IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0745-18

JOSEPH ANDREW DIRUZZO, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS VICTORIA COUNTY

YEARY, J., delivered the opinion of the Court in which KEASLER, RICHARDSON, KEEL, WALKER and SLAUGHTER, JJ., joined. HERVEY and NEWELL, JJ., concurred in the result. KELLER, P.J., dissented.

O P I N I O N

Convicted of sixteen counts of illegally practicing medicine under Section 165.152 of the Texas Occupations Code, TEX. OCCUPATIONS CODE § 165.152, Appellant argued on appeal that the district court never acquired subject matter jurisdiction over the case because the indictment only charged him with misdemeanor offenses. He argued that the trial court erred to deny his motion to quash the indictment raising this issue. The Corpus Christi Court

of Appeals rejected Appellant's claim, holding that "the indictment sufficiently alleged the third degree felony offense under [S]ection 165.152, thereby invoking the subject-matter jurisdiction of the trial court." *Diruzzo v. State*, 549 S.W.3d 301, 309 (Tex. App.—Corpus Christi 2018).

On discretionary review, Appellant contends that, construing Section 165.152 *in pari materia* with neighboring provisions in the Texas Occupations Code, it is evident that the indictment alleges no more than a misdemeanor offense under Section 165.151 of the Texas Occupations Code. TEX. OCCUPATIONS CODE § 165.151. Appellant argues that, because the indictment alleged only a misdemeanor offense, the court of appeals erred to hold that the district court acquired subject matter jurisdiction over the case. And because the trial court lacked subject matter jurisdiction, he concludes, it erred to deny his motion to quash the indictment. We agree that the indictment on its face alleged no more than a misdemeanor offense. We therefore reverse the court of appeals' judgment, vacate the trial court's judgment, and remand the cause to the trial court for further proceedings not inconsistent with this opinion.[1]

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[1] Typically, when this Court reverses a conviction based on a trial court's failure to grant a motion to quash the indictment, we have ordered the indictment dismissed. *E.g.*, *Smith v. State*, 658 S.W.2d 172, 174 (Tex. Crim. App. 1983). Such an appellate disposition is not appropriate, however, when the motion to quash is predicated on a claim that the district court lacked subject matter jurisdiction over a misdemeanor offense. *See* TEX. CODE CRIM. PROC. art. 21.26 (mandating that district courts should issue transfer orders in any case in which the indictment alleges an offense over which it lacks subject matter jurisdiction); *Ex parte Jones*, 682 S.W.2d 311, 313 (Tex. Crim. App. 1984) (remanding the cause for the district court to transfer an indictment alleging only a misdemeanor to a county court).

I. BACKGROUND

Appellant was charged in a sixteen-count indictment with sixteen separate instances of practicing medicine without holding a license. Each count alleged that Appellant treated the same patients but on different dates.[2] Each count was also headed by a caption with the following notation: "**§§ 155.001 & 165.152 Occupation Code/3rd DEGREE FELONY**".[3] After a jury trial, Appellant was convicted on all sixteen counts. The jury assessed his punishment at four years' confinement in the penitentiary for each count (which is well within the range for a third-degree felony offense), and a fine of $1,500 for each count. The trial court then ordered that Appellant's sentences be served concurrently.

Prior to trial, Appellant had filed a motion to quash the indictment. At a pre-trial hearing on the motion, Appellant argued that the trial court lacked subject matter jurisdiction because the indictment alleged no more than a misdemeanor offense. His argument was

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[2] While alleging a different date of commission, each count alleged that Appellant:

> did then and there intentionally or knowingly practice medicine in this state of Texas in violation of Occupation Code Title 3 "Health Professionals", Subtitle B "Physicians" by providing treatment including withdrawal of blood and fluids and injections purported to be "stem cells" in treatment of Nelson Jannsen & Estelle L. Jannsen while not holding a license to practice medicine.

See TEX. OCCUPATIONS CODE § 165.152(b) ("Each day a violation continues constitutes a separate offense.").

[3] Section 155.001 is captioned "**Licence Required**" and reads: "A person may not practice medicine in this state unless the person holds a license issued under this subtitle." TEX. OCCUPATIONS CODE § 155.001. Section 165.162 is captioned "**Practicing Medicine in Violation of Subtitle**" and presently makes it a third-degree felony for a person to "practice[ ] medicine in this state in violation of this subtitle [that is, Subtitle B ("Physicians"), of Title 3 ("Health Professionals") of this Texas Occupations Code]." TEX. OCCUPATIONS CODE § 165.152.

almost wholly predicated on an amendment to Section 165.152 that the Legislature passed in 2003, which he asserted made the provision applicable only to licensed physicians who have violated the Medical Practices Act. He claimed that, after the 2003 amendment, only Sections 165.151 and 165.153 may be read to apply to non-physicians who practice medicine.[4] Because Section 165.153 requires a showing of harm as an element of the felony offense, and because the indictment failed to allege any harm, he urged, the indictment can only be construed to allege the misdemeanor offense described in Section 165.151. And because only misdemeanor offenses are alleged in the indictment, he concluded, it failed to confer subject matter jurisdiction on the district court. The trial court denied Appellant's motion to quash, and the case proceeded to trial.

