

No. 14-12-00378-CR

**IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS**

ORLANDO SALINAS

Appellant

v.

THE STATE OF TEXAS

Appellee

On Appeal from Cause Number 1313253
From the 228th District Court of Harris County, Texas

**APPELLANT'S BRIEF ON REMAND
FROM THE
COURT OF CRIMINAL APPEALS**

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

JANI MASELLI WOOD
Assistant Public Defender
Harris County, Texas
TBN. 00791195
1201 Franklin Street, 13th Floor
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278

Counsel for Appellant

IDENTITY OF PARTIES AND COUNSEL

Appellant: Orlando Salinas
SPN# 01780669
Harris County Jail
701 North San Jacinto
Houston, Texas 77002

Trial Prosecutors: Abbie Miles
Allison Buess

Appellate Prosecutor Bridget Holloway
Assistant District Attorneys
Harris County, Texas
1201 Franklin, 6th Floor
Houston, Texas 77002

Defense Counsel at Trial: R.P. “Skip” Cornelius
2028 Buffalo Terrace
Houston, Texas 77019

Presiding Judge: Hon. Marc Carter (MNT and presiding judge)
Hon. James Anderson (visiting trial judge)
185th District Court
Harris County, Texas
1201 Franklin, 17th floor
Houston, Texas 77002

Defense Counsel On Appeal: Jani Maselli
Assistant Public Defender
Harris County Public Defender’s Office
1201 Franklin, 13th Floor
Houston, Texas 77002

TABLE OF CONTENTS

Identity of Parties and Counsel.	2
Table of Contents	3
Index of Authorities	4
Introduction.	6
1. <i>Peraza</i> and precedent.	6
2. Pending Motion for Rehearing in <i>Peraza</i>	7
A. The standard for a facial challenge has been altered.	7
B. The burden of a party alleging that a statute is facially unconstitutional.	7
C. The former family protection fee - partly constitutional and partly not.	9
D. A statute that is unconstitutional in part is an unconstitutional statute.	10
3. The decision in <i>Salinas</i> rests upon two decisions by this Court:	11
A. Which facial constitutionality test is correct?	11
B. Whether each of the individualized consolidated court costs are to be considered separately or as one cost?	11
4. There are at least three costs that do not comply with the new more relaxed CCA standard.	13
5. The entire statute should be found unconstitutional.	16
Prayer.	16
Certificate of Service.	17
Certificate of Compliance.	18

INDEX OF AUTHORITIES

Cases:

<i>Armstrong v. State</i> , 340 S.W.3d 759 (Tex. Crim. App. 2011).....	6
<i>Ex parte Carson</i> , 143 Tex. Crim. 498, 159 S.W.2d 126 (1942).....	6
<i>Johnson v. State</i> , 423 S.W.3d 385 (Tex. Crim. App. 2014).....	6
<i>Peraza v. State</i> , PD-0100-15, 0101-15, 2015 WL 3988926 (Tex. Crim. App. July 1, 2015).	passim
<i>Salas v. State</i> , 365 S.W.2d 174 (Tex. Crim. App. 1963).....	12
<i>Salinas v. State</i> , 464 S.W.3d 363 (Tex. Crim. App. 2015).....	16
<i>Salinas v. State</i> , 426 S.W.3d 318 (Tex. App.—Houston [14th Dist.] 2014).	12
<i>Santikos v. State</i> , 836 S.W.2d 631 (Tex. Crim. App. 1992)	8
<i>State v. Rosseau</i> , 396 S.W.3d 550 (Tex. Crim. App. 2013)	8
<i>Tussey v. State</i> , 494 S.W.2d 866 (Tex. Crim. App. 1973).....	11
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	7, 11

