NO. PD 733-13

IN THE
COURT OF CRIMINAL APPEALS
AT AUSTIN

No. 01-11-01123-CR
IN THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS
AT HOUSTON

JOSE JUAN CARDENAS
Appellant

v.

THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

ORAL ARGUMENT WAS NOT GRANTED

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STATEMENT OF THE CASE

This is an appeal from a felony conviction for the offense of aggravated robbery with a deadly weapon. (C.R. at 19). *See Tex. Penal Code Ann. § 29.03.* The charge averred Mr. Cardenas, "while in the course of committing theft of property owned by Javier Mata, Jr., and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and place in fear of imminent bodily injury and death, and the Defendant did then and there use and exhibit a deadly weapon, namely, a firearm." (C.R. at 5). A PSI hearing was held where no witnesses were called. (2 R.R.; 3 R.R.). After conferring with the State as to whether Mr. Cardenas should get "credit" for pleading guilty, the court assessed punishment at 25 years imprisonment in the Texas Department of Criminal Justice - Institutional Division. (3 R.R. at 13; C.R. at 19). Timely notice of appeal was filed. (C.R. 23).

STATEMENT OF THE PROCEDURAL HISTORY

On February 7, 2013, in a published opinion, the First Court of Appeals affirmed Mr. Cardenas's conviction. *Cardenas v. State*, No. 01-11-01123-CR, 2013 WL 460437, at *1 (Tex. App. – Houston [1st Dist.] February 7, 2013). A motion for en banc reconsideration was filed on February 19, 2013. On March 21, 2013, the original opinion was withdrawn and the panel issued a new published opinion, rendering moot the motion for en banc reconsideration. *Cardenas v. State*, No. 01-11-01123-CR, 2013 WL 1164365, at *1 (Tex. App. – Houston [1st Dist.] March 21, 2013). Mr. Cardenas filed a motion for en banc reconsideration on the new opinion and that was denied on May 13, 2013.

ISSUES FOR WHICH REVIEW WAS GRANTED

First Issue: The First Court of Appeals decision to support the sufficiency of the evidence in a court cost challenge has created two new rules of law which are unprecedented in appellate practice:

1A. Can a Court of Appeals order a bill of costs to be created for appellate purposes only?

1B. Can a Court of Appeals consider evidence that was unavailable to the trial court?

1C. Can a Court of Appeals create facts in the record that are entirely absent from the record and are untrue?

Second Issue: Is the Court of Appeals determination that a criminal defendant has an available remedy for court cost issues through *Tex. Code Crim. Proc. 103.008* also a remedy for insufficient evidence in light of the following questions:

2A. Assuming bills of costs need be generated only upon appeal, how can a non-appealing defendant challenge errors in assessed costs under Article 103.008?

2B. Does the procedure under Article 103.008 allow a defendant to make constitutional challenges to assessed court costs?

2C. Is a defendant entitled to an evidentiary hearing in an Article 103.008 challenge?

2D. Under Article 103.008, errors are corrected by the court in which the case is pending or was last pending - can this be the appeals court?

2E. Is there any appeal from an Article 103.008 hearing?

STATEMENT OF FACTS

The judgment had a notation that Mr. Cardenas was responsible for $294 in court costs. (C.R. at 56). Nowhere in the record was there any documentation supporting this fee. The record was silent, despite a mandatory statutory requirement. *See Tex. Code Crim. Proc. 103.001.* In his Designation of Clerk's Record, Mr. Cardenas specifically requested the District Clerk include "[t]he bill of costs reflecting all fees and costs assigned to Defendant post-conviction." (C.R. at 27). The original clerk's record originally filed did not include a bill of costs.

On December 10, 2012, after all briefing had been completed, the Court of Appeals *sua sponte* issued the following order to the Harris County District Clerk:

> Pursuant to Texas Rules of Appellate Procedure 34.5(c) and 44.3, the trial court clerk is ordered to prepare, certify, and file a supplemental record containing a bill of costs. If no bill of costs currently exists, the trial court clerk or an officer of the court is ordered to prepare a bill of costs for inclusion in the supplemental record. See TEX. CODE CRIM. PROC. ANN. art. 103.006 (West 2001) ("If a criminal action or proceeding . . . is appealed, an officer of the court shall certify and sign a bill of costs stating the costs that have accrued and send the bill of costs to the court to which the action . . . is . . .appealed.").

