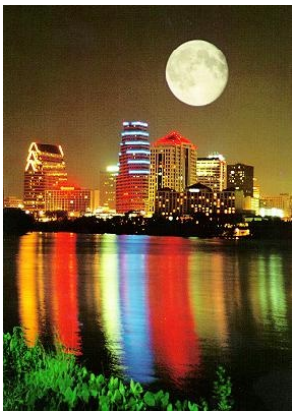

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Vol. 29, No. 6 - February 10, 2020

Case Name: ***Ex parte R.A.L. Jr.***

- **NATURE OF CASE**: Expunction Proceedings
- **COUNTY**: Bexar
- **C/A CASE No**. 04-19-00479-CV
- **DATE OF OPINION**: February 5, 2020 **OPINION**: Justice Watkins
- **DISPOSITION**: Trial Court Reversed
- **TRIAL COURT**: 144th D/C; Hon. Ray Olivarri
- **LAWYERS**: Ashley Morgan (Defense); Brent Burpee (DPS)

602 Expunction Proceedings / Entitlement to Relief: Appellant was convicted of driving while intoxicated in 2013. On December 25, 2017, Appellant was arrested for driving while intoxicated. After a jury acquitted him of that charge, he filed a petition to expunge all criminal records and files pertaining to his 2017 arrest. DPS did not file an answer, and the trial court signed an order requiring DPS to expunge all records regarding Appellant's 2017 arrest. DPS filed a motion for new trial alleging that Appellant was not entitled to expunge the records of his 2017 arrest because he was previously convicted of driving while intoxicated in 2013, and since the 2013 and 2017 offenses are "the same or similar offenses," they constitute a criminal episode for which expunction is not available. In its motion for new trial, DPS alleged that it "was not made aware of any Petition for Expunction or hearing date, only receiving notice of the signed order." Appellant's petition for expunction lists DPS as one of several "law enforcement agencies [that] have records or files subject to expunction herein and should be served with notice of this petition." DPS attached to its motion a certified copy of the 2013 judgment convicting Appellant of driving while intoxicated with a blood alcohol content of 0.15 or higher. The record indicates that no hearing was held on the expunction petition or DPS's motion for new trial. DPS timely appealed, arguing that Appellant was not statutorily entitled to an expunction and that the evidence supporting the trial court's order is legally insufficient.

Holding: Article 55.01(a)(1)(A), C.Cr.P., permits a person to have all records and files relating to an arrest expunged if the person is tried and acquitted of the offense. *** That statute contains an exception which prohibits a trial court from ordering the expunction of records -- even if the

person was acquitted -- if the offense arose out of a criminal episode and the person was convicted of at least one other offense occurring during the criminal episode. *** Article 55.01(c) incorporates the definition of criminal episode from Texas Penal Code section 3.01. *** ***Ex parte Rios***, No. 04-19-00149-CV (Tex.App. - San Antonio, 09/11/2019)(see ☙, Vol. 27, No. 35; 09/16/2019). For that reason, we must construe both article 55.01(c) of the Texas Code of Criminal Procedure and section 3.01 of the Texas Penal Code to determine whether the trial court properly granted the expunction *** Section 3.01(2) of the Texas Penal Code defines criminal episode as "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," if "the offenses are the repeated commission of the same or similar offenses." *** Section 3.01(2) does not impose a particular time frame within which the same or similar offenses must be repeated. *** The 2017 offense for driving while intoxicated constitutes "the repeated commission of the same . . . offense" as the 2013 offense for driving while intoxicated for which [Appellant] was convicted. *** The Legislature has declared that records from a subsequent arrest for the repeated commission of the same offense are not available for expunction if the previous arrest resulted in a conviction. *** For that reason, [Appellant]'s arrest record for the 2017 offense of driving while intoxicated is not available for expunction.

(**David A. Schulman**) I was unhappy with the holding in ***Rios***, believing that the same Court of Appeals was incorrect in its interpretation of the statutes and that the holding might constitute a dangerous precedent. In this opinion, by stating that "*Section 3.01(2) does not impose a particular time frame within which the same or similar offenses must be repeated*," the Court specifically addresses a concern I voiced at the time ***Rios*** was decided, which is that their interpretation of "same criminal episode" could include "repeated" commission of the same offense decades apart. The Court's application in ***Rios*** is unrealistic. This case is just as bad.

(**John G. Jasuta**) Could the Legislature have intended the absurd result David posits? Doubtful.