SCAC MEETING AGENDA (Amended)
Friday, April 22, 2016
9:00 a.m.

Location: **Texas Associations of Broadcasters**
502 E. 11th Street, #200
Austin, Texas 78701
(512) 322-9944

1. **WELCOME (Babcock)**

2. **STATUS REPORT FROM CHIEF JUSTICE HECHT**

   Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the December 2016 meeting.

3. **EX PARTE COMMUNICATIONS**

   Judicial Administration Sub-Committee Members:
   Ms. Nina Cortell - Chair
   Hon. David Peeples
   Hon. Tom Gray
   Professor Lonny Hoffman
   Hon. Bill Boyce
   Mr. Michael A. Hatchell

   (a) Proposed Rule on Certain Non-Party Communications To A Judge
   (b) SCAC Memo on Ex Parte Communications
   (c) Example Emails to Justices
   (d) Ex Parte Communications from Litigants
   (e) Survey of Court Clerks on Ex Parte Communications

4. **TEXAS RULE OF EVIDENCE 203**

   Evidence Sub-Committee Members:
   Mr. Gilbert "Buddy" Low - Chair
   Hon. Harvey Brown - Vice
   Hon. Levi Benton
   Prof. Elaine Carlson
   Prof. Lonny Hoffman
   Mr. Roger Hughes
   Mr. Peter Kelly
   Hon. Elsa Alcala

   (f) TRE 203

5. **TIME STANDARDS FOR THE DISPOSITION OF CRIMINAL CASES IN DISTRICT AND STATUTORY COUNTY COURTS**

166-166a Sub-Committee Members:

Hon. David Peeples - Chair
Richard Munzinger – Vice
Hon. Jeff Boyd
Prof. Elaine Carlson
Ms. Nina Cortell
Mr. Rusty Hardin
Ms. Christina Rodriguez
Mr. Carlos Soltero
Hon. Elsa Alcala

(g) Memorandum from Sub-Committee

6. **PROPOSED APPELLATE RULE 57**

Appellate Sub-Committee Members:

Prof. Bill Dorsaneo – Chair
Ms. Pamela Baron – Vice
Hon. Bill Boyce
Hon. Brett Busby
Prof. Elaine Carlson
Mr. Frank Gilstrap
Mr. Charles Watson
Mr. Evan Young
Mr. Scott Stolley

(h) Proposed Appellate Rule 57
(i) SCAC Memorandum-December 2, 2015
(j) SCAC Memorandum-December 10, 2015
(k) Proposed Appellate Rule 34

7. **CONSTITUTIONAL ADEQUACY OF TEXAS GARNISHMENT PROCEDURE**

523-734 Sub-Committee Members:

Mr. Carl Hamilton – Chair
Mr. L. Hayes Fuller – Vice
Mr. E. Rodriguez

(l) Section 3 Garnishment
(m) 2013-10-29 Order – *Strickland v. Greene & Cooper*
(n) 2014-11-20 Appeal
(o) 2015-09-08 Order – *Strickland v. Alexander*
(p) 2015 09-08 Judgment – *Strickland v. Alexander*
(q) Texas Finance Code 59.008

PROPOSED RULE OF JUDICIAL ADMINISTRATION 17

If a written communication is sent to and received by a judge from a non-party with respect to a case pending before the judge, then the clerk of the court or the judge must:

(a) preserve the writing among the documents in the case to which the communication is related;

(b) send a copy of the writing to all parties, if that has not already occurred; and

(c) take such other action as the court deems appropriate.

Proposed Official Comment

This rule encompasses all forms of written communications, including electronic communications. Communications "sent to" a judge are communications that are directed to a judge (individually or collectively with other judges), and the term does not include communications directed to a broad audience such as newspaper editorials, billboards, and non-specific posts on social media. Communications "received by" a judge are communications that are received *and* seen by the judge, and the term does not include communications that may have been technically received but are not seen by the judge. With respect to subsection (c), examples of actions the court might consider include (1) a letter informing the parties that they may respond to the communication, or (2) a response to the sender of the communication.

Note to the Committee:

The Subcommittee decided not to include a reference in the rule to Section 36.04 of the Texas Penal Code, but thought that the full Committee should be aware of the code provision:

(a) A person commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, "adjudicatory proceeding" means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(c) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

15408239_5

To: Chip Babcock August 10, 2015

From: Martha Newton

Re: Research on Ex Parte Communications

I. Introduction

Last spring, while Case No. 11-0024, *In the Matter of the Marriage of J.B. and H.B.*, and No. 11-0114, *Texas v. Naylor* (the same-sex-divorce cases) were pending, the justices of the Supreme Court of Texas received numerous messages sent to the justices' Court email addresses from individuals unaffiliated with the parties to those cases. The messages urged the justices to uphold Texas's same-sex-marriage ban before the Supreme Court of the United States issued its decision in *Obergefell v. Hodges*. Examples are attached. The emails were the result of a lobbying campaign as publicized in the *Austin American-Statesman*.[1]

When the Court began receiving the emails, I was asked to research whether legal prohibitions against ex parte communications encompass the kind of messages that the justices received, and whether any legal authority dictated how the Court should respond. My research yielded no clear answer, but I have summarized it below in case the research is helpful to the Advisory Committee's work on this issue.

Additionally, our Clerk, Blake Hawthorne, contacted other appellate court clerks to inquire how courts handle communications like those received by the justices. The clerks' responses are attached. Ultimately, the Court decided to forward the emails to the Clerk's office, which stamped them as amicus letters and added them to the case files for the *J.B.* and *Naylor* cases.

II. Summary of Research on Ex Parte Communications

The rule on ex parte communications in the Texas Code of Judicial Conduct, consistent with its counterparts in the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges, prohibits a judge from even *permitting* an improper ex parte communication.[2] But unlike those other codes, the Texas rule only

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[1] Chuck Lindell, *Conservative Leader Lobbies Texas Court on Gay Marriage*, AUSTIN AM.-STATESMAN (Mar. 31, 2015, 5:20 p.m.), http://www.mystatesman.com/news/news/state-regional-govt-politics/conservative-leader-lobbies-texas-court-on-gay-mar/nkjj5/#f98723b4.3597037.735698.

[2] TEX. CODE JUD. CONDUCT, Canon 3(B)(8); MODEL CODE JUD. CONDUCT Canon 2, Rule 2.9(A) (2011); CODE CONDUCT U.S. JUDGES Canon 3(A)(4); (all prohibiting a judge from "initiat[ing], permit[ting], or consider[ing]" an improper ex parte communication).

expressly prohibits ex parte communications about the merits of a pending case between a judge and a party, an attorney, or another person involved in the case.[3]

The ABA and federal codes prohibit a broader category of communications. The ABA Model Code prohibits a judge from initiating, permitting, or considering any communication made to the judge outside the presence of the parties.[4] The listed exceptions to the general rule and the comment to the rule clarify that the general prohibition applies to communications from a person unrelated to the case.[5] The applicable rule in the federal code is virtually identical to its ABA counterpart.[6] In addition, the ABA and federal codes state expressly that "[i]f a judge receives an unauthorized ex parte communication *bearing on the substance of a matter*, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested."[7]

A 1993 opinion of the State Bar Judicial Ethics Committee also advises that ex parte communications be disclosed, although the specific question that the committee addressed describes a situation that may be distinguishable from the facts here: "What is a judge's ethical obligation upon receiving *from a litigant* a letter which attempts to communicate privately to the judge *information concerning a case* that is or has been pending?"[8] The Committee outlines a three-step process: (1) give the letter to the clerk to be put in the case file; (2) send a copy to all parties; and (3) send a letter to the communicant, with a copy to the parties, stating that the communication was improper, that the judge will take no action in response to it, and that the letter has been sent to all

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[3] *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(8) ("A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between a judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding."); Misc. Docket No. 93-0132 (June 30, 1993) (adopting Canon 3(B)(8) in its current form).

[4] MODEL CODE JUD. CONDUCT Canon 2, Rule 2.9(A) ("A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows . . . .").

[5] *See id.* Rule 2.9(A)(2) (a judge may obtain the written advice of a disinterested expert on the law); Rule 2.9(A)(3) (a judge may confer with court staff); Rule 2.9 cmt. 3 ("The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.").

[6] CODE CONDUCT U.S. JUDGES Canon 3(A)(4) ("Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.").

[7] *Id.* (emphasis added); *see* MODEL CODE JUD. CONDUCT Canon 2, Rule 2.9(B) (virtually identical language).

[8] Comm. on Jud. Ethics, State Bar of Tex., Op. 154 (1993) (emphasis added).

parties.[9] Here, the emails received by the Court were from strangers to the case, and they merely expressed the sender's personal view of how the cases should be decided and when. Furthermore, like the provisions of the ABA and federal codes, the 1993 opinion seems to contemplate a single communication, not a hundred of them.

In sum, while some legal authorities define ex parte communications broadly enough to include communications from a person unrelated to the case at issue, I did not find any authority distinguishing between a communication containing real information that may bear on the outcome of a case and a communication that merely expresses the communicant's personal view of how a case should come out. Similarly, while authorities counsel that judges should disclose ex parte communications to the parties, they do not distinguish between a judge's receipt of a single message and a judge's receipt of numerous messages.

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[9] *See id.*; *see also Youkers v. State*, 400 S.W.3d 200, 204-07 (Tex. App.—Dallas 2013, pet. ref'd) (rejecting the defendant's challenge to an adverse ruling based on the defendant's allegation of bias stemming from the TC's receipt of a private Facebook message from the victim's father where, after receiving the message, the TC followed the protocol outlined in Judicial Ethics Committee Opinion No. 154).

[redacted]

From: Laura Branson <Laura@haulmarkservices.com>
Sent: April 01, 2015 10:24 AM
To: [redacted]
Subject: Marriage in Texas - One man One woman

To all,

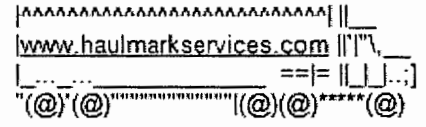
The Supreme Court of the United States will hear oral arguments on April 28 to determine whether homosexuals have a Constitutional right to marry. Texas' forceful voice in favor of historic and Biblical marriage **must be heard before April 28th**.

I expect that this Court would rule and affirm the constitutionality of the Texas Constitution Marriage Amendment, Article 1, Section 32, which provides, **"Marriage in this state shall consist only of the union of one man and one woman."**

Sincerely,

Laura Branson

Haulmark Services, Inc.
O 281-345-0911
F 281-345-3787



[redacted]

From: cfnjapan@juno.com
Sent: March 30, 2015 4:39 PM
To: [redacted]

Subject: The Texas Marriage Amendment

Dear Members of the Texas Supreme Court,

Our family and families in Texas recognize the **AUTHORITY that you have** as Members of the Texas Supreme Court, and we appreciate how you have faithfully used that power.

Together with you we also recognize that that **Authority was given to you by God Himself**, from whom all authority comes. (Romans 13:1) We trust that you will vote to affirm the decision of the Texas 5th Court of Appeals regarding the Texas Constitution Marriage Amendment being constitutional under the U.S. Constitution. Your affirmation in this case ("J B" No. 11-0024) will be in line with God's Word and with truth.

The Source of Authority has clearly spoken that **homosexuality is**

"shameful,
immoral,
ungodly,
unrighteous
inexcusable idolatry,
suppresses truth,
exchanges the truth of God for a lie,
darkens the mind and heart,
dishonors the body,
worships the creature rather than God,
and receives the penalty of its error". (Romans 1:18-32)

As you can see, "**the judgement of God is according to truth** against those who **practice** such things...or who **approve of those** who practice them". (Romans 2:2 and 1:32)

So we all encourage you to take a stand and to vote **IN FAVOR of the Texas Marriage Amendment**, which recognizes that Marriage is only between one man and one woman. As you already recognize, Marriage is embedded by God into creation, and people can no more change the law of marriage than they can change the law of gravity.

We trust you, and we thank you for your diligence in upholding truth.

With appreciation,

Charles and Dianne Gyurko

[redacted]

From: Brenda Sumner <brenda.sumner@sbcglobal.net>
Sent: March 30, 2015 1:30 PM
To: [redacted]
Subject: Texas Constitution Marriage Amendment

Importance: High

Dear madam;

I encourage the Texas Supreme Court to demonstrate the same courage displayed by the Texas Fifth Court of Appeals and declare, without equivocation, that the Texas Constitution Marriage Amendment is constitutional under the United States Constitution.

PLEASE rule in favor of the Texas Constitution Marriage Amendment.

Thank you and God bless America!!!

Sincerely,

Brenda Sumner

[redacted]

From: Wkbart@gmail.com
Sent: March 30, 2015 1:15 PM
To: [redacted]
Subject: Texas Constitution of Marriage

As a father of 3 and grandfather of 9, I have experienced first hand the value of a husband and a wife working together and bringing the separate perspective and qualities of the male and female to the family relationships. Marriage between a man and a women is ordained if God. Please help insure that Texas does its part to preserve and protect this institution that is so critical to the survival of our society.
Sincerely,
WK Barton

Sent from my iPad

[redacted]

From: [redacted]
Sent: April 22, 2015 10:43 AM
To: [redacted]
Subject: FW: Should Homosexuals have the Constitutional Right to Marry

Follow Up Flag: Follow up
Flag Status: Flagged

From: [redacted]
Sent: Wednesday, April 22, 2015 8:46 AM
To: [redacted]
Subject: FW: Should Homosexuals have the Constitutional Right to Marry

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From: Acbhhw@aol.com [mailto:Acbhhw@aol.com]
Sent: Thursday, April 09, 2015 11:27 AM
To: [redacted]
Cc: acbhhw@aol.com
Subject: Should Homosexuals have the Constitutional Right to Marry

Your Honor:

It has come to my attention that you are set to hear Oral Arguments by April 28th on whether homosexuals have a Constitutional right to marry.

I would like to submit to you that as a citizen of the State of Texas, I am strongly opposed to violating our Judean-Christian principals that Marriage is a God-ordained institution (Genesis 2:24) and not a "man-made decree". My view is that marriage is this state shall consist only of the union of one man and one woman.

I am not an attorney and therefore can not quote law, but I do believe in principles. Marriage is not a fundamental right, and therefore homosexuals should not demand this. I believe that there are other avenues that may be available to them, such as a Civil Union, but not Marriage.

Please review the Decision of the Texas Fifth Court of Appeals on this matter as well as the decision of the Alabama Supreme Court, under the leadership of Chief Justice Roy Moore. It appears that these decisions are clear and appropriate.

I am trusting in your wisdom in this matter.

Sincerely,

Ms. Audrey C. Wahl

[redacted]

[redacted]

EX PARTE COMMUNICATIONS FROM LITIGANTS
Opinion No. 154 (1993)
State Bar of Texas, Judicial Section, Committee on Judicial Ethics

QUESTION: What is a judge's ethical obligation upon receiving from a litigant a letter which attempts to communicate privately to the judge information concerning a case that is or has been pending?

ANSWER: Canon 3A(5)* provides that a judge shall not permit or consider improper ex parte or other private communication concerning the merits of a pending or impending judicial proceeding. (Canon 10** provides that the word "shall" when used in the Code means compulsion.) Judges may comply with Canon 3A(5)* by doing the following: 1) Preserve the original letter by delivering it to the court clerk to be file marked and kept in the clerk's file. 2) Send a copy of the letter to all opposing counsel and pro se litigants. 3) Read the letter to determine if it is proper or improper; if improper, the judge should send a letter to the communicant, with a copy of the judge's letter to all opposing counsel and pro se litigants, stating that the letter was an improper ex parte communication, that such communication should cease, that the judge will take no action whatsoever in response to the letter, and that a copy of the letter has been sent to all opposing counsel and pro se litigants.

Canon 3A(4)* provides that a judge shall accord to every person who is legally interested in a proceeding the right to be heard according to law. Consideration of an ex parte communication would be inconsistent with Canon 3A(4),* because it would not accord to other parties fair notice of the content of the communication, and it would not accord to other parties an opportunity to respond. Canon 3*** provides that the judicial duties of a judge take precedence over all the judge's other activities. A judge's consideration of a controversy that is not brought before the court in the manner provided by law would be inconsistent with the judicial duty to determine "cases" and "controversies" (Art. 3, Constitution of the United States). A judge has no authority or jurisdiction to consider, or to take any action concerning, out-of-court controversies. A judge's consideration of a controversy that is not properly before the court could give the appearance of inappropriate action under color of judicial authority, which would tend to diminish public confidence in the independence and impartiality of the judiciary, rather than promote it as Canon 1 and Canon 2 require a judge to do.

Finally, a judge should try to minimize the number of cases in which the judge is disqualified. If a judge permits a communication to the judge concerning any matter that may be the subject of a judicial proceeding, that could necessitate disqualification or recusal.

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* Now see Canon 3B(8). ** Now see Canon 8B(1). *** Now see Canon 3A.

Survey of Court Clerks on Ex Parte Communications	
Court	**Response**
Alaska Supreme Court	We don't have a written policy or rule, but I think if the justices get letters about pending cases, they forward them to me for a response. I don't think they get many emails like that but I'm sure they would forward those, too.
Australia - High Court of Australia and all appellate court in Australia	Apropos your questions below, I advise that the situation here is not dissimilar to what I understand to be the situation in the USA. Members of the public sometimes write to the High Court or particular justices about a pending matter, but the justices will never respond. Any paper communication which somehow gets to their chambers may be passed to me, but might just as well be simply 'binned' by the receiving justice. Rarely, some person will work out a justice's email address and email him or her, but again no justice would respond to such a communication. Most of the communications that are passed to me from a receiving justice deserve no response at all from me, while I might occasionally write to a sender pointing out the inappropriateness of communicating with justices on pending cases. There are no written policies or rules—but the situation is clear. The situation would be the same in all of the appellate courts in Australia. You may be interested in a letter sent recently by the Chief Justice of Australia to the Chair of the Council of Australian Law Deans about incidents in which legal academics attempted to provide to the High Court copies of papers relating to matters pending before the Court. A copy is attached; the letter is in the public arena down here, so you would be welcome to share it if you wish. The CJ's views are reasonably clear, I think. (Letter discusses email sent by academic to the Court and concludes "No doubt the author of the email was acting in good faith, however communications with the Court on matters pending before the Court providing materials which are not accessible to the parties, a fortiori after the Court has reserved its decision, are inappropriate and inconsistent with the transparency of the judicial process." Letter goes on to suggest that an effort be made to advise law professors to stop sending articles to the court.)
California Court of Appeal, Second Appellate District, Los Angeles	No written policy. But communications are forwarded to the Clerk and the responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).
Canada - Supreme Court of Canada	E-mails and other correspondence are usually forwarded to our Communications Unit in the Registrar's Office (Clerk's Office), who will determine whether or a not a response is warranted. If there is a response, it would usually be to the effect that the Court is only permitted to consider material submitted by parties to a case, or interveners, and that it would be inappropriate to comment on a case that is before the Court.
Colorado Court of Appeals and	Communications sent to the Clerk and marked received and filed in a

Supreme Court	miscellaneous file with no response.
Florida Supreme Court	Justices send these types of materials to the Clerk's Office and we either send a letter, or with the numerous postcards we are receiving RE gay marriage, we just scan and save to a retention file.
Georgia Supreme Court	Would treat them like any other letter—either we respond and advise them it is improper to communicate with a Justice or we keep them in a file without a response.
Illinois Supreme Court	In Illinois, correspondence received in chambers concerning a pending case or some other topic is referred by chambers to my office for a response. The Clerk's office response generally indicates that the correspondence has been referred to our office for a response. We then inform the writer that the Court can't make decisions based on correspondence and that it can only consider matters properly before it consistent with Supreme Court Rules. If appropriate, we also let them know that the justices of the Court are prohibited by Court rules from ex parte communication. Sometimes the response letter simply indicates that we are in receipt of their letter, with no further information. Similar to what you describe, since the beginning of this month, we have received a hundred or so post cards addressed to our Chief Justice from the Liberty Tree Alliance (out of Houston, TX) – Alan Keyes, Chairperson, urging our Court to strike down gay marriage laws. We received a copy of the letter that went out to who knows how many people that apparently enclosed a stamped post card addressed to our Court. The back of the post card has some printed material with a signature line for the sender to sign their name. We do not intend to respond to these post cards.
Indiana Supreme Court	No formal published policy or rule. The Justices forward those types of emails or letters to me and I provide a response under my signature as the Court's Administrator. I have some standard form letters that I use and tweak them to address the particular circumstances. The one I would use in response to the sort of letter you describe below would say something like: "The Court generally does not or cannot, because of its own rules, comment on matters that have come before the Court and have been decided, or that are pending or that may possibly come before the Court. We appreciate the concerns of citizens, like yourself, who take the time to express their thoughts about particular cases or issues. We regret we cannot be of more assistance."
Louisiana Supreme Court	These letters forwarded to Clerk's Office and staff person responds that our Code of Judicial Conduct provides that "a judge shall not permit private or ex parte interviews, arguments or communications designed to influence his or her judicial action in any case, either civil or criminal." Canon 3. A. (5)

Maryland Court of Appeals	Judges give the correspondence to clerk for reply.
Michigan Supreme Court	No written policy. But communications are forwarded to the Clerk and the responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).
Texas Court of Appeals - Corpus Christi/Edinburgh	When the Hannah Overton case was pending at our court, we received lots of emails from the public. Here's how we responded: I am in receipt of your email concerning the Hannah Overton case. Your attempt to influence this case is inappropriate and your email will not be forwarded to the justices. Any efforts at attempting to influence the justices could result in a recusal of the entire court and further delay the appeal. All judges are bound by the Code of Judicial Conduct which does not allow a judge to permit or consider any ex parte communication. An ex parte communication occurs when a party to a case or someone else, talks or writes to or otherwise communicates directly with the judge about the issue in the case without the other parties' knowledge. This ban helps judges decide cases fairly since their decisions are based on the evidence and applicable law. It also preserves public trust in the legal system. As the clerk of the court, I cannot allow you to contact any of the justices concerning this case. All contact with the Court must come through the clerk's office. If you have any questions, please do not hesitate to contact me.
Texas Court of Appeals - Tyler	E-mails are immediately forwarded directly to the Clerk. Clerks sends the following reply: "All correspondence or contact with the Court of Appeals should be conducted through the office of the Clerk of the Court, not the individual Justices or Attorneys at the Court. See Tex. R. App. 9.6. The Clerk's Office is not authorized to answer any questions via email or facsimile. Please call the Clerk's Office at 903-593-8471 for further information not reflected on the Court's website."
Texas Court of Criminal Appeals	We do not have a policy for emails. All regular mail is responded to by the clerk's office. We do reference Rule 9.6 when we feel it is appropriate.
United States Supreme Court	Letters commenting on cases are generally discarded. But if someone appears to be asking the Court for some form of relief, we will send them a letter explaining that we do not have jurisdiction (assuming we don't).
Utah Supreme Court	All mail screened by the Clerk. Email would be forwarded to the Clerk to respond to.
Virginia Supreme Court	No written policy. But communications are forwarded to the Clerk and the responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).
Washington Supreme Court	No written policy. But communications are forwarded to the Clerk and

	he responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).
West Virginia Court of Appeals	No written policy. But communications are forwarded to the Clerk and he responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).

TRE 203

ROBIN MALONE DARR
District Judge
385th Judicial District Court
500 N. Loraine, Ste. 801
Midland, TX 79701

432/688-4385
432/688-4935 (fax)

August 6, 2015

Chief Justice Nathan Hecht
Supreme Court of Texas
via e-mail

Mr. Gilbert I. "Buddy" Lowe
Vice Chair of Supreme Court Advisory Committee
via e-mail

Dear Chief Justice Hecht and Mr. Lowe:

A proposal to amend Rule 203 (attached) is being presented only on behalf of the Administrative Rules of Evidence Committee of the State Bar of Texas and should not be construed as representing the position of the Board of Directors, the Executive Committee or the general membership of the State Bar of Texas. The Administrative Rules of Evidence Committee is a volunteer standing committee of the State Bar of Texas. This proposed amendment has been approved by the membership of the Administrative Rules of Evidence Committee pursuant to applicable procedures and represents the views of a majority of the members of the Committee.

A subcommittee, headed by Mr. John Janssen, reviewed the Article 2 Rules and recommended the change in Rule 203. The relevant part of the subcommittee report is set out below.

> Rule 203. Determination of the Laws of Foreign Countries. The subcommittee had recommended further study of how the 30-day pre-trial deadline for raising the issue of law of a foreign countries interfaces or should interface with the 45-day before trial provision of Rule of Evidence 1009(a) relating to the translation of foreign language documents. At the February 23rd meeting, the subcommittee recommended changing the 30-day pre-trial deadline in Rule 203 to a 45-day deadline so as to align with Rule 1009.

If I can be of further assistance please do not hesitate to contact me.

Sincerely,

Robin Malone Darr
Chair, Administrative Rules of Evidence Committee

MOTION: That Rule 203 be amended to read as follows:

Rule 203. Determining Foreign Law

(a) Raising a Foreign Law Issue. A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least ~~30~~ 45 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

matters in someone's personal knowledge, but they are not necessarily matters subject to judicial review).

In re Sigmar, 270 S.W.3d 289, 302 (Tex.App.—Waco 2008, orig. proceeding). "[M]atters of legislative fact or of other non-adjudicative fact are subject to judicial notice but are not governed by Rule 201."

Barnard v. Barnard, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied). "A court may take judicial notice of its own files and the fact that a pleading has been filed in a case. 'A court may not ... take judicial notice of the truth of allegations in its records.'"

Apostolic Ch. v. American Honda Motor Co., 833 S.W.2d 553, 555-56 (Tex.App.—Tyler 1992, writ denied). "Highway nomenclature and designations within the trial court's jurisdiction are matters of common knowledge and proper subjects for judicial notice. ... In matters involving geographical knowledge, it is not necessary that a formal request for judicial notice be made by a party."

Marble Slab Creamery, Inc. v. Wesic, Inc., 823 S.W.2d 436, 439 (Tex.App.—Houston [14th Dist.] 1992, no writ). "The trial court is entitled to take judicial notice of its own records where the same subject matter between the same parties is involved. [W]e may presume that the trial court took such judicial notice of the record without any request being made and without any announcement that it has done so." *See also Sierad v. Barnett*, 164 S.W.3d 471, 481 (Tex.App.—Dallas 2005, no pet.) (trial court does not need to announce it is taking judicial notice). *But see In re C.L.*, 304 S.W.3d 512, 515-16 (Tex.App.—Waco 2009, no pet.) (appellate court held that trial court did not take judicial notice when party did not request it and trial court did not announce in open court it was taking judicial notice).

TRE 202. DETERMINATION OF LAW OF OTHER STATES

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 202 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxv). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvi). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxi): Language was added and deleted to make it clear that all parties are entitled to notice and hearing of the court's taking judicial notice of the law of other states; the last four sentences were added. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxviii). Source: TRCP 184, 184a, TRCS art. 3731a (repealed). Former TRCP 184a, re judicial notice, was originally adopted eff. Feb. 1, 1946, by order of Oct. 10, 1945 (8 Tex.B.J. 533 [1945]).

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 128.

ANNOTATIONS

Daugherty v. Southern Pac. Transp., 772 S.W.2d 81, 83 (Tex.1989). "The failure to plead sister-state law does not preclude a court from judicially noticing that law. ... Rule 202 requires the moving party to furnish sufficient information to the trial court for it to determine the foreign law's applicability to the case and to furnish all parties any notice that the court finds necessary." *See also Colvin v. Colvin*, 291 S.W.3d 508, 514 (Tex.App.—Tyler 2009, no pet.) (preliminary motion required to assure application of laws from another jurisdiction).

Burlington N. & Santa Fe Ry. v. Gunderson, Inc., 235 S.W.3d 287, 292 (Tex.App.—Fort Worth 2007, no pet.). "Rule 202 simply provides a mechanism by which a party may compel the trial court to judicially notice the law of another state; it does not force a party to make a definitive declaration as to which state's law applies."

TRE 203. DETERMINATION OF THE LAWS OF FOREIGN COUNTRIES

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may

Effective April 1, 2015, the TREs will be restyled. For a note about the proposed changes, see p. 1178

consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 203 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvi). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxii): The words "all parties" were substituted for "to the opposing party or counsel" in the first and second sentences; in the fourth sentence, "all" was substituted for "the"; in the last sentence, "The court's" was substituted for "Its"; and the words "on appeal" were deleted. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxviii). Source: TRCS art. 3718; FRCrP 26.1; FRCP 44.1.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 131.

ANNOTATIONS

Long Distance Int'l v. Telefonos de Mexico, S.A. de C.V., 49 S.W.3d 347, 351 (Tex.2001). "Rule 203 has been aptly characterized as a hybrid rule by which the presentation of the foreign law to the court resembles the presentment of evidence but which ultimately is decided as a question of law. Summary judgment is not precluded when experts disagree on the law's meaning if, as here, the parties do not dispute that all the pertinent foreign law was properly submitted in evidence. When experts disagree on how the foreign law applies to the facts, the court is presented with a question of law."

PennWell Corp. v. Ken Assocs., 123 S.W.3d 756, 760-61 (Tex.App.—Houston [14th Dist.] 2003, pet. denied). "Although appearing under the subtitle 'Judicial Notice' in the [TREs], the procedure established under Rule 203 for presentment of foreign law is not considered a judicial notice procedure because that term refers only to adjudicative facts and not to matters of law. Thus, the specific procedures set forth in Rule 203 must be followed for the determination of foreign law. [A] party requesting judicial notice must furnish the court with sufficient information to enable it to properly comply with the request; otherwise, the failure to provide adequate proof results in a presumption that the law of the foreign jurisdiction is identical to that of Texas." *See also Gerdes v. Kennamer*, 155 S.W.3d 541, 548 (Tex.App.—Corpus Christi 2004, no pet.).

TRE 204. DETERMINATION OF TEXAS CITY & COUNTY ORDINANCES, THE CONTENTS OF THE TEXAS REGISTER, & THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 204 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvii): Judicial notice upon motion of a party is made mandatory rather than discretionary. Adopted eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxii). Source: New rule.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 134.

ANNOTATIONS

Office of Pub. Util. Counsel v. Public Util. Comm'n, 878 S.W.2d 598, 600 (Tex.1994). "The court of appeals ... erred by refusing to take judicial notice of the published order of [respondent]. ... The authenticity and contents of [respondent's] ratemaking order are capable of accurate and ready determination by resort to a published record whose accuracy cannot reasonably be questioned."

Eckmann v. Des Rosiers, 940 S.W.2d 394, 399 (Tex.App.—Austin 1997, no writ). "[T]he duty [to take judicial notice is] mandatory, even in the absence of a request under Rule 204, respecting administrative agency regulations published in the Texas Register and Texas Administrative Code. ... They are legislative facts, or a part of the body of law a court is required to apply in reasoning toward a decision."

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

History of TRE 1008 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxxiii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lxvii). Source: FRE 1008.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 1030.

TRE 1009. TRANSLATION OF FOREIGN LANGUAGE DOCUMENTS

(a) Translations. A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.

(b) Objections. Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.

(c) Effect of Failure to Object or Offer Conflicting Translation. If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.

(d) Effect of Objections or Conflicting Translations. In the event of conflicting translations under paragraph (a) or if objections to another party's translation are served under paragraph (b), the court shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.

(e) Expert Testimony of Translator. Except as provided in paragraph (c), this Rule does not preclude the admission of a translation of foreign language documents at trial either by live testimony or by deposition testimony of a qualified expert translator.

(f) Varying of Time Limits. The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule.

(g) Court Appointment. The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

Comment to 1998 change: This is a new rule.