On December 12, 2012, Mr. Cardenas objected to the order, arguing:[1]

> A newly created bill of costs fails to fulfill due process and is violative of not only *Johnson v. State*, 14-11-00693-CR, 2012 WL 4878803 (Tex. App.--Houston [14th Dist.] Oct. 16, 2012, no. pet. h.)but also *Harrell v. State*, 286 S.W.3d 315 (Tex. 2009).

[1] See Objection filed 12/12/2012, http://www.search.txcourts.gov/Case.aspx?cn=01-11-01123-CR

The District Clerk supplemented the record on December 17, 2013. Mr. Cardenas filed the following objection:[2]

The "Bill of Costs" Does Not Comply With the Statute

> The Harris County District Clerk filed a purported "J.I.M.S. Cost Bill Assessment" (Supp. C.R. At 2-4). The "cost bill" appears to be screen snap shots from their computer program, "Justice Information Management System." (Supp. C.R. At 2-4). While these screen shots may give information as to how the $294 court cost was calculated, it is *not* a bill of cost.
>
> > A cost is not payable by the person charged with the cost until a written bill is produced or is ready to be produced, containing the items of cost, *signed by the officer* who charged the cost or the officer who is entitled to receive payment for the cost. (Emphasis supplied).
>
> *Tex. Code. Crim. Proc. Art. 103.001.* While the "cost bill" produced is a certified copy, it is not a certified copy of a signed cost bill. This simply is not a cost bill as contemplated and required by law.

Despite the objections, the First Court of Appeals ultimately held that the computer print-outs created months after the judgment were sufficient evidence to support the court costs. *See Cardenas*, 2013 WL 1164365 at *5-6.

[2] See Objection filed 12/20/2013, http://www.search.txcourts.gov/Case.aspx?cn=01-11-01123-CR

SUMMARY OF THE ARGUMENT

Without a cost bill, there is insufficient evidence to support court costs. A Court of Appeals should not be able to thwart the absence of a record by ordering it created and then further create facts to support the new evidence. Under any theory of appellate practice, that is wrong.

The "promise" of a remedy under 103.008 is not only illusory, but in practice an impossibility.

Any efforts by an appellate court to become the accountant of court costs fails because there is no meaningful way to object or properly challenge the costs.

The court costs should be struck because there is no evidence in the record to support them.

ARGUMENT

First Issue: The First Court of Appeals decision to support the sufficiency of the evidence in a court cost challenge has created two new rules of law which are unprecedented in appellate practice:

1A. Can a Court of Appeals order a bill of costs to be created for appellate purposes only?

1B. Can a Court of Appeals consider evidence that was unavailable to the trial court?

> By the rules of an appellate court, it can act on no evidence which was not before the court below, or receive any paper that was not used at the hearing.

Boone v. Chiles, 35 U.S. 177, 178 (1836).

> We cannot enter into an examination of that question at all: whatever took place in the state court which forms no part of the record sent up to this court, must be entirely laid out of view. This is the established course of this court: and neither the opinion of the chancellor, or the proceedings on the motion, forms a part of the record.

Davis v. Packard, 31 U.S. 41, 48 (1832).

It is axiomatic that a Court of Appeals lacks authority to consider evidence unavailable to the trial court.[3] As explained in the treatise by Professors Dix and

[3] State and federal cases across the country are legion for this proposition. See, e.g., *Ford v. Potter*, 354 Fed. App'x 28, 31 (5th Cir. 2009)("Generally, we will not enlarge the record on appeal with evidence not before the district court."); *Neeb v. Lastrapes*, 64 So. 3d 278, 283 (La. Ct. App. 2011) ("An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence."); *In re Payeur*, 22 B.R. 516, 554 (B.A.P. 1st Cir. 1982)(holding that record should contain documentation necessary to afford reviewing court complete understanding of case.); *In re Lockwood Corp.*, 223 B.R. 170, 33 (B.A.P. 8th Cir. 1998)(holding an appellate court can properly consider only the record and facts before the trial court); *Guardianship of M.R.S.*, 960 P.2d 357, 365 (Okla. (continued...)

