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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO._____

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

DOUGLAS PAUL CARTER
Petitioner

v.

THE STATE OF TEXAS
Respondent

Petition is in Cause No. 1419623D from
Criminal District Court No. Two of Tarrant County, Texas,
and Cause No. 02-16-00191-CR in the
Court of Appeals for the Second District of Texas

PETITION FOR DISCRETIONARY REVIEW

Abe Factor
TBN: 06768500
Factor & Campbell
Attorneys at Law
5719 Airport Freeway
Phone: (817) 222-3333
Fax: (817) 222-3330
Email: lawfactor@yahoo.com
Attorney for Petitioner
Douglas Paul Carter

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, the following is a list of all parties to the trial court's judgment, and respective trial and appellate counsel:

Presiding Judge
Hon. Wayne Salvant, presiding trial judge
Hon. Louis Sturns, presiding at punishment
Criminal District Court No. Two
Tarrant County, Texas

Attorneys for Appellee (State of Texas)
Timothy Rodgers (at trial)
Julie Harbin
Debra Windsor (on appeal)
John Meskunas
Tarrant Co. District Atty's Office
401 West Belknap
Fort Worth, Texas 76196

Attorneys for Appellant
Don Hase (at trial)
4025 Woodland Park, Ste. 100
Arlington, Texas 76013

Abe Factor (on appeal)
3663 Airport Freeway
Fort Worth, Texas 76111

Appellant
Douglas Paul Carter

TABLE OF CONTENTS

page

INDEX OF AUTHORITIES

Cases ***page***

Constitutions

Statutes

Court Rules

Other Sources

STATEMENT REGARDING ORAL ARGUMENT

Because Petitioner does not believe that oral argument will materially assist the Court in its evaluation of matters raised by this pleading, Petitioner respectfully waives oral argument.

STATEMENT OF THE CASE

On August 7, 2015, Appellant Douglas Paul Carter ("Mr. Carter" or "Petitioner") was indicted for the felony offense of possession of a controlled substance of one gram or more but less than four grams. [C.R. 5]. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(c) (West 2010). On April 26, 27, & 29, 2016, a jury trial was held in Criminal District Court Number Two of Tarrant County, the Honorable Wayne Salvant presiding over trial, with the Honorable Louis Sturns presiding over punishment. [II, III, & IV R.R. *passim*]. The jury found Petitioner guilty as charged in the indictment. [C.R. 135; III R.R. 40]. Punishment was to the trial court, which after finding the habitual offender enhancement paragraph to be true, assessed a sentence of twenty-five (25) years incarceration. [C.R. 138; IV R.R. 38].

STATEMENT OF PROCEDURAL HISTORY

The Opinion by the Second Court of Appeals affirming the conviction was handed down on December 23, 2016. *Carter v. State*,

2016 WL7240681 (Tex. App.–Fort Worth, Dec. 15, 2016, no. pet. h.) (mem. op., not designated for publication).

GROUNDS FOR REVIEW

GROUND FOR REVIEW ONE

Did the court of appeals err in holding that Section 133.102(a)(1) of the Texas Local Government Code by which the "consolidated court cost" was assessed is not facially unconstitutional?

REASONS FOR REVIEW

1. The decision by the Second Court of Appeals has decided an important question of state law in a way that has not been, but should be, settled by the Court of Criminal Appeals. *See* TEX. R. APP. P. 66.3(b).

ARGUMENT

GROUND FOR REVIEW ONE (Restated)

Did the court of appeals err in holding that Section 133.102(a)(1) of the Texas Local Government Code by which the "consolidated court cost" was assessed is not facially unconstitutional?

A. ***Background***

As a detailed recounting of the facts is not necessary, this petition will not set forth any more facts than are pertinent to the matters raised in this appeal. Appellant was found guilty by the jury. [C.R. 135; III R.R. 40]. The judgment in count one included as court costs a

"Consolidated Court Cost" in the amount of $133. [C.R. 138, 142].

B. *Opinion Below*

The court of appeals held that the statute mandating the "Consolidated Court Cost" was not facially unconstitutional, and cited to its earlier decision in *Ingram* in which the court concluded that (1) the allocation of 5.0034% to "law enforcement officers standards and education," which is now collected into an account in the general revenue fund; (2) the allocation of 9.8218% to "comprehensive rehabilitation," which is spent at the direction of an agency in the executive branch; and (3) the allocation of 0.0088% to a fund for "abused children's counseling" with no statutory direction to which State account the percentage should be directed, are all related to the the administration of the criminal justice system. *Carter*, 2016 WL7240681 at *3.