II. ON APPEAL

A. Appellant's Claim

On appeal, Appellant pursued his pre-trial claim that the indictment alleged no more than a misdemeanor offense, thus depriving the trial court of subject matter jurisdiction. His argument was predicated on the provisions of Subchapter D ("Criminal Penalties") of Chapter 165 ("Penalties") of the subtitle of the Occupations Code that regulates physicians. He maintained that, reading current Sections 165.151, 165.152, and 165.153 *in pari materia* makes it clear that Section 165.152—the provision under which the indictment purported to charge Appellant—was not meant to regulate non-physicians who engage in the practice of

[4] We will set out the complete texts of the various statutes at issue in this case in the immediately succeeding portions of this opinion.

medicine.[5] He argued that only Sections 165.151 and 165.153 reach the offense of practicing medicine without a license. The latter makes the offense a felony, he contended, depending upon a showing of harm; and in the absence of such a showing, the former makes it a misdemeanor. Appellant argued that, because the indictment did not allege harm, it only alleged the Class A misdemeanor offense under Section 165.151. In order to gain an adequate perspective on Appellant's *in pari materia* claim, it is necessary to review, in some detail, the history of these statutory provisions.

B. The Medical Practice Act

When the Medical Practice Act was enacted in 1981, the provision making it an offense to practice medicine in violation of its requirements was wholly contained in a single subsection—Article 4495b, Section 3.07(a), which read:

> Sec. 3.07. (a) A person practicing medicine in violation of this Act commits an offense. Except as provided for by this section, an offense under this section is a Class A misdemeanor. If it be shown in the trial of a violation of this Act that the person has once before been convicted of a violation of this Act, on conviction that person shall be punished for a third degree felony. Each day of violation constitutes a separate offense. On final conviction of an offense under this section, a person forfeits all rights and privileges conferred by virtue of his licensure under this Act.

See Acts 1981, 67th Leg., ch. 1, § 1, p. 18, eff. Aug. 5, 1981 (enacting VERNON'S ANN. CIV. ST. art. 4495b, § 3.07(a)). Whether this provision was meant to cover persons purporting to

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[5] In *Smith*, we observed that the "doctrine [of *in pari materia*] is a rule of statutory construction for determining which statutory provisions controls when a general statutory provision and a more specific statutory provision deal with the same subject matter and they irreconcilably conflict." 185 S.W.3d 887, 889 n.5 (Tex. Crim. App. 2006).

practice medicine without a license to do so could perhaps be open to debate.[6] But that question appears to have been mooted by a legislative amendment to Section 3.07(a) in 1995. The amendment reads:

> (a) *A person practicing medicine in this state must be licensed under this Act.* A person practicing medicine in violation of this act commits an offense. Except as provided by this section, an offense under this section is a Class A misdemeanor.
>
> > *(1)* If it be shown in the trial of a violation of this Act that the person has once before been convicted of a violation of this Act, on conviction that person shall be punished for a third degree felony. Each day of violation constitutes a separate offense. On final conviction of an offense under this section, a person forfeits all rights and privileges conferred by virtue of his licensure under this Act.
> >
> > *(2) A person practicing medicine without a valid license or permit and who causes physical or psychological harm to another by such practice shall, on conviction, be punished for a third degree felony.*
> >
> > *(3) A person practicing medicine without a valid license or permit and who causes financial harm to another by such practice shall, on conviction, be punished for a state jail felony.*

Acts 1995, 74th Leg., ch. 868, § 1, pp. 4321–22, eff. Sept. 1, 1995 (1995 additions in italics). This amendment leaves no doubt that the penalty provision in Section 3.07(a) of the Medical Practice Act was intended to apply—as of 1995, if not before—both to physicians who

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[6] It might be argued, for example, that the license forfeiture provision indicates that this subsection was only meant to apply to licensed physicians who commit a violation of the Medical Practice Act. Indeed, Appellant argues that current Section 165.152 of the Texas Occupations Code applies only to licensed physicians for exactly this reason. *See* TEX. OCCUPATIONS CODE § 165.152(d) ("On final conviction of an offense under this section, a person forfeits all rights and privileges conferred by virtue of a license issued under this subtitle.").

practice medicine in violation of the Act as well as to non-physicians who purport to practice medicine but who lack a valid license to do so.

C. Codification in the Texas Occupations Code

The Medical Practice Act was incorporated into the Texas Occupations Code in 1999. The caption of the 1999 legislation states that this codification was intended to effectuate "the adoption of a nonsubstantive revision of statutes" relating to the licensing and regulation of certain professions including the practice of medicine. Acts 1999, 76th Leg., ch. 388, § 1, p. 1431, eff. Sept. 1, 1999. When it came to Section 3.07(a) of the former Medical Practice Act, however, the Texas Occupation Code re-codification broke what was formerly one subsection into four discrete statutes: Sections 155.001, 165.151, 165.152, and 165.153. As originally re-codified in 1999, those provisions read:

> **§ 155.001. LICENSE REQUIRED**
>
> A person may not practice medicine in this state unless the person holds a license issued under this subtitle.
>
> **§ 165.151. GENERAL CRIMINAL PENALTY**
>
> (a) A person commits an offense if the person violates this subtitle or a rule of the board.
>
> (b) If another penalty is not specified for the offense, an offense under this section is a Class A misdemeanor.
>
> **§ 165.152. PRACTICING MEDICINE IN VIOLATION OF SUBTITLE**
>
> (a) A person commits an offense if the person practices medicine in this state in violation of this subtitle.
>
> (b) Each day a violation continues constitutes a separate offense.

> (c) An offense under Subsection (a) is a Class A misdemeanor, except that if it is shown in the trial of the offense that the defendant has previously been convicted under Subsection (a), the offense is a felony of the third degree.
>
> (d) On final conviction of an offense under this section, a person forfeits all rights and privileges conferred by virtue of a license issued under this subtitle.
>
> **§ 165.153. CRIMINAL PENALTIES FOR ADDITIONAL HARM**
>
> (a) A person commits an offense if the person practices medicine without a license or permit and causes another person:
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> (1) physical or psychological harm; or
>
> (2) financial harm.
>
> (b) An offense under Subsection (a)(1) is a felony of the third degree.
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> (c) An offense under Subsection (a)(2) is a state jail felony.