Dawson: "The record for an appeal is based upon what can usefully be regarded as the trial court record. Matters not adequately brought within the trial court record cannot later be included within the appellate record because the appellate record is limited to the trial court record." 43A George E. Dix & Robert O. Dawson, *Criminal Practice and Procedure § 43.301* (Texas Practice 2d ed. 2001). "Perhaps the most basic characteristic of the appellate record is that it is limited to matters before the trial court. An appellate court may not consider such extra-record materials as affidavits attached to appellate briefs . . . . The appellate record is limited to matters in the trial record." *Id. § 43.06*.

Only if a document is mistakenly *omitted*, may the record be supplemented. "If a relevant item has been omitted from the clerk's record, the trial court, the appellate court, or any party may by letter direct the trial court clerk to prepare, certify, and file in the appellate court a supplement containing the omitted item." *Tex. R. App. P.*

[3](...continued)
1998)(holding that it would be improper for the Court to consider facts not in evidence before the trial court.); *Najjar v. Ashcroft*, 257 F.3d 1262, 1277(11th Cir. 2001) (on review of immigration decisions, court cannot notice new facts on appeal); *Zell v. Jacoby-Bender, Inc.*, 542 F.2d 34, 38 (7th Cir. 1976) (court would not take judicial notice of documents filed in companion case in order to reverse judgment of trial court since to do so would violate rule that appellate court will only consider the record before the trial court); *Squire v. Geer,* 885 N.E.2d 213, 216 (2008)(Ohio Supreme Court clarifying that an appellate court cannot add matter to the record before it that was not part of the prior proceedings and then decide the appeal on the basis of the new matter.); *Dyer v. General American Life Insurance Co.*, 541 S.W.2d 702, 704 n. 2 (Mo. App.1976)(explaining the Court may not consider, in reaching our decision, documents that were neither pleaded nor before the trial court.); *Wallace v. Mantych Metalworking*, 937 N.E.2d 177, 182 (Ohio App. 2 Dist. 2010)("However, we may not consider, in reaching our decision, documents that were neither pleaded nor before the trial court."); *Avery v. Sabbia*, 704 N.E.2d 750, 753 (1998) ("matters not properly part of the record and not considered by the trial court will not be considered on review even though included in the record").

34.5. *See*, *Getts v. State*, 155 S.W.3d 153, 155 (Tex. Crim. App. 2005)(explaining when interpreting a statute, Courts focus their attention on the literal text of the statute in question and if the language is clear and unambiguous, the plain meaning of those words is applied.).

The plain meaning of "omit," is "to leave out; fail to include or mention."[4] That would presuppose the document was in existence before the supplementation. The Austin Court of Appeals examined a case where a motion from the defendant's other case had not been made a part of the appellate record:

> The appellate record consists of the clerk's record, and where appropriate, a reporter's record in the case. *Tex.R.App. P. 34.1*. Materials that are not filed with the district clerk as part of the record of the case are considered outside of the record. *Merchandise Ctr., Inc. v. WNS, Inc.*, 85 S.W.3d 389, 394 (Tex.App.-Texarkana 2002, no pet.). Such materials cannot be made part of the appellate record by supplementation. *Id.*

Martinez v. State, 03-10-00138-CR, 2012 WL 512659 (Tex. App.—Austin Feb. 16, 2012, no pet.)(not designated for publication).

There was no cost bill in the record before the trial court. The Fourteenth Court of Appeals recognized this deficiency and determined the evidence was insufficient in a procedurally identical case. *See Johnson v. State*, 389 S.W.3d 513 (Tex. App. – Houston [14th Dist.] 2012, pet. granted). The First Court of Appeals chose a more problematic approach - the creation of evidence.

"The rule does not allow a party to supplement the reporter's record with documents that were not admitted in evidence. Nor does rule 34.5(c) permit the

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[4] http://dictionary.reference.com/browse/omit

clerk's record in an appeal to be supplemented unless it is clear that the item to be considered was on file when the trial court rendered judgment." *In re E.W.*, 05-01-01463-CV, 2002 WL 1265541 (Tex. App.--Dallas June 7, 2002, pet. denied). The Fort Worth Court of Appeals explained:

> Our duty, as an appellate court, is to consider only the testimony adduced and the evidence tendered and/or admitted at the time of trial. *Gulf Oil Corp. v. Southland Royalty Co.*, 478 S.W.2d 583, 591 (Tex.Civ.App.—El Paso 1972), aff'd, 496 S.W.2d 547 (Tex.1973).