C. *Standard of Review*

The burden rests upon the party who challenges a statute to establish its unconstitutionality. *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015). When reviewing the constitutionality of a statute, the court commences with the presumption that such statute is valid and that the legislature has not acted unreasonably or arbitrarily

in enacting the statute. *Id*. The court "must seek to interpret a statute such that its constitutionality is supported and upheld." *Id*. "A reviewing court must make every reasonable presumption in favor of the statute's constitutionality, unless the contrary is clearly shown." *Id*.

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, ---U.S. ----, 135 S.Ct. 2443, 2449, 192 L.Ed.2d 435 (2015). To prevail on a facial challenge, a party generally must establish that the statute always operates unconstitutionally in all possible circumstances. *Salinas v. State*, 464 S.W.3d 363, 367 (Tex. Crim. App. 2015). In a facial challenge to a statute, evidence of how the statute operates in actual practice is irrelevant; courts consider only how the statute is written, not how it operates in practice. *Id*. at 368.

D. ***Section 133.102(a)(1)***

The trial court assessed a cost pursuant to section 133.102(a)(1) of the Texas Local Government Code, which mandates that a person convicted of a felony must pay $133 "as a court cost, in addition to all other costs." *See* TEX. LOC. GOV'T CODE ANN. § 133.102(a)(1)(West Supp. 2016). The collected amounts must be remitted to the state comptroller,

who in turn must allocate this money to fourteen specified "accounts and funds:"

(1) abused children's counseling;

(2) crime stoppers assistance;

(3) breath alcohol testing;

(4) Bill Blackwood Law Enforcement Management Institute;

(5) law enforcement officers standards and education;

(6) comprehensive rehabilitation;

(7) operator's and chauffeur's license;

(8) criminal justice planning;

(9) an account in the state treasury to be used only for the establishment and operation of the Center for the Study and Prevention of Juvenile Crime and Delinquency at Prairie View A & M University;

(10) compensation to victims of crime fund;

(11) emergency radio infrastructure account;

(12) judicial and court personnel training fund;

(13) an account in the state treasury to be used for the establishment and operation of the Correctional Management Institute of Texas and Criminal Justice Center Account; and

(14) fair defense account.

TEX. LOC. GOV'T CODE ANN. § 133.102(b)(1), (e) (West Supp. 2016). Subsection (e) provides that the designated funds "may not receive less than" certain specified percentages of the collected amounts. *Id*. Section 133.058 permits a municipality or county to retain 10 percent of collected amounts as a "service fee."

E. *Discussion*

The trial court's assessment of a "Consolidated Court Cost" against Appellant violates the separation of powers clause of the Texas Constitution.[1] In *Peraza*, this Court crafted a modified test for determining whether a court cost was an unconstitutional tax, holding that

---

[1] Article II, § 1 of the Texas Constitution holds:

> DIVISION OF POWERS; THREE SEPARATE DEPARTMENTS; EXERCISE OF POWER PROPERLY ATTACHED TO OTHER DEPARTMENTS. 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, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. ART. II § 1.

> if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause. A criminal justice purpose is one that relates to the administration of our criminal justice system. Whether a criminal justice purpose is "legitimate" is a question to be answered on a statute-by-statute/case-by-case basis.

Peraza, 467 S.W.3d at 517-18.

Section 133.102(e)(5) directs the comptroller to allocate 5.0034% of the proceeds received to "law enforcement officers standards and education." TEX. LOC. GOV'T CODE ANN. § 133.102(e)(5). Two-thirds of these proceeds may be used "only to pay expenses related to continuing education" for law enforcement officers licensed under Chapter 1701 of the Occupations Code, and the remaining third may be used only to pay related administrative expenses. TEX. LOC. GOV'T CODE ANN. § 133.102(f) (West Supp. 2016).

Statutorily, this fee is defined in the Texas Occupations Code:

> (a)The law enforcement officer standards and education fund account is in the general revenue fund. (b) The commission shall use the account in administering this chapter and performing other commission duties established by law.

