GOOD CASES YOU CAN USE

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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. Appeals

1. An indigent appellant may retain counsel but still qualify for a free record.

Aragon v. State, 2004 WL 199279 * 2-3 (Tex. App.–San Antonio 2004, no pet.)(not designated for publication)

That the appellant's parents gathered enough money to retain appellate counsel for him is not grounds for denying him a free statement of facts. The court may only consider

appellant's own financial condition at the time of the hearing, and not that of his friends or family. When appellant presents some evidence of his indigency, the burden shifts to the state to disprove his entitlement to a free record. A request for a free record made before the notice of appeal is due is timely.

2. There is no motion for new trial from a deferred adjudication.

Sanchez v. State, 2004 WL 2450908 *1 (Tex. App.–San Antonio 2004, no pet. h.)(not designated for publication)

Appellant pleaded guilty and was given deferred adjudication. Within 30 days he filed a motion for new trial, but not a notice of appeal. Later -- but not within the original 30 day time period -- he filed a notice of appeal. "A motion for new trial, however, is not available as a remedy for a defendant who receives deferred adjudication." The court of appeals held that it was without jurisdiction to hear the appeal because the notice was not timely.

3. Mailing a motion for new trial.

Apt v. State, 2004 WL 730832 (Tex. App.–San Antonio 2004, no pet.)(not designated for publication)

Appellant mailed her notice of appeal before the expiration of 30 days, but it was not postmarked by the clerk of the court until after 30 days had passed. Noting that this seemed "inherently unfair," the court of appeals held that the notice of appeal was untimely, citing Texas Rule of Appellate Procedure 9.2(b) which says that documents filed by mail are timely if mailed on or before the last day for filing, *and* if received within 10 days after the filing deadline.

C. Argument

1. Time limitations.

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."

2. Comments on failure to testify.

Sandoval v. State, 2004 WL 1453453 *4-6 (Tex. App.–San Antonio 2004, pet. dism'd untimely filed)(not designated for publication)

During his closing argument the prosecutor explained circumstantial evidence in terms of an analogy to a parent who comes home to find chocolate chip crumbs on his son Johnny's clothes. The prosecutor then said, "little Johnny may invoke his Fifth Amendment privilege and not tell you what he did." The defense objected that this was an improper comment on the defendant's privilege not to testify. The court of appeals condemned the remark as improper. "The jury could only naturally and necessarily take the statement as referring to defendant's failure to come forward with an explanation as to why the evidence should not incriminate him. The law is clear that a prosecutor cannot comment on a defendant's failure to testify and to allow a prosecutor to craft a clever analogy, such as the one here, would undermine the rule itself." The error here was cured, though, by the trial court's prompt instruction to disregard.

D. 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.)(not designated for publication)

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. When a hearing is required.

Alvarado v. State, 2004 WL 1102764 *8 (Tex. App.–San Antonio 2004, no pet.)

The trial court erred when it refused to give appellant an evidentiary hearing on his motion for new trial where affidavits attached to the motion sufficiently raised the question whether trial counsel conducted an independent investigation of the facts.

5. The minority view.

Johnson v. State, 2005 WL 50102 (Tex. App.–San Antonio 2005, no pet. h.)(Stone, J., concurring)(not designated for publication)("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.").

E. Bail

Kniatt v. State, 2005 WL 23197 * (Tex. App.–Waco 2005, no pet. h.)

When informed that the defendant had "reneged" on his agreement to plead guilty, the judge revoked his bond and ordered him to jail without bond until they got around to his trial. Four days later, appellant pleaded guilty. Appellant satisfied his burden of proving that his guilty plea was involuntary. A judge may not revoke bail to oppress or punish.

F. Capital Punishment

1. The execution of juveniles.

Roper v. Simmons, 2005 WL 464890 (2005)

In a 5–4 decision written by Justice Kennedy, the Court held that it violates the Eighth Amendment to execute persons who were under 18 when they committed their offenses.

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."

G. 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)

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).

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.

K. 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.

L. Extraneous Offenses

Webb v. State, 2005 WL 418215 *3-5 (Tex. App.–San Antonio 2005, no pet. h.)

The trial court erred under Rule 404(b) when it admitted evidence that appellant had made sexual advances against a third person. Contrary to what the state argued at trial, this extraneous misconduct did not prove appellant's motive or identity in the offense for which he was tried — murder. Appellant's substantial right not to be convicted based on character evidence might only have been slightly affected, and therefore harmless, if the evidence of appellant's guilt was overwhelming. "But it is not."

M. Guilty Plea

1. When a plea bargain is accepted.

Wright v. State, 2005 WL 94353 (Tex. App.–San Antonio 2005, no pet. h.)

