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Of PDRs and Precedent

By Jim Paulsen and James Hambleton

Pity the poor Texas Court of Criminal Appeals! Here it is, the court's one-hundredth birthday, and nobody seems to be celebrating. A blue-ribbon commission recommends that the supreme court take direct administrative control of the court of criminal appeals, and some propose to get rid of the court altogether. Even make things worse, the state legislature has just eliminated almost all of the Texas Court of Criminal Appeals' jurisdiction by repealing all crimes but murder, effective Sept. 1, 1994. (Yes, they really did — just check West's 1992 pocket part for Title I of the Penal Code. And no, they really didn't mean it ... at least, we hope they didn't. And yes, there's a story behind it, but the story is too long and too boring even for this column.)

Adding insult to injury, people won't even leave the court's birthday celebration alone. No less a legal authority than the *Texas Lawyer*, in its Sept. 14, 1992 edition, announced that the court of criminal appeals dates to 1876, which would make the centenary celebration about 25 years too late. The *Texas Lawyer* evidently agrees with the *Harvard Bluebook*, which has always insisted on confusing the "old" court of appeals with the court of criminal appeals. This sort of mistake evidently is easier to make than one might think: LEXIS lists occasional court of criminal appeals rulings as court of appeals decisions, and vice versa. Even U.T.'s *Greenbook* can't get it right. Up through the sixth edition, the *Texas Rules of Form* claimed the court of criminal appeals dated to 1889. The newest (eighth) edition, issued in September, now swears that the court dates to 1891, which would put the birthday celebration off by a year.

Our best guess, though admittedly contrary to the combined and weighty authority of the *Bluebook*, *Greenbook* , and *Texas Lawyer*, is that 1992 really does mark the centenary of the Texas Court of Criminal Appeals. The enabling legislation did not take effect until Sept. 1, 1892 and the first reported decision — *Jim Jones v. State* — is dated Oct. 9, 1892. (Mr. Jones, by the way, was convicted of murder in the course of attempted horsetheft and sentenced to life in prison; so far as the court of criminal appeals is concerned, he may still be there.)

"Our best guess..., is that 1992 really does mark the centenary of the Texas Court of Criminal Appeals. The enabling legislation did not take effect until Sept. 1, 1892 and the first reported decision is dated Oct. 9, 1892."

So, if this really is the court's hundredth birthday, what sort of contribution can a legal research column make to the celebration? The answer is easy. We propose to take the next couple of pages to demonstrate that the Texas Court of Criminal Appeals is badly underrated in at least one respect — its use of discretionary review powers to discourage out-of-staters from even thinking about setting up a law practice in Texas.

The U.S. Supreme Court took more than 50 years to complicate the certiorari process to the point that even specialists cannot understand it. Likewise, the Texas Legislature and Texas Supreme Court played with the writ of error system for nearly a century before refining it to the point that it now generates hate mail from the Fifth Circuit. (Check out, for example, *Exxon Co. v. Banque de Paris*, 889 F.2d 674 (5th Cir. 1989)). Yet the Texas Court of Criminal Appeals, in but a few short years, has put the petition for discretionary review (or "PDR" to insiders) process on a track that bids fair to eclipse both of its illustrious counterparts.

A decade or so ago, when the PDR system went into effect, no one could have suspected such an outcome — after all, the Texas Court of Criminal Appeals was given so very little with which to work. In 1981, when the legislature decided that criminal appeals should first be routed to the various courts of appeals instead of being sent directly to Austin, the court of criminal appeals was given discretionary jurisdiction. The original recommendation from the Judicial Planning Committee was that the process should be called "writ of certiorari," just like that of the U.S. Supreme Court. After vigorous debate, during which the merits of the Texas Supreme Court's writ of error notation system were considered repeatedly and specifically rejected, the certiorari approach was adopted.

The only change, and a good one at that, was to replace the plain English phrase "petition for discretionary review" for the unspellable and unpronounceable "writ of certiorari." That way, not only could ordinary humans understand what was going on without resorting to a dictionary, but the court of criminal appeals could ignore some of the more questionable aspects of the U.S. Supreme Court's certiorari practice — like dissents or concurrences on certiorari.

At first, it looked like the Texas Court of Criminal Appeals was determined to keep things simple. In a 1983 decision, the court went to great pains to announce that a "PDR refused" is not "an endorsement or adoption of the reasoning employed by the court of appeals." So far, so good. That's what "discretionary" is all about. But then, only a few months later, the court issued its opinion in *Sheffield v. State* (650 S.W.2d 813).

In *Sheffield*, the court of criminal appeals refused the petition for discretionary review per curiam. The court stat-

ed, in what has since become a litany in many PDR refusals: "As is true in every case, refusal of discretionary review by this court does not constitute an endorsement or adoption of the reasoning employed by the court of appeals."

The court just would not leave it at that, though. Instead, it continued, in language quoted many times since:

> To prevent any misunderstanding, we take this opportunity to emphasize that the summary refusal of a petition for discretionary review by this Court is of no precedential value. This is true where the petition is refused without opinion, as is the usual practice, as well as where the petition is refused with a brief opinion disavowing the reasoning employed by the court of appeals, as in the instant case. The Bench and Bar of the State should not assume that the summary refusal of a petition for discretionary review lends any additional authority to the opinion of the court of appeals.

