CRIMINAL LAW

Technology EXPO
& Legal Outfitter 2005

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Mark Stevens
310 S. St. Mary's, Suite 1505
San Antonio, Texas 78205
(210) 226-1433

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I.
Scope of Paper

The State Bar's annual Advanced Criminal Law Course takes almost 30 hours to present. Luckily for you, I am allotted a mere 30 minutes to cover the subject of criminal law. To make my very large topic fit in this very small space I will focus on just a few recent cases from the United States Supreme Court, the Texas Court of Criminal Appeals, and the Fourth Court of Appeals. I picked these cases because I think they are both interesting and important. I hope you find the discussion useful.

II.
Topics

A. Actual Innocence

1. The most recent case.

Ex parte Thompson, 2005 WL 51327 (Tex. Crim. App. 2005)

To succeed on an actual innocence claim under article 11.07, "the applicant bears the burden of showing that the newly discovered evidence unquestionably establishes his or her innocence." The newly discovered evidence must be examined in light of the evidence presented at trial, and the habeas court must find that no rational jury would have convicted in light of this new evidence.

Here, the habeas court recommended relief, and these findings are supported by the record.

Applicant was convicted in 1991 of aggravated sexual assault against his 5 year old daughter. At the habeas hearing evidence was presented about a custody dispute, and the complainant, now 20 years old, testified that applicant had not really abused her, but that she had been pressured by her mother to accuse her father. The mother admitted to certain acts of physical violence against her daughter, and also expressed some doubt about the original accusations. Evidence was presented to explain some of the physical evidence at trial, and an expert testified that she believed the complainant's recantation was valid.

"The Court finds that Applicant's ground for relief should be granted and the conviction set aside under authority of *Ex parte Elizondo*, 947 S.W.2d 202 (Tex.Crim.App.1996), in that Applicant has shown by clear and convincing evidence that no reasonable juror would convict him in light of the newly discovered evidence of actual

innocence presented at the evidentiary hearing on Applicant's writ application."

Judge Cochran concurred and effectively summarized the current state of the law. This is her view on the court's responsibility in resolving claims of actual innocence:

> I agree wholeheartedly with the dissent that our "judicial process is not limitless," but we fail in our primary duty of protecting the innocent and punishing the guilty if we intentionally slam the courthouse doors against one who is, in fact, innocent of wrongdoing. I believe that if the criminal justice system--even when its procedures were fairly followed--reaches a patently inaccurate result which has caused an innocent person to be wrongly imprisoned for a crime he did not commit, the judicial system has an obligation to set things straight. Our criminal justice system makes two promises to its citizens: a fundamentally fair trial and an accurate result. If either of those two promises are not met, the criminal justice system itself falls into disrepute and will eventually be disregarded.

2. Other cases on actual innocence.

a. *Court ex rel. Holmes v. Court of Appeals for the Third District*, 885 S.W. 2d 389 (Tex. Crim. App. 1994).

b. *Ex parte Elizondo*, 947 S.W. 2d 202 (Tex. Crim. App. 1997).

c. *Ex parte Franklin*, 72 S.W. 3d 671 (Tex. Crim. App. 2002).

d. *Ex parte Tuley*, 109 S.W. 3d 388 (Tex. Crim. App. 2002).

e. *Ex parte Harmon*, 116 S.W. 3d 778 (Tex. Crim. App. 2003).

f. *Ex parte Harvey*, No. WR-74,955 (Tex. Crim. App. December 8, 2004)(not designated for publication)

B. Argument

Dang v. State, 2005 WL 156721 (Tex. Crim. App. 2005)

The trial court abused its discretion when it limited Dang's lawyer to 20 minutes for final argument in a capital murder case with a number of legal theories and factual conflicts impossible to address in that time. "It would be a hollow right to afford a

defendant the right to have an argument without the right that he be allotted a reasonable time to make it." Restrictions on final argument must therefore be "reasonable." To determine reasonableness, the court provided a seven part, non-exclusive list of factors to be considered.

Dang's trial lawyer was very smart to ask for only an additional three minutes. He also listed in his motion for new trial those things he would have argued had he had the time, and this turned out to be crucial for preserving error.

Judge Meyers, joined by Judges Holcomb and Cochran, would have also found this time restriction to be a violation of the Sixth Amendment right to counsel.