History of TRE 1009 (civil): Adopted eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxxiv). Source: New rule.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 1032.

ANNOTATIONS

In re DC, No. 01-11-00387-CV (Tex.App.—Houston [1st Dist.] 2012, pet. denied) (memo op.; 3-1-12). Father "complains that the initial return was in Spanish, and because it was not translated into English until after trial, it violated [TRE] 1009, which requires that all foreign documents to be admitted at trial must be translated 45 days before trial and be accompanied by an affidavit from a qualified translator. [¶] However, rule 1009 is a rule of evidence governing the admission of foreign documents of trial. [Father] has cited no cases in which rule 1009 requires the translation of foreign returns of service into English, or that such a translation could not be done in an amended return while the trial court still had plenary power. We have found no authority holding that rule 1009 trumps [TRCP] 118, which permits amended returns of service '[a]t any time.'"

Doncaster v. Hernaiz, 161 S.W.3d 594, 601 (Tex. App.—San Antonio 2005, no pet.). "[P] did file a copy of the [foreign-language document] with a translation with her initial summary judgment motion, but failed to attach the translator's affidavit. Later, [P] supplemented her motion with an affidavit from the translator.... Because of [P's] late supplementation, the trial court provided [D] a one-week continuance before conducting the summary judgment hearing. Rule 1009 provides the court with authority to lengthen or shorten the time limits set by the rule. [A]ny error in failing to initially provide the affidavit of the translator was cured by its inclusion in the supplement, and it was therefore within the court's discretion to admit [the document]."

only that immigration forms be authenticated through some recognized procedure, such as those required by [government] regulations or by the [FRCPs]."

AMFAC Distrib. v. Harrelson, 842 F.2d 304, 306-07 (11th Cir.1988). "Under [FRCP] 44(a)(1), two things are required to authenticate a copy of a state court judgment. First, the copy must be attested to by the officer having the legal custody of the judgment or by his deputy. Second, there must be a certificate that the attesting officer has legal custody; this certificate is to be made by a judge of a court of record of the district or political subdivision in which the judgment is kept and must be authenticated by the seal of the court. [¶] [If P] did not substantially comply with Rule 44(a), ... the Texas judgment is admissible under the [FREs]. [FRE] 902 provides for authentication by certificate when a copy of the judgment bears a seal purporting to be that of a state court and a signature purporting to be an attestation of the custodian of the original judgment."

FRCP 44.1. DETERMINING FOREIGN LAW

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

See selected Notes of Advisory Committee to FRCP 44.1, p. 1289.

History of FRCP 44.1: Adopted Feb. 28, 1966, eff. July 1, 1966. Amended Nov. 20, 1972, eff. July 1, 1975, Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-N, p. 411; *O'Connor's Federal Civil Forms* (2014), FORMS 5M.

See also FRE 201 (judicial notice).

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In re Griffin Trading Co., 683 F.3d 819, 822 (7th Cir.2012). "Although it is true that Rule 44.1 requires any party who intends to present evidence of foreign law to 'give notice by a pleading or other writing,' the language of the rule itself reveals that no particular formality is required. Any 'other writing' will do, as long as it suffices to give proper notice of an intent to rely on foreign law. *At 823:* 'If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.'"

Northrop Grumman Ship Sys. v. Ministry of Def. of the Republic of Venez., 575 F.3d 491, 496-97 (5th Cir. 2009). FRCP 44.1 "is intended to 'avoid unfair surprise,' not to 'set any definite limit on the party's time for giving the notice of an issue of foreign law....' When the applicability of foreign law is not obvious, notice is sufficient if it allows the opposing party time to research the foreign rules. Some of the factors that should be considered in determining whether notice is reasonable include '[t]he stage which the case had reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised....'" *See also APL Co. Pte. Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 955-56 (9th Cir.2009).

Mutual Serv. Ins. v. Frit Indus., 358 F.3d 1312, 1321 (11th Cir.2004). "The district court is not required to conduct its own research into the content of foreign law if the party urging its application declines to do so." *See also Grand Entm't Grp. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir.1993) (court may conduct its own supplemental research).

DP Aviation v. Smiths Indus. Aerospace & Def. Sys., 268 F.3d 829, 848 (9th Cir.2001). "Absent extenuating circumstances, notice of issues of foreign law that reasonably would be expected to be part of the proceedings should be provided in the pretrial conference and contentions about applicability of foreign law should be incorporated in the pretrial order. This gives parties ample opportunity to marshal resources pertinent to foreign law, which normally will not be as well known as domestic law to parties and courts."

Republic of Turk. v. OKS Partners, 146 F.R.D. 24, 27 (D.Mass.1993). "'Statutes, administrative material, and judicial decisions can be established most easily by introducing an official or authenticated copy of the applicable provisions or court reports supported by expert testimony as to their meaning...[.] In addition ... a litigant may present any other information concerning foreign law he believes will further his cause, including secondary sources such as texts, learned journals, and a wide variety of unauthenticated documents relating to foreign law.'"

FRCP 45. SUBPOENA

(a) In General.

(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact.' [¶] However, personal knowledge of a fact 'is not an absolute' to Rule 602's foundational requirement, which 'may consist of what the witness thinks he knows from personal perception.' Similarly, a witness may testify to the fact of what he did not know and how, if he had known that independently established fact, it would have affected his conduct or behavior."

Payne v. Pauley, 337 F.3d 767, 772 (7th Cir.2003). "[A]lthough personal knowledge may include reasonable inferences, those inferences must be 'grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.'"

U.S. v. Sinclair, 109 F.3d 1527, 1536 (10th Cir. 1997). "Although Rule 602 provides that a witness's testimony must be based on personal knowledge, it 'does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible ... only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to.'" *See also U.S. v. Brown*, 669 F.3d 10, 22 (1st Cir. 2012).

SEC v. Singer, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992). "Testimony is admissible even though the witness is not positive about what he perceived, provided the witness had an opportunity to observe and obtained some impressions based on his observations. [¶] Testimony can be admissible under Rule 602 even if the witness has only a broad general recollection of the subject matter. [¶] [A] witness' *conclusion based on personal observations over time* may constitute personal knowledge despite the witness' inability to recall the specific incidents upon which he based his conclusions."

FRE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

History of FRE 603: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.

ANNOTATIONS

U.S. v. IMM, 747 F.3d 754, 770 (9th Cir.2014). FRE 603 "'is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and *children*.' '[A]ffirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.'" *See also Doe v. Phillips*, 81 F.3d 1204, 1211 (2d Cir.1996); *U.S. v. Saget*, 991 F.2d 702, 710 (11th Cir.1993).

U.S. v. Mensah, 737 F.3d 789, 806 (1st Cir.2013). FRE 603 "provides that the requisite declaration 'must be in a form designed to impress that duty on the witness's conscience'—but does not say that only a verbal warning or response suffices. Hence, it appears that the inquiry into whether an oath has been given is routinely treated as a question of substance rather than form: '[it] turns on whether the declarant expressed the fact that ... she is impressed with the solemnity and importance of ... her words and of the promise to be truthful, in moral, religious, or legal terms.'"

U.S. v. Solorio, 669 F.3d 943, 950 (9th Cir.2012). See annotation under FRE 604, this page.

U.S. v. Frazier, 469 F.3d 85, 92 (3d Cir.2006). "Oaths are administered to witnesses as a reminder to them of their obligation to testify *truthfully*. They are not intended to guarantee *accuracy*. The fact that a witness is under oath has no bearing on the quality of a witness' memory (such that one is more or less likely to make a mistake under oath)." *See also U.S. v. Zizzo*, 120 F.3d 1338, 1348 (7th Cir.1997) (idea of oath is to make witness amenable to perjury prosecution if he lies).

FRE 604. INTERPRETER

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

History of FRE 604: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.

ANNOTATIONS

U.S. v. Solorio, 669 F.3d 943, 950 (9th Cir.2012). FRE 604 "does not ... indicate whether ... an oath must be administered in any particular manner or at any specified time, including whether the oath must be administered for each trial. ... Although some courts administer oaths to interpreters each day, or once for an entire case, others 'administer the oath to staff and contract interpreters once, and keep it on file.' [¶] We

Walker, Marti

From: Walker, Marti
Sent: Thursday, December 10, 2015 2:44 PM
To: 'aalbright@law.utexas.edu'; 'adawson@beckredden.com'; Babcock, Chip; 'brett.busby@txcourts.gov'; 'cristina.rodriguez@hoganlovells.com'; 'csoltero@mcginnislaw.com'; 'cwatson@lockelord.com'; 'd.b.jackson@att.net'; 'dpeeples@bexar.org'; 'ecarlson@stcl.edu'; 'elsa.alcala@txcourts.gov'; 'errodriguez@atlashall.com'; 'esteveza@pottercscd.org'; 'evan.young@bakerbotts.com'; 'evansdavidl@msn.com'; 'fgilstrap@hillgilstrap.com'; 'fuller@namanhowell.com'; 'harvey.brown@txcourts.gov'; 'Honorable Robert H. Pemberton'; 'jane.bland@txcourts.gov'; 'jperduejr@perdueandkidd.com'; Sullivan, Kent; 'kvoth@obt.com'; 'LJefferson@JeffersonCano.com'; 'lbenton@levibenton.com'; 'lhoffman@central.uh.edu'; 'Linda Riley'; 'lisa@kuhnhobbs.com'; 'mahatchell@lockelord.com'; 'martha.newton@txcourts.gov'; 'mgreer@adjtlaw.com'; 'nathan.hecht@txcourts.gov'; 'nina.cortell@haynesboone.com'; 'och@atlashall.com'; 'pkelly@texasappeals.com'; 'psbaron@baroncounsel.com'; 'pschenkkan@gdhm.com'; 'rhardin@rustyhardin.com'; 'rhughes@adamsgraham.com'; 'rhwallace@tarrantcounty.com'; 'richard@ondafamilylaw.com'; 'rmeadows@kslaw.com'; 'rmun@scotthulse.com'; 'robert.l.levy@exxonmobil.com'; 'Scott Stolley'; 'shanna.dawson@txcourts.gov'; 'stephen.yelenosky@co.travis.tx.us'; 'tom.gray@txcourts.gov'; 'tracy.christopher@txcourts.gov'; 'triney@rineymayfield.com'; 'wdorsane@mail.smu.edu'; 'coliden@lockelord.com'; 'wshelton@shelton-valadez.com'; 'Justice Boyd (jeff.boyd@txcourts.gov)'; 'Elaine Carlson (elainecarlson@comcast.net)'; 'Viator, Mary (MViator@kslaw.com)'; 'bill.boyce@txcourts.gov'
Subject: FW: Subcommittee on Time Standards for Criminal Cases
Attachments: Hecht letter and speedy trial statutes.pdf

Committee Members:
On behalf of the 166-166a Sub-Committee, please see the attachment and below email (which will serve as item "N") on the Agenda. Thank you for your attention to this matter.

From: Peeples, David [mailto:dpeeples@bexar.org]
Sent: Thursday, December 10, 2015 2:37 PM
To: Walker, Marti
Subject: Subcommittee on Time Standards for Criminal Cases

To the SCAC:

The Subcommittee on Time Standards for Criminal Cases recommends that a task force be created to draft a set of time standards. Then, at a later meeting, the SCAC could consider the three options stated below. The task force would consist of a few members of the SCAC and other members chosen by the Court of Criminal Appeals. Here is some background and further information.

Chief Justice Hecht's October 9 letter to the SCAC asked our subcommittee to recommend language for Administrative Rule 6.1(a). That rule reads as follows:

Rule 6.1 District and Statutory County Courts.

District and statutory county court judges of the county in which cases are filed should, so far as reasonably possible, ensure that all cases are brought to trial or final disposition in conformity with the following time standards:

(a) Criminal Cases. As provided by Article 32A.02, Code of Criminal Procedure.

As the Chief's letter says, in 1987 the Court of Criminal Appeals held that article 32A.02 violates the separation of powers and is unconstitutional. In 2005 the Legislature repealed article 32A.02. Yet Administrative Rule 6.1 still refers to it. What should the Supreme Court do?

I have attached copies of three parts of the Code of Criminal Procedure that deal with speedy trial principles. They are: (1) article 17.151 (delay when accused has been indicted and is in custody or out on bail), (2) article 32.01 (delay when person is in custody but not yet officially charged), and (3) article 32A.01 (trial priorities).

The Sixth Amendment to the U.S. Constitution says in part, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . ." This command has been incorporated and it applies to the states.

The subcommittee has identified the following three options:

(1) Simply delete the section on time standards for criminal cases.

(2) Delete the reference to art. 32A.02 and replace it with the three CCP articles mentioned above.

(3) Delete the reference to art. 32A.02, draft time standards, and perhaps refer to the three CCP articles mentioned above.

We have not yet drafted time standards for option three because we feel that this group of primarily civil lawyers and judges should seek input from the Court of Criminal Appeals. After the meeting on December 11, we should be in communication with the CCA through Judge Alcala.

For the December 11 meeting we recommend that a joint subcommittee (or task force) be created to draft time standards for the full SCAC's consideration. The full committee would then have a tangible option three to evaluate when it decides, at a later meeting, which of the three options to recommend to the court.

I add that there is no real support for option one. The real decision seems to be whether the committee should recommend option two or three.

Thanks,
David Peeples

The Supreme Court of Texas

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NATHAN L. HECHT

JUSTICES
PAUL W. GREEN
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OSLER McCARTHY

October 9, 2015

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rule of Evidence 203. The State Bar Administration of Rules of Evidence Committee (AREC) has submitted the attached proposal to amend Texas Rule of Evidence 203. AREC recommends changing the deadline in Rule 203(a)(2) for a party to produce any written material that the party intends to use to prove foreign law from 30 days before trial to 45 days before trial. The change would align the requirements of Rule 203 with the requirement in Rule 1009 that a party produce a translation of any foreign language document that the party intends to introduce into evidence at least 45 days before trial.

Texas Rule of Evidence 503. AREC has also submitted the attached proposal to amend Texas Rule of Evidence 503, which governs application of the attorney-client privilege. Rule 503(b)(1)(C) codifies the "allied litigant" doctrine. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012). As set forth in the rule, the doctrine protects communications (1) between a client or the client's lawyer (or the representative of either); (2) to a lawyer for another party (or the lawyer's representative); (3) *in a pending action*; and (4) concerning a matter of common interest in the pending action. *See* TEX. R. EVID. 503(b)(1)(C); *In re XL Specialty Ins. Co.*, 373 S.W.3d at 52-53. AREC recommends that the privilege be expanded to include communications made in anticipation of future litigation.

New TRAP Rule on Filing Documents Under Seal. Except for Rule 9.2(c)(3), which states that documents filed under seal or subject to a pending motion to seal must not be filed electronically, the Texas Rules of Appellate Procedure do not address under what circumstances a document may be filed under seal in an appellate court, nor do they set forth any procedure for filing a document under seal. The

Court requests that the Advisory Committee draft a new rule addressing how and under what circumstances a document may be filed under seal in an appellate court. The rule should address both documents that were filed under seal in the trial court and documents that were not filed under seal or were not filed at all in the trial court.

Rules for Juvenile Certification Appeals. SB 888, passed by the 84th Legislature, amends Family Code section 56.01 to permit an immediate appeal from the decision of a juvenile court under section 54.02 waiving its exclusive jurisdiction and certifying the juvenile to stand trial as an adult. Section 56.01(h-1) requires the Court to adopt rules to accelerate these appeals. Concerned that the statutory change might catch some practitioners unaware, the Court in August issued an administrative order (Misc. Docket No. 15-9156), which imposes temporary procedures for accelerated juvenile certification appeals pending the adoption of permanent rules. The Court requests the Advisory Committee to draft an appropriate rule.

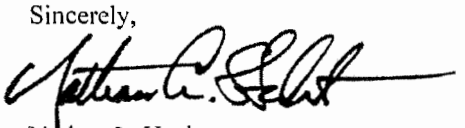
Time Standards for the Disposition of Criminal Cases in District and Statutory County Courts. Rule of Judicial Administration 6.1 sets forth aspirational time standards for the disposition of cases in the district and statutory county courts. Since its adoption in 1987, subsection (a) has provided that, so far as reasonably possible, criminal cases should be brought to trial or final disposition "[a]s provided by Article 32A.02, Code of Criminal Procedure." Former article 32A.02, known as the Speedy Trial Act, required the trial court to grant a motion to set aside an indictment, information, or complaint if the state was not ready for trial within a specified time period. Shortly after Rule 6.1(a) became effective, the Court of Criminal Appeals ruled article 32A.02 unconstitutional as a violation of separation of powers. *See Meshell v. State*, 739 S.W.2d 246, 257-58 (Tex. Crim. App. 1987). Article 32A.02 was formally repealed in 2005, but Rule 6.1(a) has not been amended. The Court requests the Advisory Committee's recommendations on how Rule 6.1(a) should be amended to reflect the repeal of Article 32A.02.

Rules for the Administration of a Deceased Lawyer's Trust Account. SB 995, passed by the 84th Legislature, adds to the Estates Code Chapter 456, which governs the disbursement and closing of a deceased lawyer's trust or escrow account for client funds. Section 465.005 authorizes the Court to adopt rules for the administration of funds in a trust or escrow account that is subject to Chapter 456.

Constitutional Adequacy of Texas Garnishment Procedure. A federal district court has ruled that Georgia's post-judgment garnishment statute violates due process because it (1) does not require that the debtor be notified that seized property may be exempt under state or federal law; (2) does not require that the debtor be notified of the procedure for claiming an exemption; and (3) does not provide a prompt and expeditious procedure for a debtor to reclaim exempt property. *Strickland v. Alexander*, No. 1:12-CV-02735-MHS, 2015 WL 5256836, at *9, 12, 16 (N.D. Ga. Sept. 8, 2015). In light of this decision, the Court requests the Advisory Committee's recommendations on whether further revisions should be made to the garnishment rules proposed in the final report of the Ancillary Proceedings Task Force.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,



Nathan L. Hecht
Chief Justice

Attachments

ANNOTATIONS

Ludwig v. State, 812 S.W.2d 323, 325 (Tex.Crim. App.1991). "We are not inclined to read 'victim' in [art. 17.15(5)] to cover anyone not actually a complainant in the charged offense."

Ex parte Brooks, 376 S.W.3d 222, 223 (Tex.App.—Fort Worth 2012, pet. ref'd). "In addition to [the rules listed in art. 17.15,] the Texas Court of Criminal Appeals [in *Ex parte Rubac*, 611 S.W.2d 848 (Tex.Crim. App.1981),] stated that the court should also weigh the following factors: (1) the accused's work record; (2) the accused's family ties; (3) the accused's length of residence; (4) the accused's prior criminal record, if any; (5) the accused's conformity with the conditions of any previous bond; (6) the existence of outstanding bonds, if any; and (7) aggravating circumstances alleged to have been involved in the charged offense."

Montalvo v. State, 315 S.W.3d 588, 592-93 (Tex. App.—Houston [1st Dist.] 2010, no pet.). "A defendant carries the burden of proof to establish that bail is excessive. In reviewing a trial court's ruling for an abuse of discretion, an appellate court will not intercede as long as the trial court's ruling is at least within the zone of reasonable disagreement. We acknowledge, however, that an abuse-of-discretion review requires more of the appellate court than simply deciding that the trial court did not rule arbitrarily or capriciously. The appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made."

Perez v. State, 897 S.W.2d 893, 898 (Tex.App.—San Antonio 1995, no pet.). "[T]he court of criminal appeals has considered the nonviolent aspect of an offense as a factor favorable to a bond reduction."

ART. 17.151 RELEASE BECAUSE OF DELAY

Sec. 1. A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within:

(1) 90 days from the commencement of his detention if he is accused of a felony;

(2) 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;

(3) 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or

(4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

Sec. 2. The provisions of this article do not apply to a defendant who is:

(1) serving a sentence of imprisonment for another offense while the defendant is serving that sentence;

(2) being detained pending trial of another accusation against the defendant as to which the applicable period has not yet elapsed;

(3) incompetent to stand trial, during the period of the defendant's incompetence; or

(4) being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community under this article.

Sec. 3. Repealed by Acts 2005, 79th Leg., ch. 110, §2, eff. Sept. 1, 2005.

History of CCP art. 17.151: Acts 1977, 65th Leg., ch. 787, §2, eff. July 1, 1978. Amended by Acts 2005, 79th Leg., ch. 110, §§1, 2, eff. Sept. 1, 2005.

See also CCP art. 29.12.

ANNOTATIONS

Rowe v. State, 853 S.W.2d 581, 582 (Tex.Crim.App. 1993). "Article 17.151 provides that if the State is not ready for trial within 90 days after commencement of detention for a felony, the accused 'must be released either on personal bond or by reducing the amount of bail required[.]' Thus the trial court has two options: release upon personal bond or reduce the bail amount. However, there is nothing in the statute indicating that the provisions do not apply if the delay was based upon the accused's request to testify before the grand jury. Article 17.151 contains no provisions excluding certain periods from the statutory time limit to accommodate exceptional circumstances." ***But see Ex Parte Matthews***, 327 S.W.3d 884, 888 (Tex.App.—Beaumont 2010, no pet.) (because CCP art. 17.15 applies to CCP art. 17.151, trial court may consider victim and community safety concerns in determining amount of bail under art. 17.151).

Ex parte Shaw, ___ S.W.3d ___ (Tex.App.—Fort Worth 2012, pet. ref'd) (No. 02-12-00116-CR; 12-21-12). Held: D was charged with three offenses. Although one offense had an indictment returned within 90 days, the

other two offenses had no indictments returned, and D continued to be jailed longer than 90 days. Appellate court held D must either be released on personal bond or have bail reduced on the unindicted charges.

Ex parte Okun, 342 S.W.3d 184, 185-86 (Tex. App.—Beaumont 2011, no pet.). "A habeas applicant has the burden of proving bail is excessive. [D] did not present any evidence about any discussions with bail bondsmen or any evidence regarding the maximum amount of bail that [D] believed he could satisfy. [¶] [D] sought a reduction in the bail amount. The trial court granted a substantial reduction in the bail amount. Under the circumstances, given the trial court's grant of [D's] motion, it was incumbent upon [D] to inform the trial court before filing this appeal that the reduced bail was not affordable, or that his request was not for a reduction in bail but for a release on personal bond."

Ex parte Castellano, 321 S.W.3d 760, 764 (Tex. App.—Fort Worth 2010, no pet.). "The stipulated evidence demonstrates that the trial court released [D] on personal bond pursuant to art. 17.151 after he had remained continuously incarcerated on the possession charge for more than 90 days without being indicted. The State thereafter rearrested [D] after he was indicted for the same possession offense. [T]he return of the indictment is the only evidence in the record that supports the trial court's decisions to revoke [D's] personal bond, to set the bond at $100,000, and to deny his requested relief to reinstate the personal bond. Article 17.151, however, 'does not permit the State to obtain an indictment, rearrest [D,] and begin the 90 day period anew from the date of the indictment or rearrest.'"

Vargas v. State, 109 S.W.3d 26, 29 (Tex.App.—Amarillo 2003, no pet.). "The courts of appeals have split over whether appellate jurisdiction exists in regard to direct appeals from pretrial bail rulings such as the one before us. [¶] We lack a statutory grant of jurisdiction over this appeal. And, although TRAP 31 addresses, in part, appeals from bail proceedings, we note that the [TRAPs] do not establish jurisdiction of courts of appeals, and cannot create jurisdiction where none exists. [¶] We lack jurisdiction over this direct appeal from interlocutory pretrial orders refusing to lower bail pursuant to CCP [art.] 17.151." *See also* ***Sanchez v. State***, 340 S.W.3d 848, 850-52 (Tex.App.—San Antonio 2011, no pet.) (no appellate jurisdiction); ***Keaton v. State***, 294 S.W.3d 870, 872-73 (Tex.App.—Beaumont 2009, no pet.) (same); ***Benford v. State***, 994 S.W.2d 404, 409 (Tex.App.—Waco 1999, no pet.) (same); ***Ex parte Shumake***, 953 S.W.2d 842, 846-47 (Tex.App.—Austin 1997, no pet.) (same). *But see* ***Ramos v. State***, 89 S.W.3d 122, 124-26 (Tex.App.—Corpus Christi 2002, no pet.) (TRAP 31.1 contemplates appeals of orders in bail proceedings); ***Saliba v. State***, 45 S.W.3d 329, 329 (Tex.App.—Dallas 2001, no pet.) (same); ***McKown v. State***, 915 S.W.2d 160, 161 (Tex.App.—Fort Worth 1996, no pet.) (same); ***Clark v. Barr***, 827 S.W.2d 556, 556-57 (Tex.App.—Houston [1st Dist.] 1992, no pet.) (same).

Ramos v. State, 89 S.W.3d 122, 128 (Tex.App.—Corpus Christi 2002, no pet.). "Article 17.151 does not require the State to 'announce ready.' The question of the State's 'readiness' within the statutory limits refers to the preparedness of the prosecution for trial. We hold that the State made a *prima facie* showing that it was ready for trial within the statutory period. Accordingly, it became [D's] burden to rebut the State's showing of readiness."

Ex parte McNeil, 772 S.W.2d 488, 489 (Tex.App.—Houston [1st Dist.] 1989, orig. proceeding). "Readiness for trial should be determined [by] the existence of a charging instrument [as] an element of preparedness. Where there is no indictment, the State cannot announce ready for trial." *See also* ***Ex parte Craft***, 301 S.W.3d 447, 449 (Tex.App.—Fort Worth 2009, no pet.); ***Ex parte Avila***, 201 S.W.3d 824, 826-27 (Tex.App.—Waco 2006, no pet.).

ART. 17.152. DENIAL OF BAIL FOR VIOLATION OF CERTAIN COURT ORDERS OR CONDITIONS OF BOND IN A FAMILY VIOLENCE CASE

(a) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.

(b) Except as otherwise provided by Subsection (d), a person who commits an offense under Section 25.07, Penal Code, related to a violation of a condition of bond set in a family violence case and whose bail in the case under Section 25.07, Penal Code, or in the family violence case is revoked or forfeited for a violation of a condition of bond may be taken into custody and, pending trial or other court proceedings, denied release on bail if following a hearing a judge or magistrate determines by a preponderance of the evidence that the person violated a condition of bond related to:

ART. 31.08. RETURN TO COUNTY OF ORIGINAL VENUE

Sec. 1. (a) On the completion of a trial in which a change of venue has been ordered and after the jury has been discharged, the court, with the consent of counsel for the state and the defendant, may return the cause to the original county in which the indictment or information was filed. Except as provided by Subsection (b) of this section, all subsequent and ancillary proceedings, including the pronouncement of sentence after appeals have been exhausted, must be heard in the county in which the indictment or information was filed.

(b) A motion for new trial alleging jury misconduct must be heard in the county in which the cause was tried. The county in which the indictment or information was filed must pay the costs of the prosecution of the motion for new trial.

Sec. 2. (a) Except as provided by Subsection (b), on an order returning venue to the original county in which the indictment or information was filed, the clerk of the county in which the cause was tried shall:

(1) make a certified copy of the court's order directing the return to the original county;

(2) make a certified copy of the defendant's bail bond, personal bond, or appeal bond;

(3) gather all the original papers in the cause and certify under official seal that the papers are all the original papers on file in the court; and

(4) transmit the items listed in this section to the clerk of the court of original venue.

(b) This article does not apply to a proceeding in which the clerk of the court of original venue was present and performed the duties as clerk for the court under Article 31.09.

Sec. 3. Except for the review of a death sentence under Section 2(h), Article 37.071, or under Section 2(h), Article 37.072, an appeal taken in a cause returned to the original county under this article must be docketed in the appellate district in which the county of original venue is located.

History of CCP art. 31.08: Acts 1989, 71st Leg., ch. 824, §1, eff. Sept. 1, 1989. Amended by Acts 1995, 74th Leg., ch. 651, §1, eff. Sept. 1, 1995; Acts 2007, 80th Leg., ch. 593, §3.13, eff. Sept. 1, 2007.

ART. 31.09. CHANGE OF VENUE; USE OF EXISTING SERVICES

(a) If a change of venue in a criminal case is ordered under this chapter, the judge ordering the change of venue may, with the written consent of the prosecuting attorney, the defense attorney, and the defendant, maintain the original case number on its own docket, preside over the case, and use the services of the court reporter, the court coordinator, and the clerk of the court of original venue. The court shall use the courtroom facilities and any other services or facilities of the district or county to which venue is changed. A jury, if required, must consist of residents of the district or county to which venue is changed.

(b) Notwithstanding Article 31.05, the clerk of the court of original venue shall:

(1) maintain the original papers of the case, including the defendant's bail bond or personal bond;

(2) make the papers available for trial; and

(3) act as the clerk in the case.

History of CCP art. 31.09: Acts 1995, 74th Leg., ch. 651, §2, eff. Sept. 1, 1995.

CHAPTER 32. DISMISSING PROSECUTIONS

ART. 32.01. DEFENDANT IN CUSTODY & NO INDICTMENT PRESENTED

When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant on or before the last day of the next term of the court which is held after his commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

History of CCP art. 32.01: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966. Amended by Acts 1997, 75th Leg., ch. 289, §2, eff. May 26, 1997; Acts 2005, 79th Leg., ch. 743, §6, eff. Sept. 1, 2005.

See also CCP art. 15.14.

ANNOTATIONS

Ex parte Countryman, 226 S.W.3d 435, 436 (Tex. Crim.App.2007). "Because the State had not obtained an indictment by the next term of court, [D] filed an application for writ of habeas corpus to have the case dismissed. After [D] filed the application, but before the trial court held a hearing, the grand jury returned an indictment. The trial court denied the application and [D]

appealed. The court of appeals reversed the trial court's order denying habeas relief and ordered that the indictment be dismissed. We granted the State's petition for discretionary review to determine whether a speedy-indictment claim is moot when it is filed before the indictment, but not heard until after the indictment is returned." Held: The court of appeals erred. The claim was moot because even a determination that the State did not show good cause would not provide a remedy to D.

Ex parte Seidel, 39 S.W.3d 221, 223-24 (Tex.Crim. App.2001). "[A] district court lacks jurisdiction over a case when an information or indictment has not yet been filed in that court. In this case, an information or indictment had not yet been filed when the trial judge dismissed the bail and prosecution against [D]. The district court, however, had proper jurisdiction to act under the Speedy Trial Act because [D] was 'held to bail for his appearance to answer any criminal accusation before the district court.' [¶] Generally, a trial court does not have the power to dismiss a case unless the prosecutor so requests. A trial court does, however, have the power to dismiss a case without the State's consent under [CCP] art. 32.01. [CCP] art. 28.061, which bars further prosecution for a discharged offense ... no longer applies to a discharge under Art. 32.01. Therefore, even if a defendant is entitled to discharge from custody under Art. 32.01, that defendant is not free from subsequent prosecution."

Author's comment: The dismissal cannot be with prejudice.

Ex parte Martin, 6 S.W.3d 524, 528 (Tex.Crim.App. 1999). "In ***Barker v. Wingo***, the [U.S.] Supreme Court set out a balancing test with four factors to determine when pretrial delay denies an accused of his right to a speedy trial.... Today we adopt a ***Barker***-like, totality-of-circumstances test for the determination of good cause under art. 32.01. The habeas court should consider, among other things, the length of the delay, the State's reason for delay, whether the delay was due to lack of diligence on the part of the State, and whether the delay caused harm to the accused. [¶] Another relevant inquiry is whether the grand jury has voted not to present an indictment. *At 529:* By adopting this test, we are not adding constitutional, speedy-trial rights to art. 32.01. We are adopting a test for a fact-based situation."

