DISSENTING Opinion Filed October 2, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00835-CV

EX PARTE CHARLES FERRIS

On Appeal from the 401st Judicial District Court
Collin County, Texas
Trial Court Cause No. 401-01805-2019

EN BANC DISSENTING OPINION

Before the En Banc Court
Dissenting Opinion by Justice Evans

Texas Department of Public Safety appeals the trial court's expunction of appellee Charles Ferris's 2018 arrest records for the offense of driving while intoxicated after a jury acquitted him in his 2019 trial. The trial court decided Ferris was entitled to acquittal expunction. *See* TEX. CODE CRIM. PROC. art. 55.01(a)(1)(A). Although Ferris had a 2014 arrest and 2015 conviction for a DWI offense, the trial court decided the criminal episode exception to acquittal expunction did not apply. *See id.* art. 55.01(c) ("A court may not order the expunction . . . if the offense for which the person was acquitted arose out of a

criminal episode, as defined by Section 3.01, Penal Code, and the person was convicted . . . .”). Section 3.01(2) provides,

> “[C]riminal episode” means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person . . . [when] *the offenses are the repeated commission of the same or similar offenses*.

TEX. PENAL CODE § 3.01(2) (emphasis added). Section 3.01(2) defines “criminal episode” without requiring offenses to be close in proximity of time or location or part of the same or related transaction or conspiracy. Instead, according to the statute, offenses comprising a criminal episode could be years apart at different locations (as Ferris’s were). All the statute requires is that the offenses be the same or similar (as Ferris’s were). The trial court, however, decided section 3.01 had to be limited to offenses in close proximity of time and place or part of one transaction. Because proper statutory construction does not include rewriting the statute and for all the reasons stated below, I would reverse and render judgment denying expunction of the 2018 arrest records for the offense of driving while intoxicated. Because the majority reaches the opposite conclusion, I respectfully dissent.

I.

DPS raises two issues: the trial court abused its discretion ascertaining the law and applying the law to the facts. I agree.

II.

Ferris does not have a *right* to expunction upon acquittal because no one has a *right* to expunction; it is a statutory *privilege* controlled by the discretion of the legislature and "is an exception to the established principle that court proceedings and records should be open to the public." *See In re State Bar of Tex.*, 440 S.W.3d 621, 624 (Tex. 2014) ("Expunction is not a right; it is a statutory privilege."); *In re Expunction of M.T.*, 495 S.W.3d 617, 620 (Tex. App.—El Paso 2016, no pet.) ("The right to expunction is neither a constitutional nor a common-law right, but rather a statutory privilege."). As a result, "courts must enforce the statutory requirements and 'cannot add equitable or practical exceptions . . . that the legislature did not see fit to enact.'" *Ex parte E.H.*, 602 S.W.3d 486, 489 (Tex. 2020) (quoting *In re Geomet Recycling LLC*, 578 S.W.3d 82, 87 (Tex. 2019) (orig. proceeding)). In addition, expunction is a civil matter even though the statutory authority for it is in the code of criminal procedure. *Id.* ("Although the expunction statute appears within the code of criminal procedure, an expunction proceeding is civil in nature.") (citing *State v. T.S.N.*, 547 S.W.3d 617, 619 (Tex. 2018)). "Because an expunction proceeding is civil rather than criminal in nature, the petitioner bears the burden to prove all statutory requirements have been satisfied." *Ex parte Enger*, 512 S.W.3d 912, 914 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Tex. Dep't of Pub. Safety v. J.H.J.*, 274 S.W.3d 803, 806 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

We review a trial court's ruling on a petition for expunction for an abuse of discretion. *T.S.N.*, 547 S.W.3d at 620. The trial court has no discretion to incorrectly decide what the law is or misapply it to the facts. *Id*. We review the trial court's legal conclusions de novo. *Id*.

> Here, the trial court's ruling on the expunction request hinged on a question of law because it required the interpretation of article 55.01; therefore, it is subject to de novo review. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) (stating that statutory construction is a question of law).

