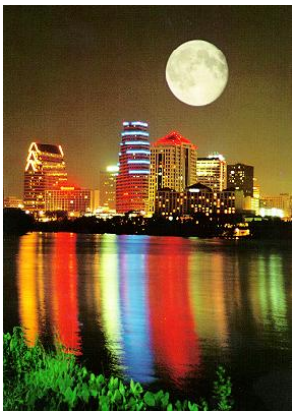

One Fabulous Skyline

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Case Name: Jose Pena v. The State of Texas

- OFFENSE: Possession of Marihuana
- COUNTY: Leon
- C/A CASE No. 10-03-0109-CR
- DATE OF OPINION: May 2, 2007
- DISPOSITION: Conviction Reversed OPINION: Justice Reyna
- TRIAL COURT: 12th D/C; Hon. Kenneth Keeling
- LAWYERS: Frank Blazek, Scott Ramsey (Defense); Whitney Smith, Sue Korioth (State), Amicus Curae: George Dix, Harvey Angel, Keith Hampton (TCDLA), John Rolater (Dallas County DA's Office)

31.026 Search & Seizure / Texas Constitution: DPS Trooper Mike Asby stopped Appellant for a traffic violation. As Asby approached Appellant's van, he smelled the odor of raw marihuana. Asby looked inside Appellant's van and saw what he believed to be freshly cut marihuana covering the entire cargo area. According to Asby, Appellant repeatedly denied that the plant material was marihuana. He could not recall whether Appellant had informed him that he wanted the plants independently tested. DPS criminalist Charles Mott tested the plant material and reported that it consisted of 23.46 pounds of marihuana. Appellant filed a motion for independent analysis of the plant material, which the trial court granted. Thereafter, it was discovered that the plant material and all records relating to the material had been destroyed. Appellant claimed that the admission of evidence regarding the results of DPS lab testing of the plants violated his rights under the Due Process Clause of the US Constitution and the Due Course of Law provision of the Texas Constitution because the plants and the DPS file regarding the plants were lost or destroyed before trial.

Holding: (More Protection Afforded by Texas Constitution) Only four Texas courts (citations omitted) have specifically addressed a contention that something other than the bad-faith standard of Arizona v. Youngblood, 488 U.S. 51 (1988) should apply to claims arising under the Texas Due Course of Law provision, and those four courts have agreed that the Youngblood standard should apply. Courts in twenty-three other states have likewise concluded that the Youngblood bad-faith requirement applies to claims arising under their respective constitutions. Conversely, courts in twelve states have considered this issue and have determined that a different standard should apply. Fourteen states have not addressed this issue. Although a majority of the states which have addressed the issue have determined that Youngblood should apply to state constitutional due process claims, a significant minority has rejected this approach, and a substantial number of states has not even addressed the issue. Therefore, no clear consensus has emerged. We join [the] twelve states and hold that, under the Due Course of Law provision of article I, section 19, the State has a duty to preserve material evidence which has

apparent exculpatory value, encompassing both exculpatory evidence and evidence that is potentially useful to the defense. (Merits) The admission of Mott's testimony and the DPS lab report without an accompanying instruction violated Appellant's right to due course of law under article I, section 19 of the Texas Constitution. Therefore, we sustain Appellant's first issue and do not reach his remaining issues.

Ed Note: Because the Court sustained Appellant's first point of error, it did not reach his remaining issues: (2) the court abused its discretion by failing to grant a motion for new trial because of trial counsel's failure to raise a speedy trial claim and counsel's failure to request a mistake-of-fact instruction in the charge (two points); (3) he received ineffective assistance of counsel because of these failures (two points); and (4) he was denied due process and due course of law because of the State's failure to disclose Brady evidence before trial.

Concurring / Dissenting Opinions: Chief Justice Gray dissented. In a classic CJ Gray dissent which begins by referencing the Court's 2005 opinion in this case, Pena v. State, 166 S.W.3d 274 (Tex. App. - Waco 2005)(see ☙, Vol. 13, No. 18; 05/09/2005), vacated, 191 S.W.3d 133 (Tex.Cr.App. 2006)(see ☙, Vol. 14, No. 16; 05/01/2006), then cites Proverbs 26:11 for the proposition that "As a dog returns to its vomit, so a fool repeats his folly." He is intensely unhappy with the majority opinion ("The majority's opinion glosses over two properly dispositive parts of the analysis, namely preservation of error and harm, in less than a page each, in order to publish its thirty-six page, mediocre law-review article on the merits of Pena's issues under the Texas Constitution"), and concludes by stating, "Even if the majority's analysis of the merits were correct, Pena's failure to preserve his complaint is fatal to his issue; and the majority's harm analysis is utterly insufficient, while a proper harm analysis would probably find that any error was harmless."

