ORAL ARGUMENT — 10/6/99
98-0679
TUNE V. TEXAS DPS

LAWYER: In January, 1996, Warren Tune applied for a concealed handgun license, which was denied by the DPS. The Dept. denied the license for the sole reason that it had evidence that he had been previously convicted of a felony, as it interpreted the statute. This was based on a judgment from the Dallas criminal court, which had occurred 27 years ago, in which the defendant had been placed on probation for 17 months for the charge of theft over $50. But that judgment had been set aside and dismissed in all respects.

The JP granted the license and directed the Dept. to issue it. The Dept. appealed to the county court at law. At a de novo trial before the county court, the county court also ruled that the applicant, Mr. Tune, was entitled to a license and directed the Dept. to grant the license. It was then appealed to the Ft. Worth CA. The Fort Worth CA reversed and we would contend that the court was wrong in three respects: 1) that it had a lack of jurisdiction to even hear the case; 2), that the Dept. did not carry its burden of proof that's required under the statute; and 3) that in this particular case, the evidence does not disclose that there is a conviction of a felony.

ENOCH: Was there any contest in either the JP court or in the county court about the identity of Tune?

LAWYER: In the JP court, I quite frankly don't remember. I think there was a whole lot more discussion about the law because it was relatively new. In the county court, the case was tried as any other civil case would be tried. The Dept. put on their case, we put on our case, the judge made a decision.

ENOCH: Was the TC in the position of a fact finder presented a dispute over the identity of Tune?

LAWYER: Well I think so. The Dept. pled that he had been convicted and that was what the case was over. They introduced evidence to that effect. Our contention is, they didn't make their case.

ENOCH: And your argument to the court was that Tune's conviction had been set aside?

LAWYER: Most of my argument was on the basis that the document that they presented - they presented the judgment, they didn't present the portion of the record that reflected it had been set aside. We introduced that record to complete the record. But our contention in the court and our argument to the court was that assuming that what they said was true, it still doesn't.

HANKINSON: But did you ever dispute that the documents that were at issue over the prior

criminal proceeding involved Mr. Tune?

LAWYER: As the defendant, I don't think we were required to. We didn't have a burden to do anything. We didn't have a burden to do anything. We entered a general denial. I would assume that would put everything in issue.

HANKINSON: Did you put at issue with the trial judge, as the fact finder, raise the question that Mr. Tune was not the person who was subject to the criminal proceeding at issue?

LAWYER: We contested every issue. We required the DPS to put on their case and make their case.

HANKINSON: Did you ever argue to the JP court that Mr. Tune was not the defendant in a prior criminal proceeding?

LAWYER: I will have to say, I don't really recall. I think you can look at the record, and most of the argument revolved around the law, because essentially that's what Judge Tice asked about was statutory authority? was there any authority? Had there been any case law? That sort of thing.

With regard to the jurisdiction, the proposition that's long-standing is that courts are a limited jurisdiction. Appellate courts particularly. The Gov't Code requires that the CA can only hear a case if the amount in controversy is over $100. This is an administrative law case. It's an administrative proceeding. It has been from the beginning. There's not amount in controversy.

PHILLIPS: He was willing pay $140 for a 4-year license?

LAWYER: Well actually, he pad a $70 fee.

PHILLIPS: He didn't know at the time he made application?

LAWYER: I don't know. I'm sure in those circumstances, I think most people pay what they are told to pay as an application fee. It's a non-refundable fee. You don't get it back if you don't get the license. To my way of thinking it's more like paying a filing fee in a lawsuit.

GONZALES: Was this a prorated fee? What did he pay for? He paid $70 for a 2-year license, is that my understanding?

LAWYER: I think that there is some indication that the Dept. was given some discretion in terms of how long the license would extend. And so, apparently they did have some discretion to pro-rate over a period of time.

ABBOTT: Well exactly how much did he pay?

LAWYER: Seventy dollars is what the record discloses on the application.

ABBOTT: Was he obligated to make any further payments?

LAWYER: Not that I'm aware of.

GONZALES: So was this for a 2-year license, or a 4-year license?

LAWYER: I would have to say I'm not sure, because this point came up later. The application shows a $70 fee. The Dept. has indicated it's a 2-year license, and I wouldn't dispute that.

