Gang-Affiliation Evidence In Texas:

Is United States v. Lemmon the criteria for admissibility?

By Peter M. Barrett

The Supreme Court of the United States has upheld the introduction of proper gang-affiliation evidence against an accused in certain limited circumstances. *See* ***United States v. Abel,*** 105 S.Ct. 465, 469 U.S. 45, 83 L.Ed.2d 450 (1984); *see also* ***Barclay v. Florida,*** 103 S.Ct. 3418, 463 U.S. 939, 77 L.Ed.2d 1134 (1983). However, the same Court has decreed as unconstitutional, a statute which authorizes the consideration of evidence by a sentencing authority that is contrary to the First and Fourteenth Amendments to the United States Constitution. *See* ***Zant v. Stephens,*** 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (aggravating circumstance held invalid where jury was authorized to draw adverse inferences from constitutionally protected conduct) ***(Id.*** at 885, 103 S.Q. at 2747). Recently, the Texas Court of Criminal Appeals has had several opportunities to address the constitutionality of gang-affiliation evidence, particularly with regard to First Amendment right of association concerns, but has thus far intentionally skirted the issue. *See e.g.,* ***Beasley v. State,*** 902 S.W.2d 452, 455-457 (Tex.Crim.App. 1995); ***Anderson v. State,*** 901 S.W.2d 946,950 (Tex.Crim.App. 1995); ***Mason v. State,*** 905 S.W.2d 570,576-577 (Tex.Crim.App. 1995).

Historical Background for Gang-Affiliation Evidence-

In Barclay v. Florida, the United States Supreme Court upheld as constitutional, the consideration by the sentencing authority of a defendant's membership in a group which termed itself the "Black Liberation Army" (BLA), and "whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war." *See Barclay v. Florida,* 463 U.S. 939, 943-944, 103 S.Ct. 3418, 3421, 77 L.Ed.2d 1134 (1983). In *Barclay,* a note which one of the co-defendants had written was affixed to the body of the deceased. *Id.* This note explained that the deceased was killed in furtherance of BLA's purpose. *Id.* Subsequently, the defendants produced several tape recordings which contained similar messages and mailed these recordings to the family of the deceased. Id

Also, in *United Stares v. Abel,* the Supreme Court permitted the introduction of gang affiliation evidence in the form of prosecution rebuttal testimony. *See United States v. Abel,* 469 U.S. 45; 105 S.Ct. 465; 83 L.Ed.2d 450 (1984). Such evidence was offered to impeach the prior testimony of a defense witness who denied on cross-examination to being a member of a secret prison gang, whose members were sworn to perjury and self-protection on each member's behalf. *See id.* The *Abel* Court teasoned that because such membership tended to show bias, it was relevant under Rule 402 of the *Federal Rules of Evidence,* which states that, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."[1] *See id.* at 105 S.Ct. 465; 469 U.S. 45 However, the Court held that such evidence "...could not have been offered to impeach [the defense witness] and prejudice him 'by mere association.'" *Id.*

The Supreme Court differentiated the facts of *Abel,* wherein the evidence was offered for relevant and legitimate impeachnieot purposes, from its prior holdings in *Brandenberg v. Ohio* and *Scales v. United Stares. See id.* at 105 S.Q. 469,469 U.S. 52-53; *see generally Brandenberg v. Ohio,* 395 U.S. 444,

448, 89 S.Ct. 1827, 1830, 23 L.Ed.2d 430 (1969) (conviction based on defendant's mere association with Ku Klux Klan reversed where state syndicalism laws violated First and Fourteenth Amendments); *Scales v. United States*, 367 U.S. 203, 219-224, 81 S.Ct. 1469, 1481-83, 6 L.Ed.2d 782 (1959) (conviction based upon statute which proscribed 'illegal party advocacy' upheld where defendant was 'active' member of communist party) . In *Abel*, the Court pointed out that *Brandenberg* and *Scales* dealt with the constitutionality of punishing persons for association and/or membership under the Smith Act and state syndicalism laws, "...for belonging to organizations which espoused illegal aims and engaged in illegal conduct." *Abel* at 105 S.Ct. 469,469 U.S. 52-53.

Recently, in *Dawson* a. *Delaware*, the United States Supreme Court again evaluated the constitutionality of gang affiliation evidence under established First and Fourteenth Amendment jurisprudence. *See Dawson v. Delaware*, 112 S.Ct. 1093 (1992). Dawson, the defendant, was convicted of first degree [capital] murder. *See* id. at 1095. Prior to commencement of the penalty phase, in which the State of Delaware intended to seek the death penalty, the prosecution informed Dawson that they intended to introduce evidence that Dawson was a member of the 'Aryan Brotherhood.' *See id.* at 1095. Additionally, the prosecution intended to provide the jury with expert testimony regarding the origin and nature of the Aryan Brotherhood. *Id.* at 1095-1096. However, after a punishment hearing outside the presence of the jury, the parties agreed to a stipulation in lieu of expert testimony, which read as follows:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware. (citation omitted). Id. at 1096.

