice system; 411, subchapter G.7 See id. § 411.145(c).

(2) administer the criminal justice planning fund; *8 The Texas Court of Criminal Appeals has clearly favored a strict definition of what constitutes a (3) prepare a state comprehensive criminal justice legitimate court cost that may be assessed against a plan, to update the plan annually based on an criminal defendant. See Carson, 159 S.W.2d at 127; analysis of the state's criminal justice problems see also Salinas v. State, 426 S.W.3d 318, 329–30 and needs, and to encourage identical or (Tex.App.–Houston [14th Dist.]

2014, no pet.) substantially similar local and regional (Jamison, J., dissenting) (explaining Carson comprehensive criminal justice planning efforts; constitutes binding precedent and “the Carson Court clearly favored a strict definition of permissible (4) establish goals, priorities, and standards for ‘court costs’ in a criminal case”). And the revenue programs and projects to improve the collected via the “DNA Record Fee” to be used by administration of justice and the efficiency of law DPS for anything covered by chapter 411, enforcement, the judicial system, prosecution, subchapter G, or for crime laboratory accreditation criminal defense, and adult and juvenile under Government Code section 411.0205, is not corrections and rehabilitation; closely enough related to appellant's criminal trial to be considered constitutional.

(5) award grants to state agencies, units of local government, school districts, and private, Appellant, again relying on Carson, next asserts that nonprofit corporations from the criminal justice the portion of the “DNA Record Fee” dedicated to planning fund for programs and projects on the general revenue fund of the criminal justice consideration of the goals, priorities, and planning account also constitutes an unconstitutional standards recommended by the Criminal Justice tax.

Policy Council; © 2015 Thomson Reuters. No claim to original U.S. Government Works. 21 -21-
Peraza v. State, --- S.W.3d ---- (2014) (6) apply for, obtain, and allocate for the purposes criminal
justice projects,” with not less than twenty of this section any federal or other funds which percent
of such money going to juvenile justice may be made available for programs and projects
programs); Financial Services: Grants over \$25,000 that address the goals, priorities, and
standards Administered by the Office of the Governor, Office established in local and regional
comprehensive o f G o v e r n o r, criminal justice planning efforts or assist those
<http://governor.state.tx.us/financial-services/grants/> efforts; (last visited Dec.

16, 2014) (grants from criminal justice planning fund “support a wide range of (7) administer the
funds provided by this section projects designed to reduce crime and improve the in such a
manner as to ensure that grants received criminal [and] juvenile justice systems”); Helpful under
this section do not supplant state or local Questions and Answers for Managing Grants, funds;
Office of Governor, Criminal Justice Div., B-12 (F e b. 2 0 1 4), http://governor.state.tx.us/files/cjd/CJD_Guide_to_Grants_v7.pdf
(8) monitor and evaluate programs and projects files/cjd/CJD_Guide_to_Grants_v7.pdf
(same). funded under this section, cooperate with and render technical assistance to state agencies
and local governments seeking to reduce crime or Numerous entities are eligible to apply for
grants enhance the performance and operation of the from the criminal justice planning fund,
including criminal justice system, and collect from any state “[s]tate agencies, units of local
government, or local government entity information, data, independent school districts, nonprofit
corporations, statistics, or other material necessary to carry out Native American tribes, COGs,
universities, the purposes of this section; colleges, hospital districts, juvenile boards, regional
education service centers, community supervision *9 (9) submit a biennial report to the legislature
and corrections departments, crime control and reporting the division's activities during the
prevention districts, and faith-based organizations.” preceding biennium including the
comprehensive CJD Funding Sources, supra, at 1; see also Tex. state criminal justice plans and
other studies, Gov’t Code Ann. § 772.006(a)(5) (CJD awards evaluations, crime data analyses,
reports, or grants from criminal justice planning fund “to state proposed legislation that the
governor determines agencies, units of local government, school districts, appropriate or the
legislature requests; and and private, nonprofit corporations”); Press Release, Office of Governor,
Gov. Perry Awards \$195,000 (10) perform other duties as necessary to carry out From State
Criminal Justice Planning Funds (Jan. the duties listed in this subsection and adopt rules 2 8, 2 0 0
8), <http://governor.state.tx.us/news/press-release/5133/> (grant
recipients from criminal justice planning fund “include local units of government, independent Id.
school districts, non-profit corporations, hospitals, universities, colleges, community supervision
and corrections departments, law enforcement agencies In regard to the CJD's administration of
the criminal and councils of governments”). justice planning account, the legislature determines
and appropriates the necessary amount of money *10 Moreover, the CJD has awarded money

from the from the criminal justice planning fund to the CJD. fund to a variety of recipients, such as the Alamo Tex.Code Crim.

Proc. Ann. art. 102.056(a) (Vernon Area Council of Governments for Regional Police Supp.2014). The CJD then uses this money to Training Academy, the Bastrop County Women's "[s]upport a wide range of projects designed to Shelter for SAINT: Sexual Assault Integrated reduce crime and improve the criminal and juvenile Nursing Team, Fort Bend County for the "Saved by justice systems."8 CJD Funding Sources, Office of the Bell" Delinquency Reduction Program, the Katy Governor, Criminal Justice Div., 1, Christian Ministries for Counseling Services for [http://governor.state.tx.us/Victims of Domestic Violence, and The Family files/cjd/CJD_Funding_Sources.pdf](http://governor.state.tx.us/Victims%20of%20Domestic%20Violence%20and%20The%20Family%20Files/cjd/CJD_Funding_Sources.pdf) (last visited Place for S.T.A.R.T.