ENOCH: The cost of the license is $140?

LAWYER: The statute provides the Dept. can charge that.

ENOCH: There may be a discount like for senior citizens, or there may be a proration like what happened here where you get less than the full length of a license for less than full payment?

LAWYER: And some people apparently don't pay these at all.

ENOCH: The State decides some authority that indicates that one way a court can evaluate its jurisdiction is by the cost of the license that's being sought. In the context of essentially here, the State is being ordered an affirmative injunction, or whatever you want to call it, being ordered to take some action. And it's taking that action. It has some value. And the authority seems to say that if that value at a minimum would be whatever the cost of the permit that they would be required to issue should be. Do you disagree that that's a reasonable way for a court to evaluate the value that's involved in litigation?

LAWYER: I think given the fact that this happens in a lot of different areas. Gov't is intrusive in our lives these days, and there's a lot of permits and licenses around. One of the reasons we have an administrative procedure act is to govern those procedures. In this particular case, the legislature chose and specifically wanted to take this proceeding out of the administrative proceeding act. So to a certain extent, I think we fall back into the situation in the *Stone v. Liquor Control Board* case. It's just an administrative proceeding. And we shouldn't do a convoluted analysis to try to find some value for something which really doesn't have a value.

BAKER: Well is your argument because it's a non-refundable fee, whatever it is, that it can never be an amount in controversy in an appellate process involving a concealed weapons license, so that you're always looking at you either get it or you don't, but you can't ever argue about

the money?

LAWYER: Right. And I don't think that it's a - first of all I don't think this is an injunctive or mandamus situation. It's simply an administrative procedure. The court simply says: Yes, he's entitled. No, he's not. So we're not really ordering the Dept. to do anything. It's just the statute says they will or they won't based on whether you qualify.

HANKINSON: It is an administrative proceeding, but obviously a question has arisen about interpreting the statute.

LAWYER: Yes.

HANKINSON: How is that to be resolved under your interpretation of a lack of jurisdiction in the appellate courts? And we obviously are seeing a conflict among the CA's in connection with interpreting this statute.

LAWYER: Quite frankly, there may be a policy here to have these decisions made on a local level as opposed to on some kind of over-reaching, overall level.

HANKINSON: So that the law will be different in different parts of the state?

LAWYER: Could be. In small claims, that's essentially what we have. I don't know that that's necessarily wrong. Maybe one part of the country has a little different attitude towards certain things than other portions of the state do. That may have been a consideration by the legislature in the way...

HANKINSON: But in the case of small claims, the issues that are raised in small claims claims court are frequently the same legal issues that may be raised in courts with increased jurisdictional powers that would lead to appellate resolution of legal questions that assist the small claims courts, correct?

LAWYER: Well that's true.

HANKINSON: You can take a DTPA claim into a JP court, and there's plenty of law by the appellate courts in Texas interpreting the DTPA?

LAWYER: Certainly.

HANKINSON: But this situation should be treated differently, and you believe that the legislature intended that?

LAWYER: I think they were very careful to take it out of the administrative procedure

act, and they were very careful to provide two levels of appeal, and then it stopped. And it would have been very easy for them to go ahead and put in an appeal to the CA's just like they have in the administrative procedure act, but they chose not to.

HANKINSON: Do you have any legislative history that indicates, beyond obviously the language of the statute is one way to interpret, but in the specific legislature history behind this statute that would support your view?

LAWYER: I haven't seen anything really one way or the other. This was quite frankly a theory that the Waco CA came up with that was not really ever briefed or argued. This is the first time to my knowledge that the issue has really been argued.

I think the court has hit the crux of the issue there with regard to the fee. The Ft. Worth CA went off on the *Jones* case, which is clearly not controlling here, because that involved a license suspension. It is covered by the administrative procedure act. So the basis for their decision is wrong. Obviously, I think you know what the issue is here with regard to the fee.

I guess in closing with regard to that, our position on the filing fee is just that that's not a proper measure, that's not the amount in controversy, that's just a side. The real thing in controversy is the license.

