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A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review† at the Texas Supreme Court*

Dylan O. Drummond

The sometimes seemingly mysterious machinations that result in the grant of review by the Texas Supreme Court of certain petitions, and the much more frequent denial of others,[1] has been discussed, debated, and dissected *ad nauseum* over the years. However, in recent years, there has been an identifiable trend among the Justices of the Court to issue separate opinions to denials of petitions for review and for writ of mandamus, which warrants further review, so to speak.

This practice has sometimes resulted in the subsequent grant of the once-denied petition, or the eventual adoption of the separate opinion's reasoning.[2] Accordingly, review of these opinions, and their subsequent treatment by the Court, may provide appellate practitioners—especially those who have just been denied review—some hope of "liv[ing] to fight another day,"[3] as well as insight into the possible, eventual disposition of their case.

Out the outset, it should be noted that this discussion encompasses the somewhat disparate methods of review historically and currently available through the Court's former obligatory jurisdiction over applications for writ of error under the former Texas Rules of Appellate Procedure (the "Rules") 130-33;[4] the Court's current discretionary jurisdiction over petitions for review under current Rules 53-56;[5] and the Court's jurisdiction to rule on motions for leave to file petition for writ of mandamus under former Rules 120-22,[6] and issue petitions for writ of mandamus under current Rule 52.[7] While the Court's discretionary jurisdiction expressly extends only to petitions for review[8]—the denial of which is not an adjudication on the merits[9]—and not to its extraordinary writ powers,[10] instances where the Court has summarily denied mandamus relief without opinion are procedurally similar to denials of appellate review, and so are germane to this analysis.[11]

The tradition of writing separately from the majority in the form of concurring or dissenting opinions began during the Court's first term in the future mayor of Austin's house on the southwest

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* And concurrences, as well as "opinions on." *See* discussion *supra.*

† As well as denial and of applications for writ of error, overruling of motions for leave to file writ of mandamus, and denial of writs of mandamus.

[1] In FY 2005, the Court disposed of 1,079 petitions for review and writ of mandamus. Of the 823 petitions for review disposed, 112 were granted (13.6%), and 661 were either refused or denied (80.3%); and of the 256 petitions for writ of mandamus disposed, 22 were conditionally granted (8.6%), and 183 were refused or denied (71.5%). *See* OFFICE OF COURT ADMINISTRATION, DISPOSITION OF OTHER THAN REGULAR CAUSES: FY 2005 (2006).

[2] *See* discussion, *infra.*

[3] *See* H.E. MARSHALL, AN ISLAND STORY: A CHILD'S HISTORY OF ENGLAND ch. XLVIII (New York, 1906).

[4] *See* VERNON'S ANN. TEXAS RULES APP. PROC., rules 53-56, at 865-77 (2003).

[5] Specifically, see TEX. R. APP. P. 53.1, 56.1..

[6] *See* VERNON'S ANN. TEXAS RULES APP. PROC., rules 52, at 818 (2003).

[7] Specifically, see TEX. R. APP. P. 52.1, 52.8.

[8] *See* TEX. GOV'T CODE ANN. §22.001(a)(6) (Vernon 2003) (enacted in 1987 by Act of May 29, 1987, 70th Leg., R.S., ch. 1106, §2, 1987 Tex. Gen. Laws 3804, 3805); *see also* TEX. R. APP. P. 56.1(a).

[9] *See Dallas Morning News v. 5th Ct. of App.*, 842 S.W.2d 655, 661 (Tex. 1992) (orig. proceeding) (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion).

[10] *See* TEX. GOV'T CODE ANN. §22.002 (Vernon 2003).

