Above the Law

How Texas prosecutors are placing their own judgment over that of the Legislature and the law of the land

By The American Civil Liberties Union of Texas
the Texas Criminal Justice Coalition, and
the Texas State Rifle Association

For More Information Contact:
Leah Pinney
512-441-8123 x102
ACLU of Texas
1210 Rosewood
Austin, Tx 78702

CREDITS

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The **TSRA Political Action Committee** is the political arm of the Texas State Rifle Association, a 501(c)(4) non-profit state affiliate of the National Rifle Association. The TSRA was founded in 1919 and has 34,000 Texas members. TSRA has a three-pronged mission. Mission I: To champion and support the rights of law-abiding Texans to own, enjoy, and use firearms as guaranteed by the Constitutions of the State of Texas and the United States of America. Mission II: To protect and defend inalienable rights of the individual Texan to acquire, possess, transport, carry, transfer ownership, and enjoy the right to lawful use of firearms for self-preservation, for the defense of family and property and for the common defense of the Republic and the individual liberties of the people. Mission III: To support junior education, competition and hunter's education programs; to declare a State Champion in the various competitions; to support Texas State Teams at the National Championships.

TEXAS STATE RIFLE ASSOCIATION

The Texas Criminal Justice Coalition is committed to identifying and working towards real solutions to the problems facing Texas' criminal justice system. We do this by identifying and educating supporters using cost-effective and innovative tools, partnering with organizations who share our core beliefs, and promoting evidence-based criminal justice solutions that embody the principles of effective management, accountability, public safety, and human and civil rights.

TEXAS CRIMINAL JUSTICE COALITION

Above the Law:

How Texas prosecutors are placing their own judgment over that of the Legislature and the law of the land

BY Scott Henson, Texas Criminal Justice Coalition
This report is a collaborative project between ACLU of Texas, the Texas State Rifle Association and the Texas Criminal Justice Coalition

Contact: Leah Pinney, 512-441-8123 x102, or Alice Tripp, 972-979-8616

Executive Summary

Some Texas prosecutors didn't like a new law — passed by the 79th Legislature and signed by the Governor — that clarified Texans' right to carry a legal handgun in a private vehicle. Some even directed local police to ignore the statute, according to statements from the Texas District and County Attorney Association (TDCAA) website and informaiton collected under a Public Information Act request.

For decades, Texans have been allowed to carry a gun while traveling, but the statute did not define "traveling" and courts came to differing conclusions about what kinds of activities constituted traveling. There was no bright line to tell law abiding Texans what they could and couldn't do. So the Legislature passed HB 823 to give police, prosecutors and gun owners clear terms for carrying a gun in the car.

TDCAA issued a post-session bill analysis suggesting that police officers could still arrest drivers for "unlawfully carrying a weapon," even if the driver met the requirements of the new law. In response to this rebellious interpretation, the ACLU of Texas and TSRA filed a Public Information Act request to district and county attorneys for any policy or interpretation of the statute they had given to local law enforcement.

Major Findings

- Most county and district attorneys have not issued written guidance documents to law enforcement.
- 13 county/district attorneys, including district attorneys for counties in large metropolitan areas like Houston and Fort Worth, have instructed police officers to interrogate Texans unnecessarily, arrest Texans, or take their guns even if they are legally carrying the gun in a car under HB 823 standards.
- TDCAA issued advice to its members that police officers are "acting within their discretion" if they arrest a person who appears to be legally carrying a gun in the car under this new law.
- TDCAA advised that police officers ask drivers a litany of intrusive questions that should no longer be relevant to the legality of carrying a gun in the car.
- One County Attorney advised police officers that it's simply too complicated to try and determine whether a Texan is legally carrying a stowed gun in the car, so officers should arrest for "unlawful carrying" as before and let the prosecutor's office "sort out the legal niceties."

Under Texas' tripartite form of government, neither courts nor prosecutors make the law, legislators do. And once they have made the law, prosecutors swear to uphold it. Clearly, in Texas some have forgotten that oath.