Id. at 1480, 1527.

Appellant concedes that, at least as initially enacted in this re-codification of the Medical Practice Act, Section 165.152 seems to have applied to physicians and non-physicians alike, and made it a misdemeanor offense for a non-physician to practice medicine without a license (unless he had been convicted previously of that offense, in which case it would be enhanced to a third-degree felony). Appellant's Brief at 13. He further concedes that Section 165.153 operated as an additional enhancement provision ("CRIMINAL PENALTIES FOR ADDITIONAL HARM") for that offense, raising the offense of practicing medicine without a license to a third-degree felony if the State can establish physical or psychological harm, and a state jail felony if it can show financial harm. *Id*. But all of this changed, he contends, in 2003.

D. The 2003 Amendment to Section 165.152

In 2003, the Legislature revised Subsection (c) of Section 165.152. That revision gives

rise to Appellant's current argument that Section 165.152 no longer covers violations committed by non-physicians such as himself. The 2003 amendment did nothing more than to change the offense level for a violation of Section 165.152—from a Class A misdemeanor (subject to enhancement to a third-degree felony if it is shown to be a repeat offense), to a third-degree felony in all cases, whether a first-time or a repeat offense. Accordingly, the provision now simply reads: "(c) An offense under Subsection (a) is a felony of the third degree." Acts 2003, 78th Leg., ch. 202, § 37, p. 844, eff. June 10, 2003. No other provision of Sections 165.151, 165.152, or 165.153 was changed. Appellant nevertheless argues that, in making this change to the punishment level for all offenses under Section 165.152, the Legislature evinced an intent that the provision as a whole should no longer apply to persons who practice medicine without a license. In support of his argument, he relies on the principle of statutory construction that related statutes should be read *in pari materia*, with an eye to avoiding irreconcilable conflicts.

E. Appellant's *In Pari Materia* Argument

After the 2003 amendment to Section 165.152, practicing medicine in violation of Subtitle B ("Physicians") of Title 3 ("Health Professionals") of the Occupations Code constitutes a third-degree felony in *every* instance—not just for a repeat offense. If practicing medicine without a license constitutes a violation under Section 165.152, then doing so is now *always* punishable as a third-degree felony. Appellant argued (among other things) on appeal that to continue to read Section 165.152 to reach those who violate the Subtitle by

practicing medicine without a license would render Section 165.153—which specifically and exclusively operates to enhance the punishment for practicing medicine without a license, and not any other violation of the Subtitle—a nullity.

Section 165.153 specifically enhances the penalty for the offense of practicing medicine without a license, and does so based upon whether the non-physician offender causes another person harm by doing so. If the harm is physical or psychological, the offense is designated a third-degree felony. TEX. OCCUPATIONS CODE § 165.153(a)(1) & (b). If the harm is financial, it is a state jail felony. TEX. OCCUPATIONS CODE § 165.153(a)(2) & (c). But if Section 165.152 applies to the offense of practicing medicine without a licence, Appellant argues, then after the 2003 amendment to Section 165.152(c), the offense is already—always—a third-degree felony, without the necessity for the State to establish harm of any sort. And, indeed, if by practicing medicine without a license, an offender causes another person financial harm, but *only* financial harm, then Section 165.153(c) would actually serve to *reduce* the severity of the offense from that under Section 165.152(c)—from a third-degree felony to a state jail felony. This would essentially operate to repeal Section 165.153 while leaving it on the books, Appellant contended on appeal, which is an absurd result that he does not believe the Legislature could possibly have intended.

To avoid this perceived absurdity, Appellant urged the court of appeals to construe the 2003 amendment to Section 165.152(c) *in pari materia* with Sections 165.151 and 165.153. Reading the amendment in that context, he argued, results in a change to the scope

of Section 165.152, so that it no longer embraces the offense of practicing medicine without a license. Instead, he argued, the Legislature has now made it plain that the ordinary offense of practicing medicine without a license is covered by Section 165.151, which is a Class A misdemeanor "[i]f another penalty is not specified for the offense[.]" TEX. OCCUPATIONS CODE § 165.151(b). That offense may then be enhanced, he continued, either to a third-degree felony in the event that physical or psychological harm is caused, or to a state jail felony, if only financial harm is caused, under the provisions of Section 165.153. Although the indictment in his case purported to charge him under Section 165.152, Appellant maintained, because it explicitly accused him of practicing medicine without a license, it charged him with an offense that is no longer covered by that provision.[7] Moreover, he says, because the indictment failed to allege any sort of harm, it merely charged him with the Class A misdemeanor offense of practicing medicine without a license under Section 165.151, not one of the harm-based felonies set out in the enhancement provisions of Section 165.153. Such an indictment, he concluded, because it alleged no more than a misdemeanor offense, was insufficient to vest jurisdiction in the district court that conducted his trial. For this reason, he asserts, the trial court erred to deny his motion to quash.