Weir v. State,
278 S.W.3d 364 (Tex. Crim. App. 2009)..... 6

Statutes and Rules

TEX. GOV'T CODE ANN. § 51.961..... 9, 10

TEX. GOV'T CODE ANN. § 311.032(c) 10

TEX. LOC. GOV'T CODE ANN. § 133.102. 12

TEX. HUM. RES. CODE ANN. § 111.052. 16

TEX. HUM. RES. CODE ANN. § 111.060. 15

TEX. HUM. RES. CODE ANN. § 115.001. 14

TEX. OCC. CODE ANN. § 1701.156. 13, 14

TEX. ATT'Y GEN. OP. NO. GA-0387 (2005). 9

To the Honorable Justices Boyce, Jamison, and Busby:

This Court has requested supplemental briefing in this case specifically requesting the parties to address the application of *Peraza v. State*, PD-0100-15, 0101-15, 2015 WL 3988926 (Tex. Crim. App. July 1, 2015).

1. *Peraza* and precedent

In *Peraza*, the Court of Criminal Appeals decided many issues that impact Mr. Salinas's case:

1. The Court overruled *Ex parte Carson*, 143 Tex. Crim. 498, 159 S.W.2d 126, 130 (1942);
2. The Court disavowed the definition of “court cost” previously expressed in *Weir v. State*, 278 S.W.3d 364, 365-66 (Tex. Crim. App. 2009), *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011), *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014), and numerous other cases; and
3. The Court adopted a new standard for what a court cost is: although the opinion has an inherent conflict regarding the definition:
“We continue to hold, as we did in *Weir*, that court costs should be related to the recoupment of **costs of judicial resources**. “
Peraza at 14. The Court then states on the next page, “We hold that, if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for **legitimate criminal justice purposes**,

then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause.” *Peraza* at 15. (Emphases added).

2. **Pending Motion for Rehearing in *Peraza*.**

There is a pending motion for rehearing in *Peraza v. State*. Filed on July 23, 2015, there has been no ruling yet. The first issue on rehearing impacts this Court’s decision on the case *sub judice*:

The discussion by the Court of how a facial challenge to a statute is considered on appeal has subtly altered current precedent from the United States Supreme Court and this Court.

A. *The standard for a facial challenge has been altered.*

Here, the CCA’s restatement of a legal principle almost imperceptibly deviates from the principle as originally formulated in precedential case law.

B. *The burden of a party alleging that a statute is facially unconstitutional*

The legal principle in question concerns the legal burden borne by a party alleging a statute to be facially unconstitutional. The CCA began with a correct statement of the law. “In order to successfully mount a facial challenge to Article 102.020, *Peraza* must establish that no set of circumstances exists under which that statute would be valid.” *Peraza*, slip op at 9. The language is identical to that set out in the United States Supreme Court case cited by the CCA. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (party making a facial challenge to a statute “must establish that no set of circumstances exists under which the Act would be valid”). The language is

also the same as that describing a challenger’s burden as declared in the two CCA cases cited as authority. *See Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992) (“the challenger must establish that no set of circumstances exists under which the statute will be valid.”); *see also State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013) (repeating the language from the *Santikos* case verbatim).

But one page later, the CCA characterized Mr. Peraza’s burden differently:

We must determine whether there are potential constitutional applications of Article 102.020 so that we can consider whether Peraza has met his burden to show that there are no possible constitutional applications of the statute.

Peraza at 10. No cases are cited for this precise phraseology.

At first glance, the two formulations of the burden seem to be the same. Here again are the two different formulations:

Original Formulation: The challenger must establish that “no set of circumstances exists under which the statute would be valid.”

Altered Formulation: The challenger must establish that “there are no possible constitutional applications of the statute.”

In the case of most statutes, the challenger’s burden is the same under either formulation. But in the case of some statutes, the challenger’s burden is improperly escalated under the altered formulation. The statutes in which the burden is erroneously heightened are those statutes that produce both constitutional and unconstitutional results at the same time. Statutes calling for the assessment of fees and costs are prime examples.