Legislative Proposals

The Texas Legislature should consider reigning in prosecutors' discretion and removing the profit motive for Texas prosecutors to abuse the gun forfeiture process. Currently, prosecutors benefit financially from the sale of siezed guns and officers have been given extraordinary discretion to go beyond the law. The Texas Legislature could:

(1) Change "presumption" a driver is traveling to a definition using the elements of the presumption as the definition;
(2) Require probable cause to believe a crime has been committed before a gun or other asset can be seized;
(3) Finally pass and the governor should sign legislation requiring officers to get written consent from drivers for police to search vehicles at traffic stop;
(4) Only allow asset forfeiture to become final if the underlying criminal case results in a conviction and take out the profit motive by redirecting money from the sale of siezed guns to the Texas Crime Victims' Compensation Fund.

Above the Law

How Texas prosecutors are placing their own judgment over that of the Legislature and the law of the land.

When the Texas Legislature passed HB 823 (Keel/Hinojosa) in 2005, lawmakers and Second Amendment proponents believed they'd finally resolved a longstanding dispute that for years turned thousands of legal gun owners into law enforcement targets. For decades, Texas law allowed people to carry a weapon in their car when "traveling," but the definition of traveling was left to the courts, which developed differing rules, and had never been legally settled. Violation of the law carries a penalty of up to one year of incarceration behind bars.

HB 823 settled the definition of "traveling" once and for all. The new law requires that judges and juries must presume that the driver is traveling unless prosecutors prove that one of five things is true:

(1) the gun is not in a personal vehicle,
(2) the person is engaged in criminal activity other than a Class C traffic violation,
(3) the person is a convicted felon or otherwise legally prohibited from possessing a firearm,
(4) the defendant is a member of a criminal street gang, or
(5) the weapon is in plain view.

The new law seemed straight forward when it was debated at the Legislature. If the gun is legal, you're not a crook, you're driving your own car, and the gun is stowed away, then you can carry a gun in your car when you're driving. Bill author and Chairman of the House Criminal Jurisprudence Committee Terry Keel intended for the legislation to protect honest gun owners from police harassment when driving. In a public statement on August 30, 2005 about the law he declared:

> In plain terms, a law-abiding person should not fear arrest if they are transporting a concealed pistol in a motor vehicle. There is no longer the need for a law enforcement officer to apply a subjective definition of what constitutes "traveling" where the citizen is cloaked with the presumption per the terms of the new statute. Under those circumstances the citizen should be allowed to proceed on their way.

Prosecutors Reject Legislative Action, Launch Offensive Against Bill's Implementation

Some Texas prosecutors opposed the bill, and just couldn't take no for an answer when it passed over their objections. This investigation finds that some local DAs still tell police to arrest motorists if they find a gun in the car, even if the driver complies with the new law.

The Texas District and County Attorneys Association (TDCAA) launched the first phase of the prosecutor rebellion against the new statute in July 2005, releasing

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Results

Most Texas prosecutors have not issued specific policies or provided advice to police, but prosecutors with jurisdiction over several major Texas cities have instructed local police to arrest Texans or take their guns, even if they are legally carrying a gun under HB 823 standards, according to the results of our open records requests.

Prosecutor	District/County	Adheres to TDCAA Guidelines	Created Unique Policy Inimical to Intent of HB 823
Allee, Don	Kendall		X
Bartley, H. Michael	Delta		X
Bradley, John	26th Judicial	X	
Curry, Tim	Tarrant		X
Earle, Ronnie	Travis	X	
Emerson, Rex	Kerr		X
Healy, John F.	Fort Bend	X	X
Kaspar, Donna	Houston	X	
Littlefield, Joel	Hunt	X	
Miller, Richard	Bell		X
Schnebly, Don	Parker	X	
Segrest, John	McLennan		X
Sparks, Ken	Colorado		X

Prosecutors not on this list did not issue such guidance according to the results of the open records requests R62 by ACLU of Texas and TSRA or did not respond to the request for information.

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their post-legislative session analysis. According to TDCAA, the new law did not prohibit arrest for "unlawful carring" (UCW) even if the driver obviously cleared the new five part test.