Vanscot Concrete Co. v. Bailey, 862 S.W.2d 781, 783 (Tex. App. – Fort Worth 1993) *aff'd*, 894 S.W.2d 757 (Tex. 1995).

It is axiomatic that a Court of Appeals can consider only evidence before it. The Court of Appeals erred in ordering evidence to be created. This Court should rule that when a document is not before the trial court, it cannot later be created for appellate court purposes only.

1C. Can a Court of Appeals create facts in the record that are entirely absent from the record and are untrue?

In the opinion on rehearing, the panel stated that, although the cost bill was newly created:

> To the extent this document had not been reduced to a hard-copy printout and thereby made part of the clerk's record prior to the entry of judgment in this case, **we nevertheless consider this document as evidence of the record that was available to the court and to the parties prior to the entry of judgment**, which we review in the light most favorable to the award. (Emphasis supplied).

Cardenas v. State, 2013 WL 1164365, *6. The highlighted portion is a mischaracterization of the record and the events in the trial court. It would be impossible to find that fact in the record and cite to it pursuant to the appellate rules because it is not true and the parties do not have access to the court cost screens on J.I.M.S.[5]

Supreme Court Standards

The Supreme Court of Texas has promulgated standards for appellate counsel. It is incumbent upon attorneys to not miscite the factual record.[6] The same rules apply to the judges on the Court of Appeals.

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[5] This Court should be aware the State is relying upon that exact block quote in its petitions for discretionary review to this Court. *See* pending State's petitions for discretionary review in *Jelks v. State*, PD 0381-13, page 17; *Stelly v. State*, PD 0385-13, page 13-14, and *Snowden v. State*, PD 0370-13, page 17.

[6] http://www.supreme.courts.state.tx.us/rules/conduct.asp

Lawyers' Duties to the Court

3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

The Court's Relationship with Counsel

2. The court will take special care not to reward departures from the record.

6. The court will abide by the same standards of professionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.

The Court of Appeals' creation of facts is anathema to the rules and every basic concept of appellate decision making. Case law is clear that an appellate litigant will be chastised, could be sanctioned by the State Bar, and could have his brief struck if the record is not cited pursuant to the rules:

> The Texas Disciplinary Rules of Professional Conduct impose upon counsel the duty of candor toward the court. *See Tex. Disciplinary R. Professional Conduct 3.03(a)(1)* (stating that a "lawyer shall not knowingly make a false statement of material fact or law to a tribunal.")....The duty of honesty and candor a lawyer owes to the appellate court, includes fairly portraying the record on appeal. Misrepresenting the facts in the record not only violates that duty but subjects offenders to sanctions. *See American Paging of Texas, Inc. v. El Paso Paging, Inc.*, 9 S.W.3d 237, 242 (Tex.App.—El Paso 1999, pet. denied).Counsel who mischaracterize or misrepresent the facts in the appellate record impose a tremendous hardship on the reviewing court and its staff.

Schlafly v. Schlafly, 33 S.W.3d 863, 872-74 (Tex. App. Houston [14th Dist.] 2000, no writ). In fact, the Court went further and held "the blatant misrepresentation and mischaracterization of the facts in his briefing to this court is inexcusable." *Id.*

Tex. R. App. Proc. 38.1

The Rules provide:

> (g) Statement of Facts. The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

Tex. R. App. Proc. 38.1. Courts of Appeals will not consider facts not in the record. *See, e.g. Janecka v. State*, 937 S.W.2d 456, 476 (Tex. Crim. App.1996)(holding a brief's mere assertions that are not supported by evidence in the record will not be considered on appeal); *Franklin v. State*, 693 S.W.2d 420, 431 (Tex. Crim. App.1985)(explaining this Court cannot review contentions that depend on factual assertions outside the record); and, *Izen v. Commission For Lawyer Discipline*, 322 S.W.3d 308, 321-22 (Tex. App.–Houston [1st Dist.] 2010) *cert. denied* 322 U.S. 308 (2011)(holding that single conclusory statement without citation to the record or to relevant authority is insufficient to preserve this issue for appeal).

Indeed, a Court of Appeals is even precluded from performing an independent review of the record in search of facts in the record:

> An appellate court has no duty-or even right-to perform an independent review of the record and applicable law to determine whether there was error. *Id.* Were we to do so, even on behalf of a pro se appellant, we would be abandoning our role as neutral adjudicators and become an advocate for that party.