TEX. OCC. CODE ANN. § 1701.156 (West Supp. 2016). But a further

review of this statute establishes that this money no longer is used even in this manner. Westlaw details "Revisor's Notes" for this statute:

> 2012 Main Volume
>
> *(1) Section 415.084(a), Government Code*, provides the manner by which money in the law enforcement standards and education fund may be spent. The revised law omits this provision because Chapter 2103, Government Code, which was enacted subsequent to the enactment of *Section 415.084*, governs expenditures by state agencies, including the issuance of warrants. The omitted law reads:
>
> > (a) On requisition of the commission, the comptroller shall draw a warrant on the state treasury for the amount specified in the requisition, except that the warrant may not exceed the amount in the law enforcement officer standards and education fund.
>
> *(2) Section 415.084(b), Government Code*, refers to collected fees being expended as specified by itemized appropriation in the General Appropriations Act. The revised law omits this reference because under Section 6, Article VIII, Texas Constitution, money may not be drawn from the treasury unless a specific appropriation is made. The omitted law reads:
>
> > (b) Money expended by the commission in the administration of this chapter and in performing other commission duties prescribed by law shall be specified and determined only by itemized appropriation in the General Appropriations Act for the commission.
>
> *(3) Section 415.081, Government Code*, created the law

> enforcement officer standards and education fund in the state treasury. In 1991, the legislature enacted Section 403.094, Government Code, now repealed, under which many funds, accounts, and dedications of revenue were abolished effective September 1, 1995. *As a result of actions taken under Section 403.094, Government Code, the law enforcement officer standards and education fund became an account in the general revenue fund.* The revised law is drafted accordingly. (Emphasis supplied)

TEX. OCC. CODE ANN. § 1701.156. The law used to provide money to a commission pursuant to an appropriation. Now, the money is merely "an account in the general revenue fund." It is money collected solely for the general revenue fund of Texas. Since the money is now merely another account in the general revenue fund and not directly allocated to a cost related to the administration of the criminal justice system, it is an unlawful tax under the *Peraza* test. *Peraza*, 467 S.W.3d at 517-18.

Section 133.102(e)(6) directs the comptroller to allocate 9.8218% of the proceeds received to "comprehensive rehabilitation." TEX. LOC. GOV'T CODE ANN. § 133.102(e)(6). These proceeds may be used only to provide rehabilitation services directly or through public resources to individuals determined by the department to be eligible for the services under a vocational rehabilitation program or other program established to provide rehabilitation services, as described in Human Resources

Code section 111.052. TEX. HUM. RES. CODE ANN. §§ 111.052, 111.060 (West 2013).

The money is spent at the direction of the Department of Assistive and Rehabilitative Services - another executive branch agency. *See* TEX. HUM. RES. CODE ANN. § 115.001 (West 2013). There is no mention how this is a "legitimate criminal justice purpose." A cursory review of the statute for this agency establishes:

> (a) The comprehensive rehabilitation fund is created in the state treasury. Money in the fund is derived from court costs collected under Subchapter D, Chapter 102,1 Code of Criminal Procedure. Money in the fund may be appropriated only to the commission for the purposes provided by Section 111.052.

TEX. HUM. RES. CODE ANN. § 111.060. A review of the "purposes" of this money under current Texas law is:

> (a) The commission shall, to the extent of resources available and priorities established by the board, provide rehabilitation services directly or through public or private resources to individuals determined by the commission to be eligible for the services under a vocational rehabilitation program or other program established to provide rehabilitative services.
>
> (b) In carrying out the purposes of this chapter, the commission may:
>
> > (1) cooperate with other departments, agencies, political subdivisions, and institutions, both public

and private, in providing the services authorized by this chapter to eligible individuals, in studying the problems involved, and in planning, establishing, developing, and providing necessary or desirable programs, facilities, and services, including those jointly administered with state agencies;

(2) enter into reciprocal agreements with other states;

(3) establish or construct rehabilitation facilities and workshops, contract with or provide grants to agencies, organizations, or individuals as necessary to implement this chapter, make contracts or other arrangements with public and other nonprofit agencies, organizations, or institutions for the establishment of workshops and rehabilitation facilities, and operate facilities for carrying out the purposes of this chapter;

(4) conduct research and compile statistics relating to the provision of services to or the need for services by disabled individuals;

(5) provide for the establishment, supervision, management, and control of small business enterprises to be operated by individuals with significant disabilities where their operation will be improved through the management and supervision of the commission;

(6) contract with schools, hospitals, private industrial firms, and other agencies and with doctors, nurses, technicians, and other persons for training, physical restoration, transportation, and other rehabilitation services; and

(7) assess the statewide need for services necessary to prepare students with disabilities for a successful transition to employment, establish collaborative relationships with each school district with education service centers to the maximum extent possible within available resources, and develop strategies to assist vocational rehabilitation counselors in identifying and reaching students in

need of transition planning.