(Students Tackling Abusive Dec. 16, 2014); see also Tex. Code Crim. Proc. Ann. Relationships Together). See, e.g., Press Release, art. 102.056(a) (money from criminal justice Office of Governor Tex., Gov. Perry Awards \$8 planning fund used by CJD "for state and local Million in Grants to Improve Criminal Justice © 2015 Thomson Reuters. No claim to original U.S. Government Works.

22 -22- Peraza v. State, --- S.W.3d ---- (2014) Systems (Sept. 10, 2008), [http:// to legitimate court costs. See 159 S.W.2d at 127 governor.state.tx.us/news/press-release/11114/](http://governor.state.tx.us/news/press-release/11114/) (costs for training and education not legitimate court (listing seventy-nine recipients that received more costs that may be assessed against criminal than \$8 million in grants from criminal justice defendants).

Accordingly, we cannot conclude that planning fund); Press Release, Office of the the criminal justice planning account, which is Governor of Tex., Gov. Perry Awards \$195,000 funded by the "DNA Record Fee," passes From State Criminal Justice Planning Fund, supra constitutional muster. See Salinas, 426 S.W.3d at (stating more than \$195,000 in grants from criminal 330–31 (Jamison, J., dissenting) (concluding court justice planning fund awarded to Wood County for costs assessed pursuant to Texas Local Government Wood County Rural Prosecutor Project and Code section 133.102, which directs approximately BeyondMissing Inc. for Texas Amber Alert thirteen percent of its revenue to the criminal justice Network); Press Release, Office of Governor, planning fund, unconstitutional).

Governor Rick Perry Announces Statewide Grant to Reduce School Dropouts (Nov. 7, 2001), [http:// governor.state.tx.us/news/press-release/4229/](http://governor.state.tx.us/news/press-release/4229/) The State argues that appellant has not shown that (announcing \$168,146 criminal justice planning fund the "DNA Record Fee" is unconstitutional because grant to Behavioral Health Institute of Waco to assist it "is a one-time fee of \$250" and "is certainly with "efforts to reduce school failure, dropout rates, applicable to appellant, as he was court-ordered to and juvenile crime"); see also Helpful Questions and provide a DNA specimen in both sexual assault Answers for Managing Grants, supra, at B–12 cases." The

State asserts that the “DNA Record Fee” (listing activities eligible for grants from criminal was ordered “to reimburse the State for expenses justice planning fund, such as job training, incurred as a result of the felony prosecution [of professional therapy and counseling, school based appellant], specifically costs spent to obtain DNA delinquency prevention, substance abuse, and peer specimens in certain cases.” And “[s]ince this support groups). statutory assessment is reasonably related to the costs of administering the criminal justice system, With this background in mind, we turn to the appellant has failed to show how the statute propriety of the portion of the revenue collected via authorizing this court cost is unconstitutional.” the “DNA Record Fee” dedicated to the criminal justice planning account and to be used by the CJD.

DPS is required to collect a DNA specimen from As the Texas Court of Criminal Appeals explained persons convicted of certain crimes, including in Carson, adopting a less than strict definition of aggravated sexual assault of a child less than what constitutes a legitimate court cost “would lead fourteen years of age, and maintain a database that into fields of expenditures which may as well include includes, among others, these DNA specimens.

See the cost of the court houses, the automobiles which Tex. Gov't Code Ann. § 411.142 (directing DPS to officers use to apprehend criminals and even the maintain “computerized database that serves as the roads upon which they ride.” 159 S.W.2d at 127. central depository in the state for DNA records”); id. § 411.1471 (Vernon 2012) (requiring collection of Here, sixty-five percent of the revenue received DNA specimen from those convicted of certain through the “DNA Record Fee” is dedicated by law crimes).

As asserted by the State, funds from the to the general revenue fund of the criminal justice criminal justice planning account may be used by the planning account in order to “[s]upport a wide range CJD to reimburse DPS and other law enforcement of projects designed to reduce crime and improve the agencies for expenses incurred in performing duties criminal and juvenile justice systems.” See CJD required by Texas Government Code section Funding Sources, supra, at 1.

The recipients of 411.1471, namely the taking of a DNA specimen money from the criminal justice planning fund are from a defendant, preserving of the specimen, and vastly diverse and range from state agencies to maintaining a collection of the specimen. See schools to hospitals and faith-based organizations. Tex.Code Crim. Proc. Ann. art. 102.056(e); Tex. Notably, the money from the criminal justice Gov't Code Ann. § 411.1471. planning fund is not required to be directed to the courts or to services necessarily or incidentally *11 Notably though, reimbursement for expenses related to criminal trials.

And often times such related to the collection and maintenance of DNA revenue is given to programs that, as the court in specimens is not automatic or guaranteed under Carson specifically noted, could not possibly relate Texas Code of Criminal Procedure article © 2015 Thomson

Reuters. No claim to original U.S. Government Works. 23 -23- Peraza v. State, --- S.W.3d ---- (2014) 102.056(e); the statute only provides that DPS will justice planning fund grant to Behavioral Health be reimbursed with funds from the criminal justice Institute of Waco to assist with “efforts to reduce planning account after it complies with certain school failure, dropout rates, and juvenile crime”). procedures.

See Tex. Code Crim. Proc. Ann. art. Thus, it cannot be reasonably concluded that the 102.056(e) (law enforcement agency, incurring revenue dedicated to the criminal justice planning expenses in previous calendar quarter, must, on first account provides services that are necessary or day after end of calendar quarter, send certified incidental to the trial of a criminal defendant's case. statement of costs incurred to CJD).

Thus, although See Carson, 159 S.W.2d at 127, 130; see also appellant provided a DNA specimen to DPS in Salinas, 426 S.W.3d at 332 (Jamison, J., dissenting) accordance with section 411.1471 in conjunction (“Although it appears some of the funds that go to with his cases, it cannot be assumed that DPS was the fair defense account may ultimately help provide automatically reimbursed by virtue of the “DNA counsel for indigent criminal defendants, it does not Record Fee” for any expenses associated with the appear that this is the sole use that can be made for collection of his specimen. these funds....