F. The State's Response

The State argued (among other things) that the 2003 amendment to the punishment

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[7] Appellant argued that his reading of Section 165.152 is supported by the fact that subsection (d) thereof provides that a persons convicted under its provisions suffers a forfeiture of his medical license. *See* note 6, *ante*.

provision contained in Section 165.152(c) was not intended to change the reach of the substantive offense, and that the statute was still meant to cover the offense of practicing medicine without a license. After all, the provision makes it an offense for a "person" to practice medicine in violation of Subtitle B, not a "physician."[8] In the State's view, this makes the provision applicable to all persons: those who practice medicine in violation of Subtitle B, albeit with a license, as well as those who practice medicine in violation of Subtitle B because they do so without a license as required by Section 155.001. In essence, then, the State concedes that the 2003 amendment *did* at least *implicitly* repeal Section 165.153, making every instance of practicing medicine without a license a third-degree felony regardless of whether it results in harm of any kind to another person. State's Brief at 12. And that, the State maintains, is exactly what the indictment in this case charged Appellant with committing—a third-degree felony offense under Section 165.152(c), capable of conferring subject matter jurisdiction on the trial court.

G. The Court of Appeals' Opinion

The court of appeals did not wholly embrace the arguments of either party. Instead, the court of appeals pointed to what it perceived to be the clear logic of the statutory scheme embodied in the Medical Practice Act. It concluded, based only on its own understanding

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[8] Indeed, had the Legislature intended to change the substantive reach of the statute, one might very well have expected it also to have amended Subsection (a) of Section 165.152, so that it would read: "A person *who is a physician* commits an offense if the person practices medicine in this state in violation of this subtitle." Section 151.002 of the Occupations Code, which provides definitions application to Subtitle B ("Physicians"), defines "physician" to mean "a person licensed to practice medicine in this state." TEX. OCCUPATIONS CODE § 151.002(12).

of the logic of the statutory scheme, that Section 165.152 had always been understood—at least prior to the 2003 amendment—to apply to persons who practiced medicine without a license. *Diruzzo*, 549 S.W.3d at 308. From that alone, the court of appeals concluded that an indictment alleging an offense of practicing medicine without a license under that Section was sufficient to allege a felony offense, thereby invoking the district court's jurisdiction. *Id*. at 309.

Along the way, the court of appeals observed:

> We cannot explain why the Legislature did not concurrently repeal section 165.153 or amend it to provide for increased penalties in harm cases—but we cannot conclude that, by declining to do so, the Legislature intended to create a new restriction limiting the applicability of 165.152 only to licensed physicians.
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> It is true, as [A]ppellant contends, that this construction essentially renders [S]ection 165.153 superfluous. *See Crosstex* [*Energy Servs., L.P. v. Pro Plus, Inc.*], 430 S.W.3d [384] at 389 [(Tex. 2014)] ("We must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous."). Under this construction, there is no conceivable scenario under which the State would choose to charge a person under [S]ection 165.153, since that section addresses behavior (practicing medicine without a license) which is encompassed by [S]ection 165.152, and yet [S]ection 165.153 requires an additional harm element, but does not provide for an increased penalty relative to [S]ection 165.152. At oral argument, the State's counsel suggested that the Legislature "implicitly repealed" [S]ection 165.153 by its 2003 amendment to [S]ection 165.152. We are unaware of any authority allowing us to construe an act of the Legislature as an "implicit repeal" of a statute which, explicitly, is left intact. But we agree with the State that the Legislature's decision to render [S]ection 165.153 superfluous does not produce an absurd result which could not have been intended.

Id. at 308–09.[9]

H. On Discretionary Review

On discretionary review, Appellant now argues that the court of appeals' analysis conflicts with basic principles of construing statutes *in pari materia*, and that a reviewing court may not resolve an irreconcilable conflict among statutory provisions by simply declaring one provision to be "superfluous." *See Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017) (in construing statutes, a reviewing court should attempt to give effect to each word, phrase, clause, and sentence). The State replies, for the first time in its responsive brief on discretionary review, that Appellant should not be allowed to invoke principles of *in pari materia* to challenge the trial court's subject matter jurisdiction in a pre-trial context, contrary to this Court's precedents. *See Ex parte Smith*, 185 S.W.3d 887, 893 (Tex. Crim. App. 2006) ("An appellate decision on the *in pari materia* claim would be premature before the State has had an opportunity to develop a complete factual record during a trial[.]"). We will address the State's counter-argument first.

III. WAS APPELLANT'S CLAIM PREMATURE?

Although Appellant obtained a ruling on his pre-trial motion to quash, the State argues that he nevertheless failed to preserve his *in pari materia* claim for appellate purposes. State's Brief at 6–7. Because this Court declared in *Smith* that a pre-trial *in pari materia* claim is "premature," 185 S.W.3d at 893, and because Appellant did not reiterate his claim

[9] At this stage in its opinion, the court of appeals dropped a footnote urging the Legislature "to revise these statutes to avoid further confusion." *Diruzzo*, 549 S.W.3d at 309 n.2.

at the close of the State's evidence or in a motion for new trial, *see Azeez v. State*, 248 S.W.3d 182, 193–94 (Tex. Crim. App. 2008) (holding that, though he failed to challenge the charging instrument prior to trial, the appellant did object on *in pari materia* grounds at the close of the State's case and in a motion for new trial, he preserved error), the State asserts that Appellant has failed to preserve his complaint for appeal. State's Brief at 7. Preservation of error is a systemic requirement, which we have sometimes addressed for the first time on discretionary review. *Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005). We disagree with the State, however, that Appellant failed to preserve error in this case.