According to its "2005-2007 Legislative Update", TDCAA clearly understood that the bill "indicates a legislative intent to de-criminalize the carrying of a weapon under the provisions listed in the new subsection." So far so good.

However, "defenses, presumptions, and other related legal concepts are issues for the courts, not the street. Therefore officers are still acting within their lawful discretion if they arrest a person who might qualify for the traveling defense or the new traveling presumption."

In other words, said TDCAA, police should still arrest motorists even if all available evidence indicates the presumption should apply. It's difficult to overstate the importance of TDCAA's position, which provided political cover for prosecutors who opposed Chairman Keel's new law and hoped thwart its purpose.

Shortly after TDCAA's "Legislative Update," some prosecutors (including those overseeing some major urban areas) began to instruct police to ignore the new law, or rather, to continue to enforce the old one. On August 30, 2005, the Houston Chronicle reported that "motorists arrested for carrying pistols in their cars without a concealed handgun license will continue to be prosecuted in Houston, despite a new law that purports to give them a legal defense." Harris County District Attorney Chuck Rosenthal told the reporter, "It is still going to be against the law for (unlicensed) persons to carry handguns in autos," and that the new legal defense can still be challenged by prosecutors.

Harris County District Attorney Chuck Rosenthal's interpretation appears to be very different from the bill author's interpretation. Rosenthal's declaration launched a firestorm of criticism from Second Amendment advocates, and a debate among prosecutors about what the new law means.

On TDCAA's public user forums on their website, a discussion between August 1, 2005 and February 9, 2006 outlined the range of opinion on the subject among prosecutors. Several were looking for a way to agree with Mr. Rosenthal.

A Department of Public Safety lawyer announced she thought the old court cases on "traveling" were still

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applicable, while District Attorney Ken Sparks from Columbus, Texas, announced: "I am giving the officers in my county the following instructions: A person is not a traveler unless he is on an overnight trip, still in the course of the journey, and has not reached his destination."

Ted Wilson, a prosecutor from Harris County, opined that police should continue to use the old case law definitions of traveling instead of the new statute when there is not a clear crime underway or the gun is not in plain view. Wrote Wilson:

> The only time the presumption may be a problem [is] a stop for a traffic violation and getting a consent to search the vehicle and finding a pistol that was not in "plain view". Then the officer needs to have some evidence to offset traveling. If he searched the vehicle and found no luggage or anything suggesting the defendant was traveling we probably beat the presumption. And, while the officer is at it, ask the defendant where he was coming from and where he was going. The defendant will probably answer the question and admit that he was just driving home from work or the bar.

Some Prosecutors and Agency Lawyers Read the Law As Written

Some in the prosecutors' online forum thought Wilson's interpretation was wrong (even if they didn't like that conclusion). Andrea Westerfeld from McKinney, Texas, replied directly to Wilson:

> Actually, the problem is that under your last scenario we WOULDN'T beat the traveling presumption. The main problem is with the wording of this "presumption." The jury is instructed that they MUST presume the defendant is traveling UNLESS the State disproves one of the five factors. So it's all well and good that he doesn't have any luggage, there's no indication of traveling, he says he's just running down to the corner store for a carton of milk -- he's still presumed traveling unless we can disprove one of the five factors.
>
> This "presumption" is a definition, for all of the State's intents and purposes. The only person this benefits in being merely a presumption rather than a definition is the defendant who doesn't meet the five factors but can still claim to be traveling under the old case law. A huge headache for prosecutorial purposes all around, in my opinion.

Similarly, Boyd Kennedy, an attorney with Texas Parks and Wildlife (which oversees Texas game wardens) weighed in with this analysis that more closely resembled Chairman Keel's reading of the law:

> As I read it, the state must be able to prove beyond a reasonable doubt at every UCW trial one of the following: Defendant is a gang member, was breaking a law, was prohibited from possessing a gun, was not in a private vehicle, or was carrying a handgun in plain view. The presumption cannot be rebutted by showing the [driver] was not really "traveling." What matters is whether the state can prove (or disprove, as applicable) one of those 5 facts beyond a reasonable doubt. I don't see any other way and have advised TPWD officers accordingly. ...
>
> On the surface the new law is worded as a presumption, but in substance at least one of the 5 facts must be treated as an element of the offense which the state must prove at trial (or disprove, depending on which one of the 5 is chosen).