[11] *See* Elizabeth V. Rodd, *What is Important to the Jurisprudence of the State*, *in* 11TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS 2 (UT CLE 2001). Accordingly, the many other instances through the years where the Court has issued an opinion denying mandamus relief are not addressed in these pages. *See, e.g.*, Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

corner of Congress Avenue and Second Street.[12] In the ninth cause decided during the Court's inaugural 1840 term,[13] Chief Justice Thomas Jefferson Rusk,[14] joined by Justices John Hemphill[15] and John T. Mills,[16] concurred with the Court's majority opinion. The first dissent was issued the following term.[17]

The Court's first dissenting opinion from an application for writ of error came fifty-four years after the Court's first dissenting opinion, and was—ironically—a dissent by Special Associate Justice Alexander from the *grant* of such an application.[18]

There followed an uneasy peace among the Court's Justices until April 1916 when Associate Justice William E. Hawkins resurrected Justice Alexander's isolated practice from twenty-one years earlier.[19] Noting the rarity of his dissent, Justice Hawkins admitted that, while "the rule in this [C]ourt has been not to write in granting or in refusing applications for writs of error[,] … I feel duty bound to state my individual views herein …."[20] Thereafter, Justice Hawkins began his three-year long campaign against the Court's penchant for denying writs of error over his objection.[21] During this span, he wrote two concurring and four dissenting opinions from the Court's denial (sometimes on rehearing) of applications for writ of error.[22]

Of historical citational interest, Justice Hawkins' separate opinion in *Terrell v. Middleton* clarified and modified the precedential weight accorded a refused writ.[23] Before his opinion, a "writ ref'd" notation meant that the Court approved the result

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[12] *See* James W. Paulsen, *Sesquicentennial Celebration: Establishment of a Unique Texas Institution*, 53 TEX. B.J. 43, 43 (1990) [hereinafter *Sesquicentennial*]. That street corner is now occupied by the 22-story 100 Congress office building. *See* LINCOLN PROPERTY CO. (2003-05), PROPERTY INFORMATION, *at* http://www.100congress.net/i_100congress.aspx (last visited March 1, 2006).

[13] *Winfried v. Yates*, Dallam 364 (1840) (Rusk, C.J., Hemphill, Mills, J.J., concurring).

[14] Chief Justice Rusk first gained considerable notoriety at the Battle of San Jacinto for routing the Mexican Army after then-Brigadier General Sam Houston was wounded, and for accepting the surrender of the Mexican forces later that same day. *See* James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 305, 314-15 (1986) [hereinafter *Republic Judges*].

[15] Who, though only serving for one week of the Court's initial term, still produced two majority opinions in addition to this concurrence. *See Sesquicentennial*, *supra* note 12, at 44.

[16] Justice Mills set the record early of being the youngest regular Justice ever to serve on the Court, at the ripe old age of twenty-one. *See Republic Judges*, *supra* note 14, at 344.

[17] *Fowler v. Poor*, Dallam 401, 403 (1841) (Baylor, Hutchinson, J.J., dissenting).

[18] *See Mut. Life Ins. Co. of New York v. Hayward*, 88 Tex. 315, 30 S.W. 1049 (1895) (per curiam) (Alexander, Special Assoc. J., dissenting from grant of application for writ of error).

[19] *El Paso & S.W. Co. v. La Londe*, 108 Tex. 67, 68, 184 S.W. 498 (1916) (per curiam) (Hawkins, J., concurring with overruling of motion for rehearing of denial of application for writ of error).

[20] *Id.*

[21] *See St. Nat. Bank of San Antonio v .E. Coast Oil Co., S.A.*, 109 Tex. 510, 212 S.W. 621 (1919) (per curiam) (Hawkins, J., dissenting from overruling of motion for rehearing on denial of application for writ of error); *Hicks v. Faust*, 109 Tex. 481, 212 S.W. 608 (1919) (per curiam) (Hawkins, J., dissenting from overruling of motion for rehearing on denial of application for writ of error); *Scott v. Shine*, 109 Tex. 412, 202 S.W. 726 (1918) (per curiam) (Hawkins, J., dissenting from overruling of motion for rehearing on denial of application for writ of error); *Terrell v. Middleton*, 108 Tex. 14, 191 S.W. 1138 (1917) (per curiam) (Hawkins, J., concurring in refusal of application for writ of error); *Beaty v. Mo., Kan. & Tex. Ry. Co. of Tex.*, 108 Tex. 82, 185 S.W. 298 (1916) (per curiam) (Hawkins, J., dissenting from overruling of motion for rehearing of denial of application for writ of error); *El Paso v. S.W. Co. v. La Londe*, 108 Tex. 67, 184 S.W. 498 (1916) (per curiam) (Hawkins, J., concurring in overruling of motion for rehearing of denial of application for writ of error). For the full and original exposition of these cases, please see former Chief Justice Phillips' separate opinion in *Dallas Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655, 661 (Tex. 1992) (orig. proceeding) (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion).