TEX. HUM. RES. CODE ANN. § 111.052.

Nowhere does the enabling statutory framework for the "comprehensive rehabilitation" fee even approach any subject related to the administration of the criminal justice system. *See Peraza*, 467 S.W.3d at 517-18. Thus, under the *Peraza* test, Section 133.102(e)(6) is an unconstitutional tax. *Id*.

Finally, section 133.102(e)(1) directs that 0.0088 percent of the fees collected are to be allocated to an "abused children's counseling" fund. TEX. LOC. GOV'T CODE ANN. § 133.102(e)(1). There appears to be no further statutory mention of this fee. Without any statutorily-directed allocation of the funds collected for "abused children's counseling," it cannot be determined which children are determined to be "abused" and therefore eligible for state-funded counseling or how the counseling of abused children may or may not be "relate[d] to the administration of our criminal justice system." *See Peraza*, 467 S.W.3d at 517-18. Thus, under the *Peraza* test, Section 133.102(e)(1) is an unconstitutional tax. *Id*.

A requirement that courts assess such costs would render the courts "tax gatherers" in violation of the separation of powers doctrine.

This is because requiring courts to collect a tax (albeit one disguised as a court cost) imposes an executive branch function on the judicial branch. The Attorney General has explained in an opinion that "court fees that are used for general purposes are characterized as taxes, and a tax imposed on a litigant interferes with access to the courts in violation of the constitution." *Tex. Atty. Gen. Op.,* No.JC-0158 (1999).

Making convicted criminals pay for certain programs, rather than obtaining funding through other means of revenue, may seem an attractive, expedient, and fair option. Nonetheless, the court of appeals is bound to follow the precedent established by this Court. *See* TEX. CONST. ART. V § 5(a); *see also Peraza*, 467 S.W.3d at 517-18.

Thus, it cannot be reasonably concluded that the revenues collected through the "Consolidated Court Costs"constitute proper court costs to be assessed against appellant or any other criminal defendant. *Id*.

F. *Remedy*

Because at least three of the uses for the funds collected from criminal defendants under the authority of section 133.102(a) do not relate to the administration of our criminal justice system, the entire statute is unconstitutional.

As this Court observed in *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987):

> ... Invalidity of a part [of a legislative enactment] does not necessarily destroy the entire act, unless the valid part is so intermingled with all parts of the act so as to make it impossible to separate them, and so as to preclude the presumption that the legislature would have passed the act anyhow.

Id. at 257 (brackets in original). There is no savings clause or severability clause in the consolidated court cost statute. Additionally, were one section to be found unconstitutional, it would undermine the entirety of the statute. As one Justice explained in reviewing section 133.102:

> Under the circumstances presented in this case, the statute requires $133 be gathered and distributed according to specified percentages. Period. Because the statute cannot be salvaged by severing constitutionally-funded programs from those not properly funded, the statute is facially unconstitutional even if certain of the listed programs could be constitutionally funded through court costs assessed against criminal defendants.

Salinas v. State, 426 S.W.3d 318, 333 (Tex. App.—Houston [14th Dist.] 2014), *rev'd*, 464 S.W.3d 363 (Tex. Crim. App. 2015)(Jamison, J., dissenting).

Justice Jamison is correct in her observation that the statute cannot be saved in its current iteration. To illustrate, a person convicted

of an offense shall pay as a court cost, in addition to all other costs:(1) $133 on conviction of a felony. TEX. LOC. GOV'T CODE ANN. § 133.102(a). If this Court were to determine certain portions of the statute unconstitutional, it would not be the intent of the legislature that the constitutional portions reapportion the $133 court cost. The statute's percentage can be reapportioned to be calculated to fit the percentage dictated by the statute. However, this would make (b)(1)'s $133 stated amount inaccurate. The constitutional portions of the statute funding valid court costs could be excised if this Court concluded they are wholly independent to the entirety of the statue. *See Salas v. State*, 365 S.W.2d 174, 175 (Tex. Crim. App. 1963)(explaining that "if the unconstitutional or void portion of any statute be stricken out and that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, the statute must be sustained"). Because the statute's provision are internally inconsistent with the three unconstitutional uses for the collected fees excised, the entire statute must fall. *See Meshell*, 739 S.W.2d at 257; *Salas*, 365 S.W.2d at 175.