C. *The former family protection fee - partly constitutional and partly not*

Ten years ago, the Attorney General considered the constitutionality of Section 51.961 of the Government Code. *See* TEX. ATT'Y GEN. OP. NO. GA-0387 (2005). This statute authorized county commissioners courts to adopt a “family protection fee” in an amount not to exceed \$30. *See* Act of June 2, 2003, 78th Leg., ch. 198, 2003 Tex. Gen. Laws 711 (amended 2005 and 2007) (current version at TEX. GOV'T CODE ANN. § 51.961 (West 2013)). The fee was to be collected upon the filing of a suit for the dissolution of marriage. *Id.* Revenue from the fee was to be directed to two different destinations. *Id.* Subsection (d) commanded that one-half of the fee be deposited in the county’s family protection account. *Id.* Subsection (g) mandated that the other half of the fee go to the State's child abuse and neglect prevention trust fund account. *Id.*

The AG opined that Subsection (g)’s allocation of revenue to the State's child abuse and neglect prevention trust fund account was unconstitutional. TEX. ATT'Y GEN. OP. NO. GA-0387 (2005) at 5. According to the AG, directing revenue to the trust fund violated the open courts provision of the Texas Constitution. *Id.* But the AG reiterated a previous opinion that Subsection (d)’s allocation of revenue to the county's family protection account was constitutional. *Id.* at 6-7. The salient message here is not the reasoning for the AG’s opinion that one fee destination was constitutional while the other fee destination was not. Rather, the reason for citing this AG opinion is to show that certain statutes can have both constitutional and unconstitutional aspects.

D. *A statute that is unconstitutional in part is an unconstitutional statute.*

A statute can have both constitutional and unconstitutional aspects - every time the statute is applied. When is a fee statute applied? Every time the fee is assessed.

When a statute has unconstitutional aspects, the statute itself is unconstitutional. The statute cannot continue to exist unchanged. The unconstitutional portion of the statute must be excised from the rest of the statute. In some circumstances, the remaining portion of the statute can continue in effect. In other situations, the excision of the invalid portion of the statute makes this impossible. *See* TEX. GOV'T CODE ANN. § 311.032(C) (West 2005) (“[I]f any provision of the statute or its application to any person is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.”).

In the case of Section 51.961, the statute could not continue to stand - even with the offending provision severed out. In order to keep the constitutional portion of the statute in effect, the Legislature had to amend the statute. The Legislature did so in the very next legislative session. *See* Act of May 22, 2007, 80th Leg. R.S., ch. 637, 2007 Tex. Gen. Laws 1212, 1215. The amendment reduced the fee from \$30 to \$15. The amendment directed the \$15 fee to the county’s family protection account which the AG had found to be constitutional. Additionally, the amendment repealed Subsection (g) which had directed part of the prior \$30 fee to the State’s child abuse and neglect prevention trust fund.

As noted in the foregoing paragraph, when a portion of a statute is unconstitutional, the statute itself is unconstitutional. Under the original formulation of the burden the challenger to the facial constitutionality bears, a partially unconstitutional statute will always be found to be unconstitutional. But under the altered formulation of the burden, a partially unconstitutional statute will always be found to be constitutional.

3. The decision in *Salinas* rests upon two decisions by this Court:

- A. Which facial constitutionality test is correct?
- B. Whether each of the individualized consolidated court costs are to be considered separately or as one cost?

The CCA has not yet ruled regarding what test will be applied regarding the facial constitutionality standard. But assuming it is the one from Supreme Court precedent, the correct test is a facial challenge to a statute “must establish that no set of circumstances exists under which the Act would be valid” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

As to the constitutionality of the entire statute:

It has been consistently held that where a portion of a statute has been declared unconstitutional, and there is an absence of a saving or severability clause, the remainder of the statute must be sustained if it is complete in itself and capable of being executed in accordance with the legislative intent wholly independent of that which has been rejected.

Tussey v. State, 494 S.W.2d 866, 870 (Tex. Crim. App. 1973). There is no savings clause or severability clause in the consolidated court cost statute. Additionally, were one

section to be found unconstitutional, it would undermine the entirety of the statute.