And the interpretation race was on!

The basic problem with the *Sheffield* rule, of course, is that it is intuitively unbelievable. Think about it for a second: The refusal of a PDR is never of any precedential value even if some petitions are refused "with a brief opinion disavowing the reasoning employed by the court of appeals"? Sure. A more natural conclusion would be that if the court of criminal appeals says something when it doesn't agree with the lower court's reasoning, we can assume the court is not offended by those decisions in which it refuses a PDR without comment. And that is exactly what a lot of people, including some courts, have concluded.

To improve the scholarly tone of this column a little, we should note that, since *Sheffield*, it has become clear that there are at least four types of PDR "refusals." Type I, or plain vanilla refusals, consist of a simple statement from the court that the petition for discretionary review has been refused. Type II, or double-dip vanilla refusals, consist of a notation from the court that the petition for discretionary review has been refused, together with an additional statement (usually citing *Sheffield*) to the effect that the refusal really, absolutely, positively doesn't mean anything at all. Type III, or chocolate-flavored refusals, include some dark hints — as in *Sheffield* — to the effect that the court of criminal appeals is displeased with something the lower court did.

The Type IV PDR refusal, a rare butterscotch-flavored variety, turns the court of appeals' opinion golden, as in the court of criminal appeals' conclusion in *Gersh v. State* that "we have reviewed the record and agree with the court of appeals opinion. We believe that they reached the correct result for the correct reasons in deciding this issue." As if this were not complicated enough, individual members of the Texas Court of Criminal Appeals also have taken to dribbling marshmallow or chocolate topping on some PDR refusals, in the form of concurrences or dissents, or even just topping off a PDR refusal with a little red cherry "so-and-so would grant" notation. Our listing is not exclusive, by the way. Other varieties of PDR refusal could include chocolate-vanilla swirl and mocha with sprinkles. But we have already gone into more than enough detail for one column.

The result of this wonderfully intricate system is predictable: a free-for-all in the lower courts. We can find statements like the Amarillo Court of Appeals' conclusion that by refusing a PDR outright (plain vanilla) the court of criminal appeals "approved [the] result," and San Antonio's conclusion that the PDR "constitutes the only recent indication of the court's feelings," juxtaposed with Eastland's conclusion that "refusal of a petition for discretionary review adds nothing to the precedential value of an opinion." The current majority opinion, to the extent that any majority can be discerned from this mess, seems to be — in the words of a respected law professor/judge writing in one of our state's law reviews — that refusal at least "indicates a finding that the court of appeals reached the correct result." No matter how you slice it, of course, that conclusion makes PDR denials at least a little bit precedential, and is surely contrary to *Sheffield*.

The impact of the Texas Court of Criminal Appeals' PDR practice is not limited simply to speculation over the extent to which a "PDR refused" adds to or detracts from the value of a court of appeals opinion. After all, every time anyone on the court of criminal appeals writes *anything* in the course of a PDR refusal, that becomes an "opinion," printed in West's reporters. Little wonder that, whenever authority lies thin on the ground, the temptation to quote or cite these statements becomes irresistible. In highbrow legal theory, of course, if refusing a PDR means nothing, anything the court of criminal appeals says in refusing a PDR is dicta, and dissents or concurrences on denials should be double dicta, at least. Nonetheless, courts cite "PDR refused" per curiams left and right.

At first blush, one might think that this is exactly the sort of behavior that the court of criminal appeals was warning against in *Sheffield* — intense scrutiny of every word the court might utter, thereby changing an inherently non-precedential act into something at least a little bit precedential. The court warned in *Sheffield* that no aspect of a PDR refusal — including the opinion on PDR refusal — is precedential and at least a dozen subsequent PDR refusals repeat the message.

The problem, though, is that the court of criminal appeals has gotten itself caught in a classic form of "Do as I say, not as I do" reasoning. Every time the court of criminal appeals writes a PDR denial emphasizing that PDR denials mean nothing it cites as authority — you guessed it — *Sheffield*, nothing more than a PDR denial itself. Little wonder that the lower courts now cite and discuss, whenever the spirit moves them, per curiam PDR refusals (Amarillo, Dallas, and San Antonio, at least), or even concurrences (Eastland and Houston [14th]) or dissents on PDR refusal (Dallas and Waco). This habit is not necessarily bad — after all, some four-judge concurrences on PDR denials would seem as authoritative, in most any way that counts, as one of the court's plurality opinions "on the merits." In fact, even the court of criminal appeals has gotten caught up in the process, citing its own PDR refusals (as in *Carroll v. State*) and even dissents from refusals (as in *Powell v. State*) on the merits of issues.

And on that note, it is best for us to stop. After all, any more citations and this will start to sound like a substantive article, with a resulting loss of readership. At any rate, it should be clear that the Texas Court of Criminal Appeals, in developing and refining an ostensibly simple PDR process, has managed to combine all the flexibility of the U.S. Supreme Court's certiorari process with all the message-sending ability of the Texas Supreme Court's writ notations, while simultaneously preserving and improving upon all the most confusing aspects of each. This is no mean accomplishment for 10 short years. Just think what our court of criminal appeals might do in its next century!

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