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⚖ Vol. 17 No. 14, April 13, 2009

Case Name: [Jose Luis Pena v. The State of Texas](#)

- OFFENSE: Possession of Marihuana
- COUNTY: Leon
- COURT OF APPEALS: Waco 2007
- C/A CITATION: 226 S.W.3d. 364
- C/A RESULT: Conviction Reversed
- CCA. CASE No. PD-1411-07 DATE OF OPINION: April 8, 2009
- DISPOSITION: Court of Appeals Reversed
- OPINION: [Keasler, J.](#) VOTE: 5-4-0
- TRIAL COURT: 12th D/C; Hon. Ken Keeling
- LAWYERS: [Scott Ramsey](#) (Defense); [Sue Koriioth](#) (State)

⚖ **331.01 Prosecutorial Misconduct / Evidence Lost or Misplaced by State:** Appellant was charged with possession of marijuana. Before trial, he sought an independent lab analysis of the substance, but the substance had been destroyed. Also, with the exception of DPS's lab report, all of the records documenting the testing were lost. Appellant objected to the admission of the marijuana, explicitly relying on the due course of law provision of the Texas Constitution, but he did not suggest that it provides greater protection than the United States Constitution. On direct appeal, although neither party raised the issue, the Court of Appeals decided that the Texas Constitution affords greater protection than the United State Constitution, and reversed the remanded the case for a new trial. [Pena v. State](#), 166 S.W.3d 274 (Tex. App. - Waco 2005)(see ⚖, Vol. [13, No. 18](#); 05/09/2005). On the State's PDR, this Court reversed and remanded the case, holding that the court of appeals erred by addressing the Texas Constitution's due course of law provision without first giving the parties an opportunity to brief the issue. [Pena v. State](#), 191 S.W.3d 133 (Tex.Cr.App. 2006)(see ⚖, [Vol. 14, No. 16](#); 05/01/2006). On remand, the Court of Appeals held that the due course of law provisions provides greater protection than the Due Process Clause when the State loses or destroys evidence (see ⚖, [Vol. 15, No. 18](#); 05/14/2007). The State filed a second PDR, alleging that the Court of Appeals erred in finding that Appellant preserved the due course of law provision claim at trial.

Holding: The complaining party bears the responsibility of clearly conveying to the trial judge the particular complaint, including the precise and proper application of the law as well as the underlying rationale. Although Appellant eventually invoked the Texas due course of law provision when objecting before the trial judge, he failed to argue that it provides greater protection than the federal Due Process Clause. Indeed, based on his initial objection under the Fourteenth Amendment, the record shows that the judge and the State under that Appellant's complaint was

under only the well-established federal standard concerning lost or destroyed evidence. Therefore, [Appellant] did not preserve his due course of law provision claim for appellant review.

Concurring / Dissenting Opinions: [Judge Holcomb](#) concurred. Judge Price and Judge Johnson joined him, and Judge Cochran joined with respect to part 1 of the opinion. According to Judge Holcomb, the Court does not address an issue if the party was required to preserve error, but failed to do so. Thus, when the Court remanded this case to the court of appeals, actually ordering it to obtain briefing from the parties on the underlying claim itself, it had in effect allowed Appellant to pass through the “procedural gateway.” Judge Holcomb also believes that Appellant did preserve error because of his repeated assertion of his rights under both the federal Due Process Clause and the Texas Due Court of Law provision. Judge Cochran joined Judge Holcomb’s dissent as to the effect of the Court’s previous disposition of the case on preservation of error, but she did not join the dissenting opinion as to actual preservation of error.