It therefore cannot be said that either the training fund or the fair defense account are necessary or incidental expenses in the trial of Further, we note that even if we presume that some appellant's criminal case.”). of the revenue collected pursuant to the “DNA Record Fee” is actually used to reimburse DPS or Accordingly, we hold that the portions of article other law enforcement agencies for collecting DNA 102.020(a)(1) and article 102.020(h) requiring the specimens from criminal defendants, preserving such collection of the “DNA Record Fee” from appellant specimens, and maintaining a record of such to be dedicated to the general revenue fund of the collections, it is readily apparent that this is not the criminal justice planning account constitute an only way in which the revenue is used.

Sixty-five unconstitutional tax. See Carson, 159 S.W.2d at 127, percent of the revenue collected through the “DNA 130. But see O'Bannon, 435 S.W.3d at 381. Record Fee” is dedicated to the general revenue fund of the criminal justice planning account.

As outlined *12 We note that our sister court has recently above, money in the criminal justice planning fund criticized the reasoning of the Texas Court of is given to a vast number of diverse entities, almost Criminal Appeals opinion in Carson as “ ‘both of none of which have any relation to the collection abbreviated and bereft of citations to supporting of a defendant's DNA specimen or a criminal trial. authority.’ ” O'Bannon, 435 S.W.3d at 381 (quoting See, e.g., Tex. Code Crim.

Proc. Ann. art. Salinas, 426 S.W.3d at 326). In “[a]ssuming 102.056(a) (money from criminal justice planning arguing that Carson requires a statute imposing fund is used for “state and local criminal justice court costs to be ‘necessary or incidental to the trial projects,” with not less than twenty percent of such of a criminal case,’ ” the Fourteenth Court of funds directed to juvenile justice programs); Tex. Appeals held that the defendant's facial Gov't Code Ann. § 772.006(a)(5) (CJD awards constitutional challenge to article 102.020 failed grants from criminal justice planning fund “to state because he did not “establish[] how the funds will agencies, units of local government, school districts, be used once they are distributed to the state and private, nonprofit corporations”); Press Release, highway fund and the criminal justice planning Office of Governor, Gov. Perry Awards \$8 Million account.” Id. at 381–82.

It asserted that the in Grants to Improve Criminal Justice Systems, defendant merely “infer[ed]” that revenue collected supra (listing seventy-nine recipients that received pursuant to article 102.020(a)(1) will “flow ‘directly more than \$8 million in grants from criminal justice to the executive branch [to be] used for policy planning fund); Press Release, Office of Governor, purposes’ ” or to the state highway fund, “not [to] be Gov. Perry Awards \$195,000 from State Criminal used for purposes necessary or incidental to DNA Justice Planning Funds, supra (stating more than collection or testing.” Id. at 382. \$195,000 in grants from criminal justice planning fund awarded to Wood County for Wood County We respectfully disagree with our sister court for the Rural Prosecutor Project and BeyondMissing Inc. reasons outlined above.

In short, we first note that for Texas Amber Alert Network); Press Release, the reasoning of the Texas Court of Criminal Office of Governor, Governor Rick Perry Appeals in Carson is sound and it constitutes Announces Statewide Grant to Reduce School binding precedent upon it and lower courts. See Dropouts, supra (announcing \$168,146 criminal Reed v. Buck, 370 S.W.2d 867, 870–71 (Tex.1963) © 2015 Thomson Reuters.

No claim to original U.S. Government Works. 24 -24- Peraza v. State, --- S.W.3d ---- (2014) (explaining simply because certain cases had “not *13 We affirm the judgment of the trial court as been cited in recent years,” such “ancient cases” do modified. not “just fade[] away”; instead, “unless there is some good reason for overruling them, they should not be disregarded”); Purchase v. State, 84 S.W.3d Harvey Brown, Justice, Concurring and Dissenting 696, 701 (Tex.App.–Houston [1st Dist.]

2002, pet. ref'd) (“[W]e are bound by the decisions of our state's highest criminal court.”). Second, we note that criminal defendants similarly situated to appellant I join with the Court's conclusions that the trial court are not asking appellate courts to “infer” how the did not abuse its discretion in denying Appellant's revenue from the “DNA Record Fee” will be motion to withdraw his guilty pleas and that the directed.

As discussed above, the revenue, by statute, judgment should be modified, striking the is dedicated by law for expenditures that are far unsupported “Sheriff's Fee” assessed in both cases. removed from actual “court costs.” A plain reading However, I disagree with the Court's conclusion that of the pertinent statutes reveals this undeniable fact. the “DNA Record Fee”¹ is unconstitutional.

We sustain appellant's third issue.⁹ Facial Challenge to the DNA Record Fee Conclusion Appellant argues that the statute authorizing Having held that the “DNA Record Fee” assessed collection of the fee is facially unconstitutional against appellant pursuant to article 102.020(a)(1) under the separation-of-powers clause of the Texas and article 102.020(h) constitutes an unconstitutional Constitution.

Tex. Const. art. II, § 1. Under that tax, we modify each judgment to delete the \$250 provision, a statute authorizing a court to collect charge from the assessed court costs. See *Cates v. costs* “neither necessary nor incidental to the trial of State, 402 S.W.3d 250, 252 (Tex.Crim.App.2013) a criminal case” is not valid.Ex parte Carson, 143 (holding proper remedy when trial court erroneously Tex.Crim.