Dennis Foster said it was easy to determine the validity of the five elements of the presumption:

> You can quickly see whether or not the person is a parolee or has a protective order against him in an instant. In fact, all of the elements for this presumption and defense can be quickly and easily established by the officer at the scene. So why [a prosecutor] would subject his county and his law enforcement officers to Section 1983 liability is beyond me!
>
> And why someone would want to waste the court's time in trying to bring forth a case that he/she darn well knows is going to lead to an acquittal is beyond me, too! It seems to me that when you do something like that, you lose credibility with the court, waste the judge's/jury's time, and waste taxpayer dollars.
>
> One final thought that no one has mentioned here is that most prosecutors like to have the public

Bell County (Belton and Temple area)

County Attorney Richard Miller advised all Bell County police agencies to ignore the new law altogether:

> *It is my opinion that the officer on the street is not able to obtain sufficient information to make a determination as to whether or not the person possessing the weapon is "otherwise prohibited from possessing a firearm." . . . Accordingly, I would suggest that UCW arrests be made as before, and leave it to us to sort out the legal niceties once full information can be acquired. . . . Arresting officers should inquire as to where the person is coming from and where he or she is going; i.e., are they going to the store, coming through the county, etc.*

impression that they never lose a case and that they are very effective because they don't lose cases. But when you start to file these bogus UCW cases and they all get thrown out of court, what is the public perception going to be? That their prosecutor is ineffective because he loses a lot of cases and that he wastes taxpayer money filing bogus cases.

Prosecutor John Bradley replied that some computer databases may suffer from incomplete data entry, so officers' shouldn't rely on them. Of course, the same argument could apply the other direction – **if data in those databases may be old, false, or incomplete, then the data is not reliable enough to use for anything, including the arrest and incarceration of Texans**. If one were to accept District Attorney Bradley's argument, it would be just as problematic to arrest someone because his or her name WAS in, say, Texas' criminal street gang database, since the information could be outdated or incorrect.

'Jimbeaux,' who is a Fort-Worth-based member of the Texas DA's user forum, found federal court precedent suggesting police would be acting improperly to arrest someone in the face of defense presumptions that could not be overcome. He wrote:

Kerr County (Kerrville area)

County Attorney Rex Emerson advised all Kerr County law enforcement to ask an extensive set of investigatory questions about the travel route a person has taken, although this is not relevant under the new law.

> *[P]lease ask a sufficient number of questions to determine the departure point, the final destination, the time on the road, whether there were any stops or side-trips, whether carrying a weapon is a habit, the purpose of carrying the weapon. . . .*

Tarrant County (Fort Worth area)

Although in legislative debate it was clearly intended for Texans to be allowed to carry a legal, stowed gun in their car wherever they are "traveling" (to work, to the store, to a freind's house), Criminal District Attorney Tim Curry appears to believe that now-superceded court decisions about "travelling" with a gun can still be used. advised police officers in Tarrant County to interrogate drivers about the purpose of their trip:

> *A trip to the grocery store with plans to return home does not constitute traveling. A drive around the neighborhood to see if any friends are hanging out on street corners does not constitute traveling. A drive to work does not constitute traveling. . . . In routine traffic stops, officers should early ask where the driver is going.*

This is an interesting issue, if only because so few courts have written anything about it. Again, Ohio federal courts seem to be the only ones who care:

> *The test for probable cause is not whether facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect is committing an act that would be a criminal offense but for the fact that the actor has a valid affirmative defense. The test is whether the officer is reasonable in believing that the actor is in fact committing a criminal offense. Since the arresting officers had actual knowledge that the Dietrichs had a valid affirmative defense to the crime of carrying concealed weapons, the facts and circumstances did not warrant a belief that the Dietrichs were committing a criminal offense. Therefore, there was no probable cause for arrest.*
>
> *Dietrich v. Burrows*, 976 F.Supp. 1099, 1103 (N.D. Ohio 1997), *aff'd*, 167 F.3d 1007. (emph in original)

Okay, this isn't exactly iron-clad precedent, but I think this is a reasonable view — if an officer has knowledge that would indicate no crime has been committed, it's hard to justify an arrest based on probable cause.