Judge Keasler found the majority's conclusion "breathtaking." To him, "It really isn't too much to ask that a lawyer be concise. Good ones are."

According to Judge Keasler: "This case will hinder trial judges in controlling the length of trials." And: "The safer practice will be to not limit lawyers at all, thereby letting them harangue the jury until they are brain dead."

C. Assistance Of Counsel

1. Some older cases from the Court of Criminal Appeals.

a. *Del Rio v. State*, 840 S.W. 2d 443 (Tex. Crim. App. 1992).

b. *Thompson v. State*, 9 S.W. 3d 808 (Tex. Crim. App. 1999).

c. *Mitchell v. State*, 23 S.W. 3d 582 (Tex. Crim. App. 2000).

d. *Bone v. State*, 77 S.W. 3d 828 (Tex. Crim. App. 2002).

2. Without a motion for new trial.

Hovey v. State, 2004 WL 2289595 *2 (Tex. App.–San Antonio 2004, no pet. h.)

Appellant complained on appeal that his trial lawyer was ineffective because he did not prepare for trial, investigate the case, or request a mistrial, and because he allowed appellant to plead guilty to a crime he did not commit. No motion for new trial was filed. The court of appeals overruled counsel's ineffectiveness claim. "Here, the record is silent as to all of defendant's complaints; therefore, to find defendant's trial counsel ineffective

on the basis of the record before this court would require us to speculate, which we will not do."

3. With a motion for new trial.

State v. Garza, 143 S.W. 3d 144 (Tex. App.–San Antonio 2004, pet. ref'd)

The trial court did not abuse its discretion when it granted defendant's motion for new trial because the trial lawyer had been ineffective in failing to challenge a juror who was challengeable for at least two reasons. One improper juror destroys the integrity of the jury verdict.

4. The minority view.

Johnson v. State, 2005 WL 50102 (Tex. App.–San Antonio 2005, no pet. h.)(Stone, J., concurring)("In my opinion, this is not a silent record on counsel's strategy, because there can be no reasonable strategy that employs insult, disrespect, and disregard of the jury.").

D. Capital Punishment

1. The execution of juveniles.

Roper v. Simmons, *certiorari granted at* 540 U.S. 1160 (2004)

Questions presented: (1) Once the Supreme Court held in *Stanford v. Kentucky*, 492 U.S. 361 (1989) that capital punishment for those under 16 is not "cruel and unusual" and thus barred by the 8th and 14th Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards? (2) Is the imposition of the death penalty on a person who commits a murder at age 17 "cruel and unusual" and thus barred by the 8th and 14th Amendments?

2. The execution of the mentally retarded.

a. *Briseno's test for retardation.*

Ex parte Briseno, 135 S. W. 3d 1 (Tex. Crim. App. 2004)

Applicant alleged in a subsequent writ of habeas corpus that he was mentally retarded and therefore exempt from execution. The trial court found against him, and the court of criminal appeals agreed. Recognizing that the legislature has not set out

procedures for dealing with executing the retarded, the court established several procedures.

Until the legislature provides some guidance, the court will use the definitions provided by the American Association on Mental Retardation, and § 591.003(13) of the Texas Health and Safety Code. Under the AAMR, mental retardation is a disability characterized by "(1) 'significantly subaverage' general intellectual functioning; (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." Under § 591.003(13), mental retardation means "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." The court then set forth a number of factors that can be used in deciding whether the applicant meets the definition.

Atkins v. Virginia does not require a post-conviction jury determination of retardation. When an inmate sentenced to death files a cognizable *Atkins* claim, the trial judge of the convicting court will determine the factual merits of that claim and the court of criminal appeals will review that determination as it does others pursuant to article 11.071 § 11.

The applicant bears the burden of proving his retardation by a preponderance of the evidence.

In *Briseno*, the court held that applicant did not proved he was retarded. "In sum, we conclude that, while there is expert opinion testimony in this record that would support a finding of mental retardation, there is also ample evidence, including expert and lay opinion testimony, as well as written records, to support the trial court's finding that applicant failed to prove that he is mentally retarded. We defer to the trial court's credibility determinations, adopt the trial court's ultimate findings of fact, and, based on those findings and our independent review, we deny relief."