Smith, on which the State relies to suggest that Appellant's *in pari materia* argument is waived, involved a pre-trial application for writ of habeas corpus. We noted that the indictment in *Smith* was "valid on its face." 185 S.W.3d at 893. The indictment in that case charged the felony offense of aggravated assault. *Id*. at 888. The appellant argued that, under principles of *in pari materia*, he should only be prosecuted and punished for hazing, a Class A misdemeanor offense over which the district court lacked subject matter jurisdiction. But nothing about the face of the indictment itself served to indicate that the State intended to charge the appellant with the lesser offense. The appellant's *in pari materia* claim only gained traction once evidence was adduced to show that the charged assault occurred in the context of a school hazing event. We held that, under those circumstances, raising the *in pari materia* claim by way of a pre-trial application for writ of habeas corpus was inappropriate; because it was, by necessity, predicated upon factual development, the interlocutory event

of a pre-trial writ application was "premature" since, at that stage, the claim was "not yet ripe for review." *Id*. at 893. Indeed, we have said in other contexts that pre-trial habeas will not lie to address claims that would benefit from a record development of the facts.[10]

But Appellant's claim does not come to us in the context of an appeal from a pre-trial application for writ of habeas corpus. It comes, instead, in the context of a direct appeal. Appellant raised his *in pari materia* claim in a motion to quash the indictment, and did not appeal its denial until after trial. Because his claim will stand or fall based upon the face of the indictment, requiring no evidentiary development—and because it challenged the trial court's jurisdiction on a basis that did not require fact development—a motion to quash was an acceptable vehicle by which to raise it. *See, e.g.*, *State v. Rosenbaum*, 910 S.W.2d 934, 948 (Tex. Crim. App. 1995) (op. on State's motion for reh'g) (adopting dissenting opinion on original submission, which had argued that "[a]n indictment must be facially tested by itself under the law, as a pleading; . . . it can not be . . . defeated by evidence presented at pretrial"); *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 919 (Tex. Crim. App. 2011) ("Texas law does not permit a defendant in a criminal case to attack the sufficiency or adequacy of an indictment by evidence beyond the four-corners of that indictment."); TEX. CODE CRIM. PROC. art. 27.02(1) ("The pleadings and motions of the defendant shall be . . . [a] motion to

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[10] For example, a limitations bar may be raised in a pre-trial application for writ of habeas corpus, but only "if the face of the indictment shows that any prosecution is barred by the statute of limitations." *Ex parte Smith*, 178 S.W.3d 797, 802 (Tex. Crim. App. 2005). *See also Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010) ("And pretrial habeas is unavailable when the resolution of a claim may be aided by the development of a record at trial."); *Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim. App. 2017) (same).

set aside or an exception to an indictment . . . on some matter of form or substance[.]"); TEX. CODE CRIM. PROC. art. 27.08(4) ("There is no exception to the substance of an indictment . . . except . . . [t]hat it shows upon its face that the court trying the case has no jurisdiction thereof."). Moreover, having obtained an adverse ruling from the trial court on his motion to quash, Appellant adequately preserved error, if any.

It is true that, in *Azeez*, we held that the appellant properly preserved error when he requested an instructed verdict and a motion for new trial, in both of which he raised his *in pari materia* claim. 248 S.W.3d at 193–94. But that holding came in the wake of a State's argument that, by failing to raise his *in pari materia* claim in a timely pre-trial motion to quash, Azeez had failed to preserve error. *Id*. Indeed, Azeez could not reasonably have been expected to raise his claim any earlier than he did—especially in light of our holding in *Smith*—because it was not until the State presented its case that it became apparent that he was being prosecuted under the wrong statute. *Id*. at 194. Here, by contrast, Appellant's *in pari materia* argument requires no such fact development; it depends purely upon the significance of the fact that the State alleged that he practiced medicine without a license, but then made no allegation whatsoever of harm.

IV. DID THE INDICTMENT ALLEGE ONLY A MISDEMEANOR?

The parties agree that, if current Section 165.152 applies to persons who practice medicine without a license, then the 2003 amendment to Subsection (c) of Section 165.152 abrogates Section 165.153, rendering it a virtual nullity—or, "superfluous," as the court of

appeals characterized it. *Diruzzo*, 549 S.W.3d at 309. What the parties disagree about is whether, given this anomalous consequence, it is appropriate to construe Section 165.152 to apply to those who practice medicine without a license. The State argues that the proper response to the anomaly is to regard the 2003 amendment as an implied repeal of Section 165.153 altogether. By that reading, the indictment properly alleged an offense of practicing medicine without a license, a third-degree felony, under Section 165.152. Appellant counters that such implied legislative repeals are not favored, and urges that, to avoid the consequence of rendering an entire statute "superfluous," we should construe Section 165.152 to apply only to licensed medical practitioners who practice medicine in an unlawful manner. By that reading, the various counts of the indictment in this case alleged only misdemeanor offenses under Section 165.151, because they alleged practicing medicine without a license without also alleging any of the sorts of harm that would elevate the offenses to felony status under Section 165.153. We believe Appellant has the better argument.

In *Cheney v. State*, 755 S.W.2d 123 (Tex. Crim. App. 1988), this Court observed:

> It is a settled rule of statutory interpretation that statutes that deal with the same general subject, have the same general purpose, or relate to the same person or thing or class of persons or things, are considered as being in pari materia though they contain no reference to one another, and though they were passed at different times or at different sessions of the legislature.

Id. at 126 (quoting 53 TEX. JUR. 2d, *Statutes* § 186 (1964), at 280). Such provisions are to "be taken, read, and construed together, each enactment in reference to the others, as though they were parts of one and the same law." *Id*. Most importantly for present purposes, "[a]ny

conflict between their provisions will be harmonized, if possible, and effect will be given to all the provisions of each act if they can be made to stand together and have concurrent efficacy." *Id*. *See* A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 27, at 180 (2012) ("[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously."); TEX. GOV'T CODE §311.021(2) (Code Construction Act) ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective[.]").[11] There can be no doubt that current Sections 155.001, 165.152, 165.152, and 165.153 should be considered *in pari materia*. Their provisions should be construed harmoniously, and in such a way as to render every part efficacious, to the extent they can plausibly be made to do so.