Id.

We construe statutes with the "primary objective . . . to ascertain and give effect to the Legislature's intent." *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009). When "the Legislature provides definitions for words it uses in statutes, then we use those definitions in our task." *Id*. "We give effect to legislative intent as it is expressed by the statute's language and the words used, unless the context necessarily requires a different construction or a different construction is expressly provided by statute." *Id*. "Unambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results." *Id*. (citing *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999)). Because the statutes that must be construed in this case are in the penal code and code of criminal procedure, I note the Texas Court of Criminal Appeals takes the same approach to statutory construction as the Texas Supreme Court quoted above:

> In interpreting statutes, we seek to effectuate the Legislature's collective intent and presume that the Legislature intended for the entire statutory scheme to be effective. . . . To achieve this goal, we necessarily focus our attention on the literal text of the statute and attempt to discern the objective meaning of that text at the time of its enactment. . . . ***If the language is unambiguous, our analysis ends because the Legislature must be understood to mean what it has expressed, and it is not for the courts to add to or subtract from such a statute***.

Bays v. State, 396 S.W.3d 580, 584–85 (Tex. Crim. App. 2013) (emphasis added; citations omitted).

III.

The facts are neither complicated nor disputed. In 2014, Ferris was arrested for DWI and charged with DWI Blood Alcohol Content >0.15, a Class A misdemeanor. In 2015, he pleaded guilty and was convicted for DWI Blood Alcohol Content >0.15. In 2018, Ferris was again arrested for and charged with DWI Class A misdemeanor. This time, a jury acquitted him in 2019. Shortly thereafter, Ferris filed this petition for acquittal expunction, which the trial court granted without a hearing. DPS timely moved for a new trial arguing the same contentions it now asserts on appeal. After hearing DPS's motion, the trial court stated its understanding of section 3.01 and solicited DPS's counsel to explain further:

> THE COURT: All right. You're going to have to help me out here, Ms. Sicola [representing DPS].
>
> I've worked in the criminal justice system for 35 years as a prosecutor and as a judge. I'm board certified in criminal law, just so you know who (sic) you're talking to.

> I have never encountered this situation before. Okay?
>
> I've had, in my career as a prosecutor, guys who drove up and down the highway robbing people on both sides of the highway. Some on the same day. Some, like, the day after.
>
> I've prosecuted more sex offenders for multiple offenses against the same victim [than] I can count.
>
> I've presided over those cases.
>
> I've never seen a case where, after the first case is disposed of via a plea and the second crime occurs after the first case is disposed of, that that is described or included within the phrase "criminal episode."

After DPS's counsel's further argument, the trial court had the following exchange with DPS's counsel:

> THE COURT: I've tried to research this, and I have had no luck finding any case anywhere that addresses this issue. My phone call[s] to the staff attorneys down in Dallas have gone unanswered.[1]
>
> Ms. Sicola, are you aware of any case that interprets the expunction statute this way?
>
> MS. SICOLA: Judge, we have been litigating this issue throughout the State of Texas. Several judges have agreed with our interpretation. Some judges have not.
>
> We have cases on appeal in multiple appellate courts right now on this issue.

[1] The First Judicial Administrative Region employs a few full-time attorneys to assist the criminal district judges in the region when they request research on legal issues in order to avoid reversals and retrials that would cost the taxpayers much more than the cost of the research attorneys. The attorneys are located in the region's offices in the criminal courthouse in Dallas, Texas.

> THE COURT: Has any appellate court decided any of these cases?
>
> MS. SICOLA: We don't have a final -- we don't have a final opinion issued yet.
>
> THE COURT: *Has some court issued an opinion* that the State has -- or that DPS has requested rehearing on?
>
> MS. SICOLA: Actually, some of the trial courts have, but *not the appellate courts yet*.
>
> THE COURT: Okay.
>
> MS. SICOLA: And there have been multiple trial courts that have denied the acquittal expunction. Some of those have been appealed. Some of those were not appealed.
>
> THE COURT: I'm just trying to figure out the appellate case law.