Judge Holcomb dissented in *Briseno*, believing that "United States Supreme Court decisions and Texas legal tradition require a jury determination on the issue of mental retardation if the applicant is able to make a *prima facie* showing sufficient to raise the issue."

b. *Other retardation cases.*

i. The trial court found that applicant was retarded in *Ex parte Modden*, No. 74,715 (Tex. Crim. App. April 21, 2004)(not designated for publication), and the court of criminal

appeals granted relief. The trial court used the criteria set out by the AAMR and the APA and its findings were supported by the record. This was not a case of "dueling experts" as all three experts who testified agreed applicant was retarded. Although there may be some evidence that applicant was not retarded, there was significant evidence that he was. Applicant's sentence was commuted to life imprisonment. *See Ex parte Valdez*, 2004 WL 2538847 (Tex. Crim. App. 2004).

ii. In *Ex parte Bell*, 2004 WL 2538846 *1 (Tex. Crim. App. 2004), the trial court found that applicant was mentally retarded, and the court of criminal appeals found that "[t]he record supports the trial court's findings." His sentence was reformed to life imprisonment. Judge Keller, joined by Judges Meyers, Keasler, and Hervey, concurred and dissented, noting a suggestion by *amicus curiae* that a permanent stay of execution, not a reformation to a life sentence, is the appropriate remedy in this situation. These four judges were uncertain about the merits of the *amicus* position, but believed it should be addressed.

3. A creative approach to future dangerousness.

Masterson v. State, 2005 WL 236822 *5 (Tex. Crim. App. 2005)

Appellant testified that he would defend himself if incarcerated, and admitted that he would probably not last "even a month" before becoming violent again. On appeal, appellant conceded his future dangerousness, but argued that, since he was so obviously dangerous, he would be placed in lock down to protect the guards and other inmates from him, and that someone so dangerous would never be paroled. "Appellant's argument appears to be that he is so dangerous that he is not dangerous. His contention is ingenious but unpersuasive. If accepted, it would stand the capital punishment scheme on its head, giving relief to the most dangerous offenders. We will not speculate, for legal sufficiency purposes, about the effectiveness of the prison and parole authorities' methods of protecting society from those who are intent on committing future criminal acts of violence."

E. Charging Instruments

1. Defective notice.

State v. Moff, 2004 WL 2248097 (Tex. Crim. App. 2004)

The trial court properly granted Moff's motion to quash his indictment for misapplication of fiduciary property because the indictment spanned seven years and failed

to specify which of many transactions the state intended to rely on for conviction. The sufficiency of an indictment is a question of law and should be reviewed *de novo* by the appellate court.

2. The timely motion to quash.

Sanchez v. State, 138 S.W. 3d 324, 330 (Tex. Crim. App. 2004)

A party can move to quash a charging instrument at any time prior to the date trial on the merits commences.

F. Confrontation

1. Crawford v. Washington.

Crawford v. Washington, 124 S. Ct. 1354 (2004)

At Crawford's assault trial the state offered a tape recorded statement his wife had made to the police the night of the alleged crime in which she told them that she had not seen anything in the complainant's hand when he was stabbed. This statement, which tended to refute Crawford's claim of self-defense, was offered as a statement against penal interest, an exception to the hearsay rule. The wife did not testify at trial. Crawford objected that this statement, though admissible under state law, would violate his Sixth Amendment right to confrontation. The evidence was admitted, Crawford was convicted, and eventually his appeal found itself in the United States Supreme Court.

Concluding that the admission of the tape recorded statement violated the Sixth Amendment, the Supreme Court acknowledged two essential propositions.

First, the Confrontation Clause applies to those who "bear testimony." Although various types of out-of-court statements might or might not qualify as "testimonial," certain types meet even the narrowest definition, including *ex parte* testimony at a preliminary hearing, and "[s]tatements taken by police officers in the course of interrogation." It is not dispositive that the statements in question were not made under oath. The primary object of the Sixth Amendment is "testimonial hearsay . . . and interrogations by law enforcement officers fall squarely within that class."

Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

The Court stated this rule: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."