When analyzed under the test explicated by this Court in *Peraza*, none of the three referenced items funded under Local Government

Code section 133.102 constitute a cost related to the administration of the criminal justice system. *See Peraza*, 467 S.W.3d at 517-18. These are therefore not legitimate items to be assessed against criminal defendants. Accordingly, section 133.102 is unconstitutional and the $133 should be deleted from the trial court's judgment.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court grant discretionary review and allow each party to fully brief and argue the issues.

Respectfully submitted,

/s/Abe Factor
Abe Factor
TBN: 06768500
Factor & Campbell
5719 Airport Freeway
Fort Worth, Texas 76117
Phone: (817) 222-3333
Fax: (817) 222-3330
Email: lawfactor@yahoo.com
Attorney for Petitioner
Douglas Paul Carter

CERTIFICATE OF COMPLIANCE

I hereby certify that the word count for the portion of this filing covered by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure is 2,929.

/s/Abe Factor
Abe Factor

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to counsel for the Appellees listed below pursuant to Rule 9.5(b)(1) of the Texas Rules of Appellate Procedure through the electronic filing manager, as opposing counsel's email address is on file with the electronic filing manager, on this 21st day of December , 2016.

/s/Abe Factor
Abe Factor

Debra Windsor
Tarrant Co. District Atty's Office
401 West Belknap
Fort Worth, TX 76196

Lisa McMinn
State Prosecuting Attorney
P.O. Box 13046
Austin, TX 78711-3046

APPENDIX

1. Opinion of the Second Court of Appeals, December 15, 2016.

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00191-CR

DOUGLAS PAUL CARTER — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 1419623D

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Douglas Paul Carter appeals his conviction for possession of a controlled substance of one gram or more but less than four grams, namely heroin. *See* Tex. Health & Safety Code Ann. § 481.115(c) (West 2010). In two points, Carter argues that the trial court erred by denying his requested article

[1]*See* Tex. R. App. P. 47.4.

38.23(a) jury instruction and that the statute assessing a $133 consolidated court cost is facially unconstitutional. For the reasons set forth below, we will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Officer Tyler Rawdon and Corporal White were together in a marked police unit[2] when they located a white sedan that an undercover officer in an unmarked police car had radioed about. The undercover officer communicated that he had seen the driver of the white sedan commit two traffic violations before the white sedan pulled into the parking lot of a vacant business. Officer Rawdon spotted the vehicle as it was coming to a stop in the parking lot of the vacant business and noticed an older black male, later identified as Carter, standing at the passenger-side window of the white sedan.[3] When Carter turned and saw the officers, he acted surprised, turned away from them, made a reaching motion to "his pants area," and then made "a distinct motion to his mouth." Based on his training and experience, as well as his location in a "high crime narcotics area" and Carter's walking up to a car that had pulled into the parking lot of an abandoned building, Officer Rawdon recognized Carter's motions as those made by someone who was trying to get rid of illegal narcotics by swallowing them. Officer Rawdon commanded Carter to get on the ground and to spit out what he

[2]Although the patrol unit was equipped with a dash camcorder, it was not working on the date in question.

[3]It was undisputed at trial that Carter was never a passenger in nor the driver of the white sedan.

had placed in his mouth. Carter complied, and Officer Rawdon saw Carter spit out two plastic bags containing what Officer Rawdon believed to be black tar heroin.

A jury found Carter guilty of possession of a controlled substance of one gram or more but less than four grams, namely heroin. The trial court found the habitual-offender notice to be true and sentenced Carter to twenty-five years' imprisonment. Carter then perfected this appeal.

III. CARTER WAS NOT ENTITLED TO AN ARTICLE 38.23 JURY INSTRUCTION

In his first point, Carter argues that the trial court erred by denying his requested article 38.23(a) jury instruction.

Article 38.23(a) of the code of criminal procedure prohibits the admission of evidence against an accused in a criminal trial if the evidence was obtained in violation of the Texas or United States constitutions or laws. Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2005). When evidence presented before the jury raises a question of whether the fruits of a police-initiated search or arrest were illegally obtained, "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." *Id.*; *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012).