(Emphases added). After more discussion, DPS added an additional comment and the trial court explained its ruling:

> [Ms. Sicola for DPS]: We're -- again, *we don't have a published appellate court opinion*. But, yes, this issue, in one of those cases [on appeal], has been addressed by the appellant.
>
> THE COURT: I understand the Department's position, and I understand limiting it to 3.01.
>
> But as I -- my view of my job is to not read things in a vacuum. Yes, that's the definition that they [the Legislature] applied. But I don't know of any court that has ever applied that definition to this situation, and *I'm not willing to do it until some appellate court tells me I'm wrong or tells some other judge that they're wrong*.
>
> So, respectfully, your motion for new trial is denied and overruled.

(Emphasis added). The trial court denied DPS's motion, unfortunately, without the guidance of more than two decades of appellate authorities cited below in this opinion which the trial court earnestly sought.[2] DPS timely perfected this appeal.

IV.

As pointed out above, the text of section 3.01(2), "repeated commission of the same or similar offenses," does not contain any requirement for proximity of time or place nor a requirement that the offenses be part of a larger transaction or conspiracy. Many courts of appeals have considered the statute and articulated a version of this statement: "Section 3.01(2) does not impose a time differential between the commission of the same or similar offenses." *In re M.T.R.*, No. 01-18-00938-CV, 2020 WL 930842, at *3 (Tex. App.—Houston [1st Dist.] Feb. 27, 2020, no pet.); *Ex parte J.A.B.*, 592 S.W.3d 165, 169 (Tex. App.—San Antonio 2019, no pet.); *Ex parte Rios*, No. 04-19-00149-CV, 2019 WL 4280082, at *2 (Tex. App.—San Antonio Sept. 11, 2019, no pet.) (mem. op.); *Waddell v. State*, 456 S.W.3d 366, 369 (Tex. App.—Corpus Christi–Edinburg 2015, no pet.); *Casey v. State*, 349 S.W.3d 825, 831 (Tex. App.—El Paso 2011, pet. ref'd); *Guidry v. State*, 909 S.W.2d 584, 585 (Tex. App.—Corpus Christi-Edinburg 1995, pet. ref'd).[3] The court in

[2] Although it can seem unfair to a trial judge who requested and tried to obtain appellate authority while counsel even told him there was no such authority, all that is required for DPS to preserve its issue and arguments for appeal was to present them to the trial court, which it did. *See* TEX. R. APP. P. 33.1. The record does not reflect that DPS sought to mislead the trial court regarding the law.

[3] Ferris urges memorandum opinions are not precedential, but he is only partially correct. Unpublished criminal opinions are not precedential. *See* TEX. R. APP. P. 47.7(a). All civil opinions after January 1, 2003

Guidry may have originated the statement quoted above, and it added thereafter, "Had the Legislature wanted us to consider a time differential in the application of this section of the Code, it could have easily done so." *Guidry*, 909 S.W.2d at 585.

The legislature's decision to not grant the privilege of acquittal expunction to defendants with a prior conviction for the same or similar offense is quite sensible. Acquittal does not mean Ferris was innocent, and it does not prove the absence of probable cause for the 2018 DWI arrest.[4] It only means the jury decided the State did not prove its case beyond a reasonable doubt. Sections 55.01(c) and 3.01(2) embody the legislature's decision that an arrested repeat offender, even one subsequently acquitted at trial, would likely have been arrested and prosecuted on probable cause and therefore is not deserving of the legislature's privilege of expunction. And the legislature could have viewed a wrongly charged person who was never before convicted of the same offense as deserving a chance to clear his record. But once a defendant has been convicted, he has a criminal record, and sections 55.01(c) and 3.01(2) embody the legislature's decision that the need to clear his record of a later offense is less compelling. In effect, the expunction statute allows a defendant to deny he has ever been arrested. *See* TEX. CODE CRIM. PROC. ANN. art. 55.03(1) ("the release, maintenance, dissemination, or use of the expunged

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are precedential. *See id*. 47.7(b) and cmt. And expunction cases are civil. *See Ex parte E.H.*, 602 S.W.3d at 489; *T.S.N.*, 547 S.W.3d at 619.