Cameron v. State, 988 S.W.2d 835, 843 (Tex. App.—San Antonio 1999, pet. ref'd). "[A] defendant cannot complain of the timeliness of a second or other indictment under art. 32.01 once a valid and timely indictment is secured by the State. For timeliness purposes, we hold that art. 32.01 is satisfied once the State secures a timely indictment arising out of the same criminal transaction or occurrence. The defendant suffers no due process violation if he continues under a valid indictment, although it is not the indictment he is ultimately prosecuted and convicted for, so long as the indictment arises out of the same criminal transaction or occurrence. ... Article 32.01 should not be read to preclude the State from advancing alternative theories or charges arising out of the same criminal transaction once the State has acted within the timetable prescribed by art. 32.01 for initially securing a timely indictment. If the State is dilatory in prosecuting the case, the defendant may invoke his speedy trial right."

Soderman v. State, 915 S.W.2d 605, 608 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). "[T]his provision applies only to district courts. Absent any language in the statute or case law to support applying this provision to county courts, we are without authority to do so."

Uptergrove v. State, 881 S.W.2d 529, 531 (Tex. App.—Texarkana 1994, pet. ref'd). Article 32.01 "does not apply to a juvenile proceeding to determine whether a juvenile is to be transferred to district court to be tried as an adult."

ART. 32.02. DISMISSAL BY STATE'S ATTORNEY

The attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.

History of CCP art. 32.02: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966.

ANNOTATIONS

Smith v. State, 70 S.W.3d 848, 850-51 (Tex.Crim. App.2002). "The authority to grant immunity derives from the authority of a prosecutor to dismiss prosecutions. The authority to dismiss a case is governed by [art.] 32.02. A grant of immunity from prosecution is, conceptually, a prosecutorial promise to dismiss a case. Article 32.02 directs that a dismissal made by the prosecutor must be approved by the trial court. Therefore, a District Attorney has no authority to grant immunity

without court approval, for the approval of the court is 'essential' to establish immunity. *At 855:* Provided the judge approves the dismissal that results from an immunity agreement, and is aware that the dismissal is pursuant to an immunity agreement, the judge does not have to be aware of the specific terms of that immunity agreement for it to be enforceable."

CHAPTER 32A. SPEEDY TRIAL

Art. 32A.01 Trial priorities

ART. 32A.01 TRIAL PRIORITIES

Insofar as is practicable, the trial of a criminal action shall be given preference over trials of civil cases, and the trial of a criminal action against a defendant who is detained in jail pending trial of the action shall be given preference over trials of other criminal actions.

History of CCP art. 32A.01: Acts 1977, 65th Leg., ch. 787, §1, eff. July 1, 1978.

ART. 32A.02. REPEALED

Repealed by Acts 2005, 79th Leg., ch. 1019, §2, eff. June 18, 2005.

CHAPTER 33. THE MODE OF TRIAL

ART. 33.01. JURY SIZE

(a) Except as provided by Subsection (b), in the district court, the jury shall consist of twelve qualified jurors. In the county court and inferior courts, the jury shall consist of six qualified jurors.

(b) In a trial involving a misdemeanor offense, a district court jury shall consist of six qualified jurors.

History of CCP art. 33.01: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966. Amended by Acts 2003, 78th Leg., ch. 466, §1, eff. Jan. 1, 2004.

See also Tex. Const. art. 5, §13; Gov't Code §62.201.

ANNOTATIONS

Roberts v. State, 957 S.W.2d 80, 81 (Tex.Crim.App. 1997). "[A] defendant may waive his statutory right to a jury of 12 members."

ART. 33.011. ALTERNATE JURORS

(a) In district courts, the judge may direct that not more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. In county courts, the judge may direct that not more than two jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

(b) Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury renders a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment, become or are found to be unable or disqualified to perform their duties or are found by the court on agreement of the parties to have good cause for not performing their duties. Alternate jurors shall be drawn and selected in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, security, and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment.

History of CCP art. 33.011: Acts 1983, 68th Leg., ch. 775, §2, eff. Aug. 29, 1983. Amended by Acts 2007, 80th Leg., ch. 846, §1, eff. Sept. 1, 2007.

ANNOTATIONS

Trinidad v. State, 312 S.W.3d 23, 24 (Tex.Crim.App. 2010). "In 2007, the Texas Legislature amended art. 33.011(b).... According to the amendment, an alternate juror in a criminal case tried in the district court, if not called upon to replace a regular juror, shall no longer be discharged at the time that the jury retires to deliberate, but shall now be discharged after the jury has rendered a verdict. Unfortunately, the amended statute does not indicate whether the alternate juror should be allowed to be present for, and to participate in, the jury's deliberations or, instead, whether he should be sequestered from the regular jury during its deliberations until such time as the alternate's services might be required by the disability of a regular juror. In the instant cases, the trial court opted for the former contingency. The court of appeals held in each case that, in doing so, the trial court violated the constitutional requirement of a jury composed of 12 persons, or, alternatively, that the trial court violated the statutory prohibition against permitting any person not a juror into the jury deliberation room. We granted the State's

Rule 57. *Direct Appeals to Texas Supreme Court*

57.1 *Perfecting Direct Appeal*

(a) *Notice of Appeal.* A direct appeal to the Supreme Court permitted by law is perfected when a written notice of appeal is filed with the trial court clerk [within the time provided by Rule 26.1 or as extended by Rule 26.3]. The trial court clerk must immediately send a copy of the notice of appeal to the clerk of the Supreme Court. [If a notice of appeal is mistakenly filed with the clerk of the Supreme Court or the clerk of a court of appeals, the notice is deemed filed the same day with the trial court clerk and the Supreme Court clerk or the court of appeals' clerk must immediately send the trial court clerk a copy of the notice.]

(b) *Contents of Notice.* The notice of direct appeal must:

(1) identify the trial court and state the case's trial court number and style;

(2) state the date of the judgment or order appealed from;

(3) state that the party desires to take a direct appeal to the Supreme Court;

(4) state the name of each party filing the notice; and

(5) state, if applicable, that the appellant is presumed indigent and may proceed without advance payment of costs as provided in Rule 20.1(a)(3).

[*When filed.* The notice of appeal must be filed within ____ days after the date on which the interlocutory order or judgment to be appealed is signed, unless the Supreme Court extends the time for filing under Rule 10.5(b). Filing a motion for new trial, any other post-trial motions or a request for findings of fact, will not extend the time to perfect a direct appeal to the Supreme Court.]

(c) *Amending the Notice.* An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the Supreme Court at any time before the [appellant's *or* petitioner's] brief is filed. The amended notice is subject

to being struck for cause on the motion of any party affected by the amended notice. After the [appellant's *or* petitioner's] brief is filed, the notice may be amended only on leave of the Supreme Court on such terms as the court may prescribe.

(d) *Other Requirements.* The [appellant *or* petitioner] must also file with the clerk of the Supreme Court a docketing statement as provided in Rule 32.1 and pay all required fees authorized to be collected by the clerk of the Supreme Court.

57.2 *Jurisdiction of Supreme Court.*

(a) *Statement of Jurisdiction.* In addition to perfecting the appeal, the appellant [or petitioner] must file with the clerk of the Supreme Court a statement of jurisdiction within ____ [*e.g.* 45] days after the notice of appeal is filed with the trial court clerk.

(b) *Contents of Statement of Jurisdiction.* The statement of jurisdiction must plainly state the basis for the exercise of the Supreme Court's direct appeal jurisdiction, otherwise follow the form and contents of a petition for review prescribed by Rule 53 and conform to the length requirements prescribed for a petition for review by Rule 9.4.

(c) *Response to Jurisdictional Statement.* [An appellee *or* A respondent] may file a response to the [appellee's *or* respondent's] statement of jurisdiction challenging the exercise of direct appeal jurisdiction, [or a waiver of response] within ____ [*e.g.* 30] days after the jurisdictional statement is filed with the Clerk of the Supreme Court. If filed, the response must conform to the form and contents of a response to a petition for review prescribed by Rule 53 and follow the length requirements of Rule 9.4.

(d) *Exercise of Jurisdiction; Discretionary Review.* The Supreme Court [may not take jurisdiction of any question of fact] and may decline to exercise jurisdiction over a direct appeal of an interlocutory order [granting or denying a temporary injunction] if the record is not adequately developed, or if its decision

would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

57.3 *Preliminary Ruling on [Probable] Jurisdiction; Dismissal of Appeal.*

The Supreme Court may determine whether the Court has probable jurisdiction based on the statement of jurisdiction and any response and without first ordering the parties to obtain the appellate record. If the Supreme Court determines that it does not have [probable] jurisdiction [or that a direct appeal should not be allowed as a matter of judicial discretion], it will dismiss the appeal. [If the direct appeal is dismissed, any party may pursue any other appeal available at the time the direct appeal was filed. The other appeal must be perfected within ten days after dismissal of the direct appeal.]

57.4 *The Appellate Record.*

(1) Preparation and Filing of Record. The parties should not request the preparation and filing of the clerk's record or the reporter's record until the Supreme Court directs them to do so. If the Supreme Court determines that it has [probable jurisdiction], or that the Court needs the record to determine whether it has probable jurisdiction, the Supreme Court clerk will send written notice:

(A) of the Supreme Court's decision to all parties to the proceeding;

(B) directing the parties to obtain the preparation of the clerk's record and, if necessary to the appeal, to request and obtain preparation of the reporter's record under Rules 34 and 35, within ____ [*e.g.* 10] days after the date written notice of the Court's decision was sent to the parties; and

(C) to the trial court clerk and the court reporter or court reporters responsible for preparing the reporter's record of the date on which the record must be filed by them in the Supreme Court.

(2) Review of Appellate Record by Clerk. On receipt of the record, the clerk of the Supreme Court must determine whether the record complies with the Supreme

Court's order on preparation of the record. If it is defective, the clerk must specify the defects and instruct the responsible official or officials to correct the defects and return the record to the Supreme Court for filing by a specified date. The clerk of the Supreme Court also must notify the parties of the date or dates of receipt and filing of the appellate record in the Supreme Court.

57.6 *Determination of Direct Appeal.*

(a) *[Ruling on Merits].* If the Supreme Court determines that it has [probable] jurisdiction [and that a direct appeal should be allowed as a matter of judicial discretion], the Court:

(1) must request a response to the statement of jurisdiction if one has not been filed;

(2) may request full briefing under Rule 55;

(3) may set the case for submission and argument under Rule 59; and

(4) may render judgment under Rule 60.

(b) *Rehearing.* Any party may file a motion for rehearing within 15 days after the final order is rendered. The motion must clearly state the points or issues relied on for rehearing.

57.7 *Direct Appeal Exclusive While Pending.* If a direct appeal to the Supreme Court is filed, the parties to the appeal must not, while the appeal is pending, pursue an appeal to the court of appeals. [But if the direct appeal is dismissed, any party may pursue any other appeal available at the time when the direct appeal was filed. The other appeal may be perfected within ten days after dismissal of the direct appeal.]

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

To: Members of the Appellate Rules Subcommittee: Pamela Baron, Hon. Bill Boyce, Hon. Brett Busby, Elaine Carlson, Frank Gilstrap, Chip Watson, Scott Stolley and Evan Young
From: Bill Dorsaneo
Date: December 2, 2015
Subject: Proposed Appellate Rule 57

As you probably know, a new version of Appellate Rule 57 is required because of the recent expansion of direct appeal jurisdiction by statute and because the current rule does a very poor and, in fact, misleading job of explaining how direct appeal jurisdiction operates. Pam Baron, Justice Brett Busby and I have been working with Blake Hawthorne on a proposal for revision of Appellate Rule 57, which is attached for your review. I am forwarding this draft to Marti for planning purposes. Please let us have your thoughts at your earliest convenience. I apologize for the shortness of notice.

cc: Chief Justice Nathan L. Hecht
Chip Babcock
Martha Newton
Blake Hawthorne

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SMU

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

Memorandum

To: Members of the Supreme Court Advisory Committee
cc: Chief Justice Nathan L. Hecht, Chip Babcock, Blake Hawthorne, Martha Newton, Marti Walker
From: Bill Dorsaneo
Subject: Proposed Appellate Rule 57
Date: December 10, 2015

Summary of Constitutional Provisions

Art. V, Section 3-b, a 1940 constitutional provision provided and still provides for a direct appeal to the Texas Supreme Court "from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this state, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State." Tex. Const. Art. V § 3-b.

2/10/1943, 48th Leg. R.S. Ch. 14, § 1, 1943 Tex. Gen. Laws 14, 14-15 (eff. Jan. 1, 1944). Legislature enacted statute authorizing both types of direct appeals. Civil Procedure Rule 499a, promulgated, effective 12/31/1943. May 29, 1983, 68th Leg., R.S. Ch. 839, § 2, 1983 Tex. Gen. Laws 4767, 4768. Repealed part of statute permitting direct appeals of orders regarding the validity of "State Board or Commission."

Amendment to Art. V, § 3, amended in 1981 to broaden Legislature's ability to prescribe appellate jurisdiction of Texas Supreme Court to "extend to all cases except criminal law matters and as otherwise provided in this Constitution or by law" Tex. Const. art. V, § 3 (effective 1/1/1981; amended 11/6/2001). *See Perry v. Del Rio*, 67 S.W.3d 85, 98n. 4). (Tex. 2001). This probably makes Art V. § 3-b unnecessary.

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New Legislation

The Legislature has now provided for direct appeals to the Texas Supreme Court in cases that do not involve orders granting or denying injunctions on the ground of a statute's constitutionality as provided in Section 22.001(c) of the Government Code. In addition to newly enacted Chapter 22A (Special Three-Judge District Court) of the Government Code, providing a procedure for convening a "three-judge district court in any suit filed in a district court in this state in which this state or a state officer or agency is a defendant in a claim that:

(1) challenges the finances or operations of this state's public school system; or

(2) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education, or the United States Congress, or state judicial districts," (*see* Tex. Gov't Code § 22A.001 (a)), various other direct appeal statutes have been enacted. *See* Rance Craft, "Go Directly to the Texas Supreme Court, Do Not Pass the Court of Appeals, Do Not Collect a Court of Appeals Disposition," 24th Annual Conference on State and Federal Appeals, UTLAW CLE, June 5-6, 2014; *see also* Appendix A.

Summary of Rule Changes

But like its predecessors, Appellate Rule 57 has been drafted as if section 22.001(c) is the only basis for the Supreme Court's direct appeal jurisdiction. Similarly, as explained in Justice Willett's dissenting opinion in the *Episcopal Diocese* case, "in the vast majority of cases where we have exercised direct appeal jurisdiction, it has been abundantly clear that the trial court issued or denied an injunction on the ground of a statute's constitutionality." *Episcopal Diocese v. Episcopal Church*, 422 S.W.3d 646 (Tex. 2013); *see also Del Rio*, 67 S.W.3d at 98-100 (Phillips, C.J., dissenting).

The following rules of procedure have dealt with the Texas Supreme Court's direct appeal jurisdiction over time. Copies of these rules are attached as Appendix B.

1. Tex. R. Civ. P. 499-a (Direct Appeals) (new rule eff. 12/31/43);
2. Tex. R. Civ. P. 140 (Direct Appeal) (9/1/86)
3. Tex. R. Civ. P. 140 (Direct Appeals) (rewritten in 1990);
4. Tex. R. Ap. P. 57 (current rule).

APPENDIX A

Sec. 1205.021. Authority to Bring Action.

An issuer may bring an action under this chapter to obtain a declaratory judgment as to:

(1) the authority of the issuer to issue the public securities;

(2) the legality and validity of each public security authorization relating to the public securities, including if appropriate:

(A) the election at which the public securities were authorized;

(B) the organization or boundaries of the issuer;

(C) the imposition of an assessment, a tax, or a tax lien;

(D) the execution or proposed execution of a contract;

(E) the imposition of a rate, fee, charge, or toll or the enforcement of a remedy relating to the imposition of that rate, fee, charge, or toll; and

(F) the pledge or encumbrance of a tax, revenue, receipts, or property to secure the public securities;

(3) the legality and validity of each expenditure or proposed expenditure of money relating to the public securities; and

(4) the legality and validity of the public securities.

Sec. 1205.068. Appeals.

(a) Any party to an action under this chapter may appeal to the appropriate court of appeals:

(1) an order entered by the trial court under Section 1205.103 or 1205.104; or

(2) the judgment rendered by the trial court.

(b) A party may take a direct appeal to the supreme court as provided by Section 22.001(c).

(c) An order or judgment from which an appeal is not taken is final.

(d) An order or judgment of a court of appeals may be appealed to the supreme court.

(e) An appeal under this section is governed by the rules of the supreme court for accelerated appeals in civil cases and takes priority over any other matter, other than writs of habeas corpus, pending in the appellate court. The appellate court shall render its final order or judgment with the least possible delay.

History

Enacted by *Acts 1999, 76th Leg., ch. 227 (H.B. 3157), § 1*, effective September 1, 1999; am. *Acts 1999, 76th Leg., ch. 1064 (H.B. 3224), § 6*, effective September 1, 1999.

Sec. 39.303. Financing Orders; Terms.

(a) The commission shall adopt a financing order, on application of a utility to recover the utility's regulatory assets and other amounts determined under Section 39.201 or 39.262, on making a finding that the total amount of revenues to be collected under the financing order is less than the revenue requirement that would be recovered over the remaining life of the regulatory assets or other amounts using conventional financing methods and that the financing order is consistent with the standards in Section 39.301.

(b) The financing order shall detail the amount of regulatory assets and other amounts to be recovered and the period over which the nonbypassable transition charges shall be recovered, which period may not exceed 15 years. If an amount determined under Section 39.262 is subject to judicial review at the time of the securitization proceeding, the financing order shall include an adjustment mechanism requiring the utility to adjust its rates, other than transition charges, or provide credits, other than credits to transition charges, in a manner that would refund over the remaining life of the transition bonds any overpayments resulting from securitization of amounts in excess of the amount resulting from a final determination after completion of all appellate reviews. The adjustment mechanism may not affect the stream of revenue available to service the transition bonds. An adjustment may not be made under this subsection until all appellate reviews, including, if applicable, appellate reviews following a commission decision on remand of its original orders, have been completed.

(c) Transition charges shall be collected and allocated among customers in the same manner as competition transition charges under Section 39.201.

(d) A financing order shall become effective in accordance with its terms, and the financing order, together with the transition charges authorized in the order, shall thereafter be irrevocable and not subject to reduction, impairment, or adjustment by further action of the commission, except as permitted by Section 39.307.

(e) The commission shall issue a financing order under Subsections (a) and (g) not later than 90 days after the utility files its request for the financing order.

(f) A financing order is not subject to rehearing by the commission. A financing order may be reviewed by appeal only to a Travis County district court by a party to the proceeding filed within 15 days after the financing order is signed by the commission. The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the financing order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.

(g) At the request of an electric utility, the commission may adopt a financing order providing for retiring and refunding transition bonds on making a finding that the future transition charges required to service the new transition bonds, including transaction costs, will be less than the future transition charges required to service the transition bonds being refunded. On the retirement of the refunded transition bonds, the commission shall adjust the related transition charges accordingly.

History

Enacted by *Acts 1999, 76th Leg., ch. 405 (S.B. 7), § 39*, effective September 1, 1999; am. *Acts 2007, 80th Leg., ch. 1186 (H.B. 624), § 4*, effective June 15, 2007.

Sec. 36.405. Determination of System Restoration Costs.

(a) An electric utility is entitled to recover system restoration costs consistent with the provisions of this subchapter and is entitled to seek recovery of amounts not recovered under this subchapter, including system restoration costs not yet incurred at the time an application is filed under Subsection (b), in its next base rate proceeding or through any other proceeding authorized by Subchapter C or D.

(b) An electric utility may file an application with the commission seeking a determination of the amount of system restoration costs eligible for recovery and securitization. The commission may by rule prescribe the form of the application and the information reasonably needed to support the application; provided, however, that if such a rule is not in effect, the electric utility shall not be precluded from filing its application and such application cannot be rejected as being incomplete.

(c) The commission shall issue an order determining the amount of system restoration costs eligible for recovery and securitization not later than the 150th day after the date an electric utility files its application. The 150-day period begins on the date the electric utility files the application, even if the filing occurs before the effective date of this section.

(d) An electric utility may file an application for a financing order prior to the expiration of the 150-day period provided for in Subsection (c). The commission shall issue a financing order not later than 90 days after the utility files its request for a financing order; provided, however, that the commission need not issue the financing order until it has determined the amount of system restoration costs eligible for recovery and securitization.

(e) To the extent the commission has made a determination of the eligible system restoration costs of an electric utility before the effective date of this section, that determination may provide the basis for the utility's application for a financing order pursuant to this subchapter and Subchapter G, Chapter 39. A previous commission determination does not preclude the utility from requesting recovery of additional system restoration costs eligible for recovery under this subchapter, but not previously authorized by the commission.

(f) A rate proceeding under Subchapter C or D shall not be required to determine the amount of recoverable system restoration costs, as provided by this section, or for the issuance of a financing order.

(g) A commission order under this subchapter is not subject to rehearing. A commission order may be reviewed by appeal only to a Travis County district court by a party to the proceeding filed within 15 days after the order is signed by the commission. The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.

History

Enacted by *Acts 2009, 81st Leg., ch. 1 (S.B. 769), § 1*, effective April 16, 2009.

Sec. 2306.932. Injunctive Relief.

(a) A district court for good cause shown in a hearing and on application by the department, a migrant agricultural worker, or the worker's representative may grant a temporary or permanent injunction to prohibit a person, including a person who owns or controls a migrant labor housing facility, from violating this subchapter or a rule adopted under this subchapter.

(b) A person subject to a temporary or permanent injunction under Subsection (a) may appeal to the supreme court as in other cases.

History

Am. *Acts 2005, 79th Leg., ch. 60 (H.B. 1099), § 1*, effective September 1, 2005 (renumbered from *Health and Safety Code Sec. 147.012*).

Annotations

Notes

STATUTORY NOTES

Effect of amendments.

2005 amendment, in (a), added "a migrant agricultural worker, or the worker's representative" and "including a person who owns or controls a migrant labor housing facility," and twice substituted "subchapter" for "chapter."

Sec. 17.62. Penalties.

(a) Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with Section 17.60 or 17.61 of this subchapter, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material or merchandise or sample of merchandise is guilty of a misdemeanor and on conviction is punishable by a fine of not more than $5,000 or by confinement in the county jail for not more than one year, or both.

(b) If a person fails to comply with a directive of the consumer protection division under Section 17.60 of this subchapter or with a civil investigative demand for documentary material served on him under Section 17.61 of this subchapter, or if satisfactory copying or reproduction of the material cannot be done and the person refuses to surrender the material, the consumer protection division may file in the district court in the county in which the person resides, is found, or transacts business, and serve on the person, a petition for an order of the court for enforcement of Sections 17.60 and 17.61 of this subchapter. If the person transacts business in more than one county, the petition shall be filed in the county in which the person maintains his principal place of business, or in another county agreed on by the parties to the petition.

(c) When a petition is filed in the district court in any county under this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order required to carry into effect the provisions of Sections 17.60 and 17.61 of this subchapter. Any final order entered is subject to appeal to the Texas Supreme Court. Failure to comply with any final order entered under this section is punishable by contempt.

History

Enacted by Acts 1973, 63rd Leg., ch. 143 (H.B. 417), § 1, effective May 21, 1973.

Sec. 36.053. [Expires September 1, 2015] Investigation.

(a) The attorney general may take action under Subsection (b) if the attorney general has reason to believe that:

(1) a person has information or custody or control of documentary material relevant to the subject matter of an investigation of an alleged unlawful act;

(2) a person is committing, has committed, or is about to commit an unlawful act; or

(3) it is in the public interest to conduct an investigation to ascertain whether a person is committing, has committed, or is about to commit an unlawful act.

(b) In investigating an unlawful act, the attorney general may:

(1) require the person to file on a prescribed form a statement in writing, under oath or affirmation, as to all the facts and circumstances concerning the alleged unlawful act and other information considered necessary by the attorney general;

(2) examine under oath a person in connection with the alleged unlawful act; and

(3) execute in writing and serve on the person a civil investigative demand requiring the person to produce the documentary material and permit inspection and copying of the material under Section 36.054.

(c) The office of the attorney general may not release or disclose information that is obtained under Subsection (b)(1) or (2) or any documentary material or other record derived from the information except:

(1) by court order for good cause shown;

(2) with the consent of the person who provided the information;

(3) to an employee of the attorney general;

(4) to an agency of this state, the United States, or another state;

(5) to any attorney representing the state under Section 36.055 or in a civil action brought under Subchapter C;

(6) to a political subdivision of this state; or

(7) to a person authorized by the attorney general to receive the information.

(d) The attorney general may use documentary material derived from information obtained under Subsection (b)(1) or (2), or copies of that material, as the attorney general determines necessary in the enforcement of this chapter, including presentation before a court.

(e) If a person fails to file a statement as required by Subsection (b)(1) or fails to submit to an examination as required by Subsection (b)(2), the attorney general may file in a district court of Travis County a petition for an order to compel the person to file the statement or submit to the examination within a period stated by court order. Failure to comply with an order entered under this subsection is punishable as contempt.

(f) An order issued by a district court under this section is subject to appeal to the supreme court.

History

Enacted by *Acts 1995, 74th Leg., ch. 824 (H.B. 2523), § 1*, effective September 1, 1995; am. *Acts 1997, 75th Leg., ch. 1153 (S.B. 30), §§ 4.01(b)*, 4.05, effective September 1, 1997 (renumbered from Sec. 36.005); am. *Acts 2005, 79th Leg., ch. 806 (S.B. 563), § 8*, effective September 1, 2005.

Notes

STATUTORY NOTES

Editor's Notes.

See Tex. *Hum. Res. Code Ann. § 21.002* for sunset provision.

Effect of amendments.

2005 amendment, added (c) — (f).

Sec. 36.054. [Expires September 1, 2015] Civil Investigative Demand.

(a) An investigative demand must:

(1) state the rule or statute under which the alleged unlawful act is being investigated and the general subject matter of the investigation;

(2) describe the class or classes of documentary material to be produced with reasonable specificity to fairly indicate the documentary material demanded;

(3) prescribe a return date within which the documentary material is to be produced; and

(4) identify an authorized employee of the attorney general to whom the documentary material is to be made available for inspection and copying.

(b) A civil investigative demand may require disclosure of any documentary material that is discoverable under the Texas Rules of Civil Procedure.

(c) Service of an investigative demand may be made by:

(1) delivering an executed copy of the demand to the person to be served or to a partner, an officer, or an agent authorized by appointment or by law to receive service of process on behalf of that person;

(2) delivering an executed copy of the demand to the principal place of business in this state of the person to be served; or

(3) mailing by registered or certified mail an executed copy of the demand addressed to the person to be served at the person's principal place of business in this state or, if the person has no place of business in this state, to a person's principal office or place of business.

(d) Documentary material demanded under this section shall be produced for inspection and copying during normal business hours at the office of the attorney general or as agreed by the person served and the attorney general.

(e) The office of the attorney general may not produce for inspection or copying or otherwise disclose the contents of documentary material obtained under this section except:

(1) by court order for good cause shown;

(2) with the consent of the person who produced the information;

(3) to an employee of the attorney general;

(4) to an agency of this state, the United States, or another state;

(5) to any attorney representing the state under Section 36.055 or in a civil action brought under Subchapter C;

(6) to a political subdivision of this state; or

(7) to a person authorized by the attorney general to receive the information.

(e-1) The attorney general shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or by an authorized representative of that person. The attorney general may use the documentary material or copies of it as the attorney general determines necessary in the enforcement of this chapter, including presentation before a court.

(f) A person may file a petition, stating good cause, to extend the return date for the demand or to modify or set aside the demand. A petition under this section shall be filed in a district court of Travis County and must be filed before the earlier of:

(1) the return date specified in the demand; or

(2) the 20th day after the date the demand is served.

(g) Except as provided by court order, a person on whom a demand has been served under this section shall comply with the terms of an investigative demand.

(h) A person who has committed an unlawful act in relation to the Medicaid program in this state has submitted to the jurisdiction of this state and personal service of an investigative demand under this section may be made on the person outside of this state.

(i) This section does not limit the authority of the attorney general to conduct investigations or to access a person's documentary materials or other information under another state or federal law, the Texas Rules of Civil Procedure, or the Federal Rules of Civil Procedure.

(j) If a person fails to comply with an investigative demand, or if copying and reproduction of the documentary material demanded cannot be satisfactorily accomplished and the person refuses to surrender the documentary material, the attorney general may file in a district court of Travis County a petition for an order to enforce the investigative demand.

(k) If a petition is filed under Subsection (j), the court may determine the matter presented and may enter an order to implement this section.

(l) Failure to comply with a final order entered under Subsection (k) is punishable by contempt.

(m) A final order issued by a district court under Subsection (k) is subject to appeal to the supreme court.

History

Enacted by *Acts 1995, 74th Leg., ch. 824 (H.B. 2523), § 1*, effective September 1, 1995; am. *Acts 1997, 75th Leg., ch. 1153 (S.B. 30), § 4.01(b)*, effective September 1, 1997 (renumbered from Sec. 36.006); am. *Acts 2005, 79th Leg., ch. 806 (S.B. 563), § 9*, effective September 1, 2005.

Annotations

Notes

STATUTORY NOTES

Editor's Notes.

See Tex. *Hum. Res. Code Ann. § 21.002* for sunset provision.

Effect of amendments.

2005 amendment, in (e), deleted "Except as ordered by a court for good cause shown," in the beginning of the paragraph, substituted "except:" for "to a person other than an authorized employee of the attorney general without the consent of the person who produced the documentary material" in the first sentence, and added subparagraphs (1) through (7); and designated the last two sentences of former (e) as (e-1).

APPENDIX B

Rule 496. Brief

A party who elects to file in this court a brief in addition to the brief filed in the Court of Civil Appeals, shall comply as nearly as may be with the rules prescribed for briefing causes in the latter court and shall confine his briefs to the points raised in the motion for a rehearing and presented in the application for a writ of error. The clerk may receive amicus curiae briefs or arguments, provided it is shown that copies have been furnished to all attorneys of record in the case. As amended by order of Oct. 10, 1945, effective Feb. 1, 1946.

Source: Texas Rule 14 (for Supreme Court), unchanged.

Rule 497. Order of Trial of Causes

Causes may be tried in such order as the justices of the Supreme Court may deem to the best interest and convenience of the parties or their attorneys.

Source: Art. 1755, with minor textual change.

Rule 498. Argument

In the argument of cases in the Supreme Court each side may be allowed thirty minutes in the argument at the bar, with fifteen minutes more in conclusion by the petitioner. In cases of very great importance, involving difficult questions, the time allotted herein may be extended by the court, provided application therefor is made before argument begins. Not more than two counsel on each side will be heard, except on leave of the court.

Source: Texas Rule 16 (for Supreme Court) in part, unchanged.

Rule 499. Correspondence

Correspondence relative to any matter before the court must be conducted with the clerk and shall not be addressed to any of the justices, or to any judge of the Commission of Appeals.

Source: Texas Rule 20 (for Supreme Court), unchanged.

Rule 499–a. Direct Appeals

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as Section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of Section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited,

and such present and any future legislation under it, has and will take, appellate jurisdiction over questions of law only, and in view of Sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State, when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(c) Such appeal shall be in lieu of an appeal to the Court of Civil Appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as may be necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the Courts of Civil Appeals shall, in so far as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder. Promulgated by order of June 16, 1943, effective December 31, 1943.

This is a new rule effective December 31, 1943.