Valadez v. Avitia, 238 S.W.3d 843, 845 (Tex. App.– El Paso 2007).

The Court of Appeals erroneous "Fact"

To uphold the sufficiency of the court costs without a cost bill, *and* comply with due process, the Court of Appeals needed something to show that Mr. Cardenas had in fact had notice and opportunity to be heard in the trial court. The only problem was there was nothing in the record to support that notion. Instead, the Court of Appeals chose an alarming route - which was to make an assumption and then recite it as fact. This undermines the entirety of their opinion. Mr. Cardenas' was denied due process, and there is no evidence in the record before the *trial* court that reflected the court costs.

Second Issue: Is the Court of Appeals determination that a criminal defendant has an available remedy for court cost issues through *Tex. Code Crim. Proc. 103.008* also a remedy for insufficient evidence in light of the following questions:

2A. Assuming bills of costs need be generated only upon appeal, how can a non-appealing defendant challenge errors in assessed costs under Article 103.008?

The Court of Appeals held that Mr. Cardenas had "been provided a separate procedural avenue to seek correction of any error in the award of costs. *See TEX. CODE CRIM. PROC. ANN. ART. 103.008(A).*" *Cardenas*, 2013 WL 1164365 at *5. This separate procedural avenue is described in Article 103.008(a) of the Code of Criminal Procedure which provides:

> On the filing of a motion by a defendant not later than one year after the date of the final disposition of a case in which costs were imposed, the court in which the case is pending or was last pending shall correct any error in the costs.

Tex. Code Crim. Proc. Art. 103.008(a). The Court of Appeals further determined:

> The ability to raise this objection for the first time on appeal and the availability of the article 103.008 review process both demonstrate that Cardenas was not entirely deprived of due process because of his alleged inability to object to the bill of costs at sentencing in this case.

Cardenas, 2013 WL 1164365 at *5.

The creation of a cost bill as ORDERED by the Court of Appeals

Mr. Cardenas did not receive a cost bill during the plea process. Mr. Cardenas did not receive a cost bill in the Clerk's Record, despite a particularized request for it upon the Designation of the Record. Mr. Cardenas did not receive a cost bill before he filed his brief. Only after the brief was filed, did the Court of Appeals ORDER the

District Clerk to create a cost bill for the record. The District Clerk complied with the order and *created* the cost bill. After briefing was completed, the cost bill came into existence solely for review by the Court of Appeals.[7]

Had Mr. Cardenas not appealed, he would have no cost bill. Without a cost bill to review for errors, any relief provided under *Code Crim. Proc. 103.008* is non-existent.

Mr. Cardenas is entitled to due process

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land. *Tex. Const. Art. 1, § 19.* The Federal Constitution, in the fifth and fourteenth amendments, also provides against deprivation of life, liberty or property without due process of law, the fourteenth amendment by its language being applicable to prevent the states from carrying out such a deprivation. *Mellinger v. City of Houston*, 68 T. 37, 3 S.W. 249 (1887). Although court costs are not punitive, it is the taking of property, and thus constitutionally protected. *See Harrell v. State*, 286 S.W.3d 315, 319 (Tex. 2009), and *Weir v. State*, 278 S.W.3d 364, 365-66 (Tex. Crim. App. 2009).

Significantly, the Supreme Court of Texas has ruled in *Harrell* , that a convicted defendant received due process *in the trial court* when he is apprised of his court costs. *Harrell*, 286 S.W.3d at 320. The court examined the "constitutional sufficiency of the

[7] Objections regarding specific cost bills created after briefing has been completed thwarts any attempted appellate challenge. Under the rules of appellate procedure, the Courts of Appeals can only consider objections timely and specifically presented in the trial court. *See Tex. R. App. P. 33.1.* Thus, no timely objection can ever be made under the rules.

procedures provided" Mr. Harrell, using the factors from *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). *Harrell*, 286 S.W.3d at 319-20. The second factor, "the risk of an erroneous deprivation of such interest through the procedures used" is where the Texas Supreme Court made the following assumption regarding procedures in the trial court:

> Harrell was party to the underlying action and notified of the costs assessed when the convicting court sentenced him. If he believed they were erroneous, he was free to contest them at the time they were assessed.

Harrell, 286 S.W.3d at 320.

It is abundantly clear that this is not the case in the trial court of Mr. Cardenas. He could *not* have been apprised of the individual costs because no cost bill existed until it was ordered to be created by the First Court of Appeals.