[4] If Ferris had proved the absence of probable cause for his arrest as hypothecated by the majority opinion, there may be other remedies outside of the expunction statute. As that is not the case, I need not speculate about any other remedies that might be available in that circumstance.

records and files for any purpose is prohibited"); *id*. art. 55.03(2) ("the person arrested may deny the occurrence of the arrest and the existence of the expunction order"). But there is little purpose in granting a defendant the privilege of denying he was arrested a second time, if his records show his prior arrest and conviction for the same offense. Perhaps the legislature thought an employer may have a reasonable interest in knowing a potential employee may have committed the same offense more than once, even if that defendant was ultimately able to convince a jury that he was not guilty the second time.

Thus the plain meaning of the criminal episode exception to acquittal expunction does not result in an absurd result: it does not grant the privilege of expunction to an acquitted defendant who already has a conviction for the same or similar offense for which there is no expunction so the old conviction remains in his record. As I observed above, "[u]nambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results." *Hernandez*, 289 S.W.3d at 318. Accordingly, because the language is unambiguous and the result is not absurd, "our analysis ends because the Legislature must be understood to mean what it has expressed, and it is not for the courts to add to or subtract from such a statute." *Bays*, 396 S.W.3d at 585. Or as stated by the supreme court, "courts must enforce the statutory requirements and 'cannot add equitable or practical exceptions . . . that the legislature did not see fit to enact.'" *Ex parte E.H.*, 602 S.W.3d at 489 (quoting *In re Geomet Recycling*, 578 S.W.3d at 87).

V.

DPS points out section 3.01(1) of the penal code actually contains a provision closely fitting what the trial judge stated the statute section 3.01(2) should be interpreted to mean. Section 3.01(1) provides:

> "[C]riminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person . . . [when] the offenses are committed pursuant to the *same transaction* or pursuant to two or more *transactions that are connected* or constitute a *common scheme or plan*.

TEX. PENAL CODE § 3.01(1) (emphasis added). Section 3.01(1) limits offenses that constitute a criminal episode to those committed as part of the same transaction, connected transactions, or conspiracy. *See id*. Thus, section 3.01(1) does not require the offenses to be repeated commission of the same or similar offenses. *See id*. But when this Court, as the trial court did, imposes the transaction requirement of section 3.01(1) on the repeated offenses scope of section 3.01(2) it renders section 3.01(2) a nullity because all repeated offenses that are also part of the same transaction are already included in section 3.01(1)'s scope of "same transaction."

Ferris argues the first use of "offenses" in section 3.01(2) means two or more convictions for offenses that are then described as being the same or similar. According to Ferris, because he was acquitted in 2019, he had only one offense, the 2015 conviction, so section 3.01(2) does not apply and the criminal episode

exception to acquittal expunction in section 55.01(c) does not apply. Ferris does not cite any authority that has agreed with his argument, which I will analyze next.

Contrary to Ferris's argument, when the legislature provides a definition, we use it to construe the statute. *Hernandez*, 289 S.W.3d at 318. Conduct constitutes an "offense" when "it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute." TEX. PENAL. CODE § 1.03. So "offense" is conduct that is prohibited by statute or statutory equivalent. *See id*. Nothing in section 1.03 includes in the definition of "offense" concepts of arrest, charge, prosecution, conviction, or acquittal. "Offense" is just prohibited conduct.

The penal code's definition of "offense" as prohibited conduct is evident in the text of article 55.01(c) of the code of criminal procedure. Article 55.01(c) provides:

> A court may not order the expunction of records and files relating to an *arrest for an offense for which a person is subsequently acquitted* . . . if the offense for which the person was acquitted arose out of a criminal episode, as defined by Section 3.01, Penal Code, and the person was *convicted* of or *remains subject to prosecution* for at least one other offense occurring during the criminal episode.