SECTION 2. JUDGMENT

Rule 500. Judgments in Open Court

In all cases decided by the Supreme Court, its judgments or decrees will be pronounced in open court; and the opinion of the court will be reduced to writing in such cases as the court deems of sufficient importance to be reported. Where the court, after the submission of a case, is of the opinion that the Court of Civil Appeals has entered the correct judgment, and that the writ should not have been granted, the court may set aside the order granting the writ, and dismiss or refuse the application as though the writ had never been granted, without

Rule 136. Briefs of Respondents and Others

(a) **Time and Place of Filing.** Briefs in response to the application for writ of error shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the application for writ of error unless additional time is granted.

(b) **Form.** Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 131(b), (c), (e), (f), (g), and (h).

(c) **Objections to Jurisdiction.** If the petitioner fails to assert valid grounds for jurisdiction by the Supreme Court, the respondent shall state in the brief the reasons that the Supreme Court has no jurisdiction.

(d) **Reply and Cross-Points.** Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross-points that respondent has preserved and that establish respondent's rights.

(e) **Reliance on Prior Brief.** If respondent relies upon his brief in the court of appeals, respondent shall file with the Clerk of the Supreme Court twelve legible copies of such brief.

(f) **Amendment.** The brief in response may be amended at any time when justice requires upon such reasonable notice as the court may prescribe.

SECTION TEN. DIRECT APPEALS

Rule 140. Direct Appeals

In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as may be necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the court of appeals shall, insofar as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder.

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

Rule 160. Form and Content of Motions for Extension of Time

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) The court of appeals and the date of its judgment, together with the number and style of the case;

Notes and Comments

Comment: New (e). Former (e) becomes new (f); former (f) becomes new (g).

SECTION TEN. DIRECT APPEALS

RULE 140. DIRECT APPEALS

In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) When a trial court has granted or denied an interlocutory or permanent injunction and its decision is based on the grounds of the constitutionality or unconstitutionality of any statute of this State, the Supreme Court shall have jurisdiction of a direct appeal of the trial court's order when the appeal contests that court's holding regarding the constitutionality or unconstitutionality of the statute.

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only. A statement of facts shall not be brought up except to the extent it is necessary to show that the appellant has an interest in the subject matter of the appeal. If the Supreme Court would be required to determine any contested issue of fact in order to rule on the constitutionality of the statute in question as ruled on by the trial court, the appeal will be dismissed.

(d) The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with Section 22.001 of the Government Code and with this rule.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988, and by Court of Criminal Appeals effective Jan. 1, 1989.)

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) The court of appeals and the date of its judgment, together with the number and style of the case;

(b) the date upon which the last timely motion for rehearing was overruled;

(c) the deadline for filing the application; and

(d) the facts relied upon to reasonably explain the need for an extension.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986.)

transmit to the court of appeals a certified copy of the orders denying, refusing or dismissing the application and of the order overruling the motion for rehearing and shall return all filed papers to the Clerk of the Court of Appeals, except the application for writ of error, any brief in response and any other briefs filed in the Supreme Court.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

RULE 135. NOTICE OF GRANTING, ETC.

When the Supreme Court grants, denies, refuses or dismisses an application for writ of error or a motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by letter.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

RULE 136. BRIEFS OF RESPONDENTS AND OTHERS

(a) Time and Place of Filing. Briefs in response to the application for writ of error shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the application for writ of error in the Supreme Court unless additional time is granted.

(b) Form. Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 131(b), (c), (e), (f), (g), and (h).

(c) Objections to Jurisdiction. If the petitioner fails to assert valid grounds for jurisdiction by the Supreme Court, the respondent shall state in the brief the reasons that the Supreme Court has no jurisdiction.

(d) Reply and Cross-Points. Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross points that respondent has preserved and that establish respondent's rights.

(e) Length of Briefs. A brief in response to the application, a brief of an amicus curiae as provided in Rule 20 and any other brief shall not exceed 50 pages in length, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.

(f) Reliance on Prior Brief. If respondent relies upon his brief in the court of appeals, respondent shall file with the Clerk of the Supreme Court twelve legible copies of such brief.

(g) Amendment. The brief in response may be amended at any time when justice requires upon such reasonable notice as the court may prescribe.

(h) Service of Briefs. Any application filed in the court of appeals and all briefs filed in the Supreme Court shall at the same time be served on all parties to the trial court's final judgment.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988; amended by Court of Criminal Appeals effective Jan. 1, 1988; amended by Court of Criminal Appeals effective Jan. 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment: New (e). Former (e) becomes new (f); former (f) becomes new (g).

Comment to 1990 change: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.

SECTION TEN. DIRECT APPEALS TO THE SUPREME COURT

RULE 140. DIRECT APPEALS

(a) Application. This rule governs direct appeals to the Supreme Court authorized by the Constitution and by statute. The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with statute or this rule.

(b) Jurisdiction. The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or of any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

(c) Statement of Jurisdiction. Appellant shall file with the record in the case a statement fully, clearly and plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after such statement is filed.

(d) Preliminary Ruling on Jurisdiction. If the Supreme Court notes probable jurisdiction over a direct appeal, the parties shall file briefs as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal shall be dismissed.

(e) Direct Appeal Exclusive While Pending. An appellant who has attempted to perfect a direct appeal to the Supreme Court may not, during the pendency of that appeal, pursue an appeal to the court of appeals. When a direct appeal is dismissed the appellant is not precluded from pursuing any other appeal available at the time the direct appeal was filed if the other appeal is pursued within time periods prescribed by these rules exclusive of the days during which the direct appeal was pending.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988, and by Court of Criminal Appeals effective Jan. 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To make express provisions for direct appeal proceedings, to make review discretionary in direct appeals, and within time limitations to permit other appeals in event a direct appeal is dismissed.

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. Twelve copies of the motion for extension of time shall be filed in the Supreme Court. A copy of the motion shall also be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) the court of appeals and the date of its judgment, together with the number and style of the case;

(b) the date upon which the last timely motion for rehearing was overruled;

(c) the deadline for filing the application; and

(d) the facts relied upon to reasonably explain the need for an extension.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To provide that 12 copies of a motion for extension be filed.

SECTION TWELVE. SUBMISSION AND ORAL ARGUMENT IN THE SUPREME COURT

RULE 170. SUBMISSION

Causes may be heard and submitted in such order as the Supreme Court may deem to be in the best interest and convenience of the parties or their attorneys. The Supreme Court may determine that causes should be submitted without oral argument, upon the vote of at least six members.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To provide that a vote of at least six of nine members of the Supreme Court is required to deny oral argument.

RULE 171. SUBMISSION DAY

(a) When Case Ready for Submission. A case shall stand for submission upon the first regular day of the submission of causes coming after the expiration of twenty days from the day on which the writ of error was granted; provided the notice of granting the writ shall have been given ten days before such submission day. If not so given, then the case shall be subject to submission on the first regular submission day which falls ten days after giving of notice.

(b) Regular Submission Day. Causes in the Supreme Court will be regularly submitted on Wednesday of each week, though a case may be set down for submission upon another day by the permission or direction of the court.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986.)

RULE 172. ARGUMENT

(a) Time. In the argument of cases in the Supreme Court, each side may be allowed such time as the court orders. The court may, upon application before the day of argument, extend the time for argument, and may also align the parties for purposes of presenting oral argument.

(b) Number of Counsel. Not more than two counsel on each side will be heard, except on leave of the court.

Rule 57. Direct Appeals to the Supreme Court.

57.1 ***Application.*** This rule governs direct appeals to the Supreme Court that are authorized by the Constitution and by statute. Except when inconsistent with a statute or this rule, the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court.

57.2 ***Jurisdiction.*** The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

57.3 ***Statement of Jurisdiction.*** Appellant must file with the record a statement fully but plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after the statement is filed.

57.4 ***Preliminary Ruling on Jurisdiction.*** If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 38 as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal will be dismissed.

57.5 ***Direct Appeal Exclusive While Pending.*** If a direct appeal to the Supreme Court is filed, the parties to the appeal must not, while that appeal is pending, pursue an appeal to the court of appeals. But if the direct appeal is dismissed, any party may pursue any other appeal available at the time when the direct appeal was filed. The other appeal must be perfected within ten days after dismissal of the direct appeal.

Comment to 1997 change. — This is former Rule 140. The rule is amended without substantive change except subdivision 57.5 is amended to make clear that no party to the direct appeal may pursue the appeal in the court of appeals while the direct appeal is pending, but allowing 10 days to perfect a subsequent appeal.

Rule 34. Appellate Record

34.6 Reporter's Record

(a) *Contents*

. . .

(b) *Request for Preparaton*

(1) At or before the time for perfecting the appeal [in the court of appeals or within ____ [*e.g.* 5] days after the date on which the parties are directed to obtain the preparation of the reporter's record in a direct appeal under Rule 57], the appellant must request in writing that the official reporter prepare the reporter's record. The request must designate the exhibits to be included. A request to the court reporter – but not the court recorder – must also designate the portions of the proceedings to be included.

From: O.C. Hamilton, Jr.
To: Chip Babcock, Chair SCAC
Subject: Report of Sub-Committee on Constitutional Adequacy of Texas Garnishment Procedure

The subcommittee discussed the issues via telephone conference. The consensus was that the current garnishment rules could be improved. The following are suggested changes to the Final Report of the Ancillary Proceeding Task Force on Garnishment.

SECTION 3. GARNISHMENT

Rule GARN 1 (616). Application for Writ of Garnishment Before Judgment and Order

(a) *Pending Suit Required for Issuance of Writ.* An application for a pre-judgment writ of garnishment may be filed at the initiation of a suit or at any time before final judgment.

(b) *Application.* An application for a writ of garnishment before judgment must:

(1) state the nature of the applicant's claim against the respondent in the underlying proceeding;

(2) state one or more statutory grounds for issuance of the writ as provided in Chapter 63 of the Civil Practice and Remedies Code and the specific facts supporting the statutory grounds for garnishment; and

(3) state the maximum dollar amount sought to be satisfied by garnishment.

(c) *Verification.* The application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

(d) *Order.*

(1) *Issuance Without Notice.* No writ shall issue before a final judgment except on written order of the court after a hearing, which may be ex parte.

(2) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(3) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

(4) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

(5) *Amount of Property to be Garnished.* The order must state the maximum' dollar amount to be satisfied by garnishment.

(6) *Safekeeping.* The order must command that the property be kept safe and preserved subject to further order of the court.

(7) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the court's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect and pay all damages and costs as may be adjudged against the applicant for wrongful garnishment.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(e) *Multiple Writs.* Writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs, constables, or other persons authorized by Rule 103 or Rule 536 to serve the writs. In the event multiple writs are issued, the applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding.

PROPOSED COMMENT TO RULE **GARN 1(b)(1) (657(b)(1)):** In a garnishment action, the respondent is the defendant in the underlying action.

Rule GARN 2 (617). Applicant's Bond or Other Security for Writ of Garnishment Before Judgment

(a) *Requirement of Bond.* A writ of garnishment before judgment may not be issued unless the applicant has filed with the clerk or justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties as approved by the clerk or justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongful garnishment.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

Rule GARN 3 (618). Application for Writ of Garnishment After Judgment and Order

(a) *Garhishment After Final Judgment.* At any time after final judgment, the judgment creditor may file with the clerk or justice of the peace an application for a writ of garnishment. The judgment, whether based on a liquidated or unliquidated demand, shall be deemed final and subsisting for the purpose of garnishment from and after the date it is signed, unless a supersedeas bond shall have been filed and approved in accordance with the Texas Rules of Appellate Procedure or an appeal bond is filed and approved by the justice of the peace.

(b) *Application.* An application for a writ of garnishment after judgment must state:

(1) that the applicant has a valid, subsisting judgment;

(2) that, within the applicant's knowledge, the judgment debtor does not possess property in Texas subject to execution sufficient to satisfy the judgment; and

(3) the maximum dollar amount sought to be satisfied by garnishment.

(c) *Verification.* The application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

(d) *Order.*

(1) Issuance Without Notice. No writ shall issue except on written order of the court after a hearing, which may be ex parte.

(2) Effect of Pleading. The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(3) Return. The order must provide that the writ is returnable to the court that issued the writ.

(4) Findings of Fact. The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

(5) *Amount of Property to be Garnished.* The order must state the maximum dollar amount to be satisfied by garnishment.

(6) *Safekeeping.* The order must command that the property be kept safe and preserved subject to further order of the court.

(7) *No Bond Required.* No bond shall be required to be posted by the applicant for a writ of garnishment after final judgment.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(9) *Multiple Writs.* Writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs, constables, or other persons authorized by Rule 103 or Rule 536 to serve the writs. In the event multiple writs are issued, the applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding.

Rule GARN 4 (619). Case Docketed

When the foregoing requirements of these rules have been complied with, the clerk or justice of the peace shall docket the case in the name of the applicant as plaintiff and of the garnishee as defendant, and shall immediately issue a writ of garnishment directed to the garnishee.

Rule GARN 5 (620). Contents of Writ of Garnishment

(a) *General Requirements.* A writ of garnishment must be dated and signed by the clerk or the justice of the peace, bear the seal of the court, and be directed to the garnishee.

(b) *Command of Writ.* The writ must command the garnishee to:

(1) appear before the court out of which the writ is issued at 10 o'clock a.m. of the Monday next following the expiration of twenty days from the date the writ was served, ~~if the writ is issued out of the district or county court, or the Monday next after the expiration of ten days from the date the writ was served, if the writ is issued out of the justice court;~~ and

(2) answer under oath:

(A) what, if anything, the garnishee was indebted to the respondent as of the date the writ was served;

(B) what, if anything, the garnishee is indebted to the respondent as of the date the garnishee is required to appear pursuant to the writ;

(C) what effects, if any, of the respondent the garnishee had in its possession as of the date the writ was served;

(D) what effects, if any, of the respondent the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and

(E) what other persons, if any, within the garnishee's knowledge, are indebted to the respondent or have in their possession effects belonging to the respondent.

(c) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent.

"The State of Texas.

"To _____, Garnishee, greetings:

"Whereas, in the _____ Court of _____ County (if a justice court, state also the number of the precinct), in a certain cause wherein _____ is plaintiff and _____ is defendant in the underlying proceeding and Respondent in this proceeding, the plaintiff, claiming an indebtedness against _____[Respondent] of _____ dollars, besides interest and costs of suit, has applied for a writ of garnishment against you; therefore you are hereby commanded to be and appear before that court at _____ in said county (if the writ is issued from the county or district court, here proceed: 'at 10 o'clock a.m. on the Monday next following the expiration of twenty days from the date of service hereof.' If the writ is issued from a justice of the peace court, here proceed: 'at 10 o'clock a.m. on the Monday next after the expiration of ten days from the date of service hereof.' In either event, proceed as follows:) then and there to answer under oath: (a) what, if anything, the garnishee was indebted to ____[Respondent] as of the date the writ was served; (b) what, if anything, the garnishee is indebted to [Respondent] as of the date the garnishee is required to appear pursuant to the writ; (c) what effects, if any, of [Respondent] the garnishee had in its possession as of the date the writ was served; (d) what effects, if any, of _____[Respondent] the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and (e) what other persons, if any, within the garnishee's knowledge, are indebted to [Respondent] or have in their possession effects belonging to [Respondent]. You are further commanded NOT to pay to[Respondent] any debt or to deliver to [Respondent] any effects, pending further order of this court. Herein fail not, but make due answer as the law directs."

(d) *Notice to Respondent.* The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To_____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN GARNISHED. GARNISHMENT IS A COURT PROCEEDING WHEREBY AN ALLEGED CREDITOR OF YOURS IS SEEKING TO ACQUIRE FROM THE GARNISHEE FUNDS OR PROPERY ALLEGEDLY OWNED BY YOU. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY OR FUNDS, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT FROM GARNISHMENT UNDER FEDERAL OR STATE LAW. IT MAY BE IN YOUR BEST INTEREST TO CONSULT A LAWYER TO DETERMINE IF YOUR PROPERTY IS EXEMPT.

"PENDING A DECISION IN THE GARNISHMENT PROCEEDINGS, YOU CANNOT REGAIN POSSESSION OF YOUR PROPERTY UNLESS YOU FILE A BOND, WHICH IS CASH OR OTHER SECURITY IN AN AMOUNT SET BY THE COURT.

"HOWEVER, IF YOU BELIEVE YOUR PROPERTY IS EXEMPT FROM GARNISHMENT UNDER STATE OR FEDERAL LAW, OR HAS BEEN WRONGFULLY GARNISHED, YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT."

(e) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ in the same manner as a citation.

PROPOSED COMMENT TO RULE **GARN 5(b)(2) (620(b)(2)).** This rule has been modified to make clear that the garnishee must account for property of the respondent in the garnishee's possession or knowledge on two dates—the date the writ was served, and the date the garnishee is required to appear pursuant to the writ. *See First Nat'l Bank in Dallas v. Banco Longoria, S.A.*, 356 S.W.2d 192 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.) (affirming judgment against garnishee that failed to account for funds held on both the date the writ was served and the date the garnishee was to answer pursuant to the writ).

PROPOSED COMMENT TO RULE **GARN 5(e) (620(c)).** The form of the writ has been modified as to justice courts to be consistent with **GARN 5(b)(2) (620(b)(2)).**

RULE GARN 6 (621). Delivery, Service, and Return of Writ

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of garnishment must deliver the writ to:

~~(1) the sheriff, constable, or other person authorized by Rule 103 or Rule 536; or~~

(2) the applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103 or Rule 536.

(b) *Service on Garnishee.* The sheriff, constable, or other person authorized by Rule 103 or Rule 536 who receives the writ of garnishment must immediately proceed to serve the writ by delivering a copy of it to the garnishee; however, only a sheriff or constable may serve a writ of garnishment that requires the actual taking of possession of property. If the garnishee is a financial institution, service of the writ is governed by the service provisions of the Texas Finance Code.

(c) *Return of Writ.* The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 or Rule 536 who served the writ. The return must be delivered to the applicant who must file it ~~filed~~ with the issuing clerk or justice of the peace without delay. ~~in the same manner as a citation.~~

(d) *Service on Respondent.* Immediately ~~As soon as practicable~~ following service of the writ on the garnishee, the applicant must serve the respondent with a copy of the writ of garnishment, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a. A certificate of service evidencing service of a copy of the writ on the respondent by the applicant must be on file with the court for at least 10 days prior to the entry of a judgment on the garnishment.

PROPOSED COMMENT TO RULE **GARN 6 (621):** See Section 63.008 of the Texas Civil Practice and Remedies Code and Section 59.008 of the Texas Finance Code.

Rule GARN 7 (622). Respondent's Replevy Rights

(a) *Where Filed.* At any time before judgment, if the garnished property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court and serving the applicant with a copy of the bond. All motions regarding the garnished property must be filed with the court having jurisdiction of the suit.

(b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the suit.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged by the applicant, the court must order the release of the garnished property to the respondent within a reasonable time after a copy of the court's order is delivered to the garnishee. Before the property is released to the respondent, the respondent must pay all expenses associated with storage of the property.

(f) *Substitution of Property.* On reasonable notice, which may be less than three days, the respondent shall have the right to move the court for a substitution of property of equal value or greater value as the property garnished. Unless the court orders otherwise, no property on which a lien exists may be substituted.

(1) *Court Must Make Findings.* If sufficient property has been garnished to satisfy the writ, the court may by written order authorize substitution of one or more items of respondent's property for all or part of the property garnished. The court must include in the order findings as to the value of the property to be substituted.

(2) *Method of Substitution.* No garnished personal property shall be deemed released until the property to be substituted is delivered to the location designated in the court's order. The original property garnished may not be released until the respondent pays all costs associated with substitution of the property, including all expenses associated with storage of the property.

(3) *Status of Garnishment.* Garnishment of substituted property shall be deemed to have existed from the date of service of the original writ of garnishment.

(g) *Judgment Against Respondent on Replevy Bond.* If the underlying suit is decided against a respondent who replevied the garnished property, final judgment must also be against all of the obligors on the respondent's replevy bond, jointly and severally, for the lesser of (1) the amount of the judgment plus interest and costs, or (2) the amount of the replevy bond.

Rule GARN 8 (623). Garnishee's Answer to Writ of Garnishment

(a) *Garnishee's Answer.* The garnishee's answer must be in writing, sworn to, signed by the garnishee, and respond to each matter inquired of in the writ of garnishment. The garnishee's answer may be filed as in any other civil case at any time before default judgment.

(b) *Judgment by Default.* If the garnishee fails to file an answer to the writ of garnishment at or before the time directed in the writ, the court may, at any time after final judgment has been signed against the respondent, and on or after the garnishee's appearance day, sign a default judgment against the garnishee for the full amount of the judgment against the respondent together with all interest and costs that have accrued in the main case and also in the ancillary garnishment proceedings. However, if the garnishee is a financial institution, default judgment must be determined by the Texas Finance Code.

PROPOSED COMMENT TO RULE **GARN 8 (623):** See Section 276.002 of the Texas Finance Code.

Rule GARN 9 (624). Garnishee's Answer May Be Controverted

(a) *Either Party May Controvert the Answer.* If the applicant is not satisfied with the answer of any garnishee, the applicant may controvert the answer by affidavit stating that the applicant has good reason to believe, and does believe, that the answer of the garnishee is incorrect, stating in what particular the applicant believes the answer to be incorrect. The respondent may also, in like manner, controvert the answer of the garnishee.

(b) *Place for Trial When Answer Controverted.* If the garnishee whose answer is controverted is a resident of the county in which the garnishment proceeding is pending, or a foreign corporation, the matter shall be tried in the county in which the garnishment proceeding is pending. Otherwise, the matter shall be tried in the county in which the garnishee resides.

(c) *Procedure for Docketing of Action Against Non-Resident Garnishee.* The clerk or the justice of the peace of the county of residence of the non-resident garnishee, on receipt of certified copies filed by the applicant under the provisions of section 63.005 of the Texas Civil Practice & Remedies Code, shall docket the case in the name of the applicant as plaintiff, and of the garnishee as defendant, and issue a notice to the garnishee, stating that the answer has been controverted, and that the issue will stand for trial on the docket of the court. The notice shall be directed to the garnishee, be dated and signed as other process from the court, and served by delivering a copy thereof to the garnishee. It shall be returnable, if issued from the district or county court, at ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of its service; and if issued from the justice court, at ten o'clock a.m. of the Monday next after the expiration of ten days from the date of service. Upon the return of the notice served, the matter shall be tried as in other cases.

Rule GARN 10 (625). Judgment After Answer

(a) *Judgment When Answer Uncontroverted And Garnishee Is Neither Indebted Nor Has Effects.*

(1) The court must enter a take-nothing, judgment against the applicant and in favor of the garnishee if it appears from the garnishee's answer that:

(A) the garnishee is not indebted to the respondent, and was not indebted when the writ was served on the garnishee;

(B) the garnishee does not have in its possession any effects of the respondent and did not have such effects in its possession when the writ was served;

(C) the garnishee has either denied that any other persons within its knowledge are indebted to the respondent or have in their possession effects belonging to the respondent, or else has named all persons within its knowledge who are indebted to the respondent or have in their possession effects belonging to the respondent; and

(D) the answer of the garnishee has not been controverted.

(2) *Costs*. Costs of the garnishment proceeding, including reasonable compensation to the garnishee, shall be taxed against the applicant.

(b) *Judgment When Garnishee is Indebted.*

(1) If the garnishee's answer admits, or the court finds, that the garnishee is indebted to the respondent in any amount, or was indebted when the writ of garnishment was served, the court must render judgment for the applicant against the garnishee. The judgment must be the lesser of:

(A) the amount admitted or found to be due to the respondent from the garnishee; or

(B) if that amount is in excess of the amount of the applicant's judgment against the respondent with interest and costs, for the full amount of the judgment already rendered against the respondent, together with interest and costs of the suit in the main case and also in the ancillary garnishment proceedings.

(2) *Costs.*

(A) If the garnishee's answer is not controverted, and the court enters judgment for the amount admitted by the garnishee, costs, including reasonable compensation to the garnishee, shall be taxed against the respondent.

(B) If the garnishee's answer is successfully controverted, the garnishee is not entitled to recover its costs.

(C) If the garnishee's answer is not successfully controverted, the court may award and apportion the costs, including reasonable compensation to the garnishee, as may be appropriate.

(D) Notwithstanding the above, if the garnishee is determined to be indebted to the respondent for less than the amount of the costs of the garnishment proceeding, costs in the amount of the indebtedness shall be taxed against the respondent, and the balance of the costs shall be taxed against the applicant.

(c) *Judgment When Garnishee Has Effects.*

(1) If the garnishee's answer admits, or the court finds, that the garnishee has in its possession, or had in its possession when the writ was served, any personal property of the respondent subject to execution, the court must order sale of the personal property by execution to satisfy the applicant's judgment against the respondent. The order must direct the garnishee to deliver so much of the personal property necessary to satisfy the judgment to the sheriff or constable for execution.

(2) If the garnishee fails to deliver personal property to the sheriff or constable on demand, on motion of the applicant, the garnishee must be ordered to appear and show cause why it should not be held in contempt of court.

(3) *Costs.*

(A) If the garnishee's answer is not controverted, and the court enters judgment ordering the sale of any effects in the possession of the garnishee, costs, including reasonable compensation to the garnishee, shall be taxed against the respondent.

(B) If the garnishee's answer is successfully controverted, the garnishee is not entitled to recover its costs.

(C) If the garnishee's answer is not successfully controverted, the court may award and apportion the costs, including reasonable compensation to the garnishee, as may be appropriate.

(d) *Garnishee Discharged on Proof of Compliance with Order*. It shall be a sufficient answer to any claim of the respondent against the garnishee founded on an indebtedness of the garnishee, or on the possession by the garnishee of any effects, for the garnishee to show that the indebtedness has been paid, or that the effects, including any certificates of stock in any incorporated or joint stock company, have been delivered to any sheriff or constable as provided in these rules.

(e) *Costs If Writ Dissolved or Overturned.* If a writ of garnishment is dissolved or overturned on appeal, the costs of the garnishment proceeding, including reasonable compensation to the garnishee, shall be taxed against the applicant.

Rule GARN 11 (626). Dissolution or Modification of Order or Writ

(a) *Motion.* Any party, or any person who claims an interest in the garnished property, may move the court to dissolve or modify the order or writ, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to admit or deny a finding, the movant must set forth the reasons why the movant cannot do so.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the writ of garnishment. If the applicant fails to carry its burden, the writ must be dissolved and the underlying order set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to dissolve or modify the order or writ. If the movant seeks to modify the order or writ based upon the value of the property, the movant has the burden to prove that the reasonable

value of the property garnished exceeds the amount necessary to secure the claim, interest for one year, and probable costs.

(3) *Hearing.* The court's determination may be made after a hearing involving all parties, or upon the basis of affidavits setting forth facts as would be admissible in evidence. Additional evidence, if tendered by any party, may be received and considered.

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or writ, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the property has been sold), as justice may require. If the court modifies its order granting garnishment, it must make further orders with respect to the bond, if any, that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the writ must release the replevy bond and discharge the sureties thereon. If the writ is dissolved, the order must be set aside, the garnished property must be released and all expenses associated with storage of the property may be taxed as costs to the applicant.

(f) *Third-Party Claimant.* If any person other than the applicant or respondent in the original suit claims all or part of the garnished property, the court, on motion and hearing, may order the release of the property to that third-party claimant. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

Rule GARN 12 (627). Perishable Property

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property garnished pursuant to court order.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after the garnishment, the applicant or other party claiming an interest in the property may file a motion with the clerk or justice of the peace,

supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable property, and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any other person or party, and the motion is granted, the court shall not issue the order unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by the court, conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

(g) *Procedure for Sale of Perishable Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

Rule GARN 13 (628). Report of Disposition of Property

When garnished property is claimed, replevied, or sold, or otherwise disposed of after the writ has been returned, the sheriff or constable who had custody of the property must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace.

Rule GARN 14 (629). Amendment of Errors

(a) *Before Order.* Before the court issues an order on an application for writ of garnishment, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Service of Writ.* After the court issues an order on an application for writ of garnishment but before the writ of garnishment is served, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the writ and the writ of garnishment may also be corrected by the court, without notice.

(c) *After Order and Service of Writ.* After service of the writ of garnishment, on motion, notice, and hearing, the court in which the suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the writ of garnishment, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds of garnishment stated in the original application.

Garnishment Statutes
Texas Civil Practice & Remedies Code

§ 63.001. Grounds

A writ of garnishment is available if:

(1) an original attachment has been issued;

(2) a plaintiff sues for a debt and makes an affidavit stating that:

(A) the debt is just, due, and unpaid;

(B) within the plaintiffs knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and

(C) the garnishment is not sought to injure the defendant or the garnishee; or

(3) a plaintiff has a valid, subsisting judgment and makes an affidavit stating that, within the plaintiffs knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment.

§ 63.002. Who May Issue

The clerk of a district or county court or a justice of the peace may issue a writ of garnishment returnable to his court.

§ 63.003. Effect of Service

(a) After service of a writ of garnishment, the garnishee may not deliver any effects or pay any debt to the defendant. If the garnishee is a corporation or joint-stock company, the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant.

(b) A payment, delivery, sale, or transfer made in violation of Subsection (a) is void as to the amount of the debt, effects, shares, or interest necessary to satisfy the plaintiffs demand.

§ 63.004. Current Wages Exempt

Except as otherwise provided by state or federal law, current wages for personal service are not subject to garnishment. The garnishee shall be discharged from the garnishment as to any debt to the defendant for current wages.

§ 63.005. Place for Trial

(a) If a garnishee other than a foreign corporation is not a resident of the county in which the original suit is pending or was tried and a party to the suit files an affidavit controverting the garnishee's answer, the issues raised by the answer and controverting affidavit shall be tried in the county in which the garnishee resides. The issues may be tried in a court of that county that has jurisdiction of the amount of the original judgment if the plaintiff files with the court a certified copy of the judgment in the original suit and a certified copy of the proceedings in garnishment, including the plaintiff's application for the writ, the garnishee's answer, and the controverting affidavit.

(b) If a garnishee whose answer is controverted is a foreign corporation, the issues raised by the answer and controverting affidavit shall be tried in the court in which the original suit is pending or was tried.

§ 63.006. Administrative Fee for Certain Costs Incurred by Employers

(a) An employer who is required by state or federal law to deduct from the current wages of an employee an amount garnished under a withholding order may deduct monthly an administrative fee as provided by Subsection (b) from the employee's disposable earnings in addition to the amount required to be withheld under the withholding order. This section does not apply to income withholding under Chapter 158, Family Code.

(b) The administrative fee deducted under Subsection (a) may not exceed the lesser of:

(1) the actual administrative cost incurred by the employer in complying with the withholding order; or

(2) $ 10.

(c) For the purposes of this section, "withholding order" means:

(1) a withholding order issued under Section 488A, Part F, Subchapter IV, Higher Education Act of 1965 (20 U.S.C. Section 1095a); and

(2) any analogous order issued under a state or federal law that:

(A) requires the garnishment of an employee's current wages; and

(B) does not contain an express provision authorizing or prohibiting the payment of the administrative costs incurred by the employer in complying with the garnishment by the affected employee.

§ 63.007. Garnishment of Funds Held in Inmate Trust Fund

(a) A writ of garnishment may be issued against an inmate trust fund held under the authority of the Texas Department of Criminal Justice under Section 501.014, Government Code, to encumber money that is held for the benefit of an inmate in the fund.

(b) The state's sovereign immunity to suit is waived only to the extent necessary to authorize a garnishment action in accordance with this section.

§ 63.008. Financial Institution As Garnishee

Service of a writ of garnishment on a financial institution named as the garnishee in the writ is governed by Section 59.008, Finance Code.