2. How the Crawford cases are being decided?

a. *Woods v. State*, 2004 WL 2896253 *5 (Tex. Crim. App. 2004)(casual remarks spontaneously made to acquaintances are non-testimonial in nature, and therefore do not fall within the new rule articulated in *Crawford*).

b. *Gonzalez v. State*, 2004 WL 2873811 *5 (Tex. App.–San Antonio 2004, no pet. h.)(under the "doctrine of forfeiture by wrongdoing," appellant is precluded from excluding testimonial hearsay because it was his misconduct – murder – that rendered the witness unavailable for cross-examination).

c. *Samarron v. State*, 150 S.W. 3d 701, 707 (Tex. App.– San Antonio 2004, no pet. h.)(police took witness to the police station and questioned him, and witness gave a formal, signed written statement that was introduced at trial. This statement was testimonial, and its admission was harmful error).

d. *Ramirez v. State*, 2004 WL 2997747 *2 (Tex. App.–San Antonio 2004, no pet. h.)(not designated for publication)(hearsay objection does not preserve confrontation complaint).

e. *Rivera v. State*, 2004 WL 3015165 *1 n.1 (Tex. App.–San Antonio 2004, no pet. h.)("*Crawford* does not apply because Rivera has not raised a confrontation complaint, and, regardless, the declarant in the instant case was present and testified at trial. Moreover, the declarant's out-of-court statements were non-testimonial in nature.")

G. Diminished Capacity

It has long been unsettled whether the doctrine of "diminished capacity" exists in Texas. That is the question before the Court of Criminal Appeals in *Kenneth Wayne Jackson v. State*, No. 03-1655.

H. DWI

1. Mechler, and the admissibility of breath test results.

State v. Mechler, 2005 WL 52775 (Tex. Crim. App. 2005)

Nearly an hour and a half after he was arrested Mechler blew 0.165. The state conceded that it lacked sufficient information for retrograde extrapolation under the *Mata* case, and the trial court suppressed the breath test results based on Rule 403, and the state appealed. The court of appeals reversed, and the court of criminal appeals granted Mechler's petition for discretionary review.

The court of criminal appeals affirmed the court of appeals, finding that the trial court had erred when it suppressed the breath test results under Rule 403. *Mata* addresses only the admissibility of expert testimony, not the admissibility of the breath test results.

"A proper Rule 403 analysis includes, but is not limited to, four factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence."

Here, three of the four factors favored admissibility of the results. The evidence was "probative" of intoxication because it indicated Mechler had consumed alcohol. There was no "great" potential to impress the jury irrationally, that is, the evidence was not unfairly prejudicial, because the evidence related directly to the charged offense. Because the test results relate directly to the charged offense, a jury could not possibly be unduly distracted, regardless of the time it takes to present this evidence. Finally, the state had little need for the evidence, in light of other evidence that Mechler was intoxicated. Because "the sum of the factors weigh in favor of admissibility," the trial court abused its discretion under Rule 403.

Judge Cochran concurred in the result, but wrote separately to make two points. First, she believes that it is difficult to make individualized Rule 403 rulings in a pretrial setting. Second, she believes that, because "Rule 403 rulings are largely idiosyncratic," it is necessary "to make individualized Rule 403 rulings on proffered intoxilyzer test results that account for the degree to which the result exceeds the legal limit of 0.08% as well as the time elapsed from driving until the test is taken." That is, breath test results will not always be admissible, but whether they are admissible will depend on the facts of the case, and this determination should ordinarily not be made in a pretrial hearing.

2. Pre-Mechler cases.

Mata v. State, 46 S.W. 3d 902, 917 (Tex. Crim. App. 2001)(where state relied on only a single breath test taken more than two hours after defendant drove, and its "expert" did not know a single personal characteristic of the defendant, the state failed to prove by clear and convincing evidence that the retrograde extrapolation employed was reliable).

Stewart v. State, 129 S.W. 3d 93 (Tex. Crim. App. 2004)(breath test results are relevant and admissible under Rules 401 and 402).

3. Computing remoteness of priors used for enhancement.

Getts v. State, 2005 WL 156633 (Tex. Crim. App. 2005)

Getts's first DWI conviction was in 1984, his second in 1997, his third in 2002. Under § 49.09(e) of the Texas Penal Code, effective September 1, 2001, the 1984 conviction was remote, and therefore unavailable to enhance the third offense to a felony, because Getts completed his sentence on the first case more than 10 years before his second case, in 1997.