With regard to the burden of proof, this was an evidentiary hearing. And the Dept. has never raised any evidentiary issues in this entire appeal. It would seem to me that since there's no findings of fact, all the findings have to be presumed to be in favor of Mr. Tune. In order for the court to overturn that, there would have to be a finding that the finding of the TC was against the great weight and preponderance of the evidence. The Dept. has never raised that. They've never talked about evidence. Unfortunately the CA never talked about evidence either.

BAKER: Would you agree though that construction of a statute, which you said, this is a case that involves that, is a question of law for the court when you apply it to the facts? So that why should we have an evidentiary matter to think about in this case?

LAWYER; As we pointed out, you still have to prove what you say. Even if you're right on the law, you still have to prove it. You can be right on the negligence law, but you still have to prove that the defendant you sued is the guy who ran into you.

BAKER: So it's your view then that the Dept. offered no evidence to prove that Mr. Tune was “convicted?”

LAWYER: They walked in. They handed the court a judgment from Dallas, and they sat down.

BAKER: And then you stood up and said, Well wait a minute, here's our piece of paper that shows the indictment was dismissed and the conviction set aside, so we're not convicted under the statute?

LAWYER: Well, I didn't say that.

BAKER: What did you say?

LAWYER: Counsel would like for me to say it. Well quite frankly I didn't say a whole lot of anything. I introduced the evidence and sat down.

BAKER: So you introduced your piece of papers and that's where the issue was joined?

LAWYER: And that was it. That was all that was before the TC.

BAKER: So why should there be an evidentiary problem when that's all the court had to look at?

LAWYER: Because the cases that we've cited in the brief have indicated for example, if you're going to revoke somebody's probation, you have to show that the person that committed this crime is the same person that was on probation over here.

BAKER: Oh, but you're now talking about the identity issue.

LAWYER: The identity issue, yes.

BAKER: But you never answered either Judge Enoch's or Justice Hankinson on was there a factual dispute in the TC over identity? Wouldn't it be fair to say when you stood up and said, Well here's our piece of paper that shows this conviction is no longer in existence because of these two facts, that that's a _____ of judicial admission that Mr. Tune is the same Mr. Tune in the judgment that the state offered? Otherwise, wouldn't you just stand up and say, We don't care what that says, we're not he, and so we don't have to introduce our papers.

LAWYER: I hope the court is not going to proceed down the slippery slope of saying that every inference that you can bring out of the trial constitutes a judicial admission that means the other side doesn't have to prove their case. In my car wreck case, if the defense lawyer doesn't jump up and say, It wasn't us driving, then the plaintiff must...

BAKER: With all due respect, the way you argue today leads me to the conclusion that this is purely a question of law for the court to decide based on how to construe this statute and that's what's before this court now, rather than some evidentiary or identity question. Would you agree to that?

LAWYER: Given the fact that there are other cases that I'm aware of that are out there, I think the court certainly ought to look at that issue.

BAKER: That didn't answer my question either. Are we here merely to construe the statute as applied to the record in this case? Was he convicted or not under the concealed weapon thing, and therefore, was he entitled to or not entitled to a permit? Pure and Simple

LAWYER: We have three points and that's one of them. And I think it's very important...

BAKER: Yes, but I'm not trying to say are the other two points no good because we're a statutory construction case and that's all we need to do here.

LAWYER: No, I think the court needs to deal with all three issues. Because I think they are all significant.

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RESPONDENT

O'NEILL: Mr. Coleman, do you afford any significance to the fact that the legislature chose not to make the handgun act subject to the administrative procedures act?

COLMAN: No, I don't. I think what happened in this case is they decided, and I'm not sure why they decided they would not make it subject to the APA. What they then did in §411.180 is say, We're going to provide that once the Dept. makes these administrative determinations, we're going to provide a method for judicial review of those. You go first to the JP court, and then you go trial by trial de novo to the county courts. And they stopped there. They provided that much judicial review.

We believe that there is no significance to the fact that the statute didn't go beyond that, because the statutory law in Texas already provides that in every civil case there shall be an appeal from the county court to the CA in any matter in which the amount in controversy exceeds $100. And that's both in the Civ. Prac. & Rem Code...

O'NEILL: Then by analogy, why did they amend the vehicle act to make it subject to the APA?