As Justice Jamison explained in her dissent in this case:

Under the circumstances presented in this case, the statute requires \$133 be gathered and distributed according to specified percentages. Period. Because the statute cannot be salvaged by severing constitutionally-funded programs from those not properly funded, the statute is facially unconstitutional even if certain of the listed programs could be constitutionally funded through court costs assessed against criminal defendants.

Salinas v. State, 426 S.W.3d 318, 333 (Tex. App.—Houston [14th Dist.] 2014), *rev'd*, 464 S.W.3d 363 (Tex. Crim. App. 2015)(Jamison, J., dissenting). This Court can determine the severability issue one of two ways:

1. The statute is entirely unconstitutional as Justice Jamison explained in her dissent. That determination would make sense because the statute reads that:

(a) A person convicted of an offense shall pay as a court cost, in addition to all other costs:(1) \$133 on conviction of a felony;

TEX. LOC. GOV'T CODE ANN. § 133.102 (Vernon). If this Court were to determine certain portions of the statute unconstitutional, it would not be the intent of the legislature that the constitutional portions reapportion the \$133 court cost.

2. The statute's percentage can be reapportioned to be calculated to fit the percentage dictated by the statute. However, this would make (b)(1)'s \$133 stated amount inaccurate. The constitutional portions of the statute funding valid court costs could be excised if this Court concluded they are wholly independent to the entirety of the statute. *See Salas v. State*, 365 S.W.2d 174, 175 (Tex. Crim. App. 1963)(explaining that “if the unconstitutional or void portion

of any statute be stricken out and that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, the statute must be sustained”).

4. There are at least three costs that do not comply with the new more relaxed CCA standard.

The first cost is labeled “Abused children’s counseling.” Statutorily, there appears to be no other mention of this fund to pay for abused children’s counseling beyond the CCC. A perusal of the State Comptroller’s Website shows that the money obtained from this particular court cost goes to the “General Revenue Fund” of Texas and is listed as a “revenue.”¹

Second is Law Enforcement Officers Standards and Education. Statutorily, this fee is defined in the Texas Occupations Code:

(a) The law enforcement officer standards and education fund account is in the general revenue fund.(b) The commission shall use the account in administering this chapter and performing other commission duties established by law.

TEX. OCC. CODE ANN. § 1701.156 (Vernon). But a further review of this statute establishes that this money no longer is used even in this manner. Westlaw details “Revisor’s Notes” for this statute:

2012 Main Volume

(1) *Section 415.084(a), Government Code*, provides the manner by which money in the law enforcement standards and education fund may be spent. The revised law omits this provision because Chapter 2103, Government Code, which was enacted subsequent to the enactment of *Section 415.084*, governs expenditures by state agencies, including the issuance of warrants. The omitted law reads:

¹ <https://cpafmprd.cpa.state.tx.us/fiscalmoa/rev.jsp?num=3704&id=4685>

(a) On requisition of the commission, the comptroller shall draw a warrant on the state treasury for the amount specified in the requisition, except that the warrant may not exceed the amount in the law enforcement officer standards and education fund.

(2) *Section 415.084(b), Government Code*, refers to collected fees being expended as specified by itemized appropriation in the General Appropriations Act. The revised law omits this reference because under Section 6, Article VIII, Texas Constitution, money may not be drawn from the treasury unless a specific appropriation is made. The omitted law reads:

(b) Money expended by the commission in the administration of this chapter and in performing other commission duties prescribed by law shall be specified and determined only by itemized appropriation in the General Appropriations Act for the commission.

(3) *Section 415.081, Government Code*, created the law enforcement officer standards and education fund in the state treasury. In 1991, the legislature enacted Section 403.094, Government Code, now repealed, under which many funds, accounts, and dedications of revenue were abolished effective September 1, 1995. *As a result of actions taken under Section 403.094, Government Code, the law enforcement officer standards and education fund became an account in the general revenue fund.* The revised law is drafted accordingly. (Emphasis supplied)

TEX. OCC. CODE ANN. § 1701.156. The law used to provide money to a commission pursuant to an appropriation. Now, the money is merely “an account in the general revenue fund.” It is money collected solely for the general revenue fund of Texas.