Uriega v. State, 136 S.W. 3d 258 (Tex. App.–San Antonio 2004, no pet.)(the proper approach under § 49.09(e) is to "look forward" 10 years from the prior conviction to the subsequent offense).

4. Synergistic effect instructions.

Gray v. State, 2004 WL 2896596 (Tex. Crim. App. 2004)

The information alleged that appellant was intoxicated due to alcohol. Evidence at trial showed that he had taken anti-depressant medication. The jury was given this instruction:

> You are further instructed that if a Defendant indulges in the use of a drug, to wit, Respiratol, Zoloft, Klonopin, and/or Depical, to such an extent that he thereby makes himself more susceptible to the influence of alcohol than he otherwise would have been, and by reason thereof becomes intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

The application portion authorized conviction "if it found that Gray was driving while intoxicated by reason of the introduction of alcohol into his body, either alone or in combination with Respiratol, Zoloft, Klonopin and/or Depical."

The court of criminal appeals held that this instruction properly applied the law to the facts. The court did not decide whether such an instruction constitutes an improper comment on the weight of the evidence.

5. Crimes of violence.

Leocal v. Ashcroft, 125 S. Ct. 377 (2004)

Leocal, a lawful permanent resident from Haiti, was convicted of driving under the influence and causing serious bodily injury to two persons in Florida and sentenced to two and a half years imprisonment. Immigration officials classified this as a crime of violence, and therefore an aggravated felony, and instituted deportation proceedings. The Supreme Court held that this crime was not properly classified as a crime of violence, because, under Florida law, conviction requires no culpable mental state, reaching both accidental and negligent conduct. The Court did *not* reach the question whether the *reckless* use of force would qualify as a crime of violence.

I. Expert Witnesses

Yates v. State, 2005 WL 20416 (Tex. App.–Houston [1st. Dist.] 2005, no pet. h.)

The state called one expert who gave his opinion that appellant knew what she did was wrong and was therefore not insane. On cross-examination, in response to a question from the defense, the expert testified that he had consulted on the TV show "Law and Order," which appellant was known to watch, and that one of the shows that aired shortly before the crime occurred depicted a mother suffering from post-partum depression who drowned her children and was acquitted by reason of insanity. Later the state cross-examined one of the defense witnesses about this show, and both sides made reference to the show during their summations. After appellant was convicted, it was shown that in fact, no such episode had aired. The jury was so instructed (during the punishment phase) but the defense's motion for mistrial was denied. The court of appeals reversed. Generally, if a witness gives material, inculpatory testimony against a defendant and this testimony is proven to be false, a mistrial should be granted. This rule does not require the state to know that the testimony was false. The only question is whether the state used the false testimony and whether there is a reasonable likelihood it affected the jury.

J. Preservation of Error

Heidelberg v. State, 144 S. W. 3d 535, 542-43 (Tex. Crim. App. 2004)

Article I, § 10 of the Texas Constitution prevents the state from commenting on a defendant's post-arrest silence, and is therefore broader than the federal constitution which only bars comments on post-*Miranda* silence. Here, though, Heidelberg forfeited his right to the broader Texas protection where his objection did not mention post-arrest silence,

where he only objected under the federal constitution, and where the trial judge did not comment in his rulings.

K. Sentencing

1. The Federal Sentencing Guidelines are merely advisory.

United States v. Booker, 125 S. Ct. 738 (2005)

A jury found Booker guilty of possessing more than 50 grams of crack which subjected him to a "base" sentence of up to 262 months under the Federal Sentencing Guidelines. At sentencing, the court found by a preponderance of the evidence that Booker had possessed an additional 566 grams, and that he had obstructed justice, and because of these findings, the court ruled that it was required by the Guidelines to sentence Booker to 360 months. Booker appealed, and the Seventh Circuit Court of Appeals held that this sentence violated his Sixth Amendment right to a jury trial. The Government sought certiorari in the United States Supreme Court.

The Guidelines provided for a maximum of 78 months imprisonment for conspiracy to possess and distribute more than 500 grams of cocaine, the crime Fanfan was convicted of. At sentencing, the trial judge found by a preponderance of the evidence that, because Fanfan actually was involved with much greater quantities of cocaine and crack, and because he was a leader and organizer, the Guidelines required a sentence of at least 15 years imprisonment. The trial court refused to impose this sentence, and the government appealed directly to the Supreme Court.