Sidebars: (David A. Schulman) The holding we have set out rather is sparse when compared to the opinion, which took thirty (30) pages to reach its ultimate conclusion. It contains an exhausting (and somewhat unnecessary) survey of cases and holdings from other jurisdictions. As to CJ Gray's comment about the opinion being a "mediocre law-review article," I'm not the one to ask, since I've only read 2 or 3 law review articles in my life, but it does seem pretty close to interminable. However, I think I have to agree, given that the opinion fails to even mention Heitman v. State, 815 S.W.2d 681 (Tex.Cr.App. 1991), where the Court of Criminal Appeals first stated that Texas courts are not bound to walk in "lock-step" with the federal courts on search and seizure questions involving the Texas Constitution, and the case which (arguably) provides the authority to engage in this analysis. If it's not mediocre, it's at least incomplete. Further, the last time the Court of Criminal Appeals even remotely took up the question of whether the Texas constitution would provide more protection than the U.S. Constitution, in Hulit v. State, 982 S.W.2d 431 (Tex.Cr.App. 1998)(see ☙, Vol. 6, No. 50; 12/21/1998), I believe the majority would have rejected the claim, if it was squarely before them. To my knowledge, the only cases in which the CCA held that the Texas constitution provides more protection than the U.S. Constitution are Autran v. State, 887 S.W.2d 31 (Tex.Cr.App. 1994)(see ☙, Vol. 2, No. 26; 09/26/1994), which found more protection as to inventory searches, and Bauder v. State, 974 S.W.2d 729 (Tex.Cr.App. 1998)(see ☙, Vol. 6, No. 23; 06/15/1998), which utilized the Heitman rationale to say that the Texas Constitution provides greater protection against Double Jeopardy. Autran has been thoroughly ignored by Texas courts because it is only a "plurality" opinion. See e.g., Garza v. State, 137 S.W.3d 878 (see ☙, Vol. 12, No. 22; 06/07/2004). The Court of Criminal Appeals specifically overruled Bauder in Ex parte Lewis, _____ S.W.3d _____ (Tex.Cr.App. No. PD-0577-05, 01/10/2007 (see ☙, Vol. 15, No. 1; 01/15/07). For those of use who believed in the promise of Heitman - only to have been disappointed by the failure of Autran to get the support of the majority of CCA Judges, it's rejection by the Courts of Appeals, and the similar rejection of Bauder, this case should be a welcome surprise. It cannot deliver, however, because we have learned over time that, in reality, Texas Courts do not believe that the Texas constitution provides more protection than the U.S. Constitution. (Karyl Anderson Krug) I am at this minute composing the "book" for a musical based upon the Waco Court of Appeals, in the style of Wynton

Marsalis's Pulitzer Prize-winning "Blood on the Fields," called "Blood on the Robes." Antonio Banderas will play the wistfully longing-for-gravitas Justice Reyna. Fred Thompson will crankily croak his way through the part of Chief Justice Gray. And, in a surprise bit of casting, Jack Black will rock the part of Justice Vance. In a cameo appearance, Tina Fey will play the feisty armed woman in the kitchen, who was memorably confronted by the intruder with the erection in a previous case-of-the-week. The intruder will be played for laughs by her old Saturday Night Live castmate, Will Farrell. Erection man (Farrell) and his champion, Justice Reyna (Banderas), will be featured together in a pas de deux dance interlude. The late Don Ho, originally cast as Governor Goodhair (who appointed Justice Reyna), will be replaced by a life-sized replica of Malibu Ken in a suit and cowboy boots. To achieve that shiny plastic-perfect effect, Ken's hair blackened with a Magic Marker. Give these boys a prize. An award. Maybe it's time for another Marvin Award? Or at least a reminder that this court is still performing at Marvin Award level?