TEX. CODE CRIM. PROC. art. 55.01(c) (emphasis added). Article 55.01(c) distinguishes between an offense, which is prohibited conduct, and arrest ("arrest for an offense"), prosecution ("remain[] subject to prosecution"), conviction

("offense . . . was convicted of"), and acquittal ("offense for which a person is subsequently acquitted" and "offense for which the person was acquitted").

The penal code's definition of offense in section 1.03 applies to section 3.01. Section 3.01 provides in full:

> In this chapter, "criminal episode" means the *commission of two or more offenses*, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:
>
> (1) the *offenses are committed* pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
>
> (2) the offenses are the repeated commission of the same or similar offenses.

TEX. PENAL. CODE § 3.01 (emphasis added). In section 3.01, an "offense" is prohibited conduct which someone can perpetrate (commit). Nothing in the text of section 3.01 indicates "offense" is an arrest, prosecution, conviction, or acquittal. Because a conviction cannot be committed by someone, but prohibited conduct can be committed by someone, Ferris's interpretation is nonsensical. So, contrary to Ferris's argument, article 55.01(c) and section 3.01 do not convey the meaning of "offense" as equivalent to "conviction."

Moreover, if Ferris were correct that "offense" is equivalent to "conviction" in article 55.01(c) and section 3.01, neither statute would make sense. For example, on Ferris's interpretation, article 55.01(c) would describe being arrested for a conviction, pending trial for a conviction, being convicted for a conviction, and

being acquitted of a conviction. Section 3.01 would be just as nonsensical on Ferris's interpretation because the statute would describe commission of two or more convictions, convictions committed as part of a transaction, and convictions that are committed repeatedly. To avoid this absurdity, Ferris argues we should select out of context only the second-to-last usage of "offense" in section 3.01(2) and change its meaning to "conviction." Here is the statute, Ferris's selective substitution, and a consistent substitution of terms:

§ 3.01(2) text:	"'criminal episode' means the commission of two or more offenses [when] the offenses are the repeated commission of the same or similar offenses"
Ferris's re-write:	"'criminal episode' means the commission of two or more offenses <u>that are convictions for</u> offenses ~~are~~ <u>for</u> the repeated commission of the same or similar offenses"
If Ferris's re-write used consistent substitution:	"'criminal episode' means the commission of two or more <u>convictions for</u> offenses <u>that are convictions for</u> offenses ~~are~~ <u>for</u> the repeated commission of the same or similar <u>convictions for</u> offenses"

Thus, Ferris's selective emendation of the statute serves his argument, but if the substitution is done consistently it renders the statute meaningless.

Courts are required to interpret statutes as a "cohesive, contextual whole." *T.S.N.*, 547 S.W.3d at 620–21. I reject Ferris's interpretation of section 3.01(2), and

instead I conclude the textual analysis as part of interpreting the statutes as a "cohesive, contextual whole" is the plain meaning of the unambiguous text of section 3.01(2): "criminal episode" means the repeated commission of the same or similar offense without limitation of time, place, same or related transaction, or conspiracy.

Ferris argues from this passage in *T.S.N.* the supreme court decided the acquittal expunction in his favor:

> Where an arrest is made pursuant to a charge for a single offense and the person is acquitted . . . then article 55.01(a)(1) entitles the person to expunction of all records and files relating to the arrest.

T.S.N., 547 S.W.3d at 621 (citing *Harris Cty. Dist. Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991)). But the supreme court pointed out in its *T.S.N.* opinion that what it decided in *T.S.N.* is not the criminal episode exception to acquittal expunction. The court wrote:

> And where an arrest is made pursuant to a charge or charges for multiple related offenses as part of a *criminal episode*, the statute just as clearly does *not entitle the person to expunction* of any files and records relating to the episode if the person either is *convicted of one of the offenses* or charges for one of the offenses remain pending. *See id*. art. 55.01; TEX. PENAL CODE § 3.01. *But this case differs from either scenario*. Here, a single arrest occurred for multiple unrelated offenses.

