

To ensure delivery of this email, please add [casesummary@tdcaa.com](mailto:casesummary@tdcaa.com) to your address book.

If you are having trouble viewing this email, go to

<http://www.tdcaadistribution.com/newsletter/newsletter.php?10510>.



## TDCAA Weekly Case Summaries - September 26, 2008

September 26, 2008

[Texas Court of Criminal Appeals](#)

[Texas Courts of Appeals](#)

[Attorney General Opinions](#)

### Texas Court of Criminal Appeals

#### **Clarke v. State - CCA**

[→ read opinion](#)

9/24/2008 : Cite No. PD-1454-07 : *Brady/Giglio* Claim

**Issue:** Did the defendant in a sexual assault case successfully preserve a *Brady/Giglio* claim when he did not explicitly raise it in a written motion for new trial but rather made the argument at a hearing on his motion?

**Holding:** Yes. A claim that the trial court erred in denying a motion for new trial is preserved for appellate review if the nature of the ground allegedly warranting a new trial is raised and litigated, without objection, at some point during the motion-for-new-trial proceedings. Because the defendant only "enlarge[d]" his claim at the hearing and the State did not object, the trial court had authority to consider and rule on the defendant's *Brady* claim even though it was not explicitly set out in the original motion for new trial.

**Dissenting:** Presiding Judge Keller (joined by Judges Keasler and Hervey) dissented, writing that [T.R.App.P. 33.1](#) prohibits a defendant from amending a motion for new trial later than 30 days after sentence has been imposed. "Appellant's attempt to add a claim orally at the hearing cannot be countenanced any more than if he had attempted to add a new claim in writing."

[→ read dissenting opinion](#)

**Commentary:** The Code of Criminal Procedure gives the defendant an opportunity to object to anything in the PSI that he believes is inaccurate and counter it with other information. CCP, art. 42.12, sec. 9(e). In addition, the defendant and his attorney have a right to read the PSI 48 hours before sentencing. CCP, art. 42.12, sec. 9(d). Nonetheless, the CCA allows the defendant to raise an issue for the first time during a hearing on a motion for new trial, letting the defense attorney claim he was just too surprised by the PSI to say anything at sentencing. Frankly, this should result in an ineffective assistance of counsel claim, not a prosecutorial misconduct claim. The probation officer developed the sentencing information. That probation officer works for the judge, and his work is subject to attack by the defense. Yet, the defendant got to twist this into a *Brady* claim. Amazing. Finally, there is no evidence that the judge gave any consideration to the alleged inaccurate information in sentencing the defendant. The CCA messes this one up big time. To avoid being placed in this position, the prosecutor must object at the first opportunity that the claim (1) falls outside the original motion for new trial, (2) was not anything that the prosecutor did or should have known was false, (3) could and should have been raised in a timely manner by the defense BEFORE sentencing, and (4) didn't have any effect on sentencing because the judge sentenced the defendant for raping a child, as alleged in the indictment and confessed to by the defendant.

---

## **Brown v. State - CCA**

[→ read opinion](#)

9/24/2008 : Cite No. AP-75,294 : Accomplice-Witness Testimony

**Issue:** Is a defendant's suspicious conduct, coupled with an admission or confession sufficient to corroborate accomplice-witness testimony?

**Holding:** Yes. The suspicious conduct and admission is sufficient corroboration of the accomplice testimony under [CCP Art. 38.14](#).

**Commentary:** Be sure to take a look at the discussion on the conclusion that the prosecutor made improper, albeit harmless, arguments in response to defense arguments that the prosecutor got the witnesses to lie. It's a tricky business to respond to such accusations without striking at the defense over the shoulder's of counsel. But it is maddening to be left unable to respond to such accusations during final argument. Apparently you better object and develop contrary evidence during trial when cross-examination raised those implied arguments. Know this: Dan Rizzo is an honorable prosecutor with a long history of excellent, ethical work.

## Texas Courts of Appeals

### *Reasor v. State* - 4th COA

[→ read opinion](#)

9/24/2008 : Cite No. 04-07-00442-CR : Evidence in Revocation Hearing

**Issue:** Did evidence of a civil claim in a landlord-tenant dispute provide sufficient evidence to revoke the defendant's probation when offered during the revocation hearing?

**Holding:** Yes. Evidence presented regarding the landlord-tenant dispute was enough to allow the trier of fact to conclude that the defendant had also committed the offense of criminal mischief. Proof of a single probation violation is sufficient to support a revocation.

**Commentary:** Moral of the story: if you are on deferred adjudication for a serious drug crime, don't mess with your landlord when you move out.

## Attorney General Opinions

## GA-0666

[→ read opinion](#)

9/22/2008

**Issue:** Is the Texas Association of Appraisal Districts a "governmental body" for purposes of the Public Information Act?

**Holding:** A determination of an entity's status as a governmental body under chapter 552 of the Government Code is dependent upon whether that entity is supported in whole or in part by public funds. The extent to which an entity is supported by public funds requires an analysis of the facts surrounding each entity.

TDCAA is pleased to offer our members unique case summaries from the U.S. Supreme Court, the 5th Circuit Court of Appeals, the Texas Court of Criminal Appeals, Texas Courts of Appeals and the Texas Attorney General. In addition to the basic summaries, each case will have a link to the full text opinion and will offer exclusive prosecutor commentary explaining how the case may impact you as a prosecutor. The case summaries are for the benefit of prosecutors, their staff members, and members of the law enforcement community. These summaries are NOT a source of legal advice for citizens. The information contained in this email message may be privileged, confidential, and protected from disclosure. Any unauthorized use, printing, copying, disclosure, dissemination of or reliance upon this communication by persons other than the intended recipient may be subject to legal restriction or sanction. Please email comments, problems, or questions to [casesummary@tdcaa.com](mailto:casesummary@tdcaa.com). In addition, if you would like to discuss the summaries with fellow prosecutors, look for the thread in our criminal forum. The U.S. Supreme Court and the Fifth Circuit have not released any opinions this week.

You are receiving this message because you have signed up to receive weekly case summaries from TDCAA. This email was sent to [%%email%%](#)

505 W. 12th Street Suite 100, Austin, Texas 78701 : [www.tdcaa.com](http://www.tdcaa.com) : (512) 474-2436

If you do not wish to receive future emails, please [unsubscribe](#). Thank you.

©2008 TDCAA

▪