§ 65.001. Application of Equity Principles

The principles governing courts of equity govern injunction proceedings if not in conflict with this chapter or other law.

§ 65.002. Restraining Order or Injunction Affecting Customer of Financial Institution

Service or delivery of a restraining order or injunction affecting property held by a financial institution in the name of or on behalf of a customer of the financial institution is governed by Section 59.008, Finance Code.

§ 65.003. to 65.010 [Reserved for expansion]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TONY W. STRICKLAND,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:12-CV-02735-MHS
GREENE & COOPER, LLP	:	
Defendant.	:	

ORDER

Presently before the Court are the parties' cross motions for summary judgment. For the reasons set forth below, the Court grants defendant's motion and denies plaintiff's motion.

Background

Plaintiff Tony W. Strickland filed a complaint against defendants Richard T. Alexander, Clerk of Court of the State Court of Gwinnett County, Georgia; Discover Bank ("Discover"); the law firm of Greene & Cooper, LLP ("G&C"); and JPMorgan Chase Bank, N.A. ("Chase") to challenge the constitutionality of Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60 et seq.

Plaintiff brought two claims against defendants for violation of the Due Process clause of the Fourteenth Amendment to the U.S. Constitution pursuant to 42 U.S.C. § 1983 and violation of the Due Process clause of the Georgia Constitution. Plaintiff contends that at least three features of the Georgia garnishment statute are unconstitutional as follows:

> (A) By not providing notice of available statutory exemptions from garnishment, O.C.G.A. § 18-4-64 fails to conform with due process notice requirements;
>
> (B) By not providing a debtor with a prompt procedure to claim an exemption and obtain return of the protected property, the structure of the garnishment process fails to conform with due process timeliness requirements;
>
> (C) By not requiring any notice to a debtor that a garnishee has filed an answer, even though the debtor has only 15 days to traverse that answer and file an exemption claim, O.C.G.A. § 18-4-83 fails to conform with due process notice requirements.

Compl. ¶ 45.

Plaintiff sought damages (including actual, nominal, and punitive), declaratory and injunctive relief, and attorneys' fees and costs for injuries caused by the statute's provisions. In particular, plaintiff requested that the

Court declare unconstitutional the following portions of Georgia's garnishment statute:

> (1) O.C.G.A. § 18-6-64, because of its failure to meet due process notice requirements;
>
> (2) the lengthy procedural scheme to claim an exemption because of its failure to meet due process timeliness requirements; and
>
> (3) O.C.G.A. § 18-4-83 because of its failure to meet due process notice requirements.

Compl. at p. 14.

The following facts are undisputed. In 2004, plaintiff reduced his work hours while undergoing cancer treatment and, as a result, defaulted on his Discover credit card in 2005. In 2009, plaintiff seriously injured his back while at work leaving him permanently disabled. Plaintiff reached a lump-sum worker's compensation settlement for his injuries in the amount of $30,000 in January 2011. Plaintiff and his wife opened an account at Chase specifically for setting aside these worker's compensation funds for household and medical expenses.

On December 4, 2009, G&C filed a lawsuit on behalf of Discover in the State Court of Fulton County against Mr. Strickland for the defaulted credit card. On April 4, 2012, Discover obtained a default judgment (the "Judgment") against plaintiff in the case for the principal amount of $13,849.93, plus attorney fees of $1,613.61, and court costs of $147.50.

On July 6, 2012, G&C, on behalf of Discover, filed a garnishment action against Mr. Strickland in the State Court of Gwinnett County, naming Chase as the garnishee, and seeking $18,096.65 as the balance due on the Judgment.

Chase was served with the garnishment summons by process server on July 11, 2012. After being served with the garnishment summons, Chase immediately froze plaintiff's savings account, which contained $15,652.67 in worker's compensation benefits.

G&C mailed timely notice to Mr. Strickland of the garnishment action, as required by O.C.G.A. § 18-4-64, via certified mail (the "G&C Letter"). Mr. Strickland received the certified letter from G&C on July 16, 2012. The G&C

Letter did not inform plaintiff that some forms of property were exempt from garnishment, nor did it inform him how to claim such an exemption.

On July 16, 2012, Mr. Strickland also received a letter from Chase, notifying him that his bank account had been frozen. Chase explained that the bank had been served with a garnishment and that some forms of income may be protected from garnishment, but the letter did not advise Mr. Strickland how to claim an exemption. Chase also advised Mr. Strickland to contact Discover if he believed that his money was exempt from garnishment. No other notices about the garnishment action were sent to plaintiff.

After receiving the letters from G&C and Chase, Mr. Strickland went to his local bank branch to inquire about the garnishment. At the bank branch, plaintiff was again advised that his account had been frozen, and that he should contact the judgment creditor if he believed the garnishment to be in error. Mr. Strickland promptly contacted G&C about the garnishment action, but the parties were unable to resolve the dispute.

On July 18, 2012, G&C mailed the state court clerk proof of its notice to plaintiff. G&C also requested that the clerk forward any funds received from the garnishment action to its office.

Chase filed an Answer in the garnishment action on August 20, 2012. Along with its Answer, Chase paid into Court a total of $15,652.67. On August 28, 2012, Mr. Strickland's counsel sent an email to G&C about the exempt funds, but she was unable to resolve the matter. On September 4, 2012, plaintiff's attorney filed a Claim for Funds in the garnishment action, asserting plaintiff's exemption for worker's compensation funds.

On October 10, 2012, Burr & Forman, LLP filed a Notice of Appearance in the state court garnishment action and a Notice of Opposition to Mr. Strickland's exemption claim on behalf of Discover. On October 12, 2012, the court scheduled a hearing in the garnishment action for October 24, 2012. On October 23, 2012, Discover, through the law firm of Burr & Forman, LLP, dismissed the state court garnishment action. On October 24, the court entered an order releasing the deposited funds to Mr. Strickland. On October 29, 2012, the State Court of Gwinnett County issued a check payable to Tony

W. Strickland in the amount of his seized worker's compensation funds, $15,652.67. The check was mailed the same day to plaintiff's attorney in the garnishment proceeding. The check from Gwinnett County was received by Mr. Strickland's attorney on November 2, 2012.

On December 4, 2012, G&C filed a satisfaction of Judgment on behalf of Discover in the State Court of Fulton County. G&C stated that the amounts in the Judgment had been paid in full to the satisfaction of Discover.

The parties disagree over whether G&C has any legal liability for the above actions. In the event that G&C is legally liable under Section 1983 for the above actions, the parties agree that the value of damages is difficult to ascertain with certainty. In lieu of the burden and expense of discovery and trial on the issue of damages, the parties stipulate to a damage award of $10,000. The parties further agree to waive attorney's fees claims, so that each party will be responsible for its own attorney's fees.

Procedural History

Discover answered the complaint on October 3, 2012. Subsequently on November 27, 2012, plaintiff and Discover filed a consent motion to dismiss Discover with prejudice. The Court granted the consent motion on November 28, 2012. Therefore, the only remaining defendants were Richard T. Alexander, Clerk of Court of the State Court of Gwinnett County, G&C, and Chase.[1]

Chase and G&C then moved to dismiss plaintiff's complaint. In an Order dated April 9, 2013, the Court granted Chase's motion to dismiss and granted in part and denied in part G&C's motion to dismiss. The Court found that plaintiff lacked standing to pursue injunctive or declaratory relief. Because plaintiff only sought injunctive relief against defendant Alexander, the Court dismissed plaintiff's claims against him without prejudice. Next, the Court concluded that Chase was not acting under color of state law when it froze plaintiff's bank account because the State had not coerced or significantly encouraged Chase to freeze all of the funds in plaintiff's account.

[1] On September 14, 2012, the Court certified to the Georgia Attorney General that O.C.G.A. § 18-4-60, et seq. had been questioned. Attorney General Olens filed a response explaining that the State of Georgia elected not to intervene in the case.

Instead, Chase had options for responding to the garnishment rather than freezing all of the funds. Therefore, the Court dismissed Chase from this case.

As for G&C, the Court found that G&C was a state actor for purposes of § 1983 because G&C jointly participated with the State by subjecting plaintiff to the State's garnishment process. Finally, the Court held that G&C had failed to show that plaintiff's due process claims should be dismissed for failure to state a claim. After the Court's rulings on defendants' motions to dismiss, the only remaining claims in this action were plaintiff's damages claims against defendant G&C.

Plaintiff then moved for summary judgment, and in response, G&C also moved for summary judgment. These cross motions for summary judgment are now before the Court.

Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material

fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Supreme Court held that this burden could be met if the movant demonstrates that there is "an absence of evidence to support the non-moving party's case." Id. at 325. At that point, the burden shifts to the non-moving party to go beyond the pleadings and present specific evidence giving rise to a triable issue. Id. at 324.

In reviewing a motion for summary judgment, the Court must construe the evidence and all inferences drawn from the evidence in the light most favorable to the non-moving party. WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original).

The Rule 56 standard is not affected by the filing of cross-motions for summary judgment: "The court must rule on each party's motion on an

individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2720 at 335-36 (3d ed. 1998). Cross-motions may, however, be probative of the absence of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. See United States v. Oakley, 744 F.2d 1553, 1555 (11th Cir. 1984).

Discussion

I. Standing

G&C argues in its motion for summary judgment that plaintiff lacks standing because he did not suffer any injury from G&C filing the garnishment action. "The federal courts are confined by Article III of the Constitution to adjudicating only actual cases and controversies." Malowney v. Federal Collection Deposit Group, 193 F.3d 1342, 1346 (11th Cir. 1999) (quotation omitted). In order to demonstrate that a case or controversy exists to meet the Article III standing requirement, the plaintiff must establish the following: "(1) an injury in fact, which is concrete and particularized and actual or imminent; (2) a causal connection between the injury and the causal

conduct; and (3) a substantial likelihood that a favorable decision will redress the injury." Amnesty Int'l, USA v. Battle, 559 F.3d 1170, 1177 (11th Cir. 2009).

Plaintiff has suffered an injury in fact. In his complaint, he sought not only damages for the seizure of his funds, but also court costs imposed by the garnishment action, emotional damages, late fees for past due bills, processing fees, and other actual damages. The record supports his damages claim. Plaintiff was deprived of his funds from July 11, 2012, until the funds were released and received on November 2, 2012. Plaintiff states in his affidavit that after learning about the garnishment, he began to cry and shake and he felt helpless and nauseous. The loss of funds presented a hardship to his household, he was forced to borrow money, and he could not afford to cover all of his household expenses. For example, plaintiff could not afford heart medication he takes to help with his atrial fibrillation, and he missed several doses. Having to skip his medicine was stressful and scary, as he had no way of knowing if his heart would fall out of rhythm and he risked suffering a stroke or needing shock therapy. He also lost his appetite and became withdrawn. In October 2012, before the funds were released,

plaintiff developed a blood clot in his hand, which required surgery. He could not afford the surgery due to his funds having been frozen, and therefore, he delayed the surgery. Plaintiff states that he lost sleep, could not eat, and cried several times. His arm turned black up to his elbow, and his hand became swollen and useless. The Court finds that plaintiff has presented sufficient evidence to show that he suffered an injury in fact.

These injuries are fairly traceable to G&C's actions. "A showing that an injury is 'fairly traceable' requires less than a showing of 'proximate cause.' Even a showing that a plaintiff's injury is indirectly caused by a defendant's actions satisfies the fairly traceable requirement." Resnick v. AvMed, Inc., 693 F.3d 1317, 1324 (11th Cir. 2012). Even though G&C was acting upon a request from its client, G&C invoked Georgia's garnishment statute and began the garnishment process. Therefore, G&C initiated the process that caused plaintiff's injuries. G&C contends that Chase made the error in freezing plaintiff's funds and this is what led to any injury. Regardless of whether Chase made an error, there was no error to be made absent G&C beginning the garnishment process. Therefore, plaintiff has shown that his injuries were at least indirectly caused by G&C's actions. See

id. (finding that the plaintiffs' injuries were traceable to the defendant who owned an office where laptops were stored and the laptops were stolen by a third party).

Moreover, once Chase received the summons, regardless of whether it correctly calculated exemptions, Chase was required to wait 30 days pursuant to O.C.G.A. § 18-4-62 before it could take any action. Chase received the summons on July 11, 2012, immediately froze plaintiff's funds, and then answered the summons and submitted the money to the court on August 17, 2012. Plaintiff alleges he was injured during this waiting period from the loss of the use of his funds. Plaintiff was required to wait until Chase filed an answer before he could submit a claim for the funds. See O.C.G.A. § 18-4-95; Order, dated 4/9/13 at 44-46. Therefore, at a minimum, plaintiff suffered injuries from the deprivation of his funds from July 11 to August 17, 2012, and these injuries are traceable to G&C and its initiation of the garnishment process.

Finally, this Court is capable of providing plaintiff a remedy in the form of damages.

II. Mootness

G&C argues that even if the Court finds that plaintiff had standing, his claim is moot because the state court returned the funds to him, there was a settlement with Discover, and Discover filed a satisfaction of judgment. "If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." Al Najjar v. Ashcroft, 273 F.3d 1330, 1336 (11th Cir. 2001).

This case is not moot. G&C has not shown that plaintiff was compensated for the injuries and damages he seeks in this action through his settlement with Discover, his return of funds, or by any other party. As explained above, he seeks damages for injuries beyond just the loss of his funds, including compensation for the time that he was denied use of his funds. Similarly, the Second Circuit has found that a claim is not moot merely because the funds have been returned:

> The issue of mootness arises in cases similar to the present one, because the judgment creditor frequently returns the debtor's property before judgment is rendered upon the constitutionality of the legislation in question. That has occurred in this case as well. However, [the plaintiff's] claim is not moot because she

> continues to demand compensatory and punitive damages for her temporary loss of funds.

McCahey v. L.P. Investors, 774 F.2d 543, 546 n.4 (2d Cir. 1985). Therefore, because the Court is still able to give plaintiff meaningful relief, the case is not moot.

III. Due Process Violations & Good Faith

The parties dispute the constitutionality of Georgia's post-judgment garnishment statute. G&C raises the defense of good faith. G&C argues that it acted in good faith by relying on Georgia's garnishment statute, which has not yet been found unconstitutional, when it acted as a zealous advocate for its client and simply sought to enforce the Judgment that had been entered in its client's favor. G&C contends that it acted without malice, recklessness, or gross negligence.

In response, plaintiff argues that a good faith defense does not apply in this case because this defense has not be expressly adopted by the U.S. Supreme Court or the Eleventh Circuit Court of Appeals in a § 1983 action. Plaintiff contends that public policy does not support extending a good faith

defense to a private debt collector defendant like G&C. Even if the Court accepted this defense, plaintiff argues that G&C has failed to show good faith because it should have anticipated that Georgia's garnishment statute would be found unconstitutional, and it should not have filed a garnishment action by simply obeying the command of its client.

Assuming that Georgia's garnishment statute is unconstitutional, G&C may assert a good faith defense in this case. See Britt v. Whitehall Income Fund '86, 891 F. Supp. 1578, 1583 (M.D. Ga. 1993) (evaluating good faith defense under the assumption that a private party was a state actor and that the statute at issue was unconstitutional). Plaintiff is correct that the U.S. Supreme Court has not explicitly adopted a good faith defense for a private defendant in a § 1983 action. But, the court has not shut the door on this option. In Wyatt v. Cole, the court held that qualified immunity is not available to private persons who act under color of law. 504 U.S. 158, 168-69 (1992). However, the court also said that it did "not foreclose the possibility that private defendants faced with § 1983 liability under Lugar v. Edmonds, 457 U.S. 922 (1982), could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than

governmental parties could require plaintiffs to carry additional burdens." Id. at 169.

On remand to the Fifth Circuit, the court permitted a good faith defense for private actors under § 1983:

> We accordingly hold that private defendants sued on the basis of Lugar may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they knew or should have known that the statute upon which they relied was unconstitutional.

Wyatt v. Cole, 994 F.2d 1113, 1118 (5th Cir. 1993). The Fifth Circuit noted further that private defendants "should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." Id. at 1120.

Other courts have followed the Fifth Circuit's lead in cases involving prejudgment seizure. See Clement v. City of Glendale, 518 F.3d 1090, 1097 (9th Cir. 2008) (private defendants could assert good faith defense in § 1983 action involving prejudgment seizure of a car); Vector Research, Inc. v. Howard & Howard Attorneys P.C., 76 F.3d 692, 699 (6th Cir. 1996) (attorney

defendants retained a good faith defense to the plaintiff's Bivens[2] claim where attorneys had participated in a prejudgment search and seizure based on an ex parte order); Pinsky v. Duncan, 79 F.3d 306, 311-313 (2d. Cir. 1996) (good faith defense applicable where private defendant attached real property under Connecticut prejudgment remedy statute); Tarantino v. Syputo, No. C 03-03450 MHP, 2006 WL 1530030, at *8-10 (N.D. Cal. June 2, 2006) (same as Clement); Van Blaricom v. Kronenberg, 50 P.3d 266, 273 (Wash. Ct. App. 2002) (private defendant attorney may raise the defense of good faith when he obtained a prejudgment writ of attachment on real property without prior notice or hearing pursuant to Washington's statute).

The good faith defense has not been limited to prejudgment seizure. See Britt, 891 F. Supp. at 1584 (good faith defense applied to private defendants who had the plaintiff arrested pursuant to a Georgia statute). The Third Circuit relied on the Fifth Circuit's opinion in Wyatt to find that a good faith defense could be asserted in a § 1983 action by private defendant

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[2] Claims brought under Bivens allege that a federal agent has violated the Constitution and are the counterpart to suits under § 1983 against state officials who infringe plaintiffs' federal constitutional or statutory rights. Vector Research, Inc., 76 F.3d at 698; see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

attorneys who garnished the plaintiff's checking account, acting on their client's command, based on a prior judgment. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1255, 1275-78 (3d Cir. 1994). This is similar to the case here. Therefore, the Court finds that G&C may assert a good faith defense in this case.

Plaintiff contends that G&C has not properly raised a good faith defense, and it is not before this Court. The Court disagrees and finds that G&C has properly raised a good faith defense by asserting this defense in its motion for summary judgment. Cf. Skrtich v. Thornton, 280 F.3d 1295, 1306 (11th Cir. 2002) (qualified immunity can be pled at various stages including on a summary judgment motion); see also Clement, 518 F.3d at 1097 (defendant did not waive good faith defense but asserted it in its answer and motion for summary judgment). Moreover, the weight of authority indicates that plaintiff bears the burden to prove that G&C knew or should have known that the statute was unconstitutional. See Jordan, 20 F.3d at 1278; Wyatt, 994 F.2d at 1119; Van Blaricom, 50 P.3d at 273 n.14. Therefore, G&C appropriately challenged plaintiff's proof by offering evidence of its good faith.

Turning first to the objective component and whether G&C knew or should have known that Georgia's garnishment statute was unconstitutional, Georgia's garnishment statute has not yet been held unconstitutional. Therefore, G&C relied on valid Georgia law when it initiated the garnishment proceedings.

Plaintiff argues that G&C should have known that Georgia's garnishment statute was unconstitutional and anticipated its unconstitutionality because every federal circuit court that has directly looked at the due process issue has found garnishment statutes similar to Georgia's to be unconstitutional. Additionally, plaintiff contends other federal circuit courts, including the Eleventh Circuit, have recognized these circuit court opinions and the constitutional requirements of due process, albeit not directly ruling on the issue. Plaintiff also asserts that G&C operates in several states, and in two of those states, post-judgment garnishment procedures have been found unconstitutional. Therefore, based on G&C's experience in those states, G&C was on notice that Georgia's similar garnishment statute was constitutionally infirm. Plaintiff contends further that an article in Georgia's Bar Journal in 2011, which would have

been received by G&C, predicted a constitutional challenge to Georgia's garnishment statute and foreshadowed the success of such a challenge. See T.H. Lee, "Is Georgia's Post-Judgment Garnishment Statute *Still* Unconstitutional?", Ga. Bar Jrnl., June 2011 (emphasis in original).[3] Finally, plaintiff argues that G&C is comprised of debt collection lawyers who should have been aware of the developments regarding the constitutionality of collection laws.

The Court finds that it was objectively reasonable for G&C to rely on Georgia's garnishment statute. As noted above, there is no evidence that Georgia's garnishment statute has been held unconstitutional. The latest opinion from the Georgia Supreme Court to address the constitutionality of Georgia's garnishment statute found that it was constitutional, and this case remains good law. See Easterwood v. LeBlanc, 240 Ga. 61 (1977).[4] Even

[3] Mr. Lee's article proposed that Georgia's legislature consider amending the notice provisions of the post-judgment garnishment statute to ensure that garnishments in Georgia adequately and constitutionally protect judgment debtors. Lee, Ga. Bar Jrnl. at 18. After examining Georgia's post-judgment garnishment statute in detail in this case, the Court agrees that Georgia citizens would benefit from the Georgia legislature reexamining the statute.

[4] As the Court noted in its Order on defendants' motions to dismiss, the Georgia Supreme Court did not directly address the due process issues plaintiff (continued...)

though Georgia's garnishment statute might be in legal jeopardy, as pointed out by Mr. Lee in his Georgia Bar Journal article and especially in light of every other federal circuit's rulings on due process, the statute remains good law and was good law at the time G&C initiated garnishment proceedings against plaintiff. See Wyatt, 994 F.2d at 1121 (finding that it was objectively reasonable for private defendants to rely on replevin statute even though perhaps the statute had been "placed in 'legal jeopardy' by" the Fifth Circuit's earlier opinion); Britt, 891 F. Supp. at 1584 (concluding that private defendants' resort to a Georgia statute was not objectively unreasonable where the law had never been held unconstitutional).

The fact that G&C consists of lawyers does not place a higher burden on G&C to predict whether a court would find Georgia's garnishment statute to be unconstitutional. See Wyatt, 994 F.2d at 1121 n.3 (rejecting the proposition that an attorney is charged with holding a greater knowledge than other private defendants).

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[4](...continued)
raises here. However, the court did explicitly find that Georgia's garnishment statute was constitutional, making G&C's reliance objectively reasonable. See Easterwood, 240 Ga. at 61.

As for the subjective element of the good faith defense, there is no evidence that G&C believed or was actually aware that Georgia's garnishment statute was unconstitutional, and therefore, acted in bad faith. In fact, G&C believes the statute is constitutional, based on the arguments it has made in this case. See Wyatt, 994 F.2d at 1121 (accepting good faith defense where the defendants had a lack of actual knowledge that the replevin statute was unconstitutional); Britt, 891 F. Supp. at 1584 (finding the defendants did not act in bad faith because there was no evidence that the defendants were actually aware that the statue was constitutionally infirm). Nor is there any evidence that G&C acted deliberately to deprive plaintiff of due process. See Jordan, 20 F.3d at 1277-78. Instead, G&C sought to enforce the valid Judgment it had obtained for Discover. Therefore, the Court holds that G&C acted in good faith when it instituted garnishment proceedings against plaintiff pursuant to Georgia's post-judgment garnishment statute.

Conclusion

For the foregoing reasons, the Court GRANTS defendant Greene & Cooper, LLP's cross motion for summary judgment [#60]; DENIES plaintiff's motion for summary judgment [#57]; and DISMISSES this action.

IT IS SO ORDERED, this 16 day of October, 2013.

Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-15483

D.C. Docket No. 1:12-cv-02735-MHS

TONY W. STRICKLAND,

Plaintiff - Appellant,

versus

RICHARD T. ALEXANDER,
Clerk of Court of the State Court of
Gwinnett County, Georgia,
GREENE & COOPER, LLP,
JPMORGAN CHASE BANK, NA,

Defendants - Appellees,

DISCOVER BANK,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

(November 20, 2014)

Before WILSON and ROSENBAUM, Circuit Judges, and SCHLESINGER,* District Judge.

ROSENBAUM, Circuit Judge:

Plaintiff-Appellant Tony W. Strickland's limited funds include those that he obtained from a workers' compensation settlement after suffering a permanent disability on the job and those that he receives from his Social Security disability payments. He keeps these funds in two bank accounts that he shares with his wife, who, like Strickland, is entirely dependent on the funds in the accounts to live. Luckily for Strickland, the law protects workers' compensation funds and Social Security disability payments from garnishment.

But that did not stop one of Strickland's creditors from having the clerk of court for the State Court of Gwinnett County, Georgia, issue a garnishment summons that resulted in the freezing of Strickland's workers' compensation funds for almost four months before Strickland's creditor finally conceded that Strickland's funds were exempt from garnishment and agreed to the dissolution of the hold on his funds. Now Strickland seeks declaratory and injunctive relief against the Georgia post-judgment garnishment statute to prevent that same thing from happening again to him and his wife, who remain judgment debtors. Because it is substantially likely that Strickland and his wife's exempt funds soon will again

* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

be the subject of a garnishment summons, we reverse the district court's dismissal of Strickland's lawsuit for lack of standing and remand for consideration of whether Georgia's post-judgment garnishment statute is constitutionally sound.

I.

In 2004, Strickland beat nasal cavity cancer. Because of his condition, however, he was unable to work as many hours as he could before he fell ill. He soon found himself unable to pay all of his bills, and in 2005, he defaulted on his Discover Bank ("Discover") credit-card balance. In 2009, to recover the balance owed, Discover, represented by Greene & Cooper, LLP ("G&C"), filed suit against Strickland in State Court for Fulton County, Georgia. (Civil Action No. 09VS171247).

Also in 2009, Strickland injured his back at work, leaving him permanently disabled. In February 2011, he received a $30,000 workers' compensation settlement to compensate him for his injury. He deposited these funds into a newly formed JPMorgan Chase Bank, N.A. ("Chase") savings account and listed his wife as a joint accountholder so that she would be able to access the funds should his health further deteriorate. The Stricklands periodically drew upon these funds to help pay for living and healthcare expenses. In the fall of 2011, Strickland also began receiving Social Security Disability benefits.

On April 4, 2012, Discover obtained a default judgment against Strickland for the monies he owed in the principal amount of $13,849.93, plus interest of $2,138.64, attorney's fees of $1,613.61, and court costs of $147.50.[1] Approximately three months later, on July 6, 2012, Discover, again represented by G&C, filed a garnishment action against Strickland's Chase funds to enforce its default judgment in the State Court of Gwinnett County, Georgia.

At that time and to this day, Defendant-Appellee Richard T. Alexander was and is the Gwinnett County clerk of court. Accordingly, Alexander's office generated the garnishment summons to be served upon Chase (the garnishee) in accordance with Georgia's statutory requirements. The summons, served on July 11, 2012, advised Chase to "hold all [of Strickland's] property, money and wages, except what is exempt," but did not provide an explanation as to what types of property are exempt from garnishment (such as unemployment benefits, Social Security Disability benefits, and workers' compensation benefits). Georgia does not require garnishment summonses to include such information. Pursuant to the summons, Chase promptly put a hold on Strickland's account.

Strickland learned of the garnishment on July 16, 2012, when he received a certified letter from G&C and a first-class letter from Chase. G&C's letter notified

[1] These amounts add up to $17,749.68, although the record refers to the total amount that Discover sought to garnish as $18,096.65, and $18,302.65. We need not concern ourselves with the actual sum sought by Discover in the garnishment proceeding because it does not bear on the issues in this appeal, and, in any case, Discover filed a satisfaction of judgment on November 27, 2012.

Strickland that a garnishment proceeding had been instituted against his property and provided the case caption and amount sought, but it did not mention that Strickland's funds might be exempt from garnishment.

For its part, Chase's letter explained that the bank had recently received the garnishment summons, and that, as a result, it was required by federal law to place a hold on Strickland's account. It further advised Strickland that he would be unable to access the funds in his account and informed him of potential bank fees that he might become liable for, the need to consult with an attorney, and the way in which the funds could be released. Unlike the G&C letter, however, the Chase letter also disclosed to Strickland that certain forms of property might be exempt from garnishment, such as unemployment benefits, disability benefits, and workers' compensation benefits. Therefore, the Chase letter recommended that Strickland "immediately contact the judgment creditor's attorney" if he believed that his funds might be exempt.

Upon receipt of these letters, Strickland went to the nearest Chase branch, where he was told that the remainder of his workers' compensation settlement funds, totaling $15,652.67, had in fact been frozen. Following the suggestion contained within Chase's letter, Strickland contacted G&C to try to persuade it to release the garnishment, but to no avail. Strickland then became "upset, felt nauseous, and began to cry and shake," because, according to Strickland, the

frozen funds were vital to the Stricklands' ability to pay for living and healthcare expenses.

On August 20, 2012, Chase answered the garnishment summons by paying into court $15,652.67, which constituted the entire remainder of Strickland's workers' compensation funds. These funds were retained by the clerk's office throughout the pendency of the garnishment action.

Acting through counsel, Strickland first tried to resolve the matter without resorting to the formal claims process. When he was unsuccessful, Strickland then filed a statutory claim to the funds on September 4, 2012, on the grounds that the funds were exempt from garnishment under Georgia law.[2] Discover opposed the claim, and a hearing was scheduled for October 24, 2012. The day before the hearing, however, Discover voluntarily dismissed the action.

An order to release the funds was entered on October 24, 2012. On October 29, 2012, the court clerk's office issued a check for the return of Strickland's workers' compensation funds, which Strickland's counsel received on November 2, 2012. Discover filed a satisfaction of judgment on November 27, 2012.

[2] *See* O.C.G.A. § 34-9-84 ("No claim for [workers'] compensation under this chapter shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors.").

II.

Strickland filed the present action on August 8, 2012, while Discover's state-court garnishment action was still pending and when his funds were therefore still frozen. At that time, Chase had not yet filed its answer in the state-court garnishment action, so Strickland was unable to assert any direct claim for the funds.

Strickland also set forth the following pertinent allegations in his complaint:

> 27. Mr. Strickland is still a judgment debtor to [Discover] . . . .
>
> 28. This judgment is likely to remain unsatisfied for some time because Mr. Strickland and his wife currently subsist on a modest income, consisting only of Mr. Strickland's monthly check for Social Security Disability, in the amount of $1,300.00.
>
> 29. This account is likely to be the subject of a future garnishment because Ms. Strickland, the joint account holder, has judgments against her, as well as other debts that are likely to be reduced to judgment. Furthermore Mr. Strickland has another bank account, which contains only his Social Security Disability income, which may be subject to garnishment by Discover. Neither Mr. Strickland nor his wife is likely to satisfy any of their debts in the near future.

Compl. ¶¶ 27–29. In light of these facts, Strickland brought two claims against Discover, Chase, G&C, and Alexander: one under 42 U.S.C. § 1983 for acting under color of state law and unconstitutionally depriving Strickland of his property

in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and one under the Georgia Bill of Rights for depriving Strickland of his property in violation of the Due Process Clause of the Georgia Constitution. In short, he alleged that Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60, *et seq.*, failed to provide him with sufficient notice of the garnishment and exemptions, and it failed to establish procedures complying with due-process requirements that would allow him to challenge the garnishment by claiming an exemption and having his funds returned.