Article 103.008 might be a workable solution had Mr. Cardenas and similarly situated defendants received cost bills. But only when a Court of Appeals orders the clerk to create one, is a bill provided. And the vast majority of cases are not appealed and thus 103.008 would be an impossibility.

2B. Does the procedure under Article 103.008 allow a defendant to make constitutional challenges to assessed court costs?

Without a cost bill, Mr. Cardenas had no ability to make an objection in the trial court or a constitutional challenge regarding any individual court cost. Due process would seem to include the ability of a defendant to raise constitutional challenges. The Article 103.008 review process actually does not provide defendants with due process. This is because most non-appealing defendants will not receive a bill of costs on which intelligent court cost challenges can be based. Assuming, however, that defendants are given bills of costs, an Article 103.008 proceeding still does not provide defendants with all the process they are due.

Had Mr. Cardenas been provided with a bill of costs at sentencing, he would likely have challenged the constitutionality of the $133 consolidated court cost. *See Tex. Loc. Gov't Code § 133.102*. For Mr. Cardenas to have all the process he is due at an Article 103.008 hearing, he would have to be able to make the same constitutional challenge. Yet case law from the Third Court of Appeals indicates that such a challenge cannot be made in an Article 103.008 hearing:

> Article 103.008(a) of the Code of Criminal Procedure provides: "On the filing of a motion by a defendant not later than one year after the date of the final disposition of a case in which costs were imposed, the court in which the case is pending or was last pending shall correct any error in the costs. By its express language, this article applies in cases in which a party complains of an "error" in the costs assessed.
>
> Clearly, Caldwell's suit does not concern an allegation of any "error" in the calculation of costs. Rather, Caldwell is seeking a declaration that the statute imposing the costs is unconstitutional. We therefore find article 103.008 inapplicable...

Rylander v. Caldwell, 23 S.W.3d 132, 137 (Tex. App.– Austin 2000, no pet.). No constitutional challenge can be made in a 103.008 hearing. And yet, all constitutional challenges must first be raised in the trial court. *See Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009)(holding "a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute.). Further, this Court has expressly held, "[e]ven a constitutional claim is forfeited if the applicant had the opportunity to raise the issue on appeal." *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2006), *citing Ex parte Gardner*, 959 S.W.2d 189, 191 (Tex. Crim. App. 1996).

Unless this Court is prepared to overrule both *Rylander v. Caldwell* and *Karenev v. State*, the current procedure is violative of due process and deprives a defendant of any opportunity at a constitutional challenge.

2C. Is a defendant entitled to an evidentiary hearing in an Article 103.008 challenge?

The answer to this is a resounding "yes." "Basic due process requires that when a decision maker is called upon to make a decision grounded on evidence, the parties involved should be provided fair notice and a meaningful opportunity to present their evidence." *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 805 (Tex. App. – Austin 2000, pet. dism'd as moot).

Further, even in administrative proceedings, the right to counsel and fair representation is one of constitutional dimension. *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984), *citing Mosley v. St. Louis Southwestern Railway*, 634 F.2d 942, 946 (5th Cir. 1981). At a minimum, due process requires the "rudiments of fair play." *Crank*, 666 S.W.2d at 94.

The right to examine witnesses is constitutionally protected: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Although court costs might not seem to be fact-driven, they certainly are.[8] And further, there is a vast area where court costs can be inaccurately

[8] Even some court costs that are statutorily mandated upon a conviction are sometimes erroneously applied. *See Jones v,. State*, No. 06-12-00107-CR, 2013 WL 119123, *4 (Tex. App. – Texarkana 2013, no pet.)(not designated for publication)(Defendant erroneously charged the statutorily mandated Graffiti Eradication fee in a non-enumerated offense). *See e.g., Allen v. State*, – SW3d – , 2013 WL 1316965 (Tex. App. – Texarkana 2013, no pet.)(State conceded error because trial court overcharged appealing defendant by $300); *Morris v. State*, No. 01-12-00894-CR, 2013 WL 1932186, *5 (Tex. App. – Houston [1st Dist.] 2013, pet. filed)(not designated for publication)(Court of (continued...)

calculated based upon the offense or the different services rendered by peace officers or the courts:[9]

Cost Assessed if Service Performed by Peace Officer:

Execute or Process Arrest Warrant – *Tex. Code Crim. Proc. Art. 102.011(a)(2)*
Serve Writ –*Tex. Code Crim. Proc. Art. 102.011(a)(4)*
Take and Approve Bond – *Tex. Code Crim. Proc. Art. 102.011(a)(5)*
Convey Witness (charge per day) – *Tex. Code Crim. Proc. Art. 102.011(c)*
Make Arrest without a Warrant – *Tex. Code Crim. Proc. Art. 102.011(a)(1)*
Summon Witness – *Tex. Code Crim. Proc. Art. 102.011(a)(3)*
Commitment to Jail – *Tex. Code Crim. Proc. Art. 102.011(a)(6)*
Release from Jail – *Tex. Code Crim. Proc. Art. 102.011(a)(6)*
Summon Jury – *Tex. Code Crim. Proc. Art.* 102.011(a)(7)
Mileage Fees for No. 12-20 (29¢/mile) – *Tex. Code Crim. Proc. Art. 102.011(b)*
Meals/Lodging Expense for No. 12-20 – *Tex. Code Crim. Proc. Art. 102.011(b)*
Overtime Costs for Testifying at Trial – *Tex. Code Crim. Proc. Art. 102.011(i)*

Cost Assessed if Def. Placed on Comm. Sup. and Def. is required to submit DNA sample under *Tex. Code Crim. Proc. Art. 42.12, Sec. 11(j)* and Judge does not Waive Cost:

DNA Testing Court Cost – *Tex. Code Crim. Proc. Art. 102.020*

Cost Assessed if Payment made after 30th day after Judgment:

Time Payment Fee – *Tex. Loc. Gov't Code § 133.103*

Cost Assessed if Conviction is by Jury:

Jury Fee – *Tex. Code Crim. Proc. Art. 102.004*

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[8](...continued)
Appeals determined appealing defendant overcharged in court costs); *Ballinger v. State*, – S.W.3d – , 2013 WL 305 (Tex. App. - Tyler 2013, no pet. h.)(State concedes that defendant overcharged by $300).

[9] See court cost chart prepared by the Office of Court Administration. http://www.courts.state.tx.us/oca/pdf/DC-CRFeeChart.pdf

Cost Assessed if DWI Defendant is Visually Recorded:

Visual Recording Fee – *Tex. Code Crim. Proc. Art. 102.018(a)*

Cost Assessed if Conviction is in Statutory County Court:

Judicial Fund Court Cost – *Tex. Gov't Code § 51.702*

Cost Assessed if Conviction is in District Court:

Court Security Fee – *Tex. Code Crim. Proc. Art. 102.017*

Cost Assessed unless Defendant Indigent & Judge Waives:

Evaluation for Drug/Alcohol Rehab. Ct. Cost – *Tex. Code Crim. Proc. Art. 102.018(b)*

Discretionary Costs:

Restitution Installment Fee – *Tex. Code Crim. Proc. Art. 42.037*
Transaction Fee – *Tex. Code Crim. Proc. Art. 102.072*

Although though this type of hearing would not encompass the full protections of a trial, even "administrative hearings cannot be arbitrary or inherently unfair." *City of Corpus Christi v. Public Utility Comm'n of Texas*, 51 S.W.3d 231, 262 (Tex. 2001). In parole proceedings to determine whether a parolee can be labeled a sex offender despite having never been convicted of a sex offense, the Fifth Circuit ruled on what process was due:

> In other words, we find Meza is due: (1) written notice that sex offender conditions may be imposed as a condition of his mandatory supervision; (2) disclosure of the evidence being presented against Meza to enable him to marshal the facts asserted against him and prepare a defense; (3) a hearing at which Meza is permitted to be heard in person, present documentary evidence, and call witnesses; (4) the right to confront and cross-examine witnesses, unless good cause is shown why this right should not be granted; (5) an impartial decision maker (which we assume

> the Board will be); and (6) a written statement by the factfinder as to the evidence relied on and the reasons it attached sex offender conditions to his mandatory supervision.

Meza v. Livingston, 607 F.3d 392, 411 (5th Cir. 2010) decision clarified on denial of reh'g, 09-50367, 2010 WL 6511727 (5th Cir. Oct. 19, 2010). This Court expressly adopted the ruling in *Meza* in *Ex parte Evans*, 338 S.W.3d 545, 550 (Tex. Crim. App. 2011). Notice of the costs, an opportunity to present evidence regarding the veracity of the costs, and a fair tribunal should all be encompassed in a 103.008 hearing.