These were the questions presented to the Supreme Court:

> 1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
>
> 2. If the answer to the first question is 'yes,' the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

In Part 1 of the opinion, written by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, the Court agreed with both lower courts that the Sixth Amendment is violated by imposition of an enhanced sentence based on facts not found by the jury beyond a reasonable doubt. "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

In Part 2 of the opinion, written by Justice Breyer and joined by Justices Rehnquist, O'Connor, Kennedy, and Ginsburg, the Court addressed the second question presented and held that the proper remedy for this constitutional violation is to deem the Federal Sentencing Guidelines advisory, not mandatory. Accordingly, federal courts must "consider" the Guideline ranges, but may "tailor the sentence in light of other statutory concerns as well."

2. Supreme Court cases leading to Booker and Fanfan.

a. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

b. *Ring v. Arizona*, 536 U.S. 584, (2002)(judge sitting alone may not determine the presence or absence of aggravating factors required by state law to impose death sentence).

c. *Blakely v. Washington*, 124 S. Ct. 2531, 2534 (2004)(enhancement of defendant's sentence from 53 to 90 months based on a finding that defendant acted with "deliberate cruelty" violated Sixth Amendment where that finding was made by the sentencing court, and not by the jury, beyond a reasonable doubt).

L. Speedy Trial

1. The trial court has wide discretion.

a. *State v. Respondek*, 2004 WL 2289705 *2-3 (Tex. App.–San Antonio 2004, no pet. h.)(not designated for publication)(affirming under *Barker* the trial court's decision to grant a motion to dismiss for want of a speedy trial).

b. *State v. Alderete*, 2004 WL 431490 (Tex. App.–San Antonio 2004, no pet.)(the trial

court did not abuse its discretion in granting a motion to dismiss for want of a speedy trial where the state delayed a simple DWI trial for 21 months).

c. *Castillo v. State*, 2004 WL 383980 *4 (Tex. App.–San Antonio 2004, no pet.)(not designated for publication)(The trial court did not err in denying appellant's speedy trial motion where two of the four factors – assertion of right and cause of delay – weighed heavily against the appellant).

d. *Bradberry v. State*, 2004 WL 199270 (Tex. App.–San Antonio 2004, pet. ref'd)(not designated for publication)(the trial court did not err in refusing to dismiss a DWI prosecution where the delay was almost three years).

2. The state is entitled to a "meaningful hearing."

State v. Reyes, 2005 WL 236859 *1 (Tex. App.–San Antonio 2005, no pet. h.)

The trial court errs when it grants the defendant's speedy trial motion without conducting a "meaningful hearing" on whether the state denied the defendant a speedy trial.

M. The Vienna Convention

In *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), the Fifth Circuit denied petitioner's request for a certificate of appealability, holding that it was bound by its own precedent and precedent from the Supreme Court to disregard *LaGrand* and *Avena* – two cases from the International Court of Justice. Medellin's petition for certiorari presents the following questions:

> The United States and Mexico are party to the Vienna Convention on Consular Relations and its Optional Protocol Concerning the Compulsory Settlement of Disputes. Acting on the consent set forth in the Optional Protocol, Mexico initiated proceedings in the International Court of Justice seeking relief for the violation of Petitioner's Vienna Convention rights. On March 31, 2004, the Court rendered a judgment that adjudicated Petitioner's rights. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31). The *Avena* Judgment built on the Court's rulings in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), an earlier case also brought under the Optional Protocol.
>
> On Petitioner's application for a certificate of appealability of the denial of his

petition for habeas corpus, the United States Court of Appeals for the Fifth Circuit held that precedents of this Court and its own barred it from complying with the *LaGrand* and *Avena* Judgments.

1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

III.
Internet Resources

A. The United States Supreme Court [www.supremecourtus.gov/opinions/opinions]

B. The United States Court of Appeals for the Fifth Circuit [www.ca5.uscourts.gov]

C. The Texas Court of Criminal Appeals [www.cca.courts.state.tx.us]

D. The Fourth Court of Appeals [www.4thcoa.courts.state.tx.us]