Should officers arrest people knowing the courts probably can't convict them?

Prosecutors like Rosenthal and Bradley seem to think they're above the law, viewing statutes on the books as merely annoying, manipulable rules to a fixed game that they always expect to win.

So Exactly What Are Prosecutors Telling Their Police Officers?

By September it was clear that law-abiding Texans who carry a gun in their car and perfectly comply with the new law were still likely to be arrested and subjected to up to one year of incarceration, depending on the prosecutor.

That's why the Texas State Rifle Association, the Texas Criminal Justice Coalition and the ACLU of Texas chose to undertake this study of prosecutors' interpretation of HB 823. To that end, the ACLU filed public information requests with more than 300 District and County Attorneys

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asking for any policy or interpretation of the statute they'd given to local law enforcement.

An analysis of the responses revealed 13 prosecutors (not including TDCAA itself) who iinstructed officers in their jurisdictions to investigate whether drivers were really "traveling" under the old definitions, and to continue making arrests even when it appeared that a driver met the new standard. Six of these simply applied TDCAA's recommendation, as issued in its legislative update and powerpoint presentation, while the rest came up with their own recommendations.

Some prosecutors directly ordered their officers to arrest drivers for UCW as before, even where the new law clearly applies. Bell County Attorney Rick Miller (from Belton along I-35 between Austin and Waco) declared that, despite the new law, "I would suggest that UCW arrests be made as before, and leave it to us [prosecutors] to sort out the legal niceties once full information can be acquired."

Under this interpretation, the justification for the arrest and incarceration of a Texan is oddly considered a "legal nicety."

Most prosecutors who forwarded new policy recommendations to officers emphasized that officers should ask a long series of questions, largely based on the old case law definition of "travelling" which is no longer dispositive. In Waco, Fort Bend, Montgomery County and others (see boxes), officers were directed to interrogate drivers about their comings and goings.

Wrote Kendall County Attorney Don Allee, "Just because all of the above circumstances apply to a certain driver does not mean that the person cannot be arrested." According to

McLennan County (Waco area)

Criminal District Attorney John Segrest advised the Waco Police Chief:

> *HB 823 did not change the defense of traveling one bit. . . .*
>
> *Officers should routinely gather information and evidence which shows or tends to show:*
> - *the distance of the journey*
> - *the time and place the journey started*
> - *the time and place the journey was to terminate*
> - *the purpose of the journey*
> - *the mode of travel*
> - *the reason for and duration of any stops or deviations in the journey along the way*
> - *whether the journey requires an overnight stop (away from home)*

What to do if you are stopped...

Whether or not you are in an area where we know that the prosecutor is giving out questionable advice, follow these guidelines if you would like to exercise your constitutional rights:

- Make sure your gun is not in plain view.
- Designate one person to speak to the officer (usually the driver) - there is no need for anyone else in the car to speak.
- Show both of your hands as the officer approaches the car - it is wise to place both hands on the steering wheel in plain view.
- When the officer is close enough to hear you, say, "Hello officer, why did you pull me over?" The officer will probably ask you the same question; if so, say, "I don't know officer, that is why I asked."
- Remember that you have the right to remain silent, and that the officer is trained to use anything you say against you later in court. You do not have to answer any of the officer's questions, If the officer asks you a question that you do not want to answer, calmly say, "Officer, I don't want to answer any questions now. Am I free to go?"
- If you decide to step out of the car - roll up all of the windows, step out of the car, and close and lock all of the car doors.
- If you are asked why you locked the doors, say, "Habit."
- It is always appropriate to say, "Officer, are you detaining me or am I free to leave?" Repeat as necessary until you're allowed to depart.
- If the officer asks for your consent to search your person or your vehicle, say, "I'm sorry but I do not consent to any searches officer." If the officer has to ask for your permission, that means that the officer does not have any other legal reason to search you. You can always decline such a search.
- If you don't know what to say at any time, just ask, "Officer, am I free to leave?"