The Court, Chief Justice Rehnquist having delivered the opinion for the majority, reversed Dawson's conviction and sentence on First and Fourteenth Amendment grounds. *See id.* at 1099. The *Dawson* Court concluded that the foregoing stipulation, "left the Aryan Brotherhood evidence totally without relevance to Dawson's sentencing proceeding." *Id.* at 1097, However, the Court stated that such evidence may have been relevant if the State had offered expert testimony, "...that the Aryan Brotherhood...advocates the murder of fellow inmates." Id The *Dawson* Court further concluded that:

> Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood was not tied in any Way to the murder of Dawson's victim. In *Barclay*, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a "racial war," were related to the murder of a white hitchhiker.... (citation omitted).

Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance. *Id.* at 1098.

In authoring *Dawson*, Chief Justice Rehnquist noted that the State of Delaware's argument on appeal was that such evidence was permissible under state law as "character" evidence. *Id.* The Court stated that such evidence violated the First Amendment regardless of "...[w]hatever label is given the evidence presented...." Id. Alternatively, the State of Delaware argued that such evidence was admissible to rebut mitigating evidence offered by the defendant. *Id.* In rejecting this assertion, the *Dawson* Court held that, "The principle of broad rebuttal asserted by Delaware is correct, but the argument misses the mark because, as stated above, the Aryan Brotherhood evidence presented in this case cannot be viewed as relevant "bad" character evidence in its own right." *Id.* at 1099.

In *United States v. Lemmon*, 723 F.2d 922, 941 (D.C.Cir.1983), the District of Columbia Cucuit Court established the following predicate for the admission of group affiliation evidence: (1) the defendant is a member of a group; (2) the group's aims are illegal; (3) the defendant intended to further the activities of the gang. *United Stares v. Lemmon*, 723 F.2d 922, 941 (D.C.Cir.1983). The standard established in *United Stales v. Lemmon* was applied by the Court of Criminal Appeals in *Fuller v. State.*[2] See *Fuller v. State*, 829 S.W.2d 191, 196 (Tex.Crim.App. 1992). In *Fuller*, the State presented testimony that the defendant was a member of the "Aryan Brotherhood," which is, according to the testimony of a prison investigator, "a white supremacy group, neo-nazi type organization...[Violence] is their main function.... *Id*, At 196. The Court declared that membership in this organization was not protected under the First Amendment, "...because organizations with illegal aims are not protected by the Constitution [and, therefore,] neither is membership with intent to further those aims." *Id.* (quoting *Lemmon* at 939-940).

Article 37.07, Pre-Grunsfeld-Gang Affiliation Evidence & Evidentiary Concerns under Rules 404 & 405

The Court of Criminal Appeals recently upheld the introduction of relevant [3] gang affiliation testimony in the punishment phase of a non-capital trial under Rules 404(c) & 405(a) of the *Texas* Rules *of Criminal Evidence? See e.g., Beasley v. State*, 902 S.W.2d 452, 455-457 (Tex.Crim.App. 1995); *Anderson* v. *Stare*, 901 S.W.2d 946, 950 (Tex.Crim.App. 1995); *Mason v. Stale*, 905 S.W.2d 570, 576-577 (Tex.Crim.App. 1995). The facts in *Beasley* reflect that, at the time of the offense, the defendant was wearing a black Raiders cap, an L.A. Lakers jacket and jeans with a blue bandana hanging out of his back pocket. *Beasley v. State*, 902 S.W.2d 452, 454. The State called Officer Griego, who had interacted with gangs, including 'Trips," for fifteen years. *Id.* He testified that the defendant's outfit matched the distinguishing clothing of members of the Crips gang. *Id.* Griego further testified that he personally knew the defendant and had viewed him in the presence of other "Crips," while wearing this distinctive clothing. *Id.* Most significantly, Officer Griego testified that the Crips have an "allegiance for a wm-

mon goal, and they engage in violent and criminal activity...their cause is violence, criminal activity such as drug trafficking, robberies, witness intimidation." *Id.* The Court reasoned that the reputation of a gang to which a defendant belongs may be relevant to the fact finder in assessing punishment, as a defendant's character is in issue during the punishment phase of a trial. *See Beasley* 902 S.W.2d at 456. The *Beasley* Court stated that, "...evidence of gang membership is relevant because the jury can make a determination of the defendant's character based on the fact that the defendant is a member of a gang." *Beasley* at 456.