Id. (emphases added). Importantly, my construction of section 3.01(2) is consistent with the supreme court's gloss of article 55.01 and section 3.01 quoted above.

Moreover, the supreme court explained why T.S.N.'s "case differs from" the criminal episode exception to acquittal expunction. *Id*. The court explained that T.S.N. had a single arrest for two offenses: a 2013 assault charge and a 2010 theft charge. *Id*. The supreme court decided the straight-forward application of the acquittal expunction statute entitled T.S.N. to have her arrest records expunged even though those arrest records included her arrest for a different charge in addition to the one for which she was acquitted. *Id*. at 621–23. No one argued that, and the supreme court did not consider whether, the criminal episode exception in article 55.01(c) and section 3.01 applied in any way to T.S.N. In other words, the government did not contend T.S.N.'s 2013 assault offense and 2010 theft offense were part of the same or related transaction or were repeated commissions of the same or similar offenses (which they obviously were not). So *T.S.N.* does not negate, and its dicta supports, my construction of section 3.01(2) that, "where an arrest is made pursuant to a charge or charges for multiple related offenses as part of a criminal episode, [article 55.01(c); section 3.01] clearly does not entitle the person to expunction of any files and records relating to the episode if the person . . . is convicted of one of the offenses." *Id*. at 621.

Finally, Ferris turns to this Court's intermediate decision in T.S.N.'s case. *See State v. T.S.N.*, 523 S.W.3d 171 (Tex. App.—Dallas 2017), *aff'd.*, 547 S.W.3d 617 (Tex. 2018). But as the supreme court pointed out, this Court's opinion has nothing to do with the criminal episode exception to acquittal expunction in article 55.01(c)

and section 3.01. *See T.S.N.*, 547 S.W.3d at 621. Indeed, our Court expressly rejected the State's reliance on authorities informed by the criminal episode exception to acquittal expunction, stating:

> The cases to which the State directs our attention are materially inapposite in that they involve: . . . (iii) offenses stemming from the same criminal episode, putting them squarely in the explicit exception of subsection (c), *see, e.g., Texas Dep't of Pub. Safety v. M.R.S.*, 468 S.W.3d 553, 557 (Tex. App.—Beaumont 2015, no pet.), *not unrelated offenses as here*.

T.S.N., 523 S.W.3d at 174–75 (emphasis added). The supreme court's gloss in *T.S.N.* of the criminal episode exception to acquittal expunction confirms my analysis, and nothing in either *T.S.N.* opinion is at odds with my construction of that exception.

Interspersed throughout Ferris's brief is the repeated argument that the State failed to meet its burden of proof, as though the State had a burden to prove Ferris was not entitled to expunction. But expunction is a civil matter. *Ex parte E.H.*, 602 S.W.3d at 489; *T.S.N.*, 547 S.W.3d at 619. So, the State did not have a burden to prove Ferris was not entitled to expunction; rather, as in every civil case, Ferris bore the burden to prove he was entitled to expunction. *Tex. Dep't of Pub. Safety v. Dicken*, 415 S.W.3d 476, 479 (Tex. App.—San Antonio 2013, no pet.).

VI.

I agree with both Justices Ginsburg and Scalia's statements that "a reviewing court's 'task is to apply the text [of the statute], not to improve upon it,'" *E.P.A. v.*