498, 159 S.W.2d 126, 127 (1942). includes amounts as court costs is to modify Appellant makes only a facial challenge, which judgment to delete erroneous amounts); *Sturdivant* requires him to “establish that no set of v. State, 445 S.W.3d 435, 443 (Tex.App.–Houston circumstances exists under which the statute will be [1st Dist.] 2014, pet. ref d) (holding trial court valid.” *Santikos v. State*, 836 S.W.2d 631, 633 erroneously included attorney pro tern fees as court (Tex.Crim.App.1992); see also *State v. Rosseau*, costs and modifying judgment accordingly); see also 396 S.W.3d 550, 557 (Tex.Crim.App.2013).

In my Tex. R. App. P. 43.2(b). view, Appellant has not shown that every application of the statue violates the Carson standard. I would, therefore, affirm the constitutionality of the fee. Further, as noted above, having held that there is no basis in the record to support the charge for “serving *capias*,” we also modify each judgment to delete the A. Reviewing a facial challenge \$50 charge from the assessed court costs.

See *French*, 830 S.W.2d at 609 (agreeing “appellate When reviewing the constitutionality of a statute, “an court has authority to reform a [trial court] judgment appellate court must presume that the statute is valid to... make the record speak the truth when the matter and that the legislature was neither unreasonable nor has been called to its attention by any source”); arbitrary in enacting it.” *Curry v. State*, 186 S.W.3d Nolan, 39 S.W.3d at 698 (“An appellate court has 39, 42 (Tex.App.–Houston [1st Dist.]

2005, no pet.) the power to correct and reform a trial court (citing *Ex parte Granviel*, 561 S.W.2d 503, 511 judgment ‘to make the record speak the truth when (Tex.Crim.App.1978)). A reviewing

court must it has the necessary data and information to do so make every reasonable presumption in favor of the....’ ” (quoting *Asberry*, 813 S.W.2d at 529)); see statute's constitutionality, unless the contrary is also Tex. R. App.

P. 43.2(b). clearly shown. *Granviel*, 561 S.W.2d at 511; see Tex. Gov't Code Ann. § 311.021 (West 2013) (noting that courts presume “compliance” with Texas and United States Constitutions). © 2015 Thomson Reuters. No claim to original U.S. Government Works. 25 -25- *Peraza v. State*, --- S.W.3d ---- (2014) sexual assault of a child under 14 years of age—and to create a database cataloging the DNA specimens.

To prevail, the party asserting a facial challenge Tex. Gov't Code Ann. § 411.142 (West 2012) “must establish that the statute always operates (directing DPS to maintain “computerized database unconstitutionally in all possible circumstances.” that serves as the central depository in the state for *Rosseau*, 396 S.W.3d at 557. When construing a DNA records” that is compatible with FBI's national statute, courts consider, among other factors, the DNA identification index system); *id.* § 411.1471 object sought to be attained by the legislation, laws (West 2012) (requiring collection of DNA on the same or similar subjects, and the specimens from people charged with or convicted of consequences of a particular construction.

Tex. Gov't certain crimes, including aggravated sexual assault Code Ann. § 311.023 (West 2013); see *State v. of child under 14 years of age*; Tex. Penal Code Neesley, 239 S.W.3d 780, 784 Ann. § 22.021 (West Supp.2014) (defining (Tex.Crim.App.2007); *Nguyen v. State*, 1 S.W.3d aggravated sexual assault of child under 14 years of 694, 696–97 (Tex.Crim.App.1999); see also *age*).

The criminal-justice planning account allocates *Dowthitt v. State*, 931 S.W.2d 244, 258 funds toward the collection and management of this (Tex.Crim.App.1996). If a statute can be reasonably statewide criminal DNA database. See Tex.Code interpreted in a manner that does not offend the Crim. Proc. Ann. art. 102.056 (West Supp.2014). constitution, a reviewing court must overrule a facial Specifically, subsection (e) of article 102.056 directs challenge to the statute's constitutionality.

Curry, the Legislature to 186 S.W.3d at 42. determine and appropriate the necessary amount from the criminal justice planning B. Constitutionality of the DNA Record Fee account to the criminal justice division of the benefiting the criminal-justice planning account governor's office for reimbursement in the form of grants to the Department of Public *14 Appellant argues that the DNA Record Fee Safety of the State of Texas and other law unconstitutionally benefits the criminal-justice enforcement agencies for expenses incurred in planning account because the account is “too performing duties imposed on those agencies remote” to be considered a necessary or incidental under Section 411.1471 or Subchapter B–1, cost of prosecuting a criminal case as required under Chapter 420, Government Code, as applicable.

Carson, 159 S.W.2d at 127 (concluding that law library fee is remote and unconstitutional). The Id. Court agrees and cites several possible uses of money from the criminal-justice planning account that are not related to the prosecution of a criminal. After looking outside the record to press releases and case. This approach is contrary to the standard that web sites, the Court insists that “it cannot be applied to claims that a statute is facially assumed that DPS was automatically reimbursed by unconstitutional because (1) it diminishes the virtue of the ‘DNA Record Fee’ for any expenses challenger's burden to demonstrate that all—not associated with the collection of [Appellant's] some—applications of a statute are unconstitutional; sample” and therefore the fee is an unconstitutional and (2) it runs afoul of precedent by favoring an tax.

This conclusion does not account for the unconstitutional reading over a constitutional remainder of subsection (e), which continues: reading when construing statutes. I would construe the criminal-justice planning account in its statutory context, situated among related statutes, and [of money from the criminal-justice planning conclude that Appellant has not demonstrated that all account] shall reimburse the law enforcement applications of the statute are unconstitutional under agency for the costs not later than the 30th day the Carson standard. after the date the certified statement is received.