[22] *See Dallas Morning News*, 842 S.W.2d at 661 (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion).

[23] *See Terrell*, 108 Tex. at 16-21, 191 S.W. at 1139-41 (Hawkins, J., concurring with refusal of application for writ of error).

reached by the court of civil appeals, but did not necessarily approve the opinion itself.[24] However, after *Terrell*, writ refusal did not even mean approval of the result reached when error was not preserved.[25] This held true until June 14, 1927, when amendments to article 1728 of the Texas Revised Civil Statutes became effective, making a "writ ref'd" opinion "as binding as a decision of the Supreme Court itself."[26]

In earning his reputation as a prolific writer,[27] if at times unnecessarily so, Justice Hawkins once followed up a twenty-three page concurrence to the per curiam refusal of an application for writ of error[28] with another concurrence to the per curiam denial of rehearing in the same case.[29] These opinions were apparently a mere "warm-up" for Justice Hawkins' one hundred and fourteen page dissent[30] to the majority's six page opinion in *San Antonio & Aransas Pass Railway Co. v. Blair*.[31] Because Justice Hawkins was never joined by another Justice in one of his separate writings to denials of writ of error, and because these opinions were never again cited by the Court until Chief Justice Phillips' separate opinion catalogued them in a footnote seventy-three years later,[32] the sum jurisprudential effect of Justice Hawkins' famously thoroughgoing disquisitions—apart from informing "writ ref'd" citations for a decade between 1917 and 1927—is questionable.[33]

1992 marked a flurried return to the practice of issuing separate opinions to orders regarding the composition of the Court's docket ("docket orders"), which has not abated to this day, though not without some consternation among the Court's Justices.[34]

In April of that year, now-Senator John Cornyn, joined by now-Senior Associate Justice Nathan L. Hecht dissented from the Court's denial of the request by the relator—Dell Valle I.S.D.—for a temporary stay of the court-ordered election of its board of trustees scheduled three days later.[35] Less than a year later, the Court eventually heard the appeal of the cause, albeit after the election at issue was held, and on procedural grounds as opposed to the merits discussed in the dissent.[36]

In November of 1992, now-Congressman Lloyd Doggett dissented from the denial of writ of mandamus,[37] over the objection of four of his

[24] *See* Gordon Simpson, *Notations on Applications for Writs of Error*, 12 TEX. B.J. 547, 574-75 (1959).

[25] *See Terrell*, 108 Tex. at 16-21, 191 S.W. at 1139-41 (Hawkins, J., concurring with refusal of application for writ of error); Simpson, *supra* note 24, at 574-75.

[26] *See Ohler v. Trinity Portland Cement Co.*, 181S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ); Simpson, *supra* note 24, at 574-75.

[27] *See Dallas Morning News*, 842 S.W.2d at 662 n.1 (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion).

[28] *See Terrell*, 108 Tex. at 16-39, 191 S.W. at 1138 (Hawkins, J., concurring with refusal of application for writ of error).

[29] *Terrell v Middleton*, 108 Tex. 14, 49, 193 S.W. 139 (1917) (per curiam) (Hawkins, J., concurring with denial of rehearing).

[30] *San Antonio & Aransas Pass Ry. Co. v. Blair*, 108 Tex. 434, 441-555, 196 S.W. 1153 (1917) (Hawkins, J., dissenting) (in part, castigating the Court for failing to support portions of its implied holding by citing to "even one single decision from any court in Christendom;" see *id.* at 555, 196 S.W. at 1198).