EME Homer City Generation, L.P., 572 U.S. 489, 508–09 (2014) (Ginsburg, J., for majority) (quoting *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989) (Scalia, J., for majority) ("Our task is to apply the text, not to improve upon it.")). Or, as Justice Sotomayor stated during her confirmation hearing, "Judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases. It's the law. . . . We apply law to facts. We don't apply feelings to facts." Josh Gerstein, *Supreme Court snoozer for Sotomayor*, Politico (Aug. 6, 2009, 6:27 PM), https://www.politico.com/story/2009/08/supreme-court-snoozer-for-sotomayor-025895. Similarly, when "the language [of a statute] is unambiguous, our analysis ends because the Legislature must be understood to mean what it has expressed, and it is not for the courts to add to or subtract from such a statute." *Bays*, 396 S.W.3d at 585. If I chose to write into section 3.01(2) restrictions such as those in section 3.01(1) or chose to just ignore section 3.01(2) altogether, I would be legislating as a member of the judicial branch. But the judicial branch does not have the constitutional power to legislate and doing so violates the separation of powers in our constitution. Texas's separation-of-powers constitutional provision clearly prohibits trial judges and appellate justices from legislating from the bench:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit:

> Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and *no person* [including a trial judge], *or collection of persons* [including appellate justices], being one of these departments [such as the judiciary], *shall exercise any power properly attached to either of the others* [including judges legislating in court decisions], except in the instances herein expressly permitted.

TEX. CONST. art II, § 1 (emphasis and annotation regarding application to the judicial branch added); *see also In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 486 n. 66 (Tex. 2011) (orig. proceeding) ("This concept has a rich history in Texas, predating even the Republic itself. In fact, there has been a Separation of Powers provision in every one of Texas's Constitutions. The wording in the current Constitution is identical to the wording used in our four previous state constitutions."). So, neither the trial court nor this Court has the power to reform or excise section 3.01(2)'s text which does not restrict the repeated offenses definition of "criminal episode" to conduct close in time, location, or part of single or related transaction(s) or conspiracy. Amending the statute is not our job as judges, so we should not do it. *See* TEX. CONST. art. II, § 1; *EME Homer City*, 572 U.S. at 508–09.

No one disputes the legislature could have authorized acquittal expunction without any exceptions so a defendant who obtains acquittal automatically obtains expunction of the arrest records without regard to whether the defendant has a prior conviction for the same or similar offense. But the legislature deliberately chose to create the criminal episode exception to acquittal expunction. *See* TEX. CODE CRIM.

PROC. art. 55.01(c). Twenty-five years have passed since the Corpus Christi-Edinburg Court observed, "Section 3.01(2) does not impose a time differential between the commission of the same or similar offenses. Had the Legislature wanted us to consider a time differential in the application of this section of the Code, it could have easily done so." *Guidry*, 909 S.W.2d at 585. The legislature has not seen fit to amend section 3.01(2) since *Guidry* was issued in 1995. But during those twenty-five years, the legislature amended article 55.01 fourteen times. And eight times the legislature amended section 3.03 of the penal code, which provides for sentences for offenses arising out of criminal episodes. And since 2011 when the El Paso Court decided *Casey*, which repeated the *Guidry* observation, article 55.01 was amended five times and section 3.03 was amended twice. There are five cases out of four courts of appeals all agreeing, "Section 3.01(2) does not impose a time differential between the commission of the same or similar offenses." *See supra* § IV. These twenty-five years of precedent applying the plain text of section 3.01(2) governs the decision in this case. *See Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 506–07 (Tex. 2012) (when legislature does not amend statute after twenty-seven years of precedent, precedent governs). This Court should not judicially amend the plain language of the statute to limit the application of the criminal episode exception based on this Court's view that it is unfair to apply the statute as written to this case.