If the criminal justice division does not reimburse the law enforcement agency The Department of Public Safety (“DPS”) is before the 90th day after the date the certified required to collect a DNA specimen from every statement is received, the agency is not person charged with certain categories of crimes, required to perform duties imposed under including the crime involved here —aggravated © 2015 Thomson Reuters.

No claim to original U.S. Government Works. 26 -26- Peraza v. State, --- S.W.3d ---- (2014) Section 411.1471 or Subchapter B–1, Chapter Likewise, Appellant has not demonstrated that the 420, Government Code, as applicable, until portion of the DNA Record Fee that benefits the the agency has been compensated for all costs state highway fund is facially invalid.

Pursuant to for which the agency has submitted a certified article 102.020(h) of the Texas Code of Criminal statement under this subsection. Procedure, a portion of collected DNA Record Fee revenue goes into the state highway fund. “[M]oney Id. Thus, the Court's skepticism is unjustified given deposited to the state highway fund under... the wording of the statute regarding reimbursement 102.020(h), Code of Criminal Procedure, may be to fund the DNA project. used only to defray the cost of administering [subchapter G of chapter 411] and Section 411.0205” of the Texas Government Code.

Tex. Gov't Code Ann. § 411.145 (West 2012). The Court also insists that, even if DPS were Subchapter G governs the collection and reimbursed, the fee is nevertheless unconstitutional management of DNA samples, including Appellant's, because the criminal-justice planning account funds by DPS. See Tex. Gov't Code Ann. § 411.1471. other unrelated projects. Following

this analysis, it Section 411.0205 regulates the accreditation of would be enough for a party bringing a facial forensic crime laboratories by DPS.

Tex. Gov't Code constitutional challenge to show that some possible Ann. § 411.0205 (West 2012). Thus, under the applications of a statute are unconstitutional to Texas Government Code, the portion of the DNA justify invalidating every application of that statute. Record Fee credited to the state highway fund is That is the wrong standard. See Santikos, 836 used to defray the costs associated with collecting, S.W.2d at 633 (“[T]he challenger must establish that storing, and testing DNA samples. no set of circumstances exists under which the statute will be valid.”).

While money from the criminal-justice planning account apparently funds The Court relies on section 222.002 of the Texas other programs in addition to the DNA database, Transportation Code, which states that money in the Appellant presents no evidence that the DNA Record state highway fund not earmarked for public Fee revenue does anything more than reimburse the roadways “may be used for any function performed criminal-justice planning account for its by” the Texas Department of Transportation DNA-database expenditures.

Appellant appears to (“TxDOT”). Tex. Transp. Code Ann. § 222.002 concede that reimbursement for these expenditures (West 2011) (emphasis added). TxDOT does not would not violate Carson. I agree. manage DNA-sample collection, management, or testing. But TxDOT does not have exclusive access to the state highway fund. Rather, the Transportation *15 I would hold that collecting the DNA Record Code simply states a general rule that TxDOT “may” Fee to benefit the criminal-justice planning account access the fund.

In contrast, the Government Code is constitutional because these funds may be provides a specific rule that money from the DNA allocated to the statewide criminal DNA database. Record Fee in the state highway fund “may be used Because such an allocation would be constitutional, only” by DPS to defray the cost of administering the Appellant fails to meet his burden of showing that DNA database.

Tex. Gov't Code Ann. § 411.145 every application of the statute would result in (emphasis added). constitutional injury. See Rosseau, 396 S.W.3d at 557 (noting moving party has burden of demonstrating statute's unconstitutionality in “all its When two statutes concern the same issue, the two possible applications.”).

Accordingly, I would should be read together as one law, and an appellate conclude that Appellant has failed to demonstrate court should attempt to harmonize any conflicting that the portion of the DNA Record Fee that benefits provisions. Garrett v. State, 424 S.W.3d 624, 629 the criminal-justice planning account is an (Tex.App.–Houston [1st Dist.] 2013, pet. ref d).

If unconstitutional tax. this is not possible, specific rules prevail over general provisions, absent contrary legislative intent. Id.; Azeez v. State, 248 S.W.3d 182, 192 C. Constitutionality of the

DNA Record Fee (Tex.Crim.App.2008).

In light of these principles, I benefiting the state highway fund would hold that the statute specifically assigning DNA Record Fee revenue in the state highway fund © 2015 Thomson Reuters. No claim to original U.S. Government Works. 27 -27- Peraza v. State, --- S.W.3d ---- (2014) to DPS for DNA sampling and crime-lab accreditation prevails over the general statute relied upon by the Court.

I would further hold that paying for DNA sampling and crime-lab accreditation is a valid, constitutional use of the DNA Record Fee under Carson. The trial court ordered Appellant to surrender a DNA sample as part of the investigation of this case.

The fee is therefore “necessary or incidental” to the trial of Appellant's case. See generally Tex. Gov't Code Ann. § 411.143(a) (West 2012) (“The principal purpose of the DNA database is to assist a federal, state, or local criminal justice agency in the investigation or prosecution of sex-related offenses or other offenses in which biological evidence is recovered.”). *16 The Court concludes that the fee is an unconstitutional tax because the revenue could possibly benefit other activities unrelated to the statewide DNA database.

In doing so, the Court again relies on web sites outside the record because Appellant has provided no record evidence of how the funds are expended and relieves Appellant of his burden when bringing a facial constitutional challenge.

Because Appellant has not demonstrated that every application of the statutes assigning DNA Record Fee revenue to the state highway fund would be unconstitutional, I would conclude that Appellant did not demonstrate that the portion of the DNA Record Fee that benefits the state highway fund is facially unconstitutional. Conclusion Having determined that both portions of the DNA Record Fee—the 65% that benefits the criminal-justice planning account and the 35% that benefits the state highway fund—are sufficiently related to the prosecution of a criminal case, I would conclude that Appellant failed to satisfy his burden of demonstrating that the DNA Record Fee is facially unconstitutional.

