

instruction. The Court of Criminal Appeals reversed that decision earlier this year (see [§§, Vol. 30, No. 13](#); 04/11/2022) and remanded for a harm analysis.

§§ 324 Court's Charge / Defensive Instructions (Article 38.23): The State filed a motion for rehearing, arguing that Appellant was not entitled to an Article 38.23 instruction because none of the factual disputes he relies upon were "material." The State honed in on the third requirement -- materiality -- for Article 38.23 analysis. The State claims three other reasons justified pulling Appellant over: (1) the license plate was not properly illuminated; (2) the license plate letters and numbers were obscured or altered; and (3) the license plate was expired.

Holding: None of these reasons impact the materiality of the contested issue of the displayed license plate. Contrary to the State's assertions in its brief to the Court of Appeals, its brief to this Court, and its motion for rehearing, the illumination and readability issues were affirmatively contested by evidence presented at trial. The third reason -- the expired tag -- is immaterial for deciding the Article 38.23 jury instruction in this case. The officer who conducted the stop testified he could not see the tag at all, and therefore, would not have been able to base the traffic stop on the expired tag. Thus, Appellant was entitled to an Article 38.23 instruction. *** Upon a thorough review of the record, we find that the officer's testimony in front of the jury combined with the dashcam video, bodycam video, and still photographs create a contested issue regarding whether Appellant violated section 547.322(f) by failing to have a white light to illuminate his license plate. The officer testified six times in his direct examination, in front of the jury, that he pulled Appellant over because he did not see a license plate at all. *** An officer cannot argue that he pulled over a driver because he did not see a license plate and that he stopped the driver because he saw that the driver had an expired license plate. Even though the record is silent on the exact moment in time the officer discovered that the license plate was expired, it was undisputed the officer testified he saw the license plate after the Appellant was stopped. By the time the license plate had been discovered, the Appellant had already been forced out of the vehicle at gunpoint by a team of officers, forced to his knees, placed in handcuffs, and then asked for permission to search his pockets while a search of his person was already underway. *** On original submission, we held that physical evidence can create a material dispute with an officer's testimony. The State's motion for rehearing does not change that. *** If Article 38.23 stands for anything, it is that when a factual dispute is raised, as in this case, about why a person is stopped, detained and/or subsequently arrested, they have a right to let a jury determine the facts underlying the lawfulness of that initial detention. Here, Appellant raised a genuine material factual dispute and was, thus, entitled to the Article 38.23 jury charge. For all these reasons, the motion for rehearing is denied.

Concurring / Dissenting Opinions: [Presiding Judge Sharon Keller](#) dissented and would grant rehearing. She would hold that Appellant failed to raise a fact issue about whether the officer had reasonable suspicion regarding the proper illumination of a license plate or tag. *"There was no testimony that there was proper illumination, and the videos are unclear about the matter. If Appellant were being tried for violating the traffic laws pertaining to having a properly illuminated license tag, the*

videos would provide some evidence that he did not violate the law. But the videos do not provide evidence that the officer lacked reasonable suspicion about the matter. Ultimately, she argued that the officer was justified in stopping the vehicle because he had a reasonable suspicion that there was no white illuminating light, and “any fact issue regarding the license plate is not material.”

([David A. Schulman](#)) It is clear that Judge Keller and the rest of the Court view this entire situation differently - but Judge Keller has a point. If the officer who made the stop did so because he couldn't see the plate or couldn't determine whether the vehicle had the required lighting, then the stop would be a good one. Whether the evidence shows that, however, is not something that can be discerned from these opinions . . . or the opinion on original submission . . . or the Court of Appeals' opinion.

([John G. Jasuta](#)) I have said many times that folks shouldn't be violating two laws at once. Here, the license plate was obscured, for whatever reason, lack of lighting, dirt, alteration, weird positioning (and it was expired), and yet this gentleman drove that vehicle while possessing a controlled substance. Too much dope mayhaps?

Ed Note: The original published opinion reversing the Court of Appeals was not withdrawn. Although somewhat unusual, the Court has previously utilized this procedure. See [Wilson v. State](#), 311 S.W.3d 452 (Tex.Cr.App. 2010)(see [§8](#), [Vol. 18, No. 22](#); June 14, 2010)(denying a motion for rehearing while addressing one of the grounds for the rehearing).