"The repeal of laws by implication is not favored." 67 TEX. JUR. 3d *Statutes* § 62, at 597 (2012).[12] "The presumption disfavoring implied repeals is . . . a judicially created rule of construction." Scalia & Garner, § 28, at 185.[13] "But it *is* a principle of statutory

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[11] The provisions of the Code Construction Act apply to each code enacted from the 60th Legislature forward, and to every amendment thereto. TEX. GOV'T CODE § 311.002(1) & (2). The Texas Occupations Code was enacted by the 76th Legislature.

[12] *See* 67 TEX. JUR. 3d *Statutes* § 62, at 597 (2012) ("The doctrine of implied repeal may not be invoked merely because there is some difference, discrepancy, inconsistency, or repugnancy between earlier and later legislation. In such a case, the court will endeavor to harmonize and reconcile the various provisions, and if both acts can stand together, the rule is to let them stand.").

[13] *See also* 1A Norman J. Singer & J.D. Shambie Singer, SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION *Repealing Acts* §23:10, at 472 (7th ed. 2009) ("Courts have created a presumption against the repeal of prior laws by implication."); *id*. at 479 ("[T]he presumption against implied repeal is grounded in judicial respect for the ultimate authority of the legislature to make laws.").

construction that a later-enacted statute that contradicts an earlier one effectively repeals it." *Id*. Thus, it is possible, as the State urges, for a later-in-time legislative act to effectively repeal an extant statute: "When a statute specifically permits what an earlier statute prohibited, or prohibits what it permitted, the earlier statute is (no doubt about it) implicitly repealed." *Id*. §55, at 327.[14] Even so, the presumption against implied repeals recognizes that, "if statutes are to be repealed, they should be repealed with some specificity." *Id*.[15] So long as the original provision is susceptible to a construction that is in harmony with the amendment, so as to avoid implied repeal of some part of the original, salvage rather than subtraction should be the preferred judicial response,[16] since "it is no more the court's function to revise [a legislative enactment] by subtraction than by addition." *Id*. § 26, at 174. What is more, "[w]hile the implication of a later enactment will rarely be strong enough to

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[14] *See also* 1A Norman J. Singer & J.D. Shambie Singer, SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION *Repealing Acts* § 23:9, at 449 (7th ed. 2009) ("A repeal may arise by necessary implication from the enactment of a subsequent act.").

[15] *See also* 67 TEX. JUR. 3d *Statutes* § 64, at 600 (2012) ("Where there is no express repeal, the presumption is that in enacting a new law, the legislature intended the old statute to remain in operation. The two acts will persist unless the conflicting provisions are so antagonistic and repugnant that both cannot stand. If by any reasonable construction two acts or statutory provisions can be reconciled and so construed that both may stand, one will not be held to repeal the other.");1A Norman J. Singer & J.D. Shambie Singer, SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION *Repealing Acts* §23:9, at 461 (7th ed. 2009) ("[I]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable or if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.").

[16] *See* 1A Norman J. Singer & J.D. Shambie Singer, SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION *Repealing Acts* §23:6, at 437–38 (7th ed. 2009) ("Texas does not favor general repealers in the absence of strong repugnance between new and existing statutes. If possible the statutes are construed to give effect to both.").

repeal a prior provision, it will often change the meaning that would be given to an earlier provision that is ambiguous." *Id*. at 330. Accordingly, even if the 2003 amendment to Section 165.152(c) has the effect of clarifying (or even modifying) the apparent reach of the original statute, such an interpretation would be preferable to construing the amendment to impliedly repeal Section 165.153 in its entirety.

Ever since the Texas Occupations Code split the penal provision of the former Medical Practices Act into three discrete statutes, there has been a certain tension between what are now Sections 165.151 and 165.152—even before the 2003 amendment to the latter. Under Section 165.151's general provision, "a person commits an offense if the person violates this subtitle"—presumably, *any* person who violates the subtitle in *any* way. TEX. OCCUPATIONS CODE § 165.151(a). Under Section 165.152, "a person commits an offense" in a slightly more specific way: "if the person *practices medicine* in this state in violation of this subtitle." TEX. OCCUPATIONS CODE § 165.152(a). A person who commits an offense under Section 165.152 has seemingly also committed an offense under Section 165.151, the latter being essentially a subset of the former.

As these two provisions were originally enacted in 1999, both the broader and the more specific provisions were punishable as Class A misdemeanors. TEX. OCCUPATIONS CODE §§ 165.151(b) & 165.152(c) (as the latter was originally enacted in 1999). The only difference was that the more specific subset of *practicing medicine* in violation of the subtitle was susceptible to felony enhancement for repeat offenders. TEX. OCCUPATIONS CODE §

165.152(c) (as originally enacted in 1999). Moreover, if the violation of the subtitle took the form of practicing medicine *without a license*, it was also susceptible to enhancement upon a showing of harm, under Section 165.153. TEX. OCCUPATIONS CODE § 165.153.[17] Thus, like Section 165.152, Section 165.153 also operates as a subset of Section 165.151—a particular way of violating the subtitle—but makes it a far more serious offense to violate the subtitle by specifically practicing medicine *without a license* and thereby *causing particular kinds of harm*.