Accordingly, I respectfully dissent. © 2015 Thomson Reuters. No claim to original U.S. Government Works. 28 -28- Peraza v. State, --- S.W.3d ---- (2014) Footnotes 1 See Tex. Penal Code Ann. § 22.021 (Vernon Supp.2014). 2 See Tex. Code Crim. Proc. Ann. art. 102.011(a)(2) (Vernon Supp.2014) (imposing \$50 charge “for executing or processing an issued arrest warrant, capias, or capias pro fine”).

3 See id. art. 102.011(a)(1) (imposing \$5 charge for arrest without warrant). 4 See Tex. Code Crim. Proc. Ann. art. 102.020(a)(1) (Vernon Supp.2014) (authorizing collection of \$250 fee from persons convicted of offenses listed in Texas Government Code section 411.1471(a)(1)).

We refer to the fee assessed pursuant to article 102.020(a)(1) as a “DNA Record Fee” because it is so labeled in the trial court clerk's bill of costs in each case. 5 Although our dissenting colleague calls into question the reliance on information available through the Texas Department of Transportation's website, we note that this Court and others have repeatedly taken judicial notice of information available on various websites, including governmental websites.

See Tex. R. Evid. 201; see, e.g., *Payan v. State*, 199 S.W.3d 380, 383 & n. 4 (Tex.App.–Houston [1st Dist.] 2006, pet. ref'd) (taking judicial notice of information available on “[t]he State Library and Archives Commission website”); see also *Chen v. Hernandez*, No. 03–11–00222–CV, 2012 WL 3793294, at *14 (Tex. App.–Austin Aug. 28, 2012, pet. denied) (mem. op.) (noting trial court took judicial notice of “government websites,” including “website for the U.S. Department of State”); *Hayden v. State*, 155 S.W.3d 640, 647 (Tex.App.–Eastland 2005, pet. ref'd) (taking judicial notice of information available on “website of the United States Naval Observatory”).

6 See *Reed v. Buck*, 370 S.W.2d 867, 870–71 (Tex.1963) (explaining simply because certain cases had “not been cited in recent years,” such “ancient cases” do not “just fade[] away”; instead, “unless there is some good reason for overruling them, they should not be disregarded”); *Purchase v. State*, 84 S.W.3d 696, 701 (Tex.App.–Houston [1st Dist.] 2002, pet. ref'd) (“[W]e are bound by the decisions of our state's highest criminal court.”).

7 We also note that under chapter 411, subchapter G, the DPS director is assigned numerous responsibilities, including “develop[ing] biennial plans” to “improve the reporting and accuracy of the DNA [D]atabase,” “audit[ing] the records, reports, procedures, or other quality assurance matters of any DNA laboratory,” and providing “training for collection of DNA samples,” none of which are responsibilities that are “necessary [or] incidental to the trial of a criminal case.” See Tex. Gov't Code Ann. §§ 411.142(e), 411.144(c), 411.146(b) (Vernon 2012); *Ex Parte Carson*, 143 Tex. Crim.

498, 159 S.W.2d 126, 127, 130 (1942) (discounting notion funds for training constitute legitimate court costs). 8 We again note that our dissenting colleague calls into question the reliance on information available through the website of the Office of the Governor.

However, as stated previously, this Court and others have repeatedly taken judicial notice of information available on various websites, including governmental websites. See Tex. R. Evid. 201; see, e.g., *Payan*, 199 S.W.3d at 383 & n. 4; see also *Chen*, 2012 WL 3793294, at *14; *Hayden*, 155 S.W.3d at 647. 9 In his fourth issue, appellant argues that the trial court erred in not granting him a hearing on his motions for new trial and in arrest of judgment because “[t]o properly challenge the constitutionality of the DNA fees and the faulty Sheriff's fee, a hearing was necessary.” Appellant filed his motions in the trial court asserting that “[t]he fees from the Sheriff reflected on the bill[s] of costs are wholly unsupported and erroneous” and “[t]he DNA court costs are unconstitutional.” Given our disposition of appellant's second and third issues, we do not reach

the issue of whether the trial court erred in not granting appellant a hearing on his motions for new trial and in arrest of judgment.

See Tex. R. App. P. 47.1. 1 See Tex. Code Crim. Proc. Ann. art. 102.020(a)(1) (West Supp.2014) (“A person shall pay as a cost of court: (1) \$250 on conviction of an offense listed in Section 411.1471(a)(1), Government Code”). End of Document © 2015 Thomson Reuters. No claim to original U.S. Government Works. © 2015 Thomson Reuters. No claim to original U.S. Government Works.

29 -29- Peraza v. State, --- S.W.3d ---- (2014) 127 (Tex.Crim.App.1942). Appellant makes only a facial 2014 WL 7530437 challenge, which requires him to “establish that no set of circumstances exists under which the statute will be valid.” NOTICE: THIS OPINION HAS NOT BEEN RELEASED S an tiko s v. S t a t e, 83 6 S.W.2 d 6 3 1, 6 3 3 FOR PUBLICATION IN THE PERMANENT LAW (Tex.Crim.App.1992); see also State v. Rosseau, 396 S.W.3d REPORTS.

UNTIL RELEASED, IT IS SUBJECT TO 550, 557 (Tex.Crim.App.2013). In my view, Appellant has REVISION OR WITHDRAWAL. not shown that every application of the statue violates the CONCURRING & DISSENTING OPINION Carson standard. I would, therefore, affirm the constitutionality of the fee. Court of Appeals of Texas, Houston (1st Dist. A. Reviewing a facial challenge When reviewing the constitutionality of a statute, “an Osmin Peraza, Appellant appellate court must presume that the statute is valid and that v. the legislature was neither unreasonable nor arbitrary in The State of Texas, Appellee enacting it.” Curry v. State, 186 S.W.3d 39, 42 (Tex.