Courts do not construe statutes based on their notions of fairness, as though the legislature does not consider fairness when it enacts a statute, or as though a court's notion of fairness trumps the legislature's balancing of factors including fairness when it enacts a statute. As I explained above in section IV, this statute is not unfair or absurd but embodies the legislature's decision that defendants with a prior conviction for the same or similar offense are not granted the privilege of acquittal expunction when their records of their prior conviction will not be expunged and there would be little benefit to expunging the later arrest. And if a court amends the statute as applied to this case because the court considers it unfair, presumably that court will continue to amend other expunction statutes it considers unfair. For example, article 55.01(a)(2)(A)(ii)(d) addresses when an expunction is available after indictment but absent a trial acquittal. Pursuant to the plain language of this provision, two defendants with identical felony charges, no criminal history, and never convicted of the offense, could end up with different expunction outcomes simply because of the way the charges are resolved. If one defendant without a prior conviction for the same offense goes to trial and is acquitted, he is entitled to an expunction under article 55.01(a)(1)(A). But if a prosecutor dismisses a second defendant's case after he is indicted (even if the prosecutor does so fearing a conviction is unlikely), the second defendant is precluded from obtaining expunction if the State later demonstrates at an expunction hearing the indictment was supported by probable cause. *See In re V.H.B.*, 583 S.W.3d 636, 642 (Tex. App.—El Paso

2018, pet. denied) ("The dismissal of an indictment due to insufficient evidence to obtain a conviction cannot be the basis of an expunction . . . ."). Although neither indictment resulted in a conviction, in a contested expunction hearing, only the first defendant will be able to obtain an expunction but not the second defendant, if the State establishes the indictment of the second defendant was based on probable cause.[5] It is for the legislature to consider this difference in outcomes along with all other factors and to amend the statute to create a different outcome—"the Legislature . . . could . . . easily do[] so." *Guidry*, 909 S.W.2d at 585.

Finally, even if proper statutory construction involved reviewing the legislature's wisdom in enacting a statute —it does *not*—this Court would have to articulate what standard should be used: perhaps de novo review (we simply substitute our own judgment for the legislature's) or abuse of discretion (the legislature's wisdom would not be over-written by courts unless it is clearly erroneous)? And would this not put courts in the business of reviewing all legislation for its wisdom? We in the judicial branch have no business re-writing statutes based on our view of fairness. *See* TEX. CONST. art. II, § 1; *EME Homer City*, 572 U.S. at 508–09.

[5] Compare this result with that of *Ex parte Ammons*, where a defendant arrested for a felony but never indicted (perhaps because he was completely innocent) still had to wait three years before he could obtain expungement. 550 S.W.3d 235, 237 (Tex. App.—Texarkana 2018, no pet.). Also consider *Ex parte K.R.K.*, which held that a defendant arrested for both felony possession of a controlled substance and misdemeanor possession of marijuana was not entitled to expunction of the felony arrest, despite the fact that the charge was later dismissed, because he pleaded guilty to the misdemeanor possession charge. 446 S.W.3d 540, 544 (Tex. App.—San Antonio 2014, no pet.).

VII.

The trial court—even though it sought appellate guidance and was told there was none—abused its discretion by misconstruing section 3.01(2) and misapplying it to Ferris's repeated DWI offenses. Because Ferris's 2018 DWI arrest was for the same or similar offense as his 2014 arrest and 2015 conviction for DWI, those repeated offenses were a "criminal episode" within the meaning of section 3.01(2). The acquittal expunction exception in article 55.01(c) of the code of criminal procedure and section 3.01 of the penal code applied. Ferris bore the burden to prove compliance with all the mandatory statutory requirements, and an expunction may not be granted if he failed to do so. *Ex parte Enger*, 512 S.W.3d at 914. Ferris failed in his burden because the repeated offenses exception in section 3.01(2) applied, so the trial court abused its discretion when it granted Ferris's expunction petition. I would sustain both of DPS's issues.

The majority reaches the opposite conclusion and affirms the trial court order granting expunction. Now, statutorily ineligible applicants for expunction will receive expunctions in six counties in North Texas that others in the remaining 248 counties will not receive. For the reasons stated above and with great respect for the learned trial judge and my colleagues in the majority,

I dissent and would reverse the trial court's expunction order and deny Ferris's petition for acquittal expunction of his 2018 DWI arrest records.

/David Evans/
DAVID EVANS
JUSTICE

Burns, C.J., and Whitehill, Schenck, Partida-Kipness, and Browning, JJ. join in this dissenting opinion.

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