Ultimately, the First Court of Appeals reliance upon 103.008 fails because there was no cost bill. But, since one was ordered to be created, a 103.008 hearing requires procedures that comport with basic rudiments of due process - notice and a meaningful opportunity to be heard.

2D. Under Article 103.008, errors are corrected by the court in which the case is pending or was last pending - can this be the appeals court?

The statute provides for the correction of court cost errors by "the court in which the case is pending or was last pending." *Tex. Code Crim. Proc. Art. 103.008*.

Mr. Cardenas made an appeal to the First Court of Appeals. This Court has granted his petition for discretionary review - thus rendering the Court of Criminal Appeals where the case was "last pending."

Mr. Cardenas has a constitutional challenge to the consolidated court cost - which could not have been made in the trial court because no cost bill had been created. Under *Karenev* and *Caldwell v. Rylander*, Mr. Cardenas would presumably be foreclosed from making his constitutional challenge.

It is axiomatic that the courts of appeals do not possess fact-finding authority. *Wisdom v. Smith*, 146 Tex. 420, 425, 209 S.W.2d 164, 166 (1948). *See Tex. Const. Art. V, Sec. 6*. (Courts of Appeals decisions "shall be conclusive on all questions of fact brought before them on appeal or error."). The legislature has statutorily given this Court and the intermediate courts of appeals a fact-finding role in a 103.008 challenge. Because the Constitutional provision should override the statutory provision, and there is no available remedy under 103.008 to an appealing defendant, the costs should be struck.

2E. Is there any appeal from an Article 103.008 hearing?

This is problematic because the law is unclear where such a hearing should be held. The law is unclear what type of hearing should be held.

If the appellate courts are actually where the hearing is held - what type of appellate review is available?

The very best practice would be for defendants (appealing and non-appealing) to receive a cost bill and have an opportunity to object at that time. Later, if a discrepancy or error were discovered, a motion in the trial court would seem to be the appropriate venue.

In Class C misdemeanors which only implicate fines, litigants are afforded an appeal through a trial *de novo* at the county court level. *See Tex. Pen. Code § 12.32, Tex. Crim. Proc. Code Ann. art. 4.08* (Vernon)("The county courts shall have appellate jurisdiction in criminal cases of which justice courts and other inferior courts have original jurisdiction."); *Tex. Crim. Proc. Code Ann. art. 45.042 (b)*("Unless the appeal is taken from a municipal court of record and the appeal is based on error reflected in the record, the trial shall be de novo.").

A corollary system - property taxes might also provide some guidance:

> It is well-established that the collection of taxes constitutes deprivation of property; therefore, a taxing authority must afford a property owner due process of law. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Florida*, 496 U.S. 18, 36–37, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990); *ABT Galveston Ltd. P'ship v. Galveston Cent. Appraisal Dist.*, 137 S.W.3d 146, 155 (Tex.App.-Houston [1st Dist.] 2004, no pet.); see *U.S. Const. amend. XIV*; *Tex. Const. art. I, § 19*.

Sondock v. Harris County Appraisal Dist., 231 S.W.3d 65, 70 (Tex. App.—Houston [14th Dist.] 2007, no pet.). If property owners are dissatisfied with their hearing before the appraisal district, they are allowed an appeal.

The same type of liberty interest - the taking of property - is implicated in a 103.008 hearing. Thus, to comport with due process, an appeal is required.

CONCLUSION

The court costs should be struck because there is no evidence in the record to support them and no meaningful avenue to challenge them.

PRAYER

Mr. Cardenas respectfully requests that this Court reverse the decision of the Court of Appeals and strike the court costs because there is no evidence to support them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition for discretionary review has been served on Bridget Holloway, Assistant District Attorney of Harris County, Texas, by hand delivery and a copy has also been mailed to Lisa McMinn, State Prosecuting Attorney, P.O. Box 13046, Austin, TX 78711, by first class mail on the 5th day of September, 2013.

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JANI J. MASELLI WOOD

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 petition contains 7616 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 14 point font in footnotes produced by Corel WordPerfect software.

3. Upon request, undersigned counsel will provide an electronic version of this brief and/or a copy of the word printout to the Court.

4. 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.

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