COLEMAN: I don't know the answer to that question. I do know that the legislature did express its intent that the ALR proceedings be handled through the APA. I do know that that is set out in the statute. I don't know why. But they clearly intended that these matters be handled differently. But the handgun case is to be handled through the JP courts and county courts, not under the APA and that the ALR's should be handled that way.

ABBOTT: If they clearly intended for it to be appealed to the CA, they could have of course just said that, and they didn't say that.

COLEMAN: They could have said that, and they didn't. But I think it's reasonable to rely on CPR C 51.012 or Gov't Code 22.220, which already said in clear and unambiguous terms that in any civil case in the county courts if your AIC is over $100, you get to go up.

ABBOTT: In that regard, isn't it true that this amount is nonrefundable?

COLEMAN: Yes, it is.

ABBOTT: So what's the controversy about with regard to in excess of $100? No one can recover $100. The $100, the $140, whatever the application fee may be is not an issue.

COLEMAN: I don't see any importance to the fact that the license fee or the application fee is nonrefundable. The issue here is under this court's case law and the federal courts case law as well, in a case like this (and he said its not injunctive or declaratory really), but the statute says when you go to JP court or you go to the county court if they are right the court shall order the Dept. to issue the license. It really is declaratory or injunctive in nature. And when you have that type of suit, you determine the amount in controversy by the value of the object. And I think the fact that the fee is nonrefundable doesn't matter because the value of the object in the general sense is well over $100. And these people will pay the application fee...

O'NEILL: You mean the value of being able to carry a gun?

COLEMAN: The value of obtaining a concealed handgun license.

GONZALES: What is the value in this case?

COLEMAN: I think in this case one can never subjectively say what the value is to a person. There was a prorated fee. When this program first came out, the Dept. was concerned that they were going to have a rush of applications and that all those applications would come up for renewal 4-years later. So what they did is arbitrarily split it. Half of the people would pay a $70 prorated fee for a 2-year license that would come up for renewal in 2 years. And then the other half paid the full statutory application fee of $140, and their licenses would come up in 4 years.

GONZALES: So he paid $70 for a 2-year license?

COLEMAN: Yes.

GONZALES: He was applying for a 2-year license?

COLEMAN: Yes.

GONZALES: He paid the full fee for that?

COLEMAN: He paid the $70...

GONZALES: Is that the value of the amount in controversy?

COLEMAN: No, I don't believe it is. The *Glenwood* case that I cite in my brief was a case over the removal of some poles and lines, and the court clearly found that the value or the cost to do that was $500. The amount in controversy in the case was $3,000. And the lower court ended up dismissing the case and said: You didn't meet it.

What the US SC said is, No, you don't measure by that finite of accounting, the value of the object is the value of obtaining and protecting that right now and in the future. And so in that case they said, We think that that will be in excess of $3,000, and therefore, the amount in controversy requirement was satisfied.

ABBOTT: Is there any proof that he wanted to renew it after 2 years?

COLEMAN: No.

ABBOTT: So there is no proof that he may have paid an extra $70 or $140 or whatever for the future to continue the license?

COLEMAN: That's correct.

ABBOTT: So how can you stretch this to say that it is anything more than $70 in controversy?

COLEMAN: Our primary argument is not that you necessarily should. We think that you can look beyond that. That the value of holding that license now in the future is greater. But our main argument is that it should be an objective measure. For instance, if you're a hometown lawyer and you know the county court is going to rule in your favor and DPS puts you on the stand and says, What's the value, we need to prove amount in controversy? That lawyer is going to instruct their client to less than $100.

PHILLIPS: Well why isn't it objective if you look at what was actually paid rather than try to define the _____ word subjectively to each individual whether they are trolls or nuns?

COLEMAN: The easiest objective way to measure this is simply to look at the application fee, that people pay as a general matter $140.

HANKINSON: That $140 is really an administrative fee isn't it for processing the license?

COLEMAN: Yes. But I believe that's looking at it the wrong way. The question is not what the Dept. is going to do with the money, but whether the individual is willing to part with the money to obtain a license. And clearly the answer is, yes. And that's in excess of $100, and we think that it meets the jurisdictional grounds.