To be entitled to an article 38.23(a) instruction, a defendant must show that (1) an issue of historical fact was raised in front of the jury, (2) the fact was contested by affirmative evidence at trial, and (3) the fact is material to the

constitutional or statutory violation that the defendant has identified as rendering the particular evidence inadmissible. *Robinson*, 377 S.W.3d at 719. When a defendant successfully raises a disputed, material issue of fact, the terms of the statute are mandatory, and the jury must be instructed accordingly. *Id.* Evidence to justify an article 38.23(a) instruction can derive "from any source," no matter whether "strong, weak, contradicted, unimpeached, or unbelievable." *Id.* (quoting *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004)). But it must, in any event, raise a "factual dispute about how the evidence was obtained." *Id.* When the issue raised by the evidence at trial does not involve controverted historical facts, but only the proper application of the law to undisputed facts, it is properly left to the determination of the trial court. *Id.*

During the charge conference, Carter requested a 38.23 jury instruction. His requested instruction and the argument related to the instruction are set forth below in their entirety:

> Judge, I'm asking for the jury to be instructed words -- these words: You are instructed that no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas or the Constitution or laws of the United States of America shall be admitted into evidence against the accused in the trial of any criminal case. You are further instructed that our law permits the stop, arrest, detention[,] and search of a person by a peace officer without a warrant only when probable cause exists to believe that an offense against the laws of this state or the United States have been violated. An officer is permitted to make an arrest of a person if the officer has probable cause to believe that the person has committed or is committing an offense. By the term probable cause as used herein it is meant where the facts and circumstances within the officer's knowledge and of which he has trustworthy information [are] sufficient unto themselves to warrant a

> man of reasonable caution to believe that an offense has been or is being committed. Therefore, if you believe beyond a reasonable doubt that the peace officer lawfully obtained the evidence, you may consider it. If you have a reasonable doubt about that the peace officer lawfully obtained the evidence you may not consider it.
>
> And, Judge, we're asking that be included in the Court's charge.

Looking just at Carter's requested jury instruction, neither the trial judge, nor this court, could have any idea of what specific fact or facts Carter believed were in dispute. *See Madden v. State*, 242 S.W.3d 504, 511–12 (Tex. Crim. App. 2007).

On appeal, Carter argues that Officer Rawdon's testimony that Carter "had nothing to do with the purpose for the detention of the occupants of the white sedan, combined with the common-sense testimony that [Carter] could just have easily been placing a candy bar in his mouth are sufficient to raise a fact issue regarding the legality of the detention" of Carter by the police. Based on his argument on appeal, it appears that what Carter wanted was a jury instruction on whether the totality of the facts that Officer Rawdon listed as his reasons for detaining Carter constituted "reasonable suspicion" under the Fourth Amendment, which amounts to an instruction focused on the law. *See id.* at 512. But as set forth above, to obtain a 38.23 instruction, Carter was required to set forth a disputed, material fact issue. *See Robinson*, 377 S.W.3d at 719. Carter, however, failed to point to any disputed material issue of fact, nor have we found any evidence controverting the reasonable suspicion that Officer Rawdon articulated for the detention: the area involved was a "high crime narcotics area";

Carter had walked up to the white sedan that had pulled into the parking lot of an abandoned building; when Carter saw the marked patrol unit, he turned away, reached into "his pants area," and put his hand to his mouth; and Officer Rawdon's training and experience in seeing such actions "so many times in the past" when individuals were trying to get rid of illegal narcotics by swallowing them.

Because none of the above testimony creates a disputed fact issue,[4] Carter was not entitled to an article 38.23 jury instruction. *See Hamal v. State*, 390 S.W.3d 302, 307 (Tex. Crim. App. 2012) (holding that because there was no dispute about what trooper did, said, saw, or heard, appellant was not entitled to article 38.23 jury instruction); *Madden*, 242 S.W.3d at 518 (holding that appellant was not entitled to article 38.23 jury instruction concerning whether trooper had reasonable suspicion to continue appellant's detention because no evidence raised a disputed fact issue material to the admissibility of the challenged evidence). We hold that the trial court did not err by refusing to include an article 38.23 instruction in the charge. Accordingly, we overrule Carter's first point.

[4]As pointed out by the State, "the trial court did not base its implicit finding of reasonable suspicion on *what* Appellant put in his mouth; rather, the trial court based reasonable suspicion on Appellant's suspicious act of putting *something* in his mouth combined with the other suspicious circumstances articulated by Officer Rawdon."