Allee, "If the officer asks the person where the driver has been and where the driver is headed to, and the driver responds 'Just coming home from work,' then the presumption does not apply because the driver's own words disproved the traveling presumption."

That interpretation ignores the clear intent of the statute, which declares that juries "must" presume the driver is traveling unless the state disproves one of the five elements. **Whether the driver is going to or from work, the grocery store, or some other local destination is legally irrelevant.** The fact that "traveling" was undefined and therefore subject to varying interpretation, was the reason the new law passed in the first place.

Another DA recommended that officers seize the weapon without an arrest and let the driver go on his or her way, although there is no basis for this approach in statute. In a memo to police, Fort Bend County District Attorney John Healey offered the following suggestion to officers in his jurisdiction:

> …(if you cannot disprove one of the 5 factors at the scene) to:
> - Seize the gun
> - Continue to investigate like any other case
> - Submit to D.A.'s office
> - If there is enough to file the case the D.A.'s office would issue a summons
> - In a case where you want to continue to investigate the case, this is less of an invasion on the accused because he does not have to worry about later having a record of arrest.…

So where did this suggestion come from? Williamson County District Attorney John Bradley first advised his colleagues to do this on the prosecutor's public online user forum, opining that DAs should instruct officers to seize motorists' guns even if the officer believes the driver is innocent under the law. Prosecutor Bradley wrote:

> As I understand it, the author didn't want "innocent" people arrested for CAW. So, why not create a procedure where the officer has the discretion (or perhaps is encouraged, based on the presence of the listed factors in the current presumption) to seize the weapon, complete a report and not make an arrest, so long as the defendant is not a threat to public safety or flight risk. Then forward the investigative report to the prosecutor for review. That gives the prosecutor an opportunity to decide if the gun owner is "innocent." If no case is filed, the gun is returned. If a case is filed, a warrant issues.

Bradley's advice is insulting to Texans, a waste of taxpayers' hard-earned dollars, and a violation of his oath to uphold the law. The "procedure" Bradley wants to create cannot be justified because law enforcement is not authorized to seize the assets of innocent people.

This suggestion, while forwarded to officers by Healey, won little support among other prosecutors on the public forum. Potter County Attorney Scott Brumley (Amarillo) chimed in on the forum to state the obvious: Bradley's suggestion

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Delta County (Northeast Texas)

County Attorney H. Michael Bartley advised the Delta County Sheriff's Office that a person must be "on an overnight trip" to legally carry a gun in the car, although no law now requires any such fact finding:

> *The law as written is difficult to understand (what's new?). . . . A person is not a traveler unless they are: a. on an overnight trip; b. still in the course of their journey; and, c. have not reached their final destination.*

Fort Bend County (Southwest Houston metro area)

District Attorney John Healey, Jr., advised all Fort Bend County peace officers:

> *I would want the officer's to ask the normal questions and note the answers*
> *- where you coming from – where you been, etc.*
> *- Be sure and note whether there were any overnight bags, etc. in plain site, or elsewhere since they probably searched since weapon found.*
> *- If there are groceries in the car, note if the food is still cold etc.*
> *- If there are children in the car with their backpacks from school. . . .*
> *One suggestion was (if you cannot disprove one of the 5 factors at the scene) to:*
> *- Seize the gun*
> *- Continue to investigate like any other* case. (see main text left, this page, for full instructions to officers with respect to gun seizure)

Montgomery County (North Houston metro area)

District Attorney Michael McDougal advised all Montgomery County Law Enforcement Agencies:

> *[O]fficers are still acting within their lawful authority to arrest a person... questions such as, ie, where have you been ?; what route did you take?; did you make any stops?; if so where?; when did you arrive?; did you stay overnight?; whose vehicle is this?; should be asked. If you discover a weapon address the foregoing issues only after you secure the weapon.*

amounted to bypassing the obvious legislative intent and risks offending legislators who understandably view statute-writing as their purview, not the prosecutors. Brumley wrote:

> While that idea has the appeal of being a solidly common-sense approach, I fear it would run headlong into the sentiment shared by a number of legislators that prosecutors generally cannot be trusted to do the right thing when given the opportunity.