HANKINSON: If we were to agree with you on this position that we should be looking at licensing fees as reflecting the value of the object to get us to the amount in controversy, what other areas of Texas law are going to be affected, and what kind of floodgates are we opening for administrative proceedings to go into the appellate courts based on licensing or administrative fees having been charged in connection with the process? What's the impact of this decision?

COLEMAN: I don't think that this decision on the matter of jurisdiction is really going to have an impact, because in the vast, vast majority of these cases, the legislature provides for review under the APA, and you don't have to worry about an amount in controversy.

HANKINSON: Are there any other administrative areas of the law that would be impacted by this decision?

COLEMAN: I'm not aware of any.

GONZALES: I guess I'm confused. Help me understand this. You're arguing that we should determine the amount in controversy by the application fee. Is that what you're suggesting?

COLEMAN: Specifically the application fee. And I think you can look at the other things that the person is required to provide and pay for.

GONZALES: But in this case, the application fee for a 2-year license is $70. He was not applying for a 4-year license. So how do we - I don't understand how there is jurisdiction here?

COLEMAN: We argue for an objective standard because ...

BAKER: Well what is your view that the objective standard encompasses?

COLEMAN: It encompasses the general view that an individual is willing to part with at least $140 to get...

BAKER: But that's not this case.

COLEMAN: That's not this case.

BAKER: So could we say, in this particular case there's no jurisdiction because it's $70 in controversy. End of the discussion. The next case comes along and John Doe pays $140 for 4-years and we say, Jurisdiction is here. Under your view of an objective standard because there's more than $100 and it will go to the CA, so that that is just cut and dry. You know that's going to happen.

COLEMAN: Two points about that. First, I think that that would be a bad decision because...

BAKER: Well how can we do anything other if we except your viewpoint?

COLEMAN: I think it would be a bad decision because essentially full fee applicants would get judicial review, but senior citizens, individuals, low-income, anybody who receives a discounted application fee would not. So you would have...

GONZALES: He paid, I would argue, a full amount for a 2-year license.

COLEMAN: Okay. My second point, other than the fact that it will have completely nonconsistent results based on that, is that you have pending in front of you the *McClendon* case. *McClendon* doesn't have this problem. It is my understanding that the CA in *McClendon* did rely on the application fee and that *McClendon,* to my knowledge, he did pay the full fee.

BAKER: That would be consistent with your view that we might have an objective standard and look at what was actually paid. That they correctly decided there was more than $100 there, but we can't correctly decide that the court had jurisdiction here because only $70 was paid.

COLEMAN: We think the objective view is not what was actually paid, but as a general matter in this class of cases, what are people willing to party with. And you have exceptions...

BAKER: Well they are willing to part with what you tell them they have to pay. And here you said $70 will do it for 2-years. Aren't you stuck with your decision?

COLEMAN: Our point is not what the individual is willing to part with, but as a general matter what we ask individuals as a class to part with to receive this.

BAKER: But you have two classes don't you: 1 2-year class; and 1 4-year class?

COLEMAN: I don't think that that exist anymore. If was part of the startup...

BAKER: _____ changing your procedures, so we're not going to see these kind of cases anymore where we have this $70 question, is that right?

COLEMAN: I think that is true. You won't see this type of case anymore.

OWEN: Let me ask about this court's jurisdiction. We would normally not have jurisdiction over a case that began or certainly that was appealed to a JP court. Assuming that we have jurisdiction to decide the CA's jurisdiction, what gives this court jurisdiction over the merits of the controversy?

COLEMAN: Conflicts jurisdiction.

OWEN: And you think that applies even when the case originates in JP court?

COLEMAN: Yes. I would like to move to the actual interpretation of what 'convicted' means under the concealed handgun act. Petitioner suggested that the court should apply a lenient interpretation, one that favors him. We strongly disagree with that . This is an important issue. Texas doesn't have a history of allowing people to carry concealed handguns. The legislature made a limited decision to allow this in certain circumstances, but it carefully circumscribed that right and strictly limited the class of individuals eligible to apply. We think because of the nature of the privilege being granted, that the court should in fact apply a strict interpretation.