So, should all three of these discrete provisions, as originally enacted in 1999, be construed to proscribe the offense of practicing medicine *without a license*? Clearly both Sections 165.151 and 165.153 do, the only difference being that, with the additional showing of harm, the latter constitutes a felony offense. But does Section 165.152 *also* cover practicing medicine without a license? On its face, it is reasonably susceptible to construction either way: It may apply to any practice of medicine that violates the provisions of the Medical Practices Act, including practicing without a license; or it may apply only to the conduct of licensed medical practitioners that violates the act. Although some courts of appeals opinions have treated Section 165.152 as if it does apply to licensed physicians and non-licensed practitioners alike (both before and after the 2003 amendment),[18] none has ever

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[17] Indeed, the only one of the three statutes expressly to speak to practicing medicine *without a license* was—and remains—Section 165.153.

[18] *See Green v. State*, 137 S.W.3d 356, 359 n.2 (Tex. App.—Austin 2004, pet. ref'd) (observing that, prior to the 2003 amendment, practicing medicine without a license could be prosecuted as a Class A misdemeanor under Section 165.152(c), subject to enhancement to a felony

authoritatively said so in the face of a claim to the contrary. And this Court has certainly never so held. In short, we need not overrule any binding court precedent in order to save Section 165.153 from extinction.

Since the 2003 amendment to Section 165.152(c), any violation of that provision is a third-degree felony. We agree with the parties that to construe Section 165.152 now to proscribe the practice of medicine without a license makes that offense a third-degree felony regardless of harm, and thereby effectively abrogates all of Section 165.153. And to read Section 165.152 as Appellant would have us read it—as *not* proscribing the practice of medicine without a license—avoids this implicit-repeal anomaly.

We think Section 165.152 is reasonably susceptible to Appellant's construction. It is possible to sensibly interpret Section 165.152's proscription against a person who "practices medicine" in violation of the subtitle to reach only licensed physicians—those who are legally *authorized* to practice medicine, but who do so in a way that violates the subtitle. Such an offense is always, under the 2003 amendment, a third-degree felony.[19] Moreover, licensed physicians who violate the subtitle may have their licenses forfeited, by operation

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under Section 165.153); *Nix v. State*, 401 S.W.3d 656, 661 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (observing that Section 165.152, even after the 2003 amendment, operates (more specifically than Section 165.151) to proscribe "the unauthorized practice of medicine").

[19] We note that the 2003 amendment to Section 165.152(c) was a very small part of a much more comprehensive legislative enactment that otherwise exclusively dealt with the regulation and enforcement of the practice of medicine by *licensed physicians*. *See* Acts 2003, 78th Leg., ch. 202, p. 833, eff. June 10, 2003. This also lends some support to our conclusion that the Legislature understood Section 165.152 to apply only to the conduct of licensed physicians who practice medicine in ways that violate the subtitle.

of Section 165.152(d).[20] By contrast, those persons who practice medicine without a license commit a Class A misdemeanor, by operation of Section 165.151—unless they thereby cause harm, in which case they have violated Section 165.153, which is a felony offense. Adopting this construction of the statute unquestionably garners "a result feasible of execution[,]" TEX. GOV'T CODE § 311.021(4), is wholly consistent with the statutory language,[21] and preserves the entirety of the legislative scheme, sacrificing no part on account of irreconcilable conflict.[22] In the absence of some more definite indication that the Legislature repealed

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[20] Appellant argues that Subsection (d) provides definitive proof that the Legislature never intended for Section 165.152 to apply to the offense of practicing medicine without a license, because such offenders have no medical license to forfeit. *See* notes 6 & 7, *ante*. While we acknowledge that Subsection (d) is certainly *consistent* with Appellant's interpretation of the statute—which we here adopt—it does not by itself make a definitive case for that interpretation. Even if we were to construe Section 165.152 to cover practicing medicine without a license, it would *also* cover licensed physicians who *otherwise* violate the subtitle, and Subsection (d) would operate to forfeit the licenses of *those* offenders.

[21] When Section 165.152(a)'s phrase ("practices medicine . . . in violation of this subtitle") is contrasted with Section 165.153(a)'s phrase ("practices medicine without a license"), it is certainly reasonable to construe the scope of the former to cover only those who may legitimately practice medicine, but who do so in a manner that somehow violates the subtitle, leaving it to the latter provision to cover those who practice without a license (and thereby cause harm). Because Section 165.151 pertains to *all* persons who in some respect violate the subtitle (including by practicing medicine without a license), this construction will clarify that such an offense is a Class A misdemeanor in the absence of an allegation and proof of one of the sorts of harm listed in Section 165.153.

[22] Thus, we resolve any potential conflict in favor of preserving the whole of the statutory scheme rather than in favor of implicit repeal of one of the three statutes in its entirety. Even if we were unsure of the Legislature's preference with respect to whether Section 165.152 proscribes practicing medicine without a license, thus making it a felony offense in all circumstances, and whether 165.153 should be altogether repealed, we would resolve our uncertainty in Appellant's favor. The rule of lenity applies to the construction of criminal statutes outside of the Texas Penal Code. *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007). The rule of lenity provides the rule of decision when the proper construction of a statute is in insoluble doubt, *Ex parte Forward*, 258 S.W.3d 151, 154 n.19 (Tex. Crim. App. 2008), and it dictates that such doubt should

Section 165.153, we think this to be the better interpretation of the present statutory scheme when all of its provisions are considered *in pari materia*.

The State argues that this construction of the statutory scheme runs contrary to the history of these provisions—at least up until the 2003 amendment—and produces an absurd result to boot. State's Brief at 15–18. It is true, as we have readily acknowledged, that prior to the 2003 amendment, Section 165.152 could have been read to cover practicing medicine without a license, and that some courts of appeals seemed inclined to believe that it did.[23] Whether we should definitively construe it that way now, however, following the 2003 amendment, is the question we address today. If construing that ambiguous provision in such a way that it reaches only the conduct of licensed physicians serves to harmonize Section 165.152 with the balance of the statutory scheme, we think it to be the better construction. As we have stated previously in this opinion, salvage rather than subtraction should be the preferred judicial approach.