[31] *Id.* at 434, 196 S.W. at 502 (Phillips, C.J., writing for the majority).

[32] *See Dallas Morning News*, 842 S.W.2d at 662 n.1 (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion).

[33] Justice Hawkins also gained somewhat inglorious fame as the first Texas Supreme Court Justice to be denied re-election. *See id.* at 662.

[34] *Compare id.* at 661, *and id.* at 657 (Gonzalez, J., concurring with overruling of motion for leave to file petition for writ of mandamus), *with id.* at 663 (Doggett, J., joined by Mauzy, Hightower, Gammage, J.J., dissenting from overruling of motion for leave to file petition for writ of mandamus)..

[35] *See Del Valle Indep. Sch. Dist. v. Dibrell*, 830 S.W.2d 87 (Tex. 1992) (orig. proceeding) (Cornyn, J., joined by Hecht, J., dissenting from denial of request for temporary relief to stay or suspend court-ordered election).

[36] *See Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808 (Tex. 1992).

[37] *See Dallas Morning News*, 842 S.W.2d at 663 (Doggett, J., joined by Mauzy, Hightower, Gammage, J.J., dissenting

colleagues, including former Chief Justice Thomas R. Phillips.[38] Then-Senior Associate Justice Raul A. Gonzalez also issued the first of his several opinions in such docket order matters as well.[39] In cautioning his colleagues against issuing unnecessary and time-consuming separate opinions, Chief Justice Phillips reasoned that, because "a published dissent from such an order has no meaningful disciplining effect on a [C]ourt opinion," the "practical and pernicious effect" is to instead "forc[e] one or more writings on a case the Court has, pursuant to its own rules, decided to decline."[40] Justice Doggett brushed aside the Chief Justice's argument against so dissenting by surmising that "[w]hen this [C]ourt of last resort concurs in the denial of access [to public trial exhibits], an explanation is appropriate."[41]

One month later, the Court took the somewhat unusual step of issuing an opinion denying an application for writ of error,[42] from which Justice Hecht dissented, joined by Justices Cornyn and Craig T. Enoch, both at the original disposition and on denial of rehearing three months later.[43] Both Associate Justice Oscar H. Mauzy's opinion and Justice Hecht's dissent have been cited positively by subsequent Court majority,[44] plurality,[45] concurring,[46] or dissenting[47] opinions.

Later the same term, Justice Doggett dissented from the denial of writ of error in a case claiming that the denial marked "a growing tendency of the majority to overrule past decisional law."[48] Justice Gonzalez concurred in the Court's denial, responding to the concern raised by the dissenting Justices by reminding them that the factual conclusivity clause of the Texas Constitution prohibited the approach they advocated.[49]

The following term, Justice Doggett again dissented from the Court's denial of application for writ of error in two cases,[50] and from the summary denial of mandamus relief in another.[51]

The first time a separate opinion to a docket order formed the basis for an eventual reversal in the Court's position on a given issue was in 1994 (and therefore, operated similarly to a dissent from a majority opinion), when Justice Gonzalez, joined by Justice Hecht, dissented from the Court's denial of leave to file a petition for writ of mandamus.[52] Therein, Justice Gonzalez framed the Court's denial of extraordinary relief as "once again duck[ing]" consideration of whether "'apex' depositions [should be] allowed before less

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from overruling of motion for leave to file petition for writ of mandamus).

[38] *See id.* at 661 (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion).

[39] *Id.* at 657 (Gonzalez, J., concurring with overruling of motion for leave to file petition for writ of mandamus).

[40] *Id.* at 661-62 (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion).

[41] *Id.* at 666 (Doggett, J., joined by Mauzy, Hightower, Gammage, J.J., dissenting,).

[42] *Hill v. Winn Dixie Tex., Inc.*, 849 S.W.2d 802 (Tex. 1992).