Strickland sought various forms of relief, including the following: (1) a declaration that the specified portions of the garnishment statute are unconstitutional; (2) injunctive relief against Alexander, Discover, G&C, and Chase to restrain them from using the allegedly unconstitutional garnishment process against Strickland's property and from freezing any exempt funds in the future; and (3) monetary damages against Discover, G&C, and Chase for the injuries that Strickland alleged that he incurred as a result of his Chase funds having been frozen.[3]

[3] Strickland alleged that he "suffered great hardship" due to his inability to draw upon his workers' compensation funds for nearly four months. For instance, Strickland has a heart condition for which he takes medication. Failure to take the medication every day puts him at greater risk for a stroke. By the end of July 2012, Strickland's funds had run out, and because he could not access his workers' compensation funds, he could not purchase his medicine for three days. Although he did not suffer a stroke or other cardiac episode during this three-day hiatus, Strickland alleged that the increased health risk that he faced while not taking his medicine caused him and his family great emotional distress. Additionally, in October 2012, Strickland

After Discover dissolved the underlying debt and dismissed its garnishment claim, it was dismissed from this action with prejudice, by consent. The trial court then turned its attention to the outstanding motions to dismiss filed by Chase and G&C, respectively. On April 11, 2013, the trial court granted Chase's Rule 12(b)(6), Fed. R. Civ. P., motion, concluding that Chase had not acted "under the color of state law" for purposes of Strickland's 42 U.S.C. § 1983 claims. In the same order, the court determined that Strickland lacked standing to continue pursuing injunctive and declaratory relief against G&C and similarly *sua sponte* dismissed without prejudice Strickland's claims for injunctive and declaratory relief against Alexander.

The dismissal order, however, preserved Strickland's claims for damages against G&C, holding that Strickland had stated a claim for violation of his due-process rights. The parties then presented a record upon cross motions for summary judgment stipulating that Strickland had suffered damages in the amount of $10,000 for his inability to access his workers' compensation funds for nearly four months as a result of the garnishment action initiated by G&C. Concluding that G&C was protected by a "good faith" defense and that Strickland had failed to

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developed a blood clot in his hand that required surgery. He delayed surgery to address the problem, however, because he could not afford the hundreds of dollars that the procedure would cost since he could not access his workers' compensation funds. Eventually, because his hand became so swollen that he could not use it, and because his forearm had turned black, his family decided that Strickland must schedule the surgery, anyway, and worry about payment later.

satisfy its burden of proof to affirmatively show G&C's bad faith, the court granted G&C's motion for summary judgment on October 29, 2013. Strickland then lodged this timely appeal against Defendant Alexander only.

III.

We review *de novo* an order granting a motion to dismiss. *Amnesty Int'l v. Battle*, 559 F.3d 1170, 1176 (11th Cir. 2009) (citation omitted). In conducting our review, we "accept all well-pleaded factual allegations as true and construe the facts in the light most favorable to the plaintiff." *Id.* (citation and internal quotation marks omitted). We also consider *de novo* whether a plaintiff has standing. *Id.* (citation omitted).

IV.

In this appeal, we must decide three questions: (1) whether Strickland had standing to seek declaratory and injunctive relief against Defendant-Appellee Alexander; (2) assuming that Strickland had standing, whether the release of Strickland's funds and the satisfaction of the judgment creditor's claim mooted Strickland's claim against Defendant-Appellee Alexander; and (3) assuming that Strickland had standing and that his claim has not been mooted, whether various provisions of Georgia's post-judgment garnishment statute satisfy Fourteenth Amendment and Georgia state constitutional due-process requirements. We address each question in turn.

A. Justiciability

Article III of the Constitution extends the jurisdiction of federal courts to only "Cases" and "Controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S. Ct. 2130, 2136 (1992). The case-or-controversy restriction imposes what are generally referred to as "justiciability" limitations. *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1244 (11th Cir. 1998) (citing *United States v. Fla. Azalea Specialists*, 19 F.3d 620, 621-22 (11th Cir. 1994) (citing *Flast v. Cohen*, 392 U.S. 83, 94-95, 88 S. Ct. 1942, 1949-50 (1968))). Justiciability doctrine serves two purposes: (1) it aims to prevent the judiciary from infringing on the powers of the executive and legislative branches, and (2) it seeks to ensure that the judiciary considers only those matters presented in an adversarial context. *Id.* (citing *Fla. Azalea Specialists*, 19 F.3d at 621-22).

Justiciability doctrine is composed of "three strands": standing, ripeness, and mootness. *See Leahy*, 145 F.3d at 1244. The failure of any one of these strands can deprive a federal court of jurisdiction. This case involves both standing and mootness issues.

1. Standing

At an "irreducible constitutional minimum," standing imposes upon a plaintiff the requirement to make the following three showings:

> (1) the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest

> which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[;]'"
>
> (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court[;]" and
>
> (3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (quoting *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136 (citation omitted)).

a. Injury in Fact

Where the plaintiff seeks declaratory or injunctive relief, as opposed to damages for injuries already suffered, for example, the injury-in-fact requirement insists that a plaintiff "allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1346 (11th Cir. 1999) (citations omitted). This is because injunctions regulate future conduct only; they do not provide relief for past injuries already incurred and over with. *See Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994). So a plaintiff seeking declaratory or injunctive relief must allege and ultimately prove "a real and immediate—as opposed to a merely hypothetical or conjectural—threat of *future* injury." *Id.* (citation omitted).

In considering whether Strickland had satisfied this requirement, the district court concluded that Strickland did not because it found that the risk that Strickland would suffer future injury was too remote. The court reached this conclusion based in large part on *Malowney*, 193 F.3d 1342, a case where the plaintiffs challenged Florida's post-judgment garnishment statute. While we can understand how the district court reached this conclusion, in *Malowney*, we expressly chose not to consider whether facts as they exist in Strickland's case would satisfy the injury-in-fact requirement. *Id.*, 193 F.3d at 1347 n.6. Now that we are faced with these facts, we conclude that *Malowney* and its brief discussion of *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980), warrant the conclusion that Strickland has alleged sufficient facts in this case to demonstrate a substantial likelihood that he will suffer garnishment proceedings in the future under Georgia's post-judgment garnishment statute.

In *Malowney*, a bank froze the plaintiffs' checking-account funds in accordance with a writ of garnishment. 193 F.3d at 1344. At the time of garnishment, the only funds in the account were Social Security Disability benefits and United States Army retirement benefits, both of which are exempt from garnishment under federal law. *Id.* at 1345. The plaintiffs sued the clerk of a circuit court that issued the writ, seeking only declaratory relief pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201. *Id.*

Specifically, they sought a judgment declaring notice provisions of Florida's post-judgment garnishment statute unconstitutional in part because those provisions failed to afford the plaintiffs adequate due process. *Id.*

When we reviewed the district court's order granting the motion to dismiss,[4] we concluded that "the amended complaint [did] not contain any allegations which could reasonably support a finding that the Malowneys are likely to be subject to future injury from the application of the statute they challenge." *Id.* at 1347. The absence of several facts underpinned this determination.

First, we noted that the complaint did not allege that the Malowneys had checking-account funds likely to be subject to garnishment in the future, or even that they were still judgment debtors. *Id.* For these reasons, we declined to speculate that the Malowneys were, or soon would become, indebted to a different judgment creditor and, as a result, would have a garnishment issued against them under the challenged statute. *Id.*

Second, we emphasized that both the creditor that obtained the garnishment summons against the Malowneys' bank account and the bank that froze the Malowneys' account were both on notice of the exempt status of the Malowneys' funds as a result of the Malowneys' case. *Id.* at 1347-48. We doubted that they

[4] The district court in *Malowney* concluded that Florida's post-judgment garnishment statute satisfies due process and is constitutional because it provides sufficient notice and an adequate opportunity to be heard. *Malowney*, 193 F.3d at 1346. We did not reach this issue on appeal because we held that the claim should have been dismissed since the plaintiffs lacked standing. *Id.*

would risk liability over wrongful garnishment again in the future. *Id.* These facts made the likelihood of a recurrence of the attempted garnishment of the Malowneys' exempt funds weak and deprived the Malowneys of standing to seek declaratory and injunctive relief. *Id.* at 1348.

In reaching this conclusion in *Malowney*, we were careful to distinguish the Third Circuit's decision in *Finberg*, 634 F.2d 50. *Malowney*, 193 F.3d at 1347 n.6. In *Finberg*, a widow whose sole source of income was Social Security retirement benefits, sought to have the application of Pennsylvania's post-judgment garnishment statute declared unconstitutional after the statute was used to initiate garnishment proceedings on Finberg's bank accounts that held her Social Security benefits. 634 F.2d at 51-52. The Third Circuit determined that Finberg's claim had not been mooted as a result of Finberg's recovery of all of the funds that had been attached through the garnishment proceedings because Finberg had demonstrated "a 'reasonable expectation' that [she would] be subject to a recurrence of the activity that [she] challenge[d]." *Id.* at 55 (citation omitted).

When we discussed *Finberg* in *Malowney*, we explained,

> *Finberg* . . . involved different facts, because in that case the plaintiff remained a judgment debtor, and she was an elderly widow on a modest income, from which the court inferred that the judgment was likely to remain unsatisfied for some time. . . .

193 F.3d at 1347 n.6. Although we noted that the Third Circuit had considered *Finberg* under a mootness analysis, as opposed to a standing analysis, *see id.*, the fact that the *Finberg* Court found, under the facts that Finberg alleged, a "reasonable expectation" that Finberg would be subjected again to garnishment proceedings on her exempt funds certainly suggests that the Third Circuit would have found these same facts to have been sufficient to establish standing by demonstrating a "substantial likelihood" that Finberg would suffer injury in the form of garnishment proceedings on her exempt funds in the future.

Taking Strickland's allegations as true and liberally construing the complaint in his favor (as we must when we review a motion to dismiss), we note that none of the disqualifying facts that existed in *Malowney* are present in Strickland's case, yet all of the facts, plus more, that allowed Finberg to escape mootness exist in Strickland's case. Unlike the Malowneys but similar to Finberg, Strickland alleged in his complaint that he and his joint-accountholder wife were both judgment debtors and that his wife had "judgments against her, as well as other debts that are likely to be reduced to judgment." Because of this situation, as Strickland points out in his brief, he is "essentially a sitting duck." Also unlike the Malowneys but again similar to Finberg's situation as construed by the court, Strickland averred that he and his wife subsist on a very modest income consisting only of Strickland's disability benefits, so they were very unlikely to satisfy their

outstanding debts "for some time." In addition, and once again in contrast to the Malowneys, Strickland asserted that, at a bank other than Chase, he had a second account containing only his Social Security disability income.

All of these facts point strongly to one conclusion: it is substantially likely that it is simply a matter of time before another judgment creditor seeks to garnish the monies that the Stricklands have in at least one of their bank accounts. And, unlike in *Malowney*, we cannot count on the creditor and the bank to have learned their lessons that the Stricklands' funds are exempt. This is so because the Stricklands have judgments against them from creditors other than Discover, the creditor involved in this case. And they have a second bank account containing exempt funds at a bank other than Chase, the bank involved in this case. These circumstances create a "real and immediate" likelihood of future injury and satisfy the injury-in-fact requirement for seeking declaratory and injunctive relief.

b. Causation

We also find that Strickland has met the second standing requirement: that the injury suffered is fairly traceable to the defendant. This "causal connection" must "link the injury to the complained-of conduct" of the defendant and is not satisfied if the injury results instead from "the independent action of some third party not before the court." *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1257 (11th Cir. 2012) (quoting *Bennett v. Spear*, 520 U.S.

154, 167, 117 S. Ct. 1154, 1163 (1997) (quotation marks omitted)). In making this inquiry, we note that "even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family*, 344 F.3d at 1273 (citation omitted).

Here, Defendant Alexander is the court clerk with the responsibility to process garnishments by docketing the garnishment affidavit, issuing the summons of garnishment, depositing the garnished property into the court registry, and holding the property. At the time that Strickland filed his complaint, Defendant Alexander had docketed the garnishment and issued the summons of garnishment. He was awaiting receipt of the garnished property from Chase and planned to hold the property until the garnishment action was resolved. Similarly, the next time that Strickland's property is the subject of a garnishment action, Alexander will be required to follow these exact same procedures. So Strickland's inability to access his exempt funds will be "fairly traceable" to Alexander's actions, not to "the independent action of some third party not before the court."

Nor, as Alexander suggests, does the fact that "his duties are ministerial in nature" somehow render Strickland's injury not fairly traceable to Alexander. Alexander provides no authority for the proposition that conduct must be "unlawful" for a resulting constitutional deprivation to be "fairly traceable" to that conduct, and he similarly identifies no support for the notion that an injury cannot

be deemed "fairly traceable" to ministerial conduct. We decline to reach such a conclusion.

In *Finberg*, the Third Circuit considered whether the prothonotary and sheriff who issued the writ of execution and served it on the garnishee were proper defendants in the action. In conducting this analysis, the Third Circuit noted that it had to determine whether the prothonotary and sheriff "[met] the prerequisites to adjudication in a federal court." 634 F.2d at 53. In other words, the court evaluated whether a causal connection between Finberg's injury and the prothonotary and sheriff's actions existed under standing doctrine.

The Third Circuit concluded that the prothonotary and sheriff's actions constituted the "immediate causes of the attachment and freezing of [the plaintiff's] bank accounts." *Id.* at 54. As the court further explained, "If the rules that they were executing are unconstitutional, their actions caused an injury to [the plaintiff's] legal rights." *Id.* In reaching this conclusion, the Third Circuit expressly rejected the proposition that the requisite causation did not exist because the prothonotary and the sheriff executed only ministerial duties in issuing and serving the garnishment. *Id.* The court reasoned that "the inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights." *Id.*

This case is exactly the same: Alexander's docketing of the garnishment affidavit and issuance of the summons of garnishment were the immediate cause of the attachment and freezing of Strickland's account, and the requirement that he execute these ministerial duties in the future when presented with the appropriate documents means that Alexander will again be a cause of any garnishment that befalls Strickland. As a result, Strickland's injury is fairly traceable to Alexander's conduct.

c. Redressability

Finally, turning to the third prong of the standing inquiry, it is likely that Strickland's injury would be redressed by a favorable decision. A federal court could declare the Georgia garnishment process unconstitutional or enjoin any future similar actions that lacked adequate due process protections. Because Strickland has demonstrated injury in fact, causation, and redressability with respect to the declaratory and injunctive relief he seeks, Strickland enjoys Article III standing.

2. Mootness

Having established that a justiciable controversy existed between Strickland and Alexander at the time that Strickland filed his complaint, we must now decide whether the controversy became moot when Strickland received his previously garnished funds from the State Court of Gwinnett County.

The Supreme Court has often remarked that "the doctrine of mootness can be described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth*, 528 U.S. at 189, 120 S. Ct. at 709 (citation and internal quotation marks omitted). But mootness and standing "are distinct doctrines that must not be confused." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1189 n.16 (11th Cir. 2007). The principle difference is that exceptions to the mootness doctrine exist, while they do not for standing. *Id.*

As relevant here, the "capable of repetition, yet evading review" exception to mootness is at issue. *Id.* This exception applies when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004) (citation and internal quotation marks omitted). We find that Strickland has satisfied both of these requirements.

First, garnishment proceedings against exempt funds are generally too short to be fully litigated before the challenged conduct is ceased. As the Third Circuit explained in *Finberg*,

> Any lawsuit challenging the constitutionality of the attachment would require, at the very least, one year to

> proceed from the filing of a complaint in the district court to the entry of judgment in this court. The attachment probably would end within that time with the occurrence of either of two events: the release of the accounts from attachment pursuant to claims of exemption, as occurred here, or the entry of a final judgment in the state court garnishment action. . . . Neither event should take as long as one year to occur because the issues and procedures in a garnishment are relatively simple. . . .

Finberg, 634 F.2d at 56 (citations omitted). In *Finberg*, the proceedings lasted for six months. *Id.*

Under Georgia law, garnishment proceedings similarly require less than a year to complete. Georgia's post-judgment garnishment statute generally provides a garnishee with forty-five days to answer a garnishment summons. O.C.G.A. § 18-4-62(a). The judgment debtor may then file a claim for funds within fifteen days of the garnishee's answer. O.C.G.A. § 18-4-85. Therefore, although a court typically will not rule on any exemptions within sixty days of the commencement of a garnishment action, it is unlikely that a garnishment action will last longer than a few months. In this case, less than four months went by between Discover's filing of the garnishment action against Strickland and Discover's dismissal of that very same action.

While state-court garnishment proceedings are relatively short in duration, constitutional challenges to statutes in federal court, in contrast, can easily require more than a year to resolve. The state attorney general may wish to become

involved in the proceedings, discovery may be appropriate, and the issues raised may be complex. Additional time, of course, would be required for appellate, and, if appropriate, Supreme Court review of any district-court decision.

For these reasons, we have held that activities spanning less than one year are likely to evade review. *Bourgeois*, 387 F.3d at 1309 ("[W]e conclude that one year is an insufficient amount of time . . . to adjudicate the typical case. Consequently, if this issue arises again . . . it is likely to evade review because the [challenged conduct] will occur before the parties have a final ruling on the merits from a court of last resort."). *See also Turner v. Rogers*, ___ U.S. ___, 131 S. Ct. 2507, 2515 (2011) (because periods of incarceration of less than twelve months are not long enough for a person to challenge the constitutionality of the procedures used to subject the person to incarceration, where a person can show that he is likely to suffer future imprisonment of less than twelve months for the same reason, the case does not become moot upon the prisoner's release from incarceration).

Other courts tend to agree with this proposition, particularly in the context of challenges to garnishment statutes. For example, besides the Third Circuit's decision in *Finberg*, the First Circuit in *Dionne v. Bouley*, 757 F.2d 1344, 1349 (1st Cir. 1985), concluded that a challenge to Rhode Island's garnishment statute was not moot even if the funds sought to be garnished had been released because "[b]y

the time a case can be heard and decided in the federal court, the attached funds will usually have been obtained by the creditor or else released." Similarly, in *Harris v. Bailey*, 675 F.2d 614, 616 (4th Cir. 1982), the Fourth Circuit determined that a challenge to West Virginia's garnishment statute was not moot, though the plaintiff's funds had been returned to her, because the state's "brief procedure" was capable of evading review. Strickland's challenge to Georgia's garnishment statute suffers from the same durational problem: the garnishment proceeding itself is highly unlikely to outlive the length of time that it takes to resolve the constitutionality of the statute used to execute the garnishment proceeding. As a result, Strickland's challenge to Georgia's post-judgment garnishment statute satisfies the first prong of the "capable of repetition, yet evading review" test.

It also satisfies the second prong. We have already concluded in our analysis of the injury-in-fact requirement under the standing inquiry that a substantial likelihood exists that Strickland's funds will again be garnished to attempt to satisfy a debt against him or his wife that has already been reduced to a judgment. Certainly, where a substantial likelihood of an event exists, a "reasonable expectation" does as well. In summary, Strickland's available funds consist solely of his exempt workers' compensation monies and his exempt Social Security disability payments. His meager income cannot currently or in the near term satisfy his and his wife's outstanding debts, some of which have already been

reduced to judgments. And, because Strickland's wife is a joint accountholder of both bank accounts, Strickland's funds within those accounts are at significant risk of garnishment. So garnishment proceedings against Strickland are "capable of repetition." *See also Finberg*, 634 F.2d at 55-56 (finding a "reasonable expectation" that garnishment proceedings against an indebted widow on a modest income would again occur).

For these reasons, we hold that the release of Strickland's funds and the satisfaction of his debt to Discover did not moot Strickland's claim against Defendant Alexander and that Strickland's claim for declaratory and injunctive relief still presents a live controversy.

B. Constitutionality of Georgia's Post-Judgment Garnishment Statute

Because Strickland has established that he has standing and his claim is not moot, we now turn to the constitutionality of Georgia's post-judgment garnishment statute. Although the Supreme Court has remarked that the courts of appeals enjoy discretion to determine what questions may be taken up and resolved for the first time on appeal, "[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 119-21, 96 S. Ct. 2868, 2876-77 (1976) (citation omitted). The reason for this is to ensure that all parties have had an opportunity to offer all evidence they believe

relevant to the issues so that they will not be surprised when the issues are decided by final decision on appeal without first having had an opportunity to be heard. *Id.*

In *Singleton*, for example, the Supreme Court held that the Eighth Circuit's resolution on the merits of a challenge to the constitutionality of a Missouri statute was improper and "an unacceptable exercise of [the Eighth Circuit's] appellate jurisdiction." *Id.* at 119-20, 96 S. Ct. at 2877. In that case, the defendant had filed only a pre-answer motion to dismiss for lack of standing and had filed no answer or other pleading addressing the merits, had stipulated to no facts, had given no intimation of what defenses, if any, he might have other than that the plaintiffs' alleged lack of standing, and had limited himself on appeal entirely to the standing determination. *Id.*

The development of the constitutional issue in this case suffers similarly. Here, although Defendant-Appellee Alexander filed an answer to Strickland's complaint, like the *Singleton* defendant, Alexander did not substantively address the constitutionality of the challenged portions of the statute in the district court. And, while Alexander has briefed the constitutional issue on appeal for the first time, he is not charged with defending the constitutionality of Georgia's statutes; that is the job of the Attorney General of the State of Georgia. Nor, unlike Georgia's Attorney General, does Alexander have a real interest in the constitutionality of the statute at issue here.

Moreover, based on the record below, it appears that Georgia's Attorney General may indeed wish to participate in proceedings relating to the constitutionality of Georgia's post-judgment garnishment statute. Although Georgia's Attorney originally declined to intervene in this action after being provided notice that the matter involved a challenge to the constitutionality of O.C.G.A. § 18-4-60, he indicated that he intended to monitor the case and that he might file an amicus brief addressing the constitutionality of the statute. Once the district court dismissed this action *sua sponte* for lack of standing, however, the Attorney General likely believed that no need existed to file an amicus brief addressing the constitutionality of the statute with our Court. We think that development of the constitutional issue would benefit from Georgia's Attorney General's involvement, should he elect to participate in the proceedings. We therefore remand this case to the district court for further proceedings to evaluate the constitutionality of the challenged portions of Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60, *et seq*.

V.

In sum, we hold that Strickland enjoys Article III standing. We further conclude that Strickland's claim is not moot but rather presents a live controversy that is ready for adjudication. Finally, we decline to pass on the constitutionality of Georgia's post-judgment garnishment statute before ensuring that all interested

parties have had notice and, if desired, a chance to present all evidence and argument, and the district court has had an opportunity to examine and consider that evidence and argument when ruling on the merits. For these reasons, we reverse the district court's *sua sponte* dismissal of Strickland's claims against Alexander and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TONY W. STRICKLAND,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:12-CV-02735-MHS
RICHARD T. ALEXANDER, Clerk of Court of the State Court of Gwinnett County, Georgia,	:	
Defendant.	:	

ORDER

This action challenging the constitutionality of Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60 *et seq.*, is before the Court on the parties' cross-motions for summary judgment. For the following reasons, the Court denies defendant's motion for summary judgment [Doc. 90], grants plaintiff's motion for summary judgment [Doc. 93], and enters appropriate declaratory and injunctive relief.

Statement of Facts[1]

Plaintiff Tony W. Strickland had a long career installing gas products until he was diagnosed with cancer in 2004. Mr. Strickland survived his bout with cancer, but because of the lasting effects of his chemotherapy treatments, he was unable to work as many hours as he had before. In 2005, as a result of the financial hardship created by his inability to work, Mr. Strickland defaulted on a Discover credit card he had used to cover household expenses during his chemotherapy treatments.

Subsequently, Mr. Strickland developed other health issues. He suffered a series of strokes and developed atrial fibrillation, a potentially dangerous heart arrhythmia. He was prescribed Propafenone (commonly known as Rythmol) to keep his heart in rhythm and was told that his heart could fall out of rhythm, with dire consequences, if it was not taken as prescribed.

On June 25, 2009, Mr. Strickland seriously injured his back while at work and subsequently began receiving weekly workers' compensation

[1] The following facts are taken from the parties' Joint Stipulation of Undisputed Facts ("Stipulation") [Doc. 88] and plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried ("Pl.'s Facts") [Doc. 93-2], which defendant does not dispute. *See* Def.'s Resp. to Pl.'s Facts [Doc. 96].

benefits. In February 2011, Mr. Strickland received a lump-sum workers' compensation settlement for his injuries in the amount of $30,000. He and his wife, Lynn, opened an account at JPMorgan Chase ("Chase") specifically for the purpose of setting aside these workers' compensation funds for household and medical expenses. Mrs. Strickland was listed as a joint account holder in case Mr. Strickland faced further health issues and was unable to access needed funds himself. The Stricklands proceeded to use these funds for basic living and healthcare expenses.

In August 2011, Mr. Strickland's health issues also qualified him to receive Social Security disability benefits. He arranged to have the Social Security Administration deposit those funds in a checking account at a separate institution.

Meanwhile, on December 4, 2009, Discover Bank ("Discover"), represented by the law firm of Greene & Cooper, LLP ("G&C"), sued Mr. Strickland for the unpaid credit card debt in the State Court of Fulton County, Georgia. Stipulation [Doc. 88-1], Ex. A. On April 4, 2012, Discover obtained a default judgment (the "Judgment") against Mr. Strickland in the principal amount of $13,849.93, plus interest of $2,138.64, attorney's fees of $1,613.61, and court costs of $147.50. *Id.*, Ex. B.

On July 6, 2012, G&C, on behalf of Discover, filed a garnishment action against Mr. Strickland in the State Court of Gwinnett County, Georgia, naming Chase as the garnishee and seeking $18,096.65 as the balance due on the Judgment. *Id.*, Ex. C. Defendant Richard T. Alexander, Clerk of Court for the State Court of Gwinnett County, generated a garnishment summons, which advised the garnishee to "hold all property, money and wages, except what is exempt . . . belonging to the defendant." *Id.*, Ex. D. After being served with the garnishment summons on July 11, 2012, Chase immediately froze Mr. Strickland's savings account, which contained $15,652.67 in workers' compensation benefits.

On July 16, 2012, Mr. Strickland received a certified letter from G&C notifying him of the garnishment action. *Id.*, Ex. G. The notice, however, did not inform Mr. Strickland that some forms of property were exempt from garnishment, nor did it inform him how to claim such an exemption. On the same day, Mr. Strickland also received a letter from Chase. *Id.*, Ex. J. The letter advised him that the bank had been served with a writ of garnishment and that his bank account had been frozen. The letter also explained that some forms of income, including workers' compensation benefits, may be protected from garnishment depending on where Mr. Strickland lived, but it

did not advise him how to claim an exemption. Instead, the letter merely advised Mr. Strickland to contact the judgment creditor's attorney if he believed that his money was exempt from the garnishment process. No other notices about the garnishment action were sent to Mr. Strickland.

After receiving the letters from G&C and Chase, Mr. Strickland went to his local bank branch to inquire about the garnishment. There, Mr. Strickland learned that the entirety of what remained of his workers' compensation funds had been frozen, and he was again advised that he should contact the judgment creditor if he believed the garnishment to be in error.

On July 17, 2012, Mr. Strickland contacted G&C, but he was unable to convince them to release the garnishment. When Mr. Strickland hung up the phone after the conversation with G&C, he was so upset that he could not speak, and he began to feel nauseated. Not knowing what the family could do or how the family would be able to afford the remaining household expenses for the month, he began to cry and shake.

By the end of July 2012, Mr. Strickland was out of money and could not afford to refill his Rythmol prescription. Despite his understanding of the dangers of not taking the medication, which included the possibility of a

stroke or the need for shock therapy, he had to skip doses. The danger of skipping the medication took an emotional toll on Mr. Strickland. He lost his appetite, became a quiet person, and felt like he had let his family down.

On August 20, 2012, Chase filed an answer in the garnishment action and paid the entire balance of Mr. Strickland's accounts, totaling $15,652.67, into court. Stipulation [Doc. 88-1], Ex. K. These funds consisted entirely of workers' compensation benefits. Defendant Alexander was responsible for the administration of these funds once they were paid into court.

On August 28, 2012, Mr. Strickland, through his attorney Marsha Kleveckis of Gwinnett Legal Aid, sent an email to G&C explaining that the funds in Mr. Strickland's Chase bank account were exempt workers' compensation settlement funds. *Id.*, Ex. L. Ms. Kleveckis, however, was unable to resolve the matter with G&C.

On September 4, 2012, Ms. Kleveckis, on behalf of Mr. Strickland, filed a Claim for Funds Paid Into Court in the garnishment action. *Id.*, Ex. M. The claim asserted that Mr. Strickland had a superior claim to the funds because they were workers' compensation benefits protected from garnishment under O.C.G.A. § 34-9-84. On October 10, 2012, Discover filed

a Notice of Opposition to Mr. Strickland's claim. *Id.*, Ex. O. The court scheduled a hearing on the claim for October 24, 2012. *Id.*, Ex. P.

Meanwhile, sometime in October 2012, Mr. Strickland developed a blood clot in his hand that required surgery. Because his workers' compensation funds were still in court, he did not know how to pay for the surgery, so Mr. Strickland had to delay scheduling it. During this time, Mr. Strickland lost sleep, lost his appetite, and again began to cry because of the emotional toll of not being able to afford needed medical care. After his hand became so swollen that he could not use it and turned black all the way up to his elbow, the Stricklands decided to schedule the surgery and worry about payment afterwards.

On October 23, 2012, the day before the scheduled hearing on Mr. Strickland's claim, Discover dismissed the garnishment action. *Id.*, Ex. Q. The next day, the court entered an order releasing the deposited funds to Mr. Strickland, and on October 29, 2012, the State Court of Gwinnett County issued a check to Mr. Strickland in the amount of his seized workers' compensation funds, $15,652.67. *Id.*, Ex. R. Mr. Strickland's attorney received the check on November 2, 2012, nearly four months after his account had initially been frozen by Chase as a result of the garnishment action.

Procedural History

On August 8, 2012, while the garnishment action was still pending in the State Court of Gwinnett County, Mr. Strickland, through attorneys with the Atlanta Legal Aid Society, filed this action against defendant Alexander, Discover, G&C, and Chase challenging the constitutionality of certain provisions of Georgia's post-judgment garnishment statute and seeking declaratory and injunctive relief as well as compensatory and punitive damages. Mr. Strickland asserted two claims against defendants: one under 42 U.S.C. § 1983 for acting under color of state law and unconstitutionally depriving him of his property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and one under the Georgia Bill of Rights for depriving him of his property in violation of the Due Process Clause of the Georgia Constitution.

Specifically, Mr. Strickland alleged that at least three aspects of the garnishment statute violated due process requirements under both the United States and Georgia Constitutions. Compl. [Doc. 4] ¶¶ 45, 52. First, Mr. Strickland alleged that by not requiring notice of available statutory exemptions from garnishment, O.C.G.A. § 18-4-64 failed to conform with due process notice requirements. Second, Mr. Strickland alleged that by not

providing a debtor with a prompt procedure to claim an exemption and obtain return of the protected property, the structure of the garnishment process failed to conform with due process timeliness requirements. Finally, Mr. Strickland alleged that by not requiring any notice to a debtor that a garnishee has filed an answer, even though the debtor has only 15 days to traverse that answer and file an exemption claim, O.C.G.A. § 18-4-83 failed to conform to due process notice requirements.

Mr. Strickland asked the Court to declare these aspects of the law unconstitutional and enter appropriate injunctive relief (1) against defendant Alexander requiring due process and restraining the unconstitutional features of the statute, (2) against defendants Discover and G&C restraining their use of the unconstitutional garnishment process against his property, and (3) against defendant Chase restraining it from unduly freezing his bank account containing exempt funds and its use of the unconstitutional garnishment process. *Id.*, Prayer for Relief ¶¶ (a)-(d). In addition, Mr. Strickland sought an award of actual, nominal, and punitive damages from defendants Discover, G&C, and Chase, as well as recovery of his attorneys' fees and litigation expenses. *Id.* ¶¶ (e)-(f).