NO. 01–12–00690–CR, NO. 01–12–00691–CR | App.–Houston [1st Dist.] 2005, no pet.) (citing Ex parte Opinion issued December 30, 2014 Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)). A reviewing court must make every reasonable presumption in favor of the statute's constitutionality, unless the contrary is clearly shown. Granviel, 561 S.W.2d at 511; see Tex. Gov't Code Ann.. § 311.021 (West 2013) (noting that courts On Appeal from the 184th District Court, Harris County, presume “compliance” with Texas and United States Texas, Trial Court Case Nos. 1305438 and 1305439.

Constitutions). Panel consists of Justices Jennings, Sharp, and Brown. 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. CONCURRING & DISSENTING OPINION When construing a statute, courts consider, among other factors, the object sought to be attained by the legislation, laws on the same or similar subjects, and the consequences of a particular construction.

Tex. Gov't Code Ann. § 311.023 (West 2013); see State v. Neesley, 239 S.W.3d 780, 784 Harvey Brown, Justice (Tex.Crim.App.2007); Nguyen v. State, 1 S.W.3d 694, 696–97 (Tex. Crim. App.

1999); see also *Dowthitt v. State*, I join with the Court's conclusions that the trial court did not 931 S.W.2d 244, 258 (Tex. Crim. App. 1996). If a statute can abuse its discretion in denying Appellant's motion to be reasonably interpreted in a manner that does not offend the withdraw his guilty pleas and that the judgment should be constitution, a reviewing court must overrule a facial modified, striking the unsupported "Sheriff's Fee" assessed in challenge to the statute's constitutionality.

Curry, 186 S.W.3d both cases. However, I disagree with the Court's conclusion at 42. that the "DNA Record Fee"¹ is unconstitutional. B. Constitutionality of the DNA Record Fee benefiting the criminal-justice planning account Appellant argues that the DNA Record Fee unconstitutionally Facial Challenge to the DNA Record Fee benefits the criminal-justice planning account because the account is "too remote" to be considered a necessary or Appellant argues that the statute authorizing collection of the incidental cost of prosecuting a criminal case as required fee is facially unconstitutional under the separation-of-powers under Carson.

159 S.W.2d at 127 (concluding that law library clause of the Texas Constitution. Tex. Const. art. II, § 1. fee is remote and unconstitutional). The Court agrees and Under that provision, a statute authorizing a court to collect cites several possible uses of money from the criminal-justice costs "neither necessary nor incidental to the trial of a planning account that are not related to the prosecution of a criminal case" is not valid.

Ex parte Carson, 159 S.W.2d 126, criminal case. This approach is contrary to the standard that © 2015 Thomson Reuters. No claim to original U.S. Government Works. 30 -30- Peraza v. State, --- S.W.3d ---- (2014) applies to claims that a statute is facially unconstitutional The criminal justice division through a grant [of money from because (1) it diminishes the challenger's burden to the criminal-justice planning account] shall reimburse the law demonstrate that all—not some—applications of a statute are enforcement agency for the costs not later than the 30th day unconstitutional; and (2) it runs afoul of precedent by after the date the certified statement is received.

If the favoring an unconstitutional reading over a constitutional criminal justice division does not reimburse the law reading when construing statutes. I would construe the enforcement agency before the 90th day after the date the criminal-justice planning account in its statutory context, certified statement is received, the agency is not required to situated among related statutes, and conclude that Appellant perform duties imposed under Section 411.1471 or has not demonstrated that all applications of the statute are Subchapter B–1, Chapter 420, Government Code, as unconstitutional under the Carson standard. applicable, until the agency has been compensated for all costs for which the agency has submitted a certified statement under this subsection.

The Department of Public Safety ("DPS") is required to collect a DNA specimen from every person charged with Id. Thus, the Court's skepticism is unjustified given the certain categories of

crimes, including the crime involved wording of the statute regarding reimbursement to fund the here—aggravated sexual assault of a child under 14 years of DNA project. age—and to create a database cataloging the DNA specimens.

Tex. Gov't Code Ann. § 411.142 (West 2012) (directing DPS to maintain “computerized database that serves as the central depository in the state for DNA records” that is compatible The Court also insists that, even if DPS were reimbursed, the with FBI's national DNA identification index system); *id.* § fee is nevertheless unconstitutional because the 411.1471 (West 2012) (requiring collection of DNA criminal-justice planning account funds other unrelated specimens from people charged with or convicted of certain projects.

Following this analysis, it would be enough for a crimes, including aggravated sexual assault of child under 14 party bringing a facial constitutional challenge to show that years of age); Tex. Penal Code Ann. § 22.021 (West some possible applications of a statute are unconstitutional to Supp.2014) (defining aggravated sexual assault of child under justify invalidating every application of that statute.

That is 14 years of age). The criminal-justice planning account the wrong standard. See Santikos, 836 S.W.2d at 633 (“[T]he allocates funds toward the collection and management of this challenger must establish that no set of circumstances exists statewide criminal DNA database. See Tex.Code Crim. Proc. under which the statute will be valid.”). While money from Ann.. art. 102.056 (West Supp.2014).

Specifically, subsection the criminal-justice planning account apparently funds other (e) of article 102.056 directs the Legislature to programs in addition to the DNA database, Appellant presents no evidence that the DNA Record Fee revenue does anything determine and appropriate the necessary amount from the more than reimburse the criminal-justice planning account for criminal justice planning account to the criminal justice its DNA-database expenditures.