Third is the Comprehensive Rehabilitation Fee. The money is spent at the direction of the Department of Assistive and Rehabilitative Services - another executive branch agency. *See* TEX. HUM. RES. CODE ANN. § 115.001. There is no mention how this is a “legitimate criminal justice purpose.” A cursory review of the statute for this agency establishes:

(a) The comprehensive rehabilitation fund is created in the state treasury. Money in the fund is derived from court costs collected under Subchapter D, Chapter 102,1 Code of Criminal Procedure. Money in the fund may be appropriated only to the commission for the purposes provided by Section 111.052.

TEX. HUM. RES. CODE ANN. § 111.060. A review of the “purposes” of this money under current Texas law is:

(a) The commission shall, to the extent of resources available and priorities established by the board, provide rehabilitation services directly or through public or private resources to individuals determined by the commission to be eligible for the services under a vocational rehabilitation program or other program established to provide rehabilitative services.

b) In carrying out the purposes of this chapter, the commission may:

- (1) cooperate with other departments, agencies, political subdivisions, and institutions, both public and private, in providing the services authorized by this chapter to eligible individuals, in studying the problems involved, and in planning, establishing, developing, and providing necessary or desirable programs, facilities, and services, including those jointly administered with state agencies;
- (2) enter into reciprocal agreements with other states;
- (3) establish or construct rehabilitation facilities and workshops, contract with or provide grants to agencies, organizations, or individuals as necessary to implement this chapter, make contracts or other arrangements with public and other nonprofit agencies, organizations, or institutions for the establishment of workshops and rehabilitation facilities, and operate facilities for carrying out the purposes of this chapter;
- (4) conduct research and compile statistics relating to the provision of services to or the need for services by disabled individuals;
- (5) provide for the establishment, supervision, management, and control of small business enterprises to be operated by individuals with significant disabilities where their operation will be improved through the management and supervision of the commission;

- (6) contract with schools, hospitals, private industrial firms, and other agencies and with doctors, nurses, technicians, and other persons for training, physical restoration, transportation, and other rehabilitation services; and
- (7) assess the statewide need for services necessary to prepare students with disabilities for a successful transition to employment, establish collaborative relationships with each school district with education service centers to the maximum extent possible within available resources, and develop strategies to assist vocational rehabilitation counselors in identifying and reaching students in need of transition planning.

TEX. HUM. RES. CODE ANN. § 111.052.

5. The entire statute should be found unconstitutional.

The CCA’s opinion in *Salinas* states that this Court should analyze “what the governing statutes say about the intended use of the funds.” *Salinas v. State*, 464 S.W.3d 363, 363 (Tex. Crim. App. 2015). The analysis should include the statute as well as any statutory explanation of where the money goes. Because portions are unconstitutional, this Court should deem the entire statute unconstitutional.

PRAYER

Mr. Salinas respectfully requests that this Court find portions of the consolidated court cost unconstitutional and invalidate the entire statute.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

Jani J. Maselli Wood

JANI J. MASELLI WOOD
Assistant Public Defender
Harris County Texas
1201 Franklin, 13th Floor
Houston Texas 77002
(713) 368-0016
(713) 368-4322
Jani.Maselli@pdo.hctx.net
TBA No. 00791195

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. Proc. 9.5, this certifies that on September 8, 2015, a copy of the foregoing was emailed to Bridget Holloway, Assistant District Attorney through texfile.com at the following address:

Bridget Holloway

holloway_bridget@dao.hctx.net

Jani J. Maselli Wood

JANI J. MASELLI WOOD
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to proposed Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of TEX. R. APP. PROC. 9.4(E)(I).

1. Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (I)(1), this brief contains 3,650 words printed in a proportionally spaced typeface.
2. This brief is printed in a proportionally spaced, serif typeface using Garamond 14 point font in text and Garamond 13 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 J. Maselli Wood

Jani J. Maselli Wood