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TARRANT COUNTY
OFFICE OF THE
CRIMINAL DISTRICT ATTORNEY

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JUSTICE CENTER
401 W. BELKNAP
FORT WORTH, TX 76196-0201

February 24, 1999

FILE # ML-4072-99
I.D. # 4072

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Honorable John Cornyn
Texas Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

VIA C.M./R.R.R. # P 283 414 651 **Opinion Committee**

Re: Opinion Request Concerning the
Constitutionality and Application
of TEX. GOV'T CODE, Section 51.702

Dear General Cornyn:

We are writing to request an opinion on the following question: May a Commissioner's Court without violating the Texas or United States Constitution adopt a resolution authorizing certain Statutory County Courts to collect an additional \$40.00 filing fee in each civil case and an additional \$15.00 in court costs upon conviction of any criminal offense, including cases where probation or deferred adjudication is given? And, if Section 51.702(b) is found to be unconstitutional, may a Commissioner's Court approve collection of the civil fee as provided by Section 51.702(a)?

Based on our review of the statute and Attorney General Opinion DM-123, we believe that the answer to both questions is "no," however, more recent state court decisions and Texas Attorney General Opinion LO 94-048, seem to infer that collection of these fees and/or costs is constitutional.

Section 51.702 of the Government Code provides:

(a) Except as provided by Subsection (g), in addition to all other fees authorized or required by other law, the clerk of a statutory county court shall collect a \$40.00 filing fee in each civil case filed in the court to be used for court-related purposes for the support of the judiciary.

(b) In addition to other court costs, a person shall pay \$15.00 as a court cost on conviction of any criminal offense in a statutory county court, including cases in which probation or deferred adjudication is granted . . .

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(c) Court costs and fees due under this section shall be collected in the same manner as other fees, fines, or costs are collected in the case.

(d) The clerk shall send the fees and costs collected under this section to the comptroller at least as frequently as monthly. The comptroller shall deposit the fees in the judicial fund.

. . .

(f) This section applies only to fees and costs for a 12-month period beginning July 1 in a county in which the commissioners court:

- (1) adopts a resolution authorizing the fees and costs under this section; and
- (2) files the resolution with the comptroller not later than June 1 immediately preceding the first 12-month period during which the fees and costs are to be collected.

. . .

TEX. GOV'T CODE ANN. § 51.702 (Vernon 1998).

In DM-123, Section 51.702 was found, in part, to violate certain constitutionally protected rights. Subsection (b) (criminal costs) was specifically addressed and held invalid under the tests announced in *Ex Parte Carson*, 159 S.W.2d 126, 129 (Tex. Crim. App. 1942) and *Memet v. State*, 642 S.W.2d 518, 526-527 (Tex. App--Houston [14th Dist.] 1982, pet. ref'd). As the statute is written, Section 51.702(b) allows different costs to be assessed in different counties for the same penal offense based on whether or not that county is a participant in the reimbursement plan.¹ In JM-880, your office held that costs assessed in criminal cases are part of the punishment and that "[a] law allowing different costs to be assessed in different counties for the same penal offense would have the effect of allowing the penalty for state-defined crimes to vary from county to county and would violate both 'due process' and 'equal protection' constitutional rights." Tex. Att'y Gen. Op. JM-880 (1988). Thus, any county within the State of Texas that collects such additional costs does so in violation of constitutionally protected rights.

However, two months after DM-123 was issued, a Wichita County District Judge, in Cause No. 139,568-B, held Section 51.702 of the Texas Government Code to be constitutional in its entirety. In finding that said statute was constitutional as written and as applied, the judge ordered

¹ In order to participate in this scheme, the county must qualify and elect to participate by adopting and filing a resolution with the comptroller of the State of Texas by June 1st each year. TEX. GOV'T CODE ANN. § 51.702(f) (Vernon 1998).

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that all costs and fees required to be collected pursuant to this statute be collected. A copy of this declaratory judgment is attached as Exhibit "A." As a result of this decision, the Texas State Comptroller's Office issued an interoffice memorandum dated August 25, 1992 reinstating the funding mechanism for the collection of these additional fees and costs so as to comply with the judge's ruling. A copy of the State Comptroller's Interoffice Memorandum is attached as Exhibit "B." Although your office intervened in this lawsuit, this adverse judgment was never appealed.²

More recently, in *Ector County v. Hoffman*, 901 S.W.2d 687, 691 (Tex. App.—El Paso 1995, no writ), the Court of Appeals held that Section 25.0005 of the Texas Government Code did "... not require a county to continue paying county court at law judges a higher salary if it chooses to discontinue collecting additional fees under TEX. GOV'T CODE ANN. Section 51.702." (emphasis added). In making this ruling, the Court of Appeals looked to the legislative intent behind House Bill Number 66, which amended the laws governing statutorily created county courts in Texas and provided a mechanism for raising the salaries of county court judges to an amount more similar to that earned by district court judges. *Id.* at 689. To accomplish this, the legislature authorized commissioner's courts in participating counties to begin collecting additional fees through each county's statutory county court. *Id.* Although this decision makes no reference to which "fees" were collected pursuant to Section 51.702, one could make an argument that this ruling creates an inference that the collection of the fees and costs under both subsection (a) and (b) is constitutional. However, the better argument is that the term "fees" applies only to the collection of civil fees pursuant to subsection (a) as "fees" are not "court costs." If your office finds this interpretation to be the correct one, then again it would seem to imply that a commissioner's court could adopt a resolution to collect additional fees pursuant to subsection (a) without adopting and collecting additional costs under subsection (b). But in DM-123, your office concluded that Section 51.702(f), as written, requires the adoption of both fees and costs as a package, and that a commissioner's court does not have the power to approve any provision for the adoption of the fees in subsection (a) without simultaneously adopting the costs of subsection (b). *See also* Tex. Att'y Gen. Op. LO 94-048 (1992), where there is again the implication that a participating county may collect additional fees and costs pursuant to subsections (a) and (b) of Section 51.702. As you can see, there are conflicting opinions, decisions and law with respect to this statute and this office respectfully requests clarification from your office whether:

- (1) collection of the criminal costs is constitutional, and
- (2) if it is not, may a county collect only the civil fee.

² On August 31, 1992, the Attorney General's Office filed a Request for Findings of Fact and Conclusion of Law, however, the Court's file reveals none were ever made part of the record in this cause.

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Conclusion

For the reasons stated above, the Tarrant County District Attorney's Office respectfully requests that your office revisit and/or clarify its views regarding the constitutionality and application of Section 51.702 of the Government Code.

Sincerely,



TIM CURRY
Criminal District Attorney



ASHLEY D. FOURT
Assistant District Attorney

ADF/fm

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