Appellant appears to concede division of the governor's office for reimbursement in the that reimbursement for these expenditures would not violate form of grants to the Department of Public Safety of the State Carson. I agree. of Texas and other law enforcement agencies for expenses incurred in performing duties imposed on those agencies under Section 411.1471 or Subchapter B–1, Chapter 420, I would hold that collecting the DNA Record Fee to benefit Government Code, as applicable. the criminal-justice planning account is constitutional because these funds may be allocated to the statewide criminal DNA Id. database.

Because such an allocation would be constitutional, Appellant fails to meet his burden of showing that every application of the statute would result in constitutional injury. See Rosseau, 396 S.W.3d at 557 (noting moving party has burden of demonstrating statute's unconstitutionality in “all its After looking outside the record to press releases and web possible applications.”).

Accordingly, I would conclude that sites, the Court insists that “it cannot be assumed that DPS Appellant has failed to demonstrate that the portion of the was automatically reimbursed by virtue of the ‘DNA Record DNA Record Fee that benefits the criminal-justice planning Fee’ for any expenses associated with the collection of account is an unconstitutional tax.

[Appellant's] sample” and therefore the fee is an unconstitutional tax. This conclusion does not account for the remainder of subsection (e), which continues: C. Constitutionality of the DNA Record Fee benefiting the state highway fund © 2015 Thomson Reuters. No claim to original U.S. Government Works. 31 -31- Peraza v. State, --- S.W.3d ---- (2014) Likewise, Appellant has not demonstrated that the portion of investigation of this case.

The fee is therefore “necessary or the DNA Record Fee that benefits the state highway fund is incidental” to the trial of Appellant's case. See generally Tex. facially invalid. Pursuant to article 102.020(h) of the Texas Gov't Code Ann. § 411.143(a) (West 2012) (“The principal Code of Criminal Procedure, a portion of collected DNA purpose of the DNA database is to assist a federal, state, or Record Fee revenue goes into the state highway fund. local criminal justice agency in the investigation or “[M]oney deposited to the state highway fund under... prosecution of sex-related offenses or other offenses in which 102.020(h), Code of Criminal Procedure, may be used only biological evidence is recovered.”). to defray the cost of administering [subchapter G of chapter 411] and Section 411.0205” of the Texas Government Code.

Tex. Gov't Code Ann. § 411.145 (West 2012). Subchapter G The Court concludes that the fee is an unconstitutional tax governs the collection and management of DNA samples, because the revenue could possibly benefit other activities including Appellant's, by DPS. See Tex. Gov't Code Ann.. § unrelated to the statewide DNA database.

In doing so, the 411.1471. Section 411.0205 regulates the accreditation of Court again relies on web sites outside the record because forensic crime laboratories by DPS. Tex. Gov't Code Ann. § Appellant has provided no record evidence of how the funds 411.0205 (West 2012).

Thus, under the Texas Government are expended and relieves Appellant of his burden when Code, the portion of the DNA Record Fee credited to the state bringing a facial constitutional challenge. highway fund is used to defray the costs associated with collecting, storing, and testing DNA samples.

Because Appellant has not demonstrated that every application of the statutes assigning DNA Record Fee revenue The Court relies on section 222.002 of the Texas to the state highway fund would be unconstitutional, I would Transportation Code, which states that money in the state conclude that Appellant did not demonstrate that the portion highway fund not earmarked for public roadways “may be of the DNA Record Fee that benefits the state highway fund used for any function performed by” the Texas Department of is facially unconstitutional.

Transportation (“TxDOT”). Tex. Transp. Code Ann. § 222.002 (West 2011) (emphasis added). TxDOT does not manage DNA-sample collection, management, or testing. But TxDOT does not have exclusive access to the state highway Conclusion fund. Rather, the Transportation Code simply states a general rule that TxDOT “may” access the fund.

In contrast, the Having determined that both portions of the DNA Record Government Code provides a specific rule that money from Fee—the 65% that benefits the criminal-justice planning the DNA Record Fee in the state highway fund “may be used account and the 35% that benefits the state highway only ” by DPS to defray the cost of administering the DNA fund—are sufficiently related to the prosecution of a criminal database.Tex.

Gov’t Code Ann. § 411.145 (emphasis added). case, I would conclude that Appellant failed to satisfy his burden of demonstrating that the DNA Record Fee is facially unconstitutional. Accordingly, I respectfully dissent. When two statutes concern the same issue, the two should be read together as one law, and an appellate court should attempt to harmonize any conflicting provisions.

Garrett v. State, 424 S.W.3d 624, 629 (Tex.App.—Houston [1st Dist.] 2013, pet. ref’d). If this is not possible, specific rules prevail Justice Brown, concurring in part and dissenting in part. over general provisions, absent contrary legislative intent. Id.; Azeez v. State, 248 S.W.3d 182, 192 (Tex.Crim.App.2008).

In light of these principles, I would hold that the statute specifically assigning DNA Record Fee revenue in the state highway fund to DPS for DNA sampling and crime-lab accreditation prevails over the general statute relied upon by the Court. I would further hold that paying for DNA sampling and crime-lab accreditation is a valid, constitutional use of the DNA Record Fee under Carson.

The trial court ordered Appellant to surrender a DNA sample as part of the © 2015 Thomson Reuters. No claim to original U.S. Government Works. 32 -32- Peraza v. State, --- S.W.3d ---- (2014) Footnotes 1 See Tex.Code Crim. Proc. Ann.. art. 102.020(a)(1) (West Supp.2014) (“A person shall pay as a cost of court: (1) \$250 on conviction of an offense listed in Section 411.1471(a)(1), Government Code”).

End of Document © 2015 Thomson Reuters. No claim to original U.S. Government Works. © 2015 Thomson Reuters. No claim to original U.S. Government Works. 33 -33-