The State perceives an absurd consequence of this construction, however, that it believes should compel us to prefer its implied-repeal approach. The State argues that "the entire purpose of these laws was meant to protect the public." State's Brief at 17. Under our

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be resolved in favor of the accused. *State v. Rhine*, 297 S.W.3d 301, 309 (Tex. Crim. App. 2009). Under present circumstances, that would mean that we should construe the statutory scheme in such a way that practicing medicine without a licence constitutes only a Class A misdemeanor under Section 165.151—at least in the absence of an allegation of harm so as to bring it within Section 165.153.

[23] *See* note 18, *ante*.

construction, the State complains, "protecting the public is at best a secondary goal [whereas] enforcing the licensing regimen becomes the primary goal." *Id*. at 18. On the one hand, the State maintains, if we limit the reach of Section 165.152 to the misconduct of licensed physicians, all such misconduct becomes a third-degree felony under Section 165.152(c), regardless of harm. On the other hand, practicing medicine without a license, if we read only Section 165.153 to reach such misconduct, will only *sometimes* constitute a third-degree felony, when physical harm results; and will constitute a mere state jail felony when only financial harm results. It is simply unthinkable to the State that the Legislature would opt to punish licensed practitioners more severely, even when their misconduct causes no harm, than it would punish many unlicensed practitioners whose conduct does cause harm.

We do not think our construction will lead to absurd consequences. It is undoubtedly clear that, by its 2003 amendment to Section 165.152(c), the Legislature expressly made licensed physician offenders—even first-time offenders—always punishable as third-degree felons. The 2003 legislative act that contained the amendment to Section 165.152(c) dealt almost exclusively with the regulation of the conduct of licensed physicians. Acts 2003, 78 th Leg., ch. 202, §§ 1–44, pp. 833–45, eff. June 10, 2003. The 2003 act did not speak to the conduct of practicing medicine without a license. It seems to have given no consideration—at all—to the possibility that its amendment to Section 165.152(c) would affect the range of punishment for practicing medicine without a license. That the Legislature seems thus to have rendered the misconduct of licensed physicians a more serious offense than practicing

medicine without a license, however, is a legitimate normative judgment. While this is not a judgment that the State (or that even we, necessarily) would share, that does not render the Legislature's normative judgment inherently absurd. And it is certainly not so manifestly illogical or unlikely that it should lead us to infer without better reason that the Legislature implicitly repealed Section 165.153.

"[A]ppellate courts are constrained to construe a statute that has been amended as if it had been originally enacted in its amended form, mindful that the Legislature, by amending the statute, may have altered or clarified the meaning of earlier provisions." *Mahaffey v. State*, 316 S.W.3d 633, 642 (Tex. Crim. App. 2010). Moreover, "[w]e must give effect to the Legislature's change in the law regardless of whether the change was intended." *Id*. (quoting *Getts v. State*, 155 S.W.3d 153, 158 (Tex. Crim. App. 2005)). Reading the 2003 amendment to Section 165.152(c) as if it were part of the originally enacted punishment scheme for the Medical Practices Act counsels that it should now be read to proscribe only the misconduct of licensed physicians. If we have mistakenly interpreted its objective, the Legislature is, of course, free to amend the statutory scheme again—perhaps this time to explicitly and formally repeal Section 165.153, while making explicit that Section 165.152 also proscribes the offense of practicing medicine without a license, making it—like the misconduct of licensed physicians, always a third-degree felony regardless of harm.

We therefore conclude that the court of appeals erred to decide that the 2003 amendment effectively repealed Section 165.153. We hold that practicing medicine without

a license is a Class A misdemeanor under Section 165.151, unless the State can allege and prove harm in satisfaction of the provisions of Section 165.153. Section 165.152, on the other hand, proscribes only the conduct of licensed physicians who violate the subtitle.

Because the indictment in this cause alleged that Appellant violated the subtitle by practicing medicine without a license, but failed to allege harm, it alleged no more than a misdemeanor offense. Consequently, at least in the face of Appellant's manifest objection to it on that basis in his pre-trial motion to quash,[24] it failed to properly invoke the subject matter jurisdiction of the district court that purported to convict him. The trial court erred to deny Appellant's motion to quash the indictment.

V. CONCLUSION

We reverse the judgment of the court of appeals, vacate the trial court's judgment, and remand the cause to the trial court for further proceedings not inconsistent with this opinion.[25]

DELIVERED: September 11, 2019
PUBLISH

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[24] *See* TEX. CODE CRIM. PROC. art. 1.14(b) (requiring a pre-trial objection to a defect to the substance of an indictment in order to preserve complaint on appeal); *Kirkpatrick v. State*, 279 S.W.3d 324, 329 (Tex. Crim. App. 2009) (holding that, even though the unobjected-to indictment alleged a misdemeanor and "lacked an element necessary to charge a felony," it still conferred subject matter on the district court, because it was returned in felony court, and it contained a heading which identified the Penal Code section and designated that offense as a felony); *Teal v. State*, 230 S.W.3d 172, 182 (Tex. Crim. App. 2007) (unobjected-to indictment which failed to allege one of the two elements necessary to establish an offense of felony grade nevertheless served to vest subject matter jurisdiction in the district court because "one could fairly conclude from the face of the charging instrument that the State intended to charge a felony offense").

[25] *See* note 1, *ante*.