However, in order to effectively evaluate such evidence, the jury must be able to determine whether a defendant's membership in an organization is aggravating or mitigating with regard to his character. Both *Anderson* and *Beasley* evaluate the admissibility of such evidence according to three independent considerations which require the State to establish beyond a reasonable doubt[6]: (1) the defeudant is a member of a particular gang; (2) that defendant's gang is involved in misconduct; (3) that defendant's gang bas a bad reputation in tbe community. *See Anderson v. State,* 901 S.W.2d 946,950; *Beasley v. State,* 902 S.W.2d 452,456; *Urbano* v. *State,* 837 S.W.2d 114, 117 (Tex.Crim.App. 1992). According to the Court, it is essential for the jury to know of the gangs activities and purposes in order to evaluate how they affect the perception of a defendant's reputation. *See id.*

The *Anderson* Court pointed out that in considering the admissibility of gang membership evidence, the trial court is obligated to determine whether the probative value of such evidence outweighs any unfair prejudice to a defendant. *Anderson* v. *State,* 901 S.W.2d 946, 950 (Tex.Crim.App. 1995). In order to evaluate whether particular gang affiliation evidence is relevant, and if so, whether such evidence is unfairly prejudicial in light of the foregoing analysis, it is necessary to evaluate the facts of each case separately.

In both *Anderson* and *Beasley,* the Court reasoned that gang affiliation testimony is not specific acts of misconduct under Rule 405(b), but rather reputation testimony relating to the character of the accused which is permissible under Rule 405(a) via Rule 404(c). *Anderson v. State,* 901 S.W.2d 946, 950; *Beasley v. State,* 902 S.W.2d 452, 456. The Court explained in *Anderson,* that:

> —For the jury to asses a defendant's character based on his gang membership, not only should the jury know of the defendant's gang membership, but also of the activities and purposes of the gang to which he belongs. Without this additional information, the jury has nothing to conclude whether membership in this gang is a positive or negative character trait of the defendant. *Anderson v. State,* 901 S.W.2d 946,950.

The difficulty with the analysis in *Anderson and Beasley, supra,* is that their criteria for the admissibility of gang affiliation evidence concentrates on the acts of the gang, which the defendant may or may not endorse. *Anderson* and *Beasley* fail to grasp that in actuality, it is the defendant's character that is in issue, rather than the character of his gang. Therefore, the *Anderson-Beasley* standard is not consistent with Rule 405, which prohibits character evidence in the form of specific instances of conduct. The Court has circumvented the constraints of Rule 405(b) by labeling specific acts of misconduct committed *by* various gang- members permissible reputation evidence under Rule 405(a). Again, the Court of Criminal Appeals bas missed the mark because at best, such evidence reflects the reputation of a gang, and not the defendant who stands trial.

Article 37.07: Post-Grunsfeld- Gang Affiliation Evidence & Constitutional Concerns (First and Fourteenth Amendments)

Following *Grunsfeld* v. *State,* 843 S.W.2d 521 (Tex.Crim.App. 1992). in which the Court of Criminal Appeals held that unadjudicated extraneous acts were not admissible in the punishment phase of a non-capital trial, the Texas legislature amended Article 37.07 § 3(a) of the *Texas Code of Criminal Procedure,* which governs the sort of evideuce which is admissible at the punishment phase of a non-capital trial. TEX. CODE CRIM. PROC. (Vernon 1993). Current Article 37.07 reads in pertinent part, as follows:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered as to any matter the court deems relevant to sentencing...that is shown beyond a reasonable doubt by evidence to have been commifted by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. Id.

This amendment changed established sentencing precedent in Texas to allow the introduction of extraneous crimes or acts committed by a defendant in a non-capital trial, notwithstanding the Rules of Evidence? *See* Acts 1993, 73rd Leg., ch. 900, §§ 5.05, 5.09 & 5.10, pp. 3762-64, eff. Sept. 1, 1993. Apparently, this amendment authorizes courts to disregard Rule402 of the *Texas Rules of Criminal Evidence,* which provides that "All relevant evidence is admissible, except as provided by constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible." Rule 402, TEX. R. CRIM. EVID.