Ultimately Mr. Tune is simply not in the class of individuals that the legislature intended to grant a privilege of carrying a concealed handgun. There are a number of reasons and I would like to talk first just about the plain language of the statute. The statute says, That you will be considered convicted, and therefore, not eligible for a license if there has been adjudication of guilt. And then in 411.171(4)(a), the sentence is probated and you are discharged from a term of community supervision. That language fits Mr. Tune perfectly. He served probation. He was discharged.

BAKER: But he says, that may be true, but it went further with me because my judgment was set aside and my indictment dismissed. And that means nothing really happened as far as this whole thing I was involved in 27-years ago.

COLEMAN: He's raising a circumstance that is included within the language of the statute. This statute broadly says, Every individual who is convicted, gets probation, is discharged from community supervision shall not be eligible to apply for a concealed handgun license. The fact that he wants to separate that out into two categories: the people who meet those requirements who get the indictment dismissed, and those who don't, they both fit under the plain language of that statute.

ABBOTT: The way you are reading the statute broadens the statute to include Tune, because he goes beyond having a probated sentence and being removed from community supervision. He goes one step further and has his conviction removed altogether. If you get convicted of a felony and you get a probated sentence and have your community supervision taken care of, then you don't have your conviction removed, do you?

COLEMAN: That's correct.

ABBOTT: With that being correct with his conviction being removed why doesn't he go one step beyond what the statute contemplates?

COLEMAN: I think that 42.12 does suggest that the indictment will be dismissed. But in asking around, I'm not sure the courts and prosecutors are applying it that way, so that there are people who complete successfully a term of community supervision who do not have their indictment dismissed. But, nevertheless, this statute is not being broadened. What the statute says is it applies to everybody. If you meet these qualifications, you're not eligible and it doesn't matter whether you have some other circumstance that applies to you.

ABBOTT: Isn't there a competing statute at play with Tune that may not exist for most other people?

COLEMAN: I don't think that the statute is competing.

ABBOTT: The old 4212, §7?

COLEMAN: I don't believe that it competes.

ABBOTT: Well what it says as you know is that he will be released from all penalties and disabilities. And a penalty or disability from that crime would be the inability to have a license to carry. And if we are to read that statute literally, he should be removed from the disability of not being able to have a license to carry.

COLEMAN: Two responses. First, we believe that the privilege to carry a concealed handgun is that, the language in 42.12 restores civil rights. That's what the courts have talked about when it says you are released from penalties and disabilities.

ABBOTT: Do civil rights derive from the Bill of Rights to some extent?

COLEMAN: Yes.

ABBOTT: And is it the AG's position that under the Second Amendment, that that does not provide a civil right?

COLEMAN: The ability to carry a concealed handgun is not a civil right. It is a privilege.

ABBOTT: So the right to bear arms under the Second Amendment is not a civil right?

COLEMAN: The right to have arms in your home probably is, but the right to carry a

concealed handgun is not. I think we would strongly assert that. Mr. Tune is arguing that the release from penalties and disabilities means that you can't consider the fact that his indictment was dismissed. But that's completely inconsistent with ½ dozen or more statutes that say that you can. 42.12 is not an absolute bar to an agency or department considering the fact that someone was convicted and then ultimately had the indictment against them dismissed. Once you recognize that, it is not a complete bar. Then you look to what the legislature intended to do.

On this point, I would like to say the *McClendon* court applied this in pari materia analysis exactly backwards. They said, We have these two statutes that look at the same thing, and because of our rights privilege distinction, we don't think they really go to the same issue. But even if you assume that they do, the concealed handgun act is the statute. That is the specific local statute that speaks to whether you get a concealed handgun, and how and what the agency may consider in making that determination. It is a newer statute. It is more specific. 42.12 is an older statute. It is general. It applies generally to criminal convictions. The rule of in pari materia in government code 311.026 says, that it is the concealed handgun act which would trump or control if you think that there is in fact a conflict. And I can't understand the *McClendon* court's suggestion that it goes the other way. I just don't think there's any argument that 42.12 is the more specific and local statute. That just isn't true. And that is why they got it wrong. So even if you do believe that there's a conflict, we still say that the concealed handgun act is the one that controls. And the language in it, I believe, is broad and general for a purpose. It is there to protect Texas citizens, to prevent people who have committed felonies in the past from having concealed handgun licenses even if they are able to convince a DC to dismiss the indictment after they have served...