IV. TEXAS LOCAL GOVERNMENT CODE SECTION 133.102(A)(1) IS NOT FACIALLY UNCONSTITUTIONAL

In his second point, Carter argues that section 133.102(a)(1) of the Texas Local Government Code, under which a $133 "consolidated court cost" was assessed against him, is facially unconstitutional. Specifically, Carter argues that the $133 "consolidated court cost" is an unconstitutional tax under the Separation of Powers Clause.

The State argues that Carter waived his right to challenge the imposed consolidated court cost—a nonsystemic, nonpenal challenge—because he raises it for the first time on appeal. But we conclude, as we have in the past, that Carter may raise his complaint on appeal, even though he did not raise it to the trial court, because the $133 "consolidated court cost" was not imposed in open court or itemized in the judgment. *See, e.g.*, *Ingram v. State*, No. 02-16-00157-CR, 2016 WL 6900908, at *2 (Tex. App.—Fort Worth Nov. 23, 2016, no pet. h.); *Rogers v. State*, No. 02-16-00047-CR, 2016 WL 4491228, at *1 (Tex. App.—Fort Worth Aug. 26, 2016, pet. filed) (mem. op., not designated for publication) (both cases relying on *London v. State*, 490 S.W.3d 503, 506–07 (Tex. Crim. App. 2016)). But even though Carter did not waive his argument, it is unavailing in light of this court's recent holding in *Ingram*. *See* 2016 WL 6900908, at *3.

The $133 "consolidated court cost" at issue was authorized by the local government code. Tex. Loc. Gov't Code Ann. § 133.102(a)(1) (West Supp. 2016). With his facial challenge, Carter has the burden to establish this statute's

unconstitutionality. *See Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1188 (2016). To successfully do so, Carter must establish that no set of circumstances exists under which this statute would be valid. *See id.* We look for an interpretation that supports and upholds a statute's constitutionality unless the contrary interpretation is clearly shown. *See id.* Regarding statutes authorizing the imposition of court costs against criminal defendants, the court of criminal appeals has specified that for such statutes to pass constitutional muster, they must "provide[] for an allocation of . . . court costs to be expended for legitimate criminal justice purposes," which are ones that "relate[] to the administration of our criminal justice system." *Id.* at 517–18.

Regarding section 133.102(a)(1)'s $133 "consolidated court cost," Carter asserts that three of the fourteen prescribed percentage allocations for the $133 are not legitimate criminal-justice purposes. Specifically, he points to (1) the allocation of 5.0034% to "law enforcement officers standards and education," which is now collected into an account in the general revenue fund; (2) the allocation of 9.8218% to "comprehensive rehabilitation," which is spent at the direction of an agency in the executive branch; and (3) the allocation of 0.0088% to a fund for "abused children's counseling" with no statutory direction to which State account the percentage should be directed. *See* Tex. Loc. Gov't Code Ann. § 133.102(e)(1), (5), (6). We follow our decision in *Ingram* in which we concluded, as have other courts of appeals, that these three enumerated designated uses as written are related to the administration of the criminal justice

system and that the legislature's directive to the comptroller to disburse those monies from the general revenue fund for those uses passes constitutional muster. *See* 2016 WL 6900908, at *3 (citing *Salinas v. State*, 485 S.W.3d 222, 226 (Tex. App.—Houston [14th Dist.] 2016, pet. granted); *Penright v. State*, 477 S.W.3d 494, 497–500 (Tex. App.—Houston [1st Dist.] 2015, pet. granted); *Denton v. State*, 478 S.W.3d 848, 851–52 (Tex. App.—Amarillo 2015, pet. ref'd) (concluding section 133.102 did not violate Takings Clause of Texas constitution)). Accordingly, Carter has failed to carry his burden to establish that section 133.102 cannot operate constitutionally under any circumstance, i.e., that the statute is invalid in all possible applications. *See Ingram*, 2016 WL 6900908, at *3 (citing *McAfee v. State*, 467 S.W.3d 622, 645–47 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *O'Bannon v. State*, 435 S.W.3d 378, 381–82 (Tex. App.—Houston [14th Dist.] 2014, no pet.)).

We overrule Carter's second point.

V. CONCLUSION

Having overruled Carter's two points, we affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: December 15, 2016