Intentions Clear: Bill authors sought protection from arrest.

The Constitution and the U.S. Supreme Court have established a right to bear arms and a right to travel freely—but it was not always clear that you could travel freely in Texas with your gun. With Texas HB 823, Criminal Jurisprudence Committee Chairman Terry Keel sought to provide legal protection for law abiding Texans driving with a legal gun.

HB 823 nullifies a longstanding legal debate about the definition of traveling that blurred the line between legal and illegal behavior. Prior to the passage of HB 823, a person could be guilty of "unlawfully carrying a weapon" if the gun was stowed in a car but the person was not "traveling." Unfortunately, there existed no uniform definition of "traveling" in case law. So law enforcement officers had to rely on a subjective definition of "traveling" while on the street.

Different Texas appellate courts came up with different definitions, leaving officers with two options for enforcing the statute: clumsy, mostly speculative street-side investigation, or blanket arrest for anyone carrying a firearm.

By creating a presumption that most drivers are "traveling" if they are in a private vehicle, HB 823 makes old case law moot and gives police officers an easy standard for determining whether a law has been broken. Under the new statute, a person is presumed to be traveling [and thus allowed to carry a stowed gun] if the person is:

(1) in a private motor vehicle;
(2) not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic;
(3) not otherwise prohibited by law from possessing a firearm;
(4) not a member of a criminal street gang, as defined by Section 71.01; and
(5) not carrying a handgun in plain view.

Bill author Terry Keel writes, "The presumption applies unless the prosecution proves beyond a reasonable doubt that the facts giving rise to the presumption do not exist." In other words, if the presumption of traveling is not disproved, then a citizen is considered "traveling" regardless of the destination or duration of the journey.

The McLennan County DA advised that the changes in the law were a matter for courts, not police officers. " None of these consequences seem to apply to law enforcement officers making decisions beside the road. All of the consequences implicate the court, the court's instructions to the jury, and the prosecutors, and not police activity or discretion at the scene of officer-citizen contact."

The law clearly makes a change in the way a police officer addresses people on the street. The set of evidence giving rise to the presumption of traveling is purposefully relevant, objective, and easily determined "on the spot" by law officers, as stated in Keel's own statement (next page).

Police officers are charged with the duty of establishing probable cause for arrest. To execute this duty, officers must determine whether the presumption applies when confronting a driver on the street.

That's what the Legislature and the bill author intended: Chairman Keel has stated, "the legislation is intended to have the practical effect of preventing in the first place the arrest of citizens who meet the newly specified prerequisites of being a presumed traveler."

The ACLU, TCJC and TSRA: Common ground in defense of the law and the constitution

The ACLU of Texas, the Texas Criminal Justice Coalition (TCJC) and the Texas State Rifle Association (TSRA) came together to spotlight unlawful, unnecessary governmental encroachment on average law-abiding citizens.

TSRA and the National Rifle Association advocated for HB 823 in 2005, and its members remain keenly interested. TCJC and the ACLU believe that Texas incarcerates too many people already for nonviolent conduct, and that unnecessary incarceration of nonviolent Texans harms both public safety and civil liberties. Even after HB 823, Texans still are subjected to stop, interrogation and possible arrest. The 80th Texas Legislature should end the confusion by changing that "presumption" to a definition and requiring written consent for searches at Texas traffic stops.

KEEL CLARIFIES RIGHT TO CARRY HANDGUN IN VEHICLE WHILE TRAVELING
For Immediate Release
Tuesday, August 30, 2005

It is well established in Texas that a person who is traveling has a right to possess a handgun for personal protection. The practical problem with this right has historically been that courts have disagreed on the definition of "traveling". The legislature has likewise never defined "traveling" because a definition invariably has the unintended effect of unfairly limiting the term to a narrow set of circumstances.