On August 30, 2012, pursuant to Fed. R. Civ. P. 5.1 and O.C.G.A. § 9-4-7(c), Mr. Strickland filed and served on Georgia Attorney General Samuel S. Olens a Notice of Constitutional Question, noting that his complaint questioned the constitutionality of the statutory framework of Georgia's post-judgment garnishment scheme, O.C.G.A. § 18-4-60 *et seq.* [Doc. 6]. On September 14, 2012, pursuant to 28 U.S.C. § 2403 and Fed. R. Civ. P. 5.1(b), the Court certified that O.C.G.A. § 18-4-60 *et seq.* had been questioned and, pursuant to Fed. R. Civ. P. 5.1(c), notified Attorney General Olens that he could intervene in the action within 60 days [Doc. 11]. On November 13, 2012, Attorney General Olens responded that, after review, he had determined that he would not intervene, but that he would monitor the case and might file an amicus brief addressing the constitutional challenge if he believed it would be beneficial to the Court [Doc. 38].

On November 27, 2012, Mr. Strickland and Discover filed a consent motion to dismiss Discover with prejudice pursuant to a settlement agreement [Doc. 40]. Discover filed a satisfaction of judgment in the garnishment proceeding the same day and in the State Court of Fulton County on December 4, 2012. On November 28, 2012, the Court entered an Order granting the consent motion and dismissing Mr. Strickland's claims

against Discover with prejudice, leaving Mr. Alexander, G&C, and Chase as defendants.

Meanwhile, on September 20, 2012, G&C and Chase each filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted [Doc. 12 & Doc. 16]. On April 11, 2013, the Court entered an Order granting Chase's motion and granting in part and denying in part G&C's motion [Doc. 50]. The Court found that Mr. Strickland lacked standing to seek declaratory or injunctive relief because the possibility of future injury was too speculative. Order at 18-26. Even though defendant Alexander had not filed a motion to dismiss, since Mr. Strickland sought only injunctive relief against him, the Court *sua sponte* dismissed Mr. Strickland's claims against Mr. Alexander as well. *Id.* at 27-28.

As for plaintiff's damages claims against Chase and G&C, the Court found that Chase was entitled to dismissal because it was not acting under color of state law when it froze Mr. Strickland's account and transferred the funds to the state court. *Id.* at 28-39. On the other hand, the Court found that G&C's joint participation with state officials in filing and pursuing the garnishment action was sufficient to characterize it as a state actor for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983. *Id.* at 39-42.

Finally, the Court found that Mr. Strickland had asserted plausible claims that the post-judgment garnishment process violated due process timeliness and notice requirements and had thus stated a viable claim for damages against G&C. *Id.* at 43-58.

On July 19 and August 23, 2013, respectively, Mr. Strickland and G&C filed cross-motions for summary judgment on Mr. Strickland's remaining damages claims [Doc. 57 & Doc. 60]. On October 29, 2013, the Court entered an Order denying Mr. Strickland's motion and granting G&C's motion [Doc. 71]. The Court rejected G&C's arguments that Mr. Alexander lacked standing because he had suffered no injury, and that his claim was moot because his funds had been returned to him. Order at 11-16. However, assuming the post-judgment garnishment statute was unconstitutional, the Court concluded that G&C had acted in good faith when it instituted garnishment proceedings against Mr. Strickland pursuant to the statute and therefore could not be held liable for his damages. *Id.* at 16-24.

Mr. Strickland appealed the Court's dismissal of his claims against defendant Alexander only. On November 20, 2014, the court of appeals reversed. *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014). The court held that Mr. Strickland had standing to seek declaratory and injunctive

relief against defendant Alexander because (1) the circumstances alleged in the complaint created "a 'real and immediate' likelihood of future injury,"[2] (2) any future injury would be "fairly traceable" to defendant Alexander's following the procedures set out in Georgia's post-judgment garnishment statute, and (3) the injury would be redressed by a favorable court decision declaring the garnishment process unconstitutional and enjoining any future similar actions that lacked adequate due process protections. *Id.* at 883-86. The court further held that the return of Mr. Strickland's previously garnished funds by the State Court of Gwinnett County and the satisfaction of his debt to Discover did not moot his claim against defendant Alexander because the "capable of repetition, yet evading review" exception to the mootness doctrine applied. *Id.* at 886-88. Finally, to ensure that all interested parties, including Georgia's Attorney General, had notice and, if desired, a chance to present evidence and argument on the constitutional

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[2] In making this finding, the court cited the allegation that Mr. Strickland and his wife subsist on a very modest income consisting only of his disability benefits, so they are very unlikely to satisfy their outstanding debts in the near future; and the allegation that the Stricklands have judgments against them from creditors other than Discover and a second bank account containing exempt funds at a bank other than Chase, so the fact that Discover and Chase now know the Stricklands' funds are exempt does not make future garnishment actions unlikely. *Strickland*, 772 F.3d at 885.

issues, the court remanded the case to this Court for further proceedings to evaluate the constitutionality of the challenged portions of Georgia's post-judgment garnishment statute. *Id.* at 888-89.

Following remand, the Court entered a consent scheduling order under which the parties were to file cross-motions for summary judgment based on stipulated facts [Doc. 87]. In accordance with the scheduling order, the parties filed their respective motions for summary judgment on April 30, 2015. On the same date, the State of Georgia, through Attorney General Olens, filed a motion to intervene [Doc. 89], and the Court entered an Order granting the motion and allowing the State of Georgia to present evidence and argument on the constitutionality of Georgia's post-judgment garnishment statute [Doc. 91]. Briefing of the motions for summary judgment by the parties and the State of Georgia is now complete and the case is ripe for decision.

Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court

held that this burden could be met if the movant demonstrates that there is "an absence of evidence to support the non-moving party's case." *Id.* at 325. At that point, the burden shifts to the non-moving party to go beyond the pleadings and present specific evidence giving rise to a triable issue. *Id.* at 324.

In reviewing a motion for summary judgment, the Court must construe the evidence and all inferences drawn from the evidence in the light most favorable to the non-moving party. *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)(emphasis in original).

The Rule 56 standard is not affected by the filing of cross-motions for summary judgment: "The court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720 at 335-36 (3d ed. 1998). Cross-motions may, however, be probative of the absence

of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. *See United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984).

Discussion

Plaintiff moves for summary judgment on his claims that Georgia's post-judgment garnishment statute violates constitutional due process requirements because it (1) does not provide judgment debtors with adequate notice that their property may be exempt from garnishment; (2) fails to inform debtors of the process to claim such exemptions; and (3) establishes a process that deprives debtors of their exempt property for an unconstitutionally long period of time. Defendant, on the other hand, supported by the State of Georgia, contends that he is entitled to summary judgment on each of these claims because (1) due process does not require that judgment debtors be notified of available exemptions or of a process to claim such exemptions, and (2) the claims process provided under the Georgia statute does not guarantee that an erroneous deprivation of exempt property will last longer than constitutionally permissible.

Before addressing the constitutional issues raised, the Court briefly describes the operation of Georgia's post-judgment garnishment statute. The

Court then considers whether each of the challenged aspects of the law comports with due process requirements.

I. Operation of Georgia's Post-Judgment Garnishment Statute

A plaintiff creditor who obtains a money judgment against a defendant debtor may file a garnishment action against a third party (the garnishee) to subject any debt that the garnishee owes to the debtor to payment of the judgment. O.C.G.A. §§ 18-4-20(b) & 18-4-60. "A creditor typically uses garnishment to reach two types of debts that a third party owes to an individual judgment debtor: an employer's debt for earnings due to an employee and a debtor's account with a bank or similar financial institution, which is a debt payable to the depositor or her order." *In re Johnson*, 479 B.R. 159, 167-68 (Bankr. N.D. Ga. 2012)(footnote omitted).

A judgment creditor initiates a garnishment action by filing an affidavit of garnishment in any court with jurisdiction over the garnishee. O.C.G.A. § 18-4-61. After determining that the affidavit contains the statutorily required information, the clerk of court issues a summons of garnishment directed to the garnishee. *Id.* The summons commands the garnishee to file an answer not sooner than 30 days and not later than 45 days after service of the summons "stating what money or other property is subject to

garnishment." O.C.G.A. § 18-4-62(a). The answer must be accompanied by the money or other property subject to garnishment. *Id.*; *see also* O.C.G.A. §§ 18-4-82 & 18-4-84. The garnishee must serve a copy of the answer on the judgment creditor; however, there is no requirement that a copy of the answer be served on the judgment debtor. O.C.G.A. § 18-4-83.

The creditor must give notice of the garnishment action to the judgment debtor by either formally serving him with a copy of the summons of garnishment or sending him written notice by other specified means consisting either of a copy of the summons of garnishment or of a document that "includes the names of the plaintiff and the defendant, the amount claimed in the affidavit of garnishment, a statement that the garnishment against the property and credits of the defendant has been or will be served on the garnishee, and the name of the court issuing the summons of garnishment." O.C.G.A. § 18-4-64(a) & (c). There is no requirement that the judgment debtor be notified that certain money or property may be exempt from garnishment.

After receiving notice of the garnishment action, the judgment debtor "may challenge the existence of the judgment or the amount claimed due thereon" or "any other matter in bar of the judgment," except the validity of

the judgment, by filing a traverse of the creditor's affidavit "stating that the affidavit is untrue or legally insufficient." O.C.G.A. §§ 18-4-65(a), 18-4-93. The judgment debtor is entitled to a hearing within 10 days after filing the traverse, and "no further summons of garnishment may issue nor may any money or other property delivered to the court as subject to garnishment be disbursed until the hearing shall be held." O.C.G.A. § 18-4-93.

After the garnishee serves its answer on the plaintiff creditor, the creditor or another "claimant" has 15 days to file a traverse stating that "the garnishee's answer is untrue or legally insufficient." O.C.G.A. §§ 18-4-85, 18-4-86. If no traverse is filed within 15 days after service of the garnishee's answer, the clerk must pay any money delivered to the court by the garnishee to the plaintiff creditor, and the garnishee is automatically discharged from further liability. O.C.G.A. §§ 18-4-85, 18-4-89(1).

In addition, prior to entry of judgment on the garnishee's answer or distribution of any money or property subject to garnishment, "any person may file a claim in writing under oath stating that he has a claim superior to that of the plaintiff to the money or other property in the hands of the garnishee subject to the process of garnishment; and the claimant shall be a party to all further proceedings upon the garnishment." O.C.G.A. § 18-4-95.

The court must retain the money or property subject to garnishment until trial of any such claims. O.C.G.A. § 18-4-88.

II. Notice of Available Exemptions

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Plaintiff contends that Georgia's garnishment statute fails to satisfy this requirement because the notice it requires does not inform the judgment debtor of available exemptions. Plaintiff relies on a long line of cases beginning with the Third Circuit's decision in *Finberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980) (en banc). In *Finberg*,, the court held that Pennsylvania's post-judgment garnishment law violated due process notice requirements because it did not inform the judgment debtor of exemptions that might apply to her property. 634 F.2d at 61-62; *see also Aacen v. San Juan Cnty. Sheriff's Dep't*, 944 F.2d 691, 699 (10th Cir. 1991) (""[T]he Constitution requires, at a minimum, that the debtor be informed that various state exemptions as to certain real and personal property exist and, if an incomplete list is given, state that the list is partial and advise the debtor regarding discovery of unlisted exemptions.") (footnote

omitted); *Reigh v. Schleigh*, 784 F.2d 1191, 1196 (4th Cir. 1986) ("notice [must] alert the judgment debtor that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the attached property") (internal quotation marks omitted); *Dionne v. Bouley*, 757 F.2d 1344, 1354 (1st Cir. 1985) (same); *McCahey v. L.P. Investors*, 774 F.2d 543, 549 (2nd Cir. 1985) (due process requires "notice to judgment debtors of exemptions to which they may be entitled").

Defendant and the State of Georgia contend that this case is controlled by the Supreme Court's decision in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924). In that case, the Supreme Court held that due process did not require notice and an opportunity to be heard before issuance of a writ to garnish a judgment debtor's wages. The Court reasoned that the judgment debtor "has had his day in court" in the underlying action on the merits, and "after the rendition of the judgment he must take notice of what will follow, no further notice being necessary to advance justice." *Id.* at 288 (internal quotation marks omitted). Under *Endicott-Johnson*, defendant and the State argue, "*no notice* beyond the underlying judgment itself is necessary to afford due process." Br. in Support of Def.'s Mot. for Summ. J. [Doc. 90-1] at 2 (emphasis in original); *see also* State of Ga.'s Br. in

Opp'n to Pl.'s Mot. for Summ. J. & in Support of Def.'s Mot. for Summ. J. ("State's Br.") [Doc. 98] at 2. Because Georgia's statute goes further and provides the judgment debtor with notice of the garnishment action, defendant and the State contend that it exceeds minimum due process notice requirements.

With regard to the more recent *Finberg* line of cases, defendant and the State argue that they are merely persuasive authority to which this Court is not bound and which this Court should not follow. They also contend that these cases do not establish a clear rule that due process requires specific notice of what statutory exemptions from garnishment exist. Finally, they point out that the Georgia courts have repeatedly upheld the constitutionality of the current post-judgment garnishment scheme.

The Court concludes that *Endicott-Johnson* is not controlling in this case, and that the overwhelming weight of authority establishes that, in a garnishment action, due process requires that a judgment debtor receive notice that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the garnished property. Because the Georgia post-judgment garnishment statute requires no such notice to the judgment debtor, it is constitutionally deficient.

An unbroken line of modern court decisions, including a decision by the former Fifth Circuit, holds that *Endicott-Johnson* is not controlling in cases challenging the constitutional sufficiency of notice and hearing procedures in post-judgment garnishment proceedings. *See Brown v. Liberty Loan Corp. of Duval*, 539 F.2d 1355, 1365 (5th Cir. 1976) ("More recent decisions of the Supreme Court [than *Endicott-Johnson*] establish the need to balance various interests in order to determine whether due process requires notice and an opportunity for a hearing whenever an individual is to be deprived of property permanently or temporarily.") (citations omitted);[3] *see also Aacen*, 944 F.2d at 695 ("*Endicott* is not dispositive of this case."); *McCahey*, 774 F.2d at 548 ("[S]ubsequent Supreme Court decisions have implied that *Endicott* is not the last word on the subject [of due process limits on post-judgment remedies]."); *Dionne*, 757 F.2d at 1351 ("[*Endicott-Johnson*'s] expansive

[3] Contrary to the State's argument, the *Brown* decision is not "rooted in *Endicott*." State's Br. [Doc. 98] at 7. Instead of applying *Endicott-Johnson*'s holding that no notice to the judgment debtor beyond the underlying judgment was necessary to satisfy due process, the *Brown* court utilized a balancing analysis derived from more recent Supreme Court decisions. 539 F.2d at 1365. The court concluded that the law adequately protected the debtor's interests primarily because, after the writ of garnishment issued, it provided for "prompt judicial determination of the debtor's claim to an exemption." *Id.* at 1368. *Endicott-Johnson*, on the other hand, required no balancing of creditor and debtor interests and evinced no concern with the debtor's ability to enforce exemptions, which were virtually nonexistent at the time.

language is no longer the law given the more recent Supreme Court precedent in the area of property sequestrations and due process.") (footnote omitted); *Duranceau v. Wallace*, 743 F.2d 709, 711 n. 1 (9th Cir. 1984) ("[T]he series of [Supreme Court] cases reexamining the pre-judgment seizure of property by an alleged creditor" indicates "that the 'established rules of our system of jurisprudence' have changed since *Endicott*.") (quoting *Endicott-Johnson*, 266 U.S. at 288) (citations omitted); *Finberg*, 634 F.2d at 57 ("[A] series of more recent decisions by the Supreme Court adopts a different line of reasoning [than *Endicott-Johnson*].")[4]

These cases have universally employed the balancing analysis summarized in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether post-judgment garnishment procedures satisfy due process requirements. *See Aacen*, 944 F.2d at 695-96; *McCahey*, 774 F.2d at 548-49; *Dionne*, 757 F.2d at 1352; *Duranceau*, 743 F.2d at 711; *Finberg*, 634 F.2d at

[4] In departing from *Endicott-Johnson*, these cases relied on four pre-judgment seizure cases in which the Supreme Court held that due process required "a constitutional accommodation of the respective interests" of the creditor and debtor. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 610 (1974); *see also N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadich v. Family Fin. Corp.*, 395 U.S. 337 (1969).

58; *Brown*, 539 F.2d at 1365-69. Under that analysis, the court considers three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335 (citation omitted).

Chief among the cases applying the *Mathews* balancing analysis to post-judgment garnishment proceedings is the Third Circuit's decision in *Finberg v. Sullivan*. The *Finberg* court noted that the judgment creditor has "a strong interest in a prompt and inexpensive satisfaction of the debt," but that the judgment debtor has a countervailing interest in access to a bank account which "may well contain the money that a person needs for food, shelter, health care, and other basic requirements of life." 634 F.2d at 58. Considering "the additional fact that the money in the accounts may, as here, be covered by exemptions designed to protect a debtor's means of purchasing basic necessities," the court found that "the debtor's interest in access to a bank account becomes very compelling." *Id.* Since "[k]nowledge of these exemptions is not widespread, and a judgment debtor may not be able to

consult a lawyer before the freeze on a bank account begins to cause serious hardships," the court found that "[n]otice of these matters can prevent serious hardship for the judgment debtor whose lack of information otherwise would cause delay or neglect in filing a claim of exemption." *Id.* at 62. Considering that "[t]he conveyance of this information would not place a great burden on the state," and that "[t]he creditor would not have to incur any additional expense or delay," the court concluded that "the failure to provide [the judgment debtor] with this information was a violation of due process." *Id.* Subsequent circuit court decisions to consider this issue have agreed with *Finberg* that due process requires that judgment debtors in garnishment proceedings be notified of the existence of statutory exemptions to garnishment. *See Aacen*, 944 F.2d at 697-98; *Reigh*, 784 F.2d at 1196; *McCahey*, 774 F.2d at 549; *Dionne*, 757 F.2d at 1354.

Apart from their misplaced reliance on *Endicott-Johnson*, defendant and the State offer little in the way of support for their argument that Georgia's post-judgment garnishment statute satisfies due process notice requirements. Quoting *McCahey*, 774 F.2d at 550, defendant argues that "judgment debtors are in the best position to provide evidence of exemption and may legitimately be required to carry the burden of proving the existence

thereof." Def.'s Br. in Support of Mot. for Summ. J. [Doc. 90-1] at 12. The *McCahey* court's statement, however, was made in the context of rejecting the suggestion that judgment creditors should be required to swear ignorance of any possible exemptions and does not imply that judgment debtors need not receive notice of exemptions in garnishment proceedings. In fact, the *McCahey* court expressly agreed with *Finberg* and other cases that such notice was constitutionally required because it struck "a fair balance between the competing interests." 774 F.2d at 549.

Defendant also points out that the Fourth Circuit in *Reigh*, following the First Circuit's decision in *Dionne* and the dissents in *Finberg*, held that "due process does not mandate that the notice to the judgment debtor of the attachment should include a list of all the exemptions possibly available to the judgment debtor." *Reigh*, 784 F.2d at 1196. Instead, "it is sufficient that the notice alert the judgment debtor 'that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the attached property. . . .'" *Id.* (quoting *Dionne*, 757 F.2d at 1354). *Reigh* and *Dionne*, however, agree with the basic principle established in *Finberg* that some notice of exemptions is constitutionally required. The only disagreement is as to the level of specificity that this notice must have.

Because the Georgia statute does not require *any* notice, either general or specific, it is clearly unconstitutional regardless.[5]

Defendant also argues that plaintiff received notice of the existence of exemptions because the affidavit of garnishment referred to property held by the garnishee "except what is exempt," and the letter plaintiff received from Chase advised him that some forms of property might be exempt from garnishment. Stipulation [Doc. 88-1], Exs. C & J. This argument, however, ignores the fact that plaintiff never received a copy of the affidavit of garnishment – or of the summons of garnishment, which also refers to property that is "exempt," *id.*, Ex. D – because the Georgia statute does not

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[5] The Court agrees that a potentially confusing "laundry list" of *all* available exemptions "is not likely to increase the probability of a debtor's correcting an erroneous deprivation," and therefore "is not required by due process." *Harris v. Bailey*, 574 F. Supp. 966, 971 (W.D. Va. 1983) (citation omitted). However, the notice should include at least a partial list of "those essential federal and state exemptions that provide the basic necessities of life for someone in [Mr. Strickland's] position." *Id.* This would certainly include the exemption for workers' compensation benefits, as well as the Social Security exemption. "Beyond this list of absolutely essential exemptions . . . , the debtor should be informed simply that other possible exemptions exist under the law." *Id.* (citation omitted); *see also Aacen*, 944 F.2d at 699 (notice may provide partial list of exemptions and advise debtor regarding discovery of unlisted exemptions); *McCahey*, 774 F.2d at 546, 550-52 (notice to judgment debtor providing expressly partial list of nine exemptions, including Social Security and workers' compensation benefits, was constitutional). "Such a requirement balances the debtor's need for notice that exemptions exist with the very real danger that information overload will only confuse the debtor." *Harris*, 574 F. Supp. at 971.

require these documents to be served on the judgment debtor. Instead, in accordance with O.C.G.A. § 18-4-64(c), the only notice plaintiff received informed him simply of the fact that a garnishment action had been or would be filed against his property and served on Chase, the name of the plaintiff and the defendant and the court issuing the garnishment, and the amount claimed due. *Id.*, Ex. G. It made no mention of exemptions. The fact that, in this case, Chase voluntarily sent plaintiff a letter that mentioned possible exemptions does not satisfy the State's duty to require that adequate notice of exemptions be sent to all judgment debtors.[6]

Finally, defendant and the State point out that the Georgia Supreme Court and the Georgia Court of Appeals have repeatedly upheld the constitutionality of the current form of Georgia's post-judgment garnishment statute. Br. in Support of Def.'s Mot. for Summ. J. [Doc. 90-1] at 16 (citing *Antico v. Antico*, 241 Ga. 294 (1978); *Easterwood v. LeBlanc*, 240 Ga. 61 (1977); *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699 (1977); *Morgan v. Morgan*, 156 Ga. App. 726 (1980)); State's Br. [Doc. 98] at

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[6] In addition, Chase's letter itself was constitutionally deficient because it merely advised Mr. Strickland to contact Discover's attorney if he believed his funds were exempt and did not inform him that there was a procedure to claim an exemption. *See* discussion in Section III *infra*.

8 (citing *Antico*, *Easterwood*, and *Black v. Black*, 245 Ga. 281 (1980)). None of these cases, however, raised the issues of notice and timeliness regarding exemptions and claim procedures that are presented in this case. Therefore, they offer no support for the constitutionality of these aspects of the statute.

III. Notice of Procedure to Claim Exemption

"Notice . . . does not comport with constitutional requirements when it does not advise the [debtor] of the availability of a procedure for protesting a [property deprivation]." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1978). Plaintiff contends that the post-judgment garnishment statute fails to satisfy this requirement because it does not inform the debtor of a procedure to claim an exemption. Plaintiff again relies on *Finberg* and its progeny, which uniformly hold that due process requires such notice. *See Aacen*, 944 F.2d at 699 ("Due process also requires some indication that a procedure exists to protect one's exempt property and how, in general, to trigger the process or to gain information regarding the process."); *Reigh*, 784 F.2d at 1196 (debtor is entitled to notice "that there is available a prompt procedure for challenging the attachment"); *McCahey*, 774 F.2d at 552 ("Notice that procedures exist to assert exemptions and a recommendation to seek legal counsel . . . meet the constitutional standards for post-judgment

remedies."); *Dionne*, 757 F.2d at 1352 ("[T]he debtor must receive and be notified of a timely opportunity to challenge any sequestration of his property which the law makes unattachable."); *Finberg*, 634 F.2d at 62 (failure to provide debtor with notice of the procedure for claiming exemptions was a violation of due process).

Defendant and the State again rely on *Endicott-Johnson* for the proposition that no notice to the debtor is required beyond the underlying judgment. In addition, defendant argues that a judgment debtor is put on notice of the procedure for claiming an exemption in the underlying proceedings in which the judgment was obtained. Defendant also again argues that plaintiff received notice of the existence of exemptions in the affidavit of garnishment and Chase's letter, and "that he ought to make some effort to ascertain how to claim them." Def.'s Resp. in Opp'n to Pl.'s Mot. for Summ. J. [Doc. 95] at 5. Apart from *Endicott-Johnson*, the State argues that Georgia's post-judgment garnishment statute itself provides ample notice of the procedures and remedies available to a judgment debtor, so that no further notice is required.

The Court finds defendant's and the State's arguments without merit and concludes that the unbroken line of cases from *Finberg* on establishes

that, in addition to notice of the existence of exemptions, due process requires that judgment debtors in garnishment actions be informed of the procedures for claiming an exemption. Because the Georgia statute requires no such notice, it is constitutionally deficient.

First, as discussed in the preceding section, the Supreme Court's decision in *Mathews v. Eldridge*, rather than *Endicott-Johnson*, provides the appropriate analytical framework for deciding what process is due in post-judgment garnishment proceedings. Using the *Mathews* balancing analysis, *Finberg* and every subsequent case to address the issue have concluded that due process requires that judgment debtors receive notice of the procedures available to claim an exemption from garnishment.

Second, defendant offers no support for his contention that the proceedings leading to the underlying judgment provide debtors with the requisite notice of procedures for claiming exemptions. The Court is aware of no authority, and defendant cites none, requiring that defendants in actions seeking to recover a debt be informed of procedures for claiming exemptions if the plaintiff creditor should subsequently seek to collect a judgment by garnishing bank accounts or other property of the debtor.

Third, defendant's argument that debtors ought to be able to find out for themselves how to claim exemptions ignores the fact that the law does not require debtors to be notified that there even *are* exemptions. Debtors cannot be expected to find out how to claim what they do not even know exists. Even where, as here, the garnishee voluntarily informs the debtor of the possible availability of exemptions, it is not reasonable to expect an untutored layperson to be able to discover the procedures for making an exemption claim. As discussed below, even if the debtor were to examine the garnishment statute, he or she would find little, if any, guidance regarding how to assert such an exemption.

Finally, the State's argument that the garnishment statute itself provides all the notice necessary of the procedures for claiming an exemption is not supported by either the facts or the law. The words "exempt," "exemption," or "exempted" appear only six times in the Georgia statute: (1) in a section referring to the exemption of a portion of a debtor's wages, O.C.G.A. § 18-4-20(f); (2) in a section providing for the exemption of pension and retirement benefits, O.C.G.A. § 18-4-22; (3) in the form summons of garnishment and summons of continuing garnishment, which direct the garnishee to hold all property "except what is exempt," O.C.G.A. §§ 18-4-66(2)

& 18-4-118(2); (4) in a section explaining how a garnishee can have a default judgment modified to exclude, in the case of garnishment of wages, "any exemption allowed the defendant by law," O.C.G.A. § 18-4-91; (5) in a section absolving the garnishee of liability for failing to deliver to the court property that is "exempted from garnishment." O.C.G.A. § 18-4-92.1(c)(2)(B); and (6) in a section providing that exemptions "required or allowed by law" are applicable to continuing garnishments, O.C.G.A. § 18-4-111(c). None of these provisions, however, says anything about how a debtor can assert a claim that seized property is exempt from garnishment.

The State argues that the Georgia post-judgment garnishment statute "clearly provides" procedures to claim an exemption in O.C.G.A. §§ 18-4-65(a) and 18-4-95. State's Br. [Doc. 98] at 12. Section 18-4-65(a) authorizes the debtor to challenge the existence or amount of the underlying judgment or "plead any other matter in bar of the judgment" by filing a traverse of the creditor's affidavit. O.C.G.A. § 18-4-65(a). Section 18-4-95 authorizes any person to file a claim asserting that "he has a superior claim to that of the plaintiff [creditor] to the money or other property in the hands of the garnishee." O.C.G.A. § 18-4-95. Neither section, however, either mentions "exemptions" or otherwise explains that it provides a procedure by which a

debtor may claim an exemption. In fact, contrary to the State's argument, Code Section 18-4-65(a) clearly does not provide a procedure for claiming an exemption because such a claim does not challenge either the existence or the amount of the underlying judgment, nor is it a plea in bar of the judgment, which remains in effect and collectible even if an exemption claim is upheld; it simply cannot be collected against the exempt property.[7]

As for Code Section 18-4-95, in *Terrell v. Fuller*, 160 Ga. App. 56 (1981), the Georgia Court of Appeals explained the complicated procedure a debtor must follow to assert an exemption under this provision. First, the debtor must become a "claimant" by filing a claim under Section 18-4-95 (former Ga. Code § 46-404) asserting that he has a claim to the garnished funds superior to that of the creditor. *Id.* at 58. Then, the debtor must file a traverse of the garnishee's answer under Section 18-4-86 (former Ga. Code § 46-505) asserting that the answer is untrue or legally insufficient. *Id.* Both the claim and the traverse must be filed within 15 days after the garnishee's answer is filed or the funds delivered to the court by the garnishee will be paid to the

[7] Even if a traverse of the creditor's affidavit provided a means to claim an exemption, the debtor would find it difficult to take advantage of the procedure because the Georgia statute does not require that debtor to be served with the affidavit.

creditor and the garnishee will be "automatically discharged from further liability." O.C.G.A. §§ 18-4-85 & 18-4-89. Failure to strictly comply with this convoluted, two-step process, which is nowhere explained in the statute, will result in the debtor's exemption claim being forever barred by *res judicata*. *Terrell*, 160 Ga. App. at 58. The Court concludes that neither O.C.G.A. § 18-4-65(a) nor O.C.G.A. § 18-4-95 is reasonably calculated to provide effective notice to judgment debtors about how to assert their exemption rights.

The State's reliance on the Supreme Court's decision in *City of West Covina v. Perkins*, 525 U.S. 234 (1999), is misplaced. In that case, the Court held that due process did not require law enforcement officers who seized property pursuant to a search warrant to give the property owners "individualized notice of state-law remedies" for return of the seized property because such remedies were "established by published, generally available state statutes and case law." 525 U.S. at 241. *West Covina*, however, "does not stand for the . . . proposition that statutory notice is always sufficient to satisfy due process." *Grayden v. Rhodes*, 345 F.3d 1225, 1244 (11th Cir. 2003). "The Court's opinion acknowledges a practical concern about the public's ability to learn of its rights," *id.*, and recognizes that, under its earlier decision in *Memphis Light*, "notice of the procedures for protecting one's

property interests may be required when those procedures are arcane and are not set forth in documents accessible to the public." *West Covina*, 525 U.S. at 242.

This case is analogous to *Memphis Light.* In that case, the Court held that a utility was required to provide individualized notice to customers threatened with termination of their service where "no description of a dispute resolution process was ever distributed to the utility's customers" and no "written account of such a procedure was accessible to customers who had complaints about their bills." *Memphis Light*, 436 U.S. at 14 n.14. Similarly, in this case, the procedures for claiming an exemption from garnishment are not clearly set forth anywhere in Georgia's post-judgment garnishment statute. Nowhere does the statute even mention "exemptions" in connection with any procedure that is available to judgment debtors. Nor does the State cite any other publicly available document where this information may be found. Instead, as discussed above, the State relies on two statutory provisions as providing the requisite notice, one of which, by its terms, does not apply to exemption claims, and another that provides for the assertion of a "superior claim" to garnished property but does not expressly refer to exemptions and does not explain that the debtor must also traverse the

garnishee's answer to avoid having his claim barred. *See* O.C.G.A. §§ 18-4-65(a) & 18-4-95; *Terrell*, 160 Ga. App. at 58. For all practical purposes, therefore, the procedures for claiming an exemption from garnishment in Georgia "are arcane and are not set forth in documents that are accessible to the public." *West Covina*, 525 U.S. at 242. Under these circumstances, a judgment debtor who is informed that a garnishment action has been filed against his property, like the utility customer in *Memphis Light* who was informed that the utility planned to terminate his service, "could not reasonably be expected to educate himself about the procedures available to protect his interests." *Id.* Therefore, individualized notice of these procedures is constitutionally required.