BAKER: On the part you're talking about now, 29(e)(e) of Art. 4413, is whether or not the sentence probated, etc, which is part 1, and the second part is the person is pardoned unless it's because of innocence, do you consider that as a range of what makes a person convicted vis a vis, a concealed handgun statute, and if so where does, if at all, Mr. Tune's specific facts fall in that range? In other words, dismissed from community service to a range of being fully pardoned where does he fall if at all in that alleged range?

COLEMAN: He falls clearly in 4(a).

BAKER: Your view then is, he is exactly (a) because you stopped as soon as you see Mr. Tune was probated, but then discharged from community service. That's all you need to know?

COLEMAN: Yes.

BAKER: And so the second part of what their proof showed is immaterial when you take the plain reading of the statute?

COLEMAN: That is correct.

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REBUTTAL

ENOCH: I guess they didn't have a deferred adjudication back when Tune had this felony problem?

LAWYER: I think you're right. I think that was a few years later.

ENOCH: But this statute does say, even if they had deferred adjudication, they are still not eligible for a permit, right?

LAWYER: I don't necessarily agree with that. And I think the point of disagreeing with it that I have primarily with the Dept's interpretation, is that they have jumped to the probation part, but they skip over the adjudication.

ENOCH: It says, Adjudication, guilt, or order of deferred adjudication, whether or not that is subsequently probated. So you say deferred adjudication would not make someone ineligible if they met the criteria?

LAWYER: The reason I would say that is at the end of the deferred adjudication, the language is very similar to the probation language. My question is, Well where is the adjudication guilt against Tune or, in the case of deferred, where is the defendant's adjudication of guilt? If a court has dismissed that judgment and has allowed the verdict to be set aside, it could be a jury verdict set aside and even dismissed the indictment, then isn't that person back where they were before they were ever charged? And how can we say that there's still an adjudication of guilt against them when it's been set aside pursuant to the language of those statutes.

ENOCH: It is inconsistent for the statute to define convicted as being one who was under an order of deferred adjudication?

LAWYER: If he completes it. If he completes the probation period, the community supervision period in a deferred adjudication, then the court is going to go back and allow him to withdraw his plea and dismiss his indictment and dismiss the proceeding, which is going to mean that order of deferred adjudication is also going to be dismissed. And I think that's routinely what's done. So there again, where is the order of deferred adjudication once the court has wiped it all out.

GONZALES: In reading the CA's decision, there's an indication or perhaps a concern that perhaps the ability of a court to do that may be unconstitutional, because it's akin to an act of clemency and clemency powers are reserved for the governor. How do you respond to that?

LAWYER: I think the Waco CA responded to that very well in *Hoffman*. Quite frankly, I think the Ft. Worth court was misled. They went off on the *Snodgrass* decision, which later was

overturned. That was not followed. The legislature and the people of Texas amended the constitution to specifically allow probation to be administered by the courts. It just doesn't make sense that the court would retain jurisdiction over a person in their entire probation period, and then doesn't have the power to do what the statute does at the end. I think it's simply a statute that gave the DC continuing jurisdiction. And I don't understand the logic followed by the Ft. Worth CA, because it's contrary to the CA, it's contrary to the Waco CA in *Hoffman*, and just isn't really logical from the standpoint of why can't we give the DC that power over a defendant. And I think we did. The constitution says we do.

I think that there's a very - if you want to know what the legislature was thinking, I think that one way to look at this, and this is to look at what they've done in the past. One person that has always been able to carry a gun on the streets in Texas has been peace officers. And we have a police officer's statute that was on the books for about 10 years at least before this one. It's now in Gov't Code 415.058. And if you lay that statute right beside the concealed handgun statute, they are almost identical. Because a peace officer is in the same situation, except that in the case of a peace officer you can't get a license to be a peace officer if or regardless of whether the accusation, complaint, information or indictment against the person is dismissed and the person is released from all penalties and disabilities resulting from the offense. The legislature could have done that with the handgun statute. They chose not to. I would submit to the court that they were using that statute as a guide for the language in this statute, and they specifically left that out because they realized that people who have served out their time and been given a second chance should be able to get their license.