HB 823 becomes effective September 1, 2005, shoring up the right of citizens to carry a concealed handgun while traveling. There have been many inquiries to my office from citizens and media regarding the upcoming change in the law and what it means.

HB 823 provides for a legal presumption in favor of citizens that they are travelers if they are in a private vehicle with a handgun that is not in plain view, they are not otherwise engaged in unlawful activity nor otherwise prohibited by law from possessing a firearm, and they are not a member of a criminal street gang.

In plain terms, a law-abiding person should not fear arrest if they are transporting a concealed pistol in a motor vehicle. There is no longer the need for a law enforcement officer to apply a subjective definition of what constitutes "traveling" where the citizen is cloaked with the presumption per the terms of the new statute. Under those circumstances the citizen should be allowed to proceed on their way.

HB 823 represents the first time a presumption has been crafted in favor of a defendant in the modern penal code of Texas. The presumption applies unless the prosecution proves beyond a reasonable doubt that the facts giving rise to the presumption do not exist. If the state fails to prove beyond a reasonable doubt that the facts giving rise to the presumption do not exist, the jury must find that the presumed fact exists. By enacting this evidentiary standard in conjunction with the presumption, the legislation is intended to have the practical effect of preventing in the first place the arrest of citizens who meet the newly specified prerequisites of being a presumed traveler.

It should be noted that the very real problem of citizens having to prove their innocence after arrest by the assertion of their right to carry a firearm while traveling was the reason for a 1997 legislative change which replaced the "defense" of traveling with a classification of the statute of UCW as instead entirely "inapplicable" to a traveler. This change was well-intentioned but did not have the intended effect of protecting honest citizens from potential arrest because the term "traveling" was still left to individual police or judicial officials to define on a case-by-case basis. As a consequence, law-abiding citizens who availed themselves of their right to have a handgun while traveling continued to face arrest and often later prevailed only in a court of law after proving that they were indeed traveling.

In enacting HB 823, the 79th legislature, like all previous legislatures, declined to define traveling as a narrow set of particular circumstances. For example, to require someone to have an overnight stay in a journey in order to be classified as a traveler would be unfair to persons traveling great distances in one day. Likewise, a requirement that a citizen be "crossing county lines" may make no sense, such as in areas of Texas where travelers drive hundreds of miles without leaving a single county. Moreover, the ability of police to elicit such evidence and consistently apply its subjective terms on the street in a traffic stop has not proven practical, at all. The new statute instead focuses on a defined set of relevant, objective facts that are capable of being determined on the spot by law officers.

There are several additional important points that should be made in regard to the enactment of HB 823 and its interface with current law.

HB 823 does not give "everyone the right to carry a gun in a car". State and federal laws applicable to firearms must be noted in conjunction with the new statute's terms, particularly the limitation of the presumption to persons who are "not otherwise prohibited by law from possessing a firearm." For example, persons subject to an active protective order are not covered by the presumption, nor are persons with any felony conviction or even some misdemeanor convictions for offenses, e.g., family violence. The presumption is likewise inapplicable to persons associated with a criminal street gang, even if they have no conviction for any offense. These as well as all other existing limitations on firearm ownership and/or possession make the new statute inapplicable to persons covered by such prohibitions.

Furthermore, as stated in the statute, the presumption will not apply to persons who are otherwise engaged in any criminal conduct. This would include persons who are driving while intoxicated, driving recklessly, committing criminal mischief, or committing any other criminal offense outside that of a minor traffic infraction.

The presumption also does not apply where the gun is openly displayed.

The enactment of HB 823 was the culmination of study, committee hearings and debate by the House Committee on Criminal Jurisprudence. I am confident that the new law will assist law enforcement in doing its job while at the same time protecting law-abiding citizens from the threat of arrest for merely exercising their right to arm themselves while traveling—a right to which they are already entitled.

1210 Rosewood Austin, Tx 78702
512-478-7300