The State also cites the Eleventh Circuit's decision in *Arrington v. Helms*, 438 F.3d 1336 (11th Cir. 2006), but that case is distinguishable as well. In *Arrington*, the court held that a state agency administering child support payments to custodial parents was not required to provide the parents with individualized notice of their right to, and procedures for obtaining, a hearing because publicly available statutes, administrative rules, and agency policy manuals provided adequate notice. 438 F.3d at 1351-53. In reaching this conclusion, the court relied on a variety of

circumstances. First, the court noted that three publicly available documents – a state statute, the state agency's administrative code, and the agency's policies and procedures manual – combined to notify parents of their right to a hearing and the procedures for obtaining one. *Id.* at 1352-53. In addition, the court pointed out that when the agency opened a child support case, it sent the parents a document alerting them to their right to a hearing, and that the parents could contact the agency's customer support unit and obtain a written statement explaining the right to appeal and how to exercise that right "without having to research [the state's] statutes, regulations, and agency policy manuals independently." *Id.* at 1353. Finally, the court noted that parents had 30 days after learning of an erroneous deprivation of child support payments to ascertain their rights and submit a request for a hearing. *Id.*

No comparable circumstances are present in this case. As discussed above, when a judgment debtor learns that his property has been seized in a garnishment action, he is confronted with nothing more than an arcane statute that nowhere explains how to go about asserting a claim of exemption. There is no publicly available administrative code and no policies and procedures manual that spells out his rights and how to enforce them.

Nor is the debtor told whom he may contact to obtain this information. Instead, he is notified only that a creditor has filed or is about to file a garnishment action against his property, together with the identity of the garnishee, the amount claimed due, and the court issuing the garnishment. *See* O.C.G.A. § 18-4-64(c); Stipulation [Doc. 88-1], Ex. G. Meanwhile, funds that may be needed to pay daily living expenses, including for food, shelter, and medical care, are frozen and subject to being forfeited just fifteen days after the garnishee files its answer if the debtor does not somehow ascertain his rights and how to enforce them. Under these very different circumstances from those present in *Arrington*, individualized notice of the procedures available for claiming an exemption from garnishment is constitutionally required.

IV. Timeliness of Procedure to Claim Exemption

"A fundamental requirement of due process is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotation marks and citation omitted). Applying this requirement in the context of post-judgment garnishment proceedings, some courts have held that a judgment debtor must be afforded a hearing on an exemption claim within a mandated time period

of limited duration. *See Finberg*, 634 F.2d at 59 ("fifteen days is too long to deprive a person of money needed for food, shelter, health care, and other basic needs"); *Harris*, 574 F. Supp. at 971 (due process requires a prompt post-seizure hearing "within a mandated period of time"). Others have required a "prompt" or "expeditious" hearing on such claims without stating a specific time limit. *See Reigh*, 784 F.2d at 1199; *McCahey*, 774 F.2d at 553.

Plaintiff contends that Georgia's post-judgment garnishment statute not only fails to afford debtors a sufficiently prompt mechanism to resolve exemption claims, but that by relegating debtors to the generic claims procedure set out in O.C.G.A. § 18-4-95, the law guarantees that such claims will not be heard for an unconstitutionally long period of time. Under that procedure, plaintiff argues, a debtor cannot file a claim for exemption until the garnishee has answered and deposited the garnished property into court, which the garnishee is not permitted to do until at least 30 days after being served with the summons of garnishment. *See* O.C.G.A. § 18-4-62(a). Thereafter, plaintiff points out, the statute provides no time frame within which a hearing must be held nor any requirement that garnished property be promptly returned if an exemption claim is upheld.

Defendant and the State do not dispute that due process requires a prompt procedural mechanism for resolving exemption claims. Instead, they argue that the Georgia statute provides such a mechanism by authorizing the judgment debtor to file a traverse of the creditor's affidavit of garnishment, whereupon the court is required to hold a hearing within 10 days. *See* O.C.G.A. §§ 18-4-65(a) & 18-4-93.

The Court concludes that the Georgia statute violates due process because it does not provide for a prompt and expeditious procedure to resolve a debtor's claim that seized property is exempt from garnishment. Contrary to defendant's and the State's argument, the procedure for traversing the creditor's affidavit does not provide for an expeditious hearing of exemption claims. As discussed above, the Georgia statute expressly limits the grounds on which a debtor may traverse the creditor's affidavit to the "the existence of the judgment or the amount claimed due thereon" or "any other matter in bar of the judgment." O.C.G.A. § 18-4-65(a). A claim of exemption does not challenge either the existence or the amount of the judgment. Nor does it seek to "bar" the judgment, which remains in effect and collectible even if the exemption claim is successful; it simply cannot be collected against the exempt property.

The State argues that the traverse procedure was available to Mr. Strickland because all of the funds in his Chase bank account were exempt and, as a result, the creditor's affidavit could be found to be "legally insufficient." State's Br. [Doc. 98] at 16 (quoting O.C.G.A. § 18-4-93). But, as the statute makes clear, the term "legally insufficient" does not include exemption-based challenges but is limited to the grounds set out in Code Section 18-4-65. *See* O.C.G.A. § 18-4-93 (providing that the debtor "may become a party to the garnishment *for the purposes set out in Code Section 18-4-65* by filing a traverse to the plaintiff's affidavit stating that the affidavit is untrue or legally insufficient") (emphasis added). The State relies on *Citizens Bank of Ashburn v. Shingler*, 173 Ga. App. 511 (1985), which upheld a trial court decision sustaining the debtor's traverse of the creditor's affidavit of garnishment on the basis that the individual retirement accounts in the garnishee's possession were exempt from garnishment. *Id.* at 512. In that case, however, no issue was raised regarding the appropriate procedure for asserting an exemption claim, and the court's one-page decision includes no discussion or analysis of Georgia's post-judgment garnishment statute. *Id.* Therefore, *Shingler* provides no authority for the State's interpretation of the statute, which is contrary to its plain terms.

Since the procedure for traversing the creditor's affidavit is not available, a debtor who contends that garnished property is exempt from garnishment must follow the generic claims procedure set out in Code Section 18-4-95. As discussed above, in accordance with the Georgia Court of Appeals' decision in *Terrell*, the debtor must first file a claim to the garnished funds and then file a traverse of the garnishee's answer under Code Section 18-4-86. *Terrell*, 160 Ga. App. at 58 ("[A] defendant . . . who has a claim superior to that of the plaintiff to money or property in the hands of the garnishee . . . must . . . assert such a claim and then traverse the answer of the garnishee."). Obviously, the debtor cannot traverse the garnishee's answer until the answer has been filed, which the garnishee must do not less than 30 days, or more than 45 days, after service of the summons of garnishment. O.C.G.A. § 18-4-62(a). Thus, the debtor must wait at least 30 days, and perhaps as long as 45 days, after his or her property has been seized before he or she can even assert an exemption claim.

Once the garnishee files its answer and deposits the garnished funds with the court, the debtor has 15 days to file a claim of exemption and a traverse or the funds will be paid to the creditor and the garnishee will be discharged from further liability. O.C.G.A. §§ 18-4-85 & 18-4-89. Despite

this limited time frame, there is no requirement in the statute that the debtor be served with the garnishee's answer. Even if the debtor learns that the garnishee has filed its answer and manages to file a timely traverse and claim of exemption, there is no statutory requirement that the court conduct an expedited hearing. And even if the court ultimately upholds the debtor's exemption claim after a hearing, there is no requirement that the garnished property or funds be promptly returned to the debtor. *See* O.C.G.A. § 18-4-94. Whatever the outer constitutional time limit may be to resolve exemption claims, the delay inherent in this procedure far exceeds it.

This unconstitutional delay is well-illustrated by the facts of this case. Chase was served with the summons of garnishment on July 11, 2012, and immediately froze Mr. Strickland's bank account, which contained exempt workers' compensation benefits. In accordance with the Georgia statute, Chase filed its answer and paid the garnished funds into court on August 20, 2012, 40 days after being served with the summons. After unsuccessfully attempting to resolve the matter informally with Discover, Mr. Strickland, through counsel, filed a Claim for Funds on September 4, 2012.[8] However,

[8] There is no indication in the record that Mr. Strickland's counsel also filed a traverse of Chase's answer, and Discover initially asserted that this failure barred (continued...)

the court did not schedule a hearing on the claim until October 24, 2012, more than seven weeks later. The day before the scheduled hearing, Discover dismissed the garnishment action. The following day, the court entered an order releasing the deposited funds to Mr. Strickland. But the court did not issue a check to Mr. Strickland until October 29, 2012, and Mr. Strickland's attorney did not receive the check until November 2, 2012. All together, therefore, Mr. Strickland was deprived of his exempt funds – money that he desperately needed to pay for everyday living expenses as well as urgent medical care – for a total of 115 days, or nearly four months. By any standard, this type of delay does not satisfy the Constitution's demand that debtors be afforded a prompt and expeditious procedure to correct potentially erroneous post-judgment deprivations of their property.

V. Conclusion

The Court concludes that plaintiff is entitled to summary judgment on his claims that Georgia's post-judgment garnishment statute violates due

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[8](...continued)
Mr. Strickland's exemption claim. Stipulation [Doc. 88-1], Ex. O. Under the holding in *Terrell*, 160 Ga. App. at 58, this defense might very well have succeeded if Discover had chosen to pursue it. If so, Mr. Strickland would have lost all of his exempt funds despite the legitimacy of his claim. Such a procedural trap for the unwary illustrates the risks that even debtors represented by counsel run in navigating the murky waters of Georgia's post-judgment garnishment statute.

process by failing to require that debtors be notified of the existence of exemptions which they may be entitled to claim with respect to the garnished property and of the procedure to claim such an exemption, and by failing to provide a timely procedure for adjudicating exemption claims. Accordingly, plaintiff is entitled to entry of final judgment in his favor declaring that the statute is unconstitutional in these respects and enjoining defendant Alexander from issuing any summons of garnishment pursuant to the existing forms and procedures insofar as they are inconsistent with this decision. *See Dionne*, 757 F.2d at 1354 (affirming, as modified, injunction prohibiting state court clerk from issuing writs of attachment under constitutionally deficient procedures).

Summary

For the foregoing reasons, the Court DENIES defendant's motion for summary judgment [Doc. 90] and GRANTS plaintiff's motion for summary judgment [Doc. 93]. The Court DECLARES that Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60 *et seq.*, is unconstitutional insofar as it (1) fails to require that judgment debtors be notified that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the garnished property; (2) fails to require

that judgment debtors be notified of the procedure to claim an exemption; and (3) fails to provide a timely procedure for adjudicating exemption claims. The Court ENJOINS defendant Alexander from issuing any summons of garnishment pursuant to the existing forms and procedures insofar as they are inconsistent with this decision. The Clerk is DIRECTED to enter final judgment accordingly.

IT IS SO ORDERED, this 8th day of September, 2015.

Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TONY W. STRICKLAND,

Plaintiff,

vs.

RICHARD T. ALEXANDER,
Clerk of Court of the State Court
of Gwinnett County, Georgia,

Defendant.

CIVIL ACTION FILE

NO. 1:12-cv-02735-MHS

JUDGMENT

This action having come before the court, Honorable Marvin H. Shoob, Senior United States District Judge, for consideration of the parties' cross-motions for summary judgment, and the court having denied defendant's motion for summary judgment and granted plaintiff's motion for summary judgment, it is

Ordered and Adjudged that judgment be entered in favor of Plaintiff and against Defendant Richard T. Alexander, Clerk of Court of the State Court of Gwinnett County, Georgia. The Court DECLARES that Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60 et seq., is unconstitutional. The Court ENJOINS defendant Alexander from issuing any summons of garnishment pursuant to the existing forms and procedures insofar as they are inconsistent with this decision, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 8th day of September, 2015.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Traci Clements-Campbell
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 8, 2015
James N. Hatten
Clerk of Court

By: s/ Traci Clements-Campbell
Deputy Clerk

Strickland v. Alexander

United States District Court for the Northern District of Georgia, Atlanta Division

October 5, 2015, Decided; October 5, 2015, Filed

CIVIL ACTION ON. 1:12-CV-02735-MHS

Reporter
2015 U.S. Dist. LEXIS 140576

TONY W. STRICKLAND, Plaintiff, v. RICHARD T. ALEXANDER, Clerk of Court of the State Court of Gwinnett County, Georgia, Defendant.

Prior History: Strickland v. Alexander, 2015 U.S. Dist. LEXIS 121958 (N.D. Ga., Sept. 8, 2015)

Counsel: [*1] For Tony W. Strickland, Plaintiff: David A. Webster, LEAD ATTORNEY, David A. Webster, Attorney at Law, Atlanta, GA; Donald Maurice Coleman, LEAD ATTORNEY, Atlanta Legal Aid Society, Inc. -Atl, Atlanta, GA; Jon Erik Heath, LEAD ATTORNEY, Atlanta Legal Aid Society, Inc., Atlanta, GA.

For Greene & Cooper, LLP, Defendant: Christopher R. Yarbrough, Frederick J. Hanna & Associates, P.C., Marietta, GA; Kyle A. Cooper, Greene & Cooper, LLP, Roswell, GA.

For State of Georgia, Intervenor: Daniel John Strowe, LEAD ATTORNEY, State of Georgia Law Department, Atlanta, GA; William Wright Banks, Jr., LEAD ATTORNEY, Office of State Attorney General, Atlanta, GA; Brittany H. Bolton, Georgia Department of Law, Office of the Attorney General, Atlanta, GA.

Judges: Marvin H. Shoob, Senior United States District Judge.

Opinion by: Marvin H. Shoob

Opinion

ORDER

Before the Court is defendant's motion to alter or amend judgment. For the following reasons, the Court grants the motion.

Background

After obtaining a default judgment against plaintiff Tony W. Strickland on a credit card debt, Discover Bank ("Discover") filed a garnishment action in the State Court of Gwinnett County against JP Morgan Chase Bank ("Chase"), where plaintiff held an account [*2] containing only worker's compensation benefits. Although such benefits are exempt from garnishment under Georgia law, Chase froze plaintiffs bank account and subsequently paid the funds into court.

While the garnishment action was still pending, plaintiff filed this action against Richard T. Alexander, Clerk of the State Court of Gwinnett County, alleging that Georgia's post-judgment garnishment statute was unconstitutional and seeking appropriate declaratory and injunctive relief. Specifically, plaintiff claimed that the statute violated due process requirements because it (1) failed to notify judgment debtors of available exemptions, (2) failed to notify debtors of the procedure for claiming an exemption, and (3) failed to provide a timely procedure for adjudicating exemption claims.

After plaintiff filed this action, Discover dismissed the garnishment action, and plaintiff's funds were returned to him. The Court then dismissed plaintiffs claims against Mr. Alexander for lack of standing. That ruling, however, was reversed on appeal, and the court of appeals remanded the case to this Court to address the constitutional issues. Strickland v. Alexander, 772 F.3d 876, 890 (11th Cir. 2014). The parties filed cross-motions for summary judgment, [*3] and the State of Georgia intervened through its Attorney General to support the constitutionality of the statute.

On September 8, 2015, the Court issued an Order granting plaintiff's motion for summary judgment and denying defendant's motion. The Court declared Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60 *et seq.*, unconstitutional "insofar as it (1) fails to require that judgment debtors be notified that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the garnished property; (2) fails to require that judgment debtors be notified of the procedure to claim an exemption; and (3) fails to provide a timely procedure for adjudicating exemption claims." Order of Sept. 8, 2015 [Doc. 105] at 47 48. The Court enjoined defendant Alexander from "issuing

any summons of garnishment pursuant to the existing forms and procedures insofar as they are inconsistent with this decision." *Id.* at 48. The Clerk entered final Judgment [Doc. 106] in accordance with the Court's Order.

On September 23, 2015, defendant Alexander filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). Defendant asks the Court to alter or amend its Order and Judgment of September [*4] 8, 2015, to limit their scope and application to garnishment actions filed against financial institutions holding a judgment debtor's property under a deposit agreement or account, and to specifically exempt from their scope and coverage continuing wage garnishment actions filed against a judgment debtor's employer pursuant to O.C.G.A. § 18-4-110 *et seq.*, as well as such actions filed against a debtor's employer to collect a judgment for periodic support of a family member pursuant to O.C.G.A. § 18-4-130 *et seq.* (collectively, "continuing wage garnishments").

Discussion

Defendant contends that the Court should alter or amend its Order and Judgment for two reasons. First, defendant argues that plaintiff lacks standing to challenge the constitutionality of the continuing wage garnishment procedures set out in O.C.G.A. §§ 18-4-110 *et seq.* and 18-4-130 *et seq.* because he does not allege that a continuing wage garnishment was filed against his employer. Second, defendant argues that the Court should limit the scope of its ruling to garnishments of financial institutions because the parties did not address, and the Court did not consider, the type of exemptions and the notice and hearing procedures that apply to continuing wage garnishments.

In response, plaintiff [*5] argues that no alteration or amendment is necessary or appropriate because continuing wage garnishments rely on the same notice and exemption claim procedures applicable to garnishments of financial institutions, which this Court has held to be unconstitutional. There is no reason, plaintiff contends, to afford wage exemptions any less protection under the due process standards established in *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980), than exemptions applicable to a debtor's property held in a financial institution. As for standing, plaintiff argues that he has standing to challenge procedures that are common to all post-judgment garnishment proceedings, whether continuing or not. Finally, plaintiff argues that there is no other compelling reason to except even continuing wage garnishments for family support from the injunction because such garnishments are only rarely invoked, and there is an alternative statutory procedure for an income deduction order under O.C.G.A. § 19-6-32, which serves the same purpose and does not raise the same due process concerns.

The Court concludes that its Order and Judgment of September 8, 2015, do not apply to continuing wage garnishments. Plaintiff lacked standing to challenge post-judgment garnishment procedures [*6] as those procedures apply to continuing wage garnishments. The court of appeals found that plaintiff satisfied the injury-in-fact requirement for standing because "it is substantially likely that it is simply a matter of time before another judgment creditor seeks to garnish the monies that the Stricklands have in at least one of their bank accounts." *Strickland*, 772 F.3d at 885. Plaintiff, however, did not allege, and there was no evidence to suggest, that there was any likelihood that a judgment creditor would file a continuing wage garnishment against plaintiff's employer. In fact, the complaint alleged that plaintiff was permanently disabled, and that his only source of income was Social Security disability benefits. Compl. [Doc. 4] ¶¶ 12, 28. Because plaintiff therefore faced no likelihood of future injury arising from a continuing wage garnishment, he lacked standing to challenge the constitutionality of the procedures governing such garnishments.

Plaintiff points out that continuing wage garnishments use the same notice, claim, and traverse procedures as garnishments of financial institutions. However, as applied to continuing wage garnishments, those procedures raise different constitutional issues. Continuing [*7] wage garnishments are subject to only limited exemptions, which are set out in the garnishment statute,[1] whereas garnishments of an individual's funds held in a bank account are subject to a broad range of federal and state statutory exemptions that are nowhere identified in the garnishment statute. Therefore, the issue of whether the garnishment statute itself provides adequate notice of exemptions is different in the context of continuing wage garnishments as compared to garnishments of financial institutions. This issue, however, was neither raised by the parties nor addressed by the Court in this case, nor could it have been since plaintiffs claims related solely to the garnishment of a bank account.

In addition, because the garnishment statute expressly exempts a portion of a debtor's wages from garnishment,

[1] *See* O.C.G.A. §§ 18-4-20(d) & (); 18-4-21; 18-4-22. The exemptions set out in O.C.G.A. § 18-4-20(d) & (f) mirror the federal exemptions set out in 15 U.S.C. § 1673(a) & (b).

the risk that an employer will erroneously withhold exempt wages is not the same as the risk that a financial institution, which may not know the source of funds in an individual's bank account, will erroneously freeze a debtor's exempt funds. The risk of such an erroneous [*8] deprivation is one factor the Court must consider in determining the requirements of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Again, however, the risk of an erroneous deprivation in a continuing wage garnishment was neither raised by the parties nor addressed by the Court in this case because plaintiff was not threatened with such a garnishment.

Plaintiff cites other cases that have found the same constitutional defects in wage garnishment statutes that this Court found in Georgia's post-judgment garnishment statute. The difference, however, is that those cases all involved plaintiffs who had standing to challenge wage garnishments, and the court addressed the due process issues in the context of such garnishments. *See Neeley v. Century Fin. Co. of Ariz.*, 606 F. Supp. 1453, 1468-69 (D. Ariz. 1985); *Kirby v. Sprouls*, 722 F. Supp. 516, 521-23 (C.D. Ill. 1989); *Follette v. Vitanza*, 658 F. Supp. 492, 511-14 (N.D. N.Y. 1987); *Davis v. Paschall*, 640 F. Supp. 198, 199-200 (E.D. Ark. 1986); *Cristiano v. Courts of the Justices of the Peace*, 669 F. Supp. 662, 666-72 (D. Del. 1987).[2]

Plaintiff also cites the district court's decision in *Hutchinson v. Cox*, 784 F. Supp. 1339 (S.D. Ohio 1992), in support of his argument that past cases have broadly enjoined the use of unconstitutional procedures in post-judgment garnishment actions. *Hutchinson*, however, actually supports defendant's argument. In that case, which involved a challenge to Ohio's post-judgment statutory procedure for execution on personal [*9] property, the court expressly stated that its grant of declaratory relief "implies no opinion with respect to Ohio's statutory provisions for post-judgment garnishment of wages or execution against land and tenements, which are not before it." 784 F. Supp. at 1344 n.4. In both of the other cases cited by plaintiff in support of this argument, no issue was raised regarding the proper scope of the relief granted. *See Dionne v. Bouley*, 757 F.2d 1344, 1357 (1st Cir. 1985) (clerk expressed willingness to follow the court's injunction); *Davis*, 640 F. Supp. at 200 (same).

To be clear, the Court is not holding that Georgia's notice and hearing procedures as applied to continuing wage garnishments are constitutional. Instead, the Court is holding that the issue of the constitutionality of such procedures in the context of continuing wage garnishments was not raised, and could not have been raised, in this case. Therefore, the Court's ruling did not address that issue, and the Court expresses no opinion on it.

Summary

For the foregoing reasons, the Court GRANTS defendant's motion to alter or amend judgment [Doc. 108]. The Order and Judgment of September 8, 2015 [Docs. 105 & 106] are hereby AMENDED by adding the following underlined language: The Court DECLARES that Georgia's post-judgment garnishment [*10] statute, O.C.G.A. § 18-4-60 *et seq.*, as applied to garnishment actions filed against a financial institution holding a judgment debtor's property under a deposit agreement or account, is unconstitutional insofar as it (1) fails to require that judgment debtors be notified that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the garnished property; (2) fails to require that judgment debtors be notified of the procedure to claim an exemption; and (3) fails to provide a timely procedure for adjudicating exemption claims. The Court ENJOINS defendant Alexander from issuing any summons of garnishment in garnishment actions filed against a financial institution holding a judgment debtor's property under deposit agreement or account pursuant to the existing forms and procedures ins. far as they are inconsistent with this decision. This declaratory judgment and injunction do not apply to continuing wage garnishments filed against a judgment debtor's employer pursuant to O.C.G.A §§ 18-4-110 *et seq.* and 18-4-130 *et seq.*

IT IS SO ORDERED, this 5 day of October, 2015.

/s/ Marvin H. Shoob

Marvin H. Shoob, Senior Judge

United States District Court

Northern District [*11] of Georgia

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[2] *Cristiano* is also distinguishable because it involved pre-judgment, rather than post-judgment, garnishment of wages.

Tex. Fin. Code § 59.008

This document is current through the 2015 regular session, 84th Legislature, Chapters: 3-11, 13-20, 22-41, 43-96, 98-105, 107-130, 132-134, 136-161, 163-172, 174, 176, 178-207, 209-234, 236-242, 244-268, 270-287, 289-295, 297-300, 302-311, 313-314, 316-322, 324-328, 330-363, 365-381, 383-393, 395-400, 402-428, 430-436, 439-447, 449-464, 466-469, 472-504, 506-514, 516-553, 555-560, 563-576, 578-596, 598, 600-601, 603, 605-614, 616-622, 624-683, 685-702, 704-707, 709-715, 717-720, 722-733, 735-751, 753-769, 771-835, 839-854, 856-859, 861-871, 874-876, 878-895, 897-907, 909-914, 916-923, 925-928, 930-933, 936-943, 945, 947, 951-961, 963-983, 986-1053, 1056-1066, 1068-1072, 1074-1088, 1090-1103, 1105-1108, 1110-1116, 1118-1137, 1139-1140, 1142-1157, 1159-1160, 1162-1169, 1171-1172, 1174-1181, 1183-1202, 1204-1214, 1216, 1218-1235, 1237-1241, 1244-1250, 1252-1254, 1256, 1258-1260, 1263-1271, 1273-1275, 1277, 1280-1282

Sec. 59.008. Claims Against Customers of Financial Institutions.

(a) A claim against a customer of a financial institution shall be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution.

(b) If a financial institution files a registration statement with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, a claim against a customer of the financial institution is not effective as to the financial institution if the claim is served or delivered to an address other than that designated by the financial institution in the registration as the address of the financial institution's registered agent.

(c) The customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to this section by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other remedy, to prevent or suspend the financial institution's response to a claim against the customer.

(d) A financial institution that does not file a registration with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law.

History

Enacted by Acts 1999, 76th Leg., ch. 344 (H.B. 2066), § 2.016, effective September 1, 1999.

Annotations

Case Notes

Banking Law: Depository Institutions: Customer-Bank Relations: General Overview

Civil Procedure: Judgments: Entry of Judgments: Enforcement & Execution: General Overview

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Banking Law: Depository Institutions: Customer-Bank Relations: General Overview

1. Absent evidence of causation, a bank's failure to obtain a certified copy of a turnover order before releasing funds to a receiver did not defeat its reliance on the statutory protections from liability under Tex. Civ. Prac. & Rem. Code Ann. § 31.010 and Tex. Fin. Code Ann. § 59.008(c). Davis v. West, 317 S.W.3d 301, 2009 Tex. App. LEXIS 9921 (Tex. App. Houston 1st Dist. 2009, no pet.)

2. Trial court properly granted a financial institution summary judgment in connection with account holders' breach of contract action; the institution, pursuant to a turnover order, gave the holders' money to a receiver in connection with an action involving the holders' brother, and for purposes of Tex. Fin. Code Ann. § 59.008(c), the burden was on the holders to prevent the institution from complying with the order; the turnover order instructed the institution to turn over all monies held by the brother under his own name or under his aliases, which included the names of the holders, and the holders did not contend that the institution took any action not specified in the order and the holders provided no authority that the institution could have been liable for complying with the order even if it was erroneous or void. Yazdchi v. Tradestar Invs., Inc., 217 S.W.3d 517, 2006 Tex. App. LEXIS 8372 (Tex. App. Houston 14th Dist. 2006, no pet.).

3. Banks, as a matter of law, were not liable for funds transferred from their customers' accounts to a court-appointed receiver under Tex. Civ. Prac. & Rem. Code Ann. §§ 31.002(b), 64.031. Pursuant to unambiguous orders that froze assets belonging to their relative that were entered in an action brought by the State against the relative because although the orders did not adjudicate the customers' ownership rights to the funds transferred by the banks to the receiver, the banks, under Tex. Civ. Prac. & Rem. Code Ann. § 31.010, Tex. Fin. Code Ann. § 59.008, and common law, were protected from liability to the customers for compliance with the orders. The banks were not required to disprove the customers' allegations of ownership in order to be entitled to summary judgment on the customers' breach of contract claims against them. Yazdchi v. Bank One, Texas, N.A., 177 S.W.3d 399, 2005 Tex. App. LEXIS 3025 (Tex. App. Houston 1st Dist. 2005), pet. denied No. 05-0658, 2005 Tex. LEXIS 906 (Tex. Dec. 2, 2005), cert. denied, 549 U.S. 895, 127 S. Ct. 206, 166 L. Ed. 2d 166, 2006 U.S. LEXIS 5485 (U.S. 2006).

Civil Procedure: Judgments: Entry of Judgments: Enforcement & Execution: General Overview

4. Absent evidence of causation, a bank's failure to obtain a certified copy of a turnover order before releasing funds to a receiver did not defeat its reliance on the statutory protections from liability under Tex. Civ. Prac. & Rem. Code Ann. § 31.010 and Tex. Fin. Code Ann. § 59.008(c). Davis v. West, 317 S.W.3d 301, 2009 Tex. App. LEXIS 9921 (Tex. App. Houston 1st Dist. 2009, no pet.)

Civil Procedure: Remedies: Provisional Remedies: General Overview

5. Banks, as a matter of law, were not liable for funds transferred from their customers' accounts to a court-appointed receiver under Tex. Civ. Prac. & Rem. Code Ann. §§ 31.002(b), 64.031. Pursuant to unambiguous orders that froze assets belonging to their relative that were entered in an action brought by the State against the relative because although the orders did not adjudicate the customers' ownership rights to the funds transferred by the banks to the receiver, the banks, under Tex. Civ. Prac. & Rem. Code Ann. § 31.010, Tex. Fin. Code Ann. § 59.008, and common law, were protected from liability to the customers for compliance with the orders. The banks were not required to disprove the customers' allegations of ownership in order to be entitled to summary judgment on the customers' breach of contract claims against them. Yazdchi v. Bank One, Texas, N.A., 177 S.W.3d 399, 2005 Tex. App. LEXIS 3025 (Tex. App. Houston 1st Dist. 2005), pet. denied No.

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Civil Procedure: Remedies: Receiverships: General Overview

6. Banks, as a matter of law, were not liable for funds transferred from their customers' accounts to a court-appointed receiver under Tex. Civ. Prac. & Rem. Code Ann. §§ 31.002(b), 64.031. Pursuant to unambiguous orders that froze assets belonging to their relative that were entered in an action brought by the State against the relative because although the orders did not adjudicate the customers' ownership rights to the funds transferred by the banks to the receiver, the banks, under Tex. Civ. Prac. & Rem. Code Ann. § 31.010, Tex. Fin. Code Ann. § 59.008, and common law, were protected from liability to the customers for compliance with the orders. The banks were not required to disprove the customers' allegations of ownership in order to be entitled to summary judgment on the customers' breach of contract claims against them. Yazdchi v. Bank One, Texas, N.A., 177 S.W.3d 399, 2005 Tex. App. LEXIS 3025 (Tex. App. Houston 1st Dist. 2005), pet. denied No. 05-0658, 2005 Tex. LEXIS 906 (Tex. Dec. 2, 2005), cert. denied, 549 U.S. 895, 127 S. Ct. 206, 166 L. Ed. 2d 166, 2006 U.S. LEXIS 5485 (U.S. 2006).

Evidence: Procedural Considerations: Burdens of Proof: Allocation

7. Trial court properly granted a financial institution summary judgment in connection with account holders' breach of contract action; the institution, pursuant to a turnover order, gave the holders' money to a receiver in connection with an action involving the holders' brother, and for purposes of Tex. Fin. Code Ann. § 59.008(c), the burden was on the holders to prevent the institution from complying with the order; the turnover order instructed the institution to turn over all monies held by the brother under his own name or under his aliases, which included the names of the holders, and the holders did not contend that the institution took any action not specified in the order and the holders provided no authority that the institution could have been liable for complying with the order even if it was erroneous or void. Yazdchi v. Tradestar Invs., Inc., 217 S.W.3d 517, 2006 Tex. App. LEXIS 8372 (Tex. App. Houston 14th Dist. 2006, no pet.).

Research References & Practice Aids

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