The Texas Court of Criminal Appeals acknowledged this paradox in *Beasley v. State,* but refused to consider the admissibility of such gang affiliation evidence in conjunction with current Article 37.07 3(a), which was not in effect at the time of the trials from which each appellant sought relief. *See Beasley* a *Stare,* 902 S.W.2d 452 (Tex.Crim.App. 1995). As Judge McCormick pointed out in his concurring opinion in *Beasley,* "[T]he 'plain language' of the 1993 amendments to Article 37.07, Section 3(a), grants trial courts *almost* 'unfettered discretion' to 'define what the issues are at the punishment phase of a non-capital trial' on a case by case basis.' *Fe Beasley v. State,* 902 S.W.2d 452, 457 (Tex. Crim. App. 1995)(McCormick, PJ concurring)(citing Clinton, J.).

However, Judge McCormick also stated that, "Whether this is an unconstitutional delegation of legislative authority is a separate question than what the 'plain language' of current Article 37.07, Section 3(a) means." *Id.*

Also, neither *Anderson* nor *Beasley* entertain First Amendment (freedom of association) and Fourteenth Amendment (due process) concerns, apparently because each respective appellant failed to raise these issues in their petitions. *See Anderson v. State*, 901 S.W.2d 952-954 (Mansfield, J. concurring) ; *Beasley v. State*, 902 S.W.2d 457 (McCormick, PJ concurring); *Beasley* at 459 (Clinton, J. concurring). In dissenting from *Beasley*, Judge Maloney accused the majority of rationalizing its analysis strictly on relevancy grounds while ignoring First Amendment concerns, thereby avoiding the analysis enunciated in *United States v. Lemmon, supra*. *See id*, at 464. However, as Judge Maloney noted, the similarities between the majority's analysis and the three part analysis of *Lemmon, supra*, are uncanny.[8] *Id.* (footnote 2). Although similar, the *Anderson-Beasley* criteria differ significantly from the *Lemmon* criteria. *Lemmon* requires that the defendant intended to further the purposes of the gang to which he belongs, whereas *Anderson* and *Beasley* merely require the State to prove that the defendant's gang has a bad reputation in the community.

After *Grunsfeld, supra*, the Texas legislature apparently decided that, irrespective of the *Texas Rules of Criminal Evidence*, and thus, The Constitutions of the United States and Texas, the trial court should be given unbridled discretion to admit any sort of evidence which it deems relevant to sentencing. The author herein cannot imagine any reasoned dispute that in amending Article 37.07 § 3(a) of the *Texas Code of Criminal Procedure*, the legislature rendered such statute facially constitutionally defective. To verify this fact, one need only recall Rule 402 of the *Texas Rules of Criminal Evidence*, which provides that "All relevant evidence is admissible, except as provided by constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible." Rule 402, TEX. R. CRIM. EVID.

There is no end to the sort of slop which this unconstitutional delegation of legislative authority will permit to be dumped into the sentencing trough, provided that there is any relevance whatsoever, subject to the autonomous discretion of the trial court. It is not difficult to imagine the catastrophic effect which the application of current Article 37.07 § 3(a) will have upon established rights afforded a criminal defendant under Article I of the Constitution of the United States, the First and Fourteenth Amendments to the Constitution of the United States, and Article II, Section 1 of the Constitution of the State of Texas.

LIST OF AUTHORITIES

Cases

Anderson v. State, 901 S.W.2d 946 (Tex.Crim.App. 1995)

Barclay v. Florida, 463 U.S. 939; 103 S.Ct. 3418; 77 L.Ed.2d 1134 (1983)

Beasley v. State, 902 S.W.2d 452 (Tex.Crim.App. 1995)

Brandenberg v. Ohio, 395 U.S. 444; 89 S.Ct. 1827; 23 L.Ed.2d 430 (1969)

Dawson v. *Delaware,* 112 S.Ct. 1093 (*Interim Ed.*) (1992)

Fuller v. State, 829 S.W.2d 191 (Tex.Crim.App.1992), *cert. denied,* 113 S.Ct. 2418 (1993)

Grunsfeld v. *State,* 843 S.W.2d 521 (Tex.Crim.App. 1992)

Mason v. State, 905 S.W.2d 570 (Tex.Crim.App. 1995)

Scales v. United States, 367 U.S. 203; 81 S.Ct. 1469; 6 L.Ed.2d 782 (1959)

United States v. Abel, 469 U.S. 45; 105 S.Ct. 465; 83 L.Ed.2d 450 (1984)

United States v. Lemmon, 723 F.2d 922 (D.C.Cir. 1983)

Urbano v. State, 837 S.W.2d 114 (Tex.Crim.App. 1992)

Ybarra v. *State,* 775 S.W.2d 409 (Tex.App.-Waco 1989, no pet. h.)