[43] *See Hill v. Winn Dixie Tex., Inc.*, 849 S.W.2d 802, 804 (Tex. 1993) (Hecht, J., joined by Cornyn and Enoch, J.J., dissenting from denial of application for writ of error).

[44] *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 433 (Tex. 2005).

[45] *Reinhart v. Young*, 906 S.W.2d 471, 472-73 (Tex. 1995).

[46] *Id.* at 475 (Hecht, J., joined by Owen, J., concurring); *Thomas v. Oldham*, 895 S.W.2d 352, 362 n.1 (Tex. 1995) (Enoch, J., concurring).

[47] *Reinhart*, 906 S.W.2d at 478 (Hightower, J., joined by Cornyn and Gammage, J.J., dissenting).

[48] *Havner v. E-Z Mart Stores, Inc.*, 846 S.W.2d 286, 287 (Tex. 1993) (Doggett, J., joined by Gammage and Spector, J.J., dissenting from denial of application for writ of error).

[49] *See id.* at 286 (Gonzalez, J., concurring with denial of application for writ of error) (citing TEX. CONST. art. V, § 6).

[50] *Adamo v. St. Farm Lloyds Co.*, 864 S.W.2d 491 (Tex. 1993) (Doggett, J., dissenting from denial of application for writ of error); *Johnson v. Galveston County Beach Park Bd.*, 848 S.W.2d 689, 690 (Tex. 1993) (Doggett, J., joined by Gammage, J., noting their dissent from denial of writ of error).

[51] *Fanestiel v. Alworth*, 876 S.W.2d 161, 161 (Tex. 1994) (orig. proceeding) (Doggett, J., dissenting from overruling of motion for leave to file petition for writ of mandamus).

[52] *Monsanto Co. v. May*, 889 S.W.2d 274 (Tex. 1994) (orig. proceeding) (Gonzalez, J., joined by Hecht, J., dissenting from denial of leave to file petition for writ or mandamus).

intrusive means of discovery have been exhausted."[53] Almost exactly one year later, Justices Gonzalez and Hecht were in the majority when the Court expressly adopted their reasoning by holding that "apex" depositions should not be allowed absent "the party seeking the deposition … attempt[ing] to obtain the discovery through less intrusive methods."[54]

The suasive effect of a sonorous separate opinion to a docket order was again demonstrated by Justice Gonzalez's dissent from the denial for application of writ of error the following year in *Davis v. Greer*.[55] In *Greer*, Justice Gonzalez advocated applying an "inherent risk" standard to tort liability in sporting events.[56] By the time Court had occasion to deny Phi Delta Theta Co.'s petition as improvidently granted, Justice Gonzalez's reasoning from *Greer* had garnered the votes of Justices Enoch and Hecht, as well as Associate Justice Priscilla R. Owen.[57] Just four years ago, while not finding it necessary to adopt Justice Gonzalez's approach on the facts of the case presented, the Court acknowledged the validity, at least in part, of his reasoning from *Greer*.[58]

Applying the lesson learned from the Court's eventual grant and adoption of he and Justice Gonzalez's reasoning from *Monsanto* in *Crown Central Petroleum* the year before, Justice Hecht dissented to the denial of the application for writ of error in *Maritime Overseas v. Ellis* in 1996.[59] Justice Hecht's dissent in *Maritime Overseas* also signaled the beginning of a long line of separate opinions to docket orders he would issue or join over the next eight years.[60] Therein, Justice Hecht agreed with the validity of Chief Justice Phillip's caution from *La Londe* that writing separately to docket orders could cause the Court's time and resources to become too strained,[61] and that the "generally … preferable approach" was to maintain the "confidentiality of votes on denied applications."[62] However, Justice Hecht justified his separate writing by reasoning that "confidentiality becomes indefensible" when "it allows decisions in cases [that] would not be made if public explanations were required," because in so doing, "public announcement of the votes on applications that are denied would make Justices more deliberate and accountable."[63]

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[53] *Id.* at 274.

[54] *See Crown Cent. Petroleum v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995) (orig. proceeding).