The state recommended a cap of 18 years imprisonment, appellant pleaded no contest, and the first judge announced on the record that he was "going to go along with the plea bargain agreement [and was] also going to accept the Defendant's plea." The case was reset for sentencing, at which time another judge was on the bench. The second judge had an *ex parte* conversation with the victim and his father, went into an "irate rage," and sentenced appellant to 99 years imprisonment before finally permitting him to withdraw his plea. Appellant had a jury trial presided over by a third judge and was convicted and sentenced to 50 years imprisonment. He appealed asserting that he was entitled to specific performance of the plea bargain providing for the 18 year cap sentence. The court of appeals agreed. Here the first judge did not indicate in any way that he was reserving approval or only conditionally accepting appellant's plea. "To the contrary, the judge affirmatively approved and accepted the plea bargain before proceeding to accept Wright's plea." The judges words and the sequence of his actions evidence express acceptance and approval of the plea bargain and plea, and therefore, appellant was entitled to insist on the benefit of the plea bargain and seek specific performance. The second trial judge had no authority to *sua sponte* rescind the plea agreement that had already been accepted by the first judge. "The State's ability to withdraw a plea offer at any time before the defendant enters his plea does not extend to the withdrawal of a plea agreement that has already been accepted by the trial court."

N. Habeas Corpus

1. Habeas jurisdiction when probation has been granted.

In re Lebo, 2005 WL 357100 * (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication)

The courts of appeal have habeas jurisdiction over the appeal pursuant to article 11.072 of the Texas Code of Criminal Procedure where the applicant is on probation and the trial court has denied relief.

2. When the trial court refuses to issue the writ.

In re Solis, 2004 WL 1336266 * (Tex. App.–San Antonio 2004, no pet.)(not designated for publication)

The court of appeals construed applicant's mandamus petition as requesting an order to compel the trial court to consider and rule on his application for writ of habeas corpus. The court noted that when the trial court refuses to issue a writ, or denies hearing on the merits, the applicant may either present the application to another judge with jurisdiction, or, under certain circumstances, may seek a writ of mandamus. "Accordingly, it appears mandamus may issue to compel a trial court to grant a writ and consider the merits of the relief requested if: (1) an application or petition for writ of habeas corpus has been filed with a court having jurisdiction; (2) the applicant has made some attempt to have the matter heard; and (3) it is not 'manifest from the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever.'"

O. Juvenile

1. The Rules of Civil Procedure govern.

In re L.M.M., 2004 WL 2289731 * (Tex. App.–San Antonio 2004, no pet. h.)(not designated for publication)

The Rules of Civil Procedure govern in a juvenile case. Under those rules, a motion for new trial is a prerequisite to challenging the factual sufficiency of the evidence. Because no motion for new trial was filed, the court of appeals refuses to consider factual sufficiency on appeal. The court only considers the legal sufficiency of the evidence under these circumstances.

P. 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.

Q. Search and Seizure

1. Franks v. Delaware.

Garza v. State, 2005 WL 357014 *3 (Tex. App.–San Antonio 2005, no pet. h.)

"While some state and federal courts have extended the *Franks* analysis to omissions from probable cause affidavits, our own Court of Criminal Appeals has never extended the Franks analysis to omissions." Absent proof that the affiant included false statements, the Court refuses to conduct an *Franks* inquiry. The Court went on to state that, even if it were to agree that omissions were cognizable in a *Franks* inquiry, it would not find the affidavit defective.

2. A home can be a "suspicious place" under article 14.03.

Lane v. State, 151 S.W. 3d 196 (Tex. Crim. App. 2004)

A home can be "suspicious place" under § 14.03 of the Texas Code of Criminal Procedure.

3. The knock and announce rule.

Benitez v. State, 2004 WL 1453470 *4 (Tex. App.–San Antonio 2004, no pet. h.)(not designated for publication)

A delay of between 5 and 10 seconds between knock-and-announce and entry was not unreasonable under the circumstances of this case.

R. 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).

3. Promising to give the maximum sentence if probation is violated.

Ex parte Brown, 2005 WL 50195 (Tex. Crim. App. 2005)

The trial judge told applicant, when he gave him probation, that he would give him the maximum sentence if he violated his probation. Due process is violated when a judge promises to give a probationer the maximum punishment if he violates a condition of his probation, then gives him that punishment and fails to actually consider the evidence presented at the revocation hearing. Appellant did not forfeit this complaint on appeal by not objecting because "the trial record, by itself, is not necessarily adequate for the defendant to object and present a valid constitutional claim at the time of the conduct."

Even though this type of error can be raised on direct appeal, it can also be raised for the first time in a writ of habeas corpus because, like an ineffective assistance of counsel claim, resolution of this issue requires extra-record evidence.

4. Failure to give notice of punishment witnesses.

Lathrop v. State, 2005 WL 49480 *3 (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication)

The trial court erred in permitting the state to call three punishment witnesses where the court had previously ordered the state to give notice of witnesses it intended to call "for any purpose," and where the state gave no notice until it did so orally, just before the witnesses were called.

5. Trial court cannot order sentence be done "day for day."

Ex parte Cortez, 143 S.W. 3d 265 (Tex. App.–San Antonio 2004, no pet.)

The trial court had no authority to include the language "day for day" in its judgment

revoking defendant's probation and sentencing him to six months in jail.

S. 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.

T. 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?

U. Voir Dire

Wingo v. State, 143 S.W. 3d 178, 185-87 (Tex. App.–San Antonio 2004, pet. granted)

The trial court erred when it permitted the state to ask the following impermissible commitment question: "Do you believe there's anything wrong with putting false information in a police report?" The error was harmless, though, because the defense failed to exhaust his peremptory challenges, failed to identify an objectionable juror, and failed to request additional challenges. *see also Sanchez v. State*, 2004 WL 946704 (Tex. App.–San Antonio 2004, pet. granted)(not designated for publication).

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]