Zant v. Stephens, 462 U.S. 862; 103 S.Ct. 2733; 77 L.Ed.2d 235 (1983)

Constitutional Provisions

Constitution of the United States, Article I

First Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

Constitution of the State of Texas, Article II, §1

Codes

TEX. CODE CRIM. PROC. ANN., Art. 37.07 §3(a) (Vernon 1993)

Rules

TEX. R. CRIM. EVID., Rule 401

TEX. R. CRIM. EVID., Rule 402

TEX. R. CRIM. EVID., Rule 403

TEX. R. CRIM. EVID., Rule 404(c)

TEX. R. CRIM. EVID., Rule 405(b)

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1 The federal rule is virtually identical to Rule 402 of the *Texas Rules of Criminal Evidence.*

2 This was a capital case in which the State sought the death penalty and introduced such evidence to establish the special issue of 'future dangerousness.' *See Fuller* at 196. *See* Rule 401, TEX. R. CRIM. EVID. (definition of 'relevant' evidence).

4 Both *Anderson v. State, infra,* and *Beasley v. State, infra,* were decided under Article 37.07 § 3(a) of the *Texas Code of Criminal Procedure,* as it existed prior to legislative amendment in 1993. Following *Grunsfeld v. State,* 843 S.W.2d 521 (Tex.Crim.App. 1992), Article 37.07 § 3(a), which governs the sort of evidence which is admissible at the punishment phase of a [non-capital] trial, was amended by the legislature, Tex. Code Crim. Proc. (Vernon 1993). The phrase "as permitted by the Rules of Evidence" was deleted from the pre-*Grunsfeld* Article 37.07. *See Beasley* v. *State,* 902 S.W.2d 452, 457-458 (footnotes 1 & 4)(Tex.Crim.App. 1995)(Clinton, J. concurring). In *Anderson* and *Beasley,* the Court held only that the introduction of proper gang affiliation evidence is relevant and is not tantamount to specific acts of misconduct under Rule 405(b) TEX. R. CRIM. EVID., but rather is considered evidence of character under Rule 404(c) TEX. R. CRIM. EVID.. *See Anderson v. State,* 901 S.W.2d 946, 950-951 (Tex.Crim.App. 1995); *Beasley* v. *State,* 902 S.W.2d 452,457 (Tex.Crim.App. 1995).

5 This holding referenced *Ybarra v. State,* in which the Waco Court of Appeals upheld the defendant's conviction for carrying a deadly weapon in a penal institution where the State admitted evidence of the defendant's membership in a gang during punishment. *See Ybarra* v. *State,* 775 S.W.2d 409 (Tex.App.-Waco 1989, no pet). The *Ybarra* Court sanctioned such evidence as consistent with Rules 404(c) & Rule 405, Tex. R. Crim. Evid.

6 Under Rule 404(c) of the TEX. R. CRIM. EVID. and Article 37.07 § 3(a) TEX. CODE CRIM. PROC., the trial court has a great deal of latitude in deciding whether to admit relevant evidence. However, under Article 37.07 § 3(a), the burden of proof required at punishment is beyond a reasonable doubt. *See* TEX. CODE CRIM. PROC., Article 37.07 § 3(a); *Urbano* v. *State,* 837 S.W.2d 114, 117 (Tex.Crim.App. 1992)(whether rational jurors could conclude such evidence was proven beyond a reasonable doubt). Furthermore, the Court in *Anderson, supra,* appears to require that in addition to having relevance, gang affiliation testimony should be excluded if the relevance of the probative value is unfairly prejudicial to the defendant. *Anderson,* 901 S.W.2d 946,950.

7 phrase "as permitted by the Rules of Evidence" was intentionally deleted from the pre-*Grunsfeld* Article 37.07. *See Beasley v. State,* 902 S.W.2d 452, 457-458 (footnotes 1 & 4)(Tex.Crim.App. 1995)(Clinton, J. concurring).

8 The *Anderson* and *Beasley* tests, *supra,* also differ somewhat from the test applied in *Mason v. State,* 905 S.W.2d 570, 576-577 (Tex.Crim.App. 1995). In *Mason,* the Court held that in order for gang affiliation evidence to be relevant, the State need only prove two elements: (1) proof of the group's violent and illegal activities, and (2) the defendant's membership in the organization. *See id.* However, the prosecution presented expert testimony which tended to establish the same sort of evidence presented in *Anderson* and *Beasley, supra. See id.* Additionally, *Mason* involved the relevance of a defendant's membership in the 'Aryan Brotherhood' to the issue of future dangerousness in assessing capital punishment. *See id.* For these reasons, it is difficult to discern if a different test was applied in *Mason* than that in *Anderson* and *Beasley.*