[55] 940 S.W.2d 582 (Tex. 1996) (Gonzalez, J., opinion on denial of application for writ of error). Although Justice Gonzalez's opinion was not technically denoted as either a dissent or a concurrence, it has been referred to in subsequent Court opinions as either a "dissenting opinion;" see *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 663 n.31 (Tex. 1999) (Enoch, J., joined by Hecht, J., dissenting from denial of petition as improvidently granted), or as an "opinion on denial of the application for writ of error;" see *S.W. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 272 (Tex. 2002).

[56] *Id.* at 582-83.

[57] *See Phi Delta Theta*, 10 S.W.3d at 658-63 (Enoch, J., joined by Hecht, J., dissenting from denial of petition for review as improvidently granted); *id.* at 663 (Owen, J., dissenting from denial of petition for review as improvidently granted) (Justice Owen, who was appointed to the Court shortly after the issuance of Justice Gonzalez's opinion in *Greer*, dissented separately from Justices Enoch and Hecht because she "reserved judgment on the merits of the issue presented;" see *id.* at 663).

[58] *See Gil-Perez*, 81 S.W.3d at 272.

[59] *Maritime Overseas Corp. v. Ellis*, 977 S.W.2d 536 (Tex. 1996) (per curiam) (Hecht, J., dissenting from denial of application for writ of error).

[60] *See* discussion, *infra.*

[61] *Maritime Overseas*, 977 S.W. at 541 (Hecht, J., dissenting from denial of application for writ of error).

[62] *Id.*

[63] *Id.* 540-41. Two of Justice Hecht's fellow Justices apparently took issue with other portions of his dissent, in which he stated his belief that, while not "intend[ing] in any way to impugn the motives of other Justices[,] … I have become convinced that if … the … Justices … had been constrained to explain his or her position publicly, the vote would have been different." *Id.* at 540; *see also In re Jane Doe*, 19 S.W.3d 346, 362, 362 n.1 (Tex. 2000) (Enoch, J., joined by Baker, J., concurring) (describing Justice Hecht's dissent from the denial of the application for writ of error as "brand[ing] his colleagues as dishonest").

The Court apparently buttressed Justice Hecht's position when it subsequently granted rehearing as well as the application for writ of error in the case almost eight months later.[64] However, the procedural arguments made by Justice Hecht appear to have been more persuasive than the substantive ones, because on rehearing, the Court affirmed the judgment of the court of appeals, to which Justice Hecht, joined by Chief Justice Phillips, dissented.[65]

Justice Gonzalez demonstrated another possible aim of issuing separate opinions to petitions the Court does not grant in *General Resources Organization v. Deadman*,[66] where his stated purpose in concurring to the Court's denial was to "call on the Legislature to enact a law apportioning one-half of punitive damage awards to the State."[67]

The latter half of the 1997-98 term saw two more dissents to docket orders that are chiefly of interest here because the first marked the last dissent from the denial of the application for writ of error under the old Rules.[68] The second opinion was the final dissent from the denial of a petition by Justice Gonzalez,[69] who—along with Justice Doggett—resurrected the practice first largely utilized and made famous by Justice Hawkins.[70]

In contrast to the sixteen separate opinions to Court docket orders issued in the previous seven years (and the eight separate docket order opinions issued in the one hundred and three years prior to that)[71] ten separate writings to docket orders were issued in 1999 alone.[72]

However, only two dissents from this time span are pertinent to this discussion.[73] The first was Justice Hecht's dissent from the denial of the petition for review in *RE/MAX of Texas, Inc. v. Katar Corp.*,[74] which signaled the first dissent to a docket order under the new Rules. The second dissent was entered in *Vickery v. Vickery*, in which Justice Hecht reiterated that "[t]he Court cannot simply pick and choose the cases in which the rule it has announced will apply."[75]

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[64] *See* Order granting application for writ of error, at 40 Tex. Sup. Ct. J. 765, 767 (July 9, 1997) (No. 94-1057).

[65] *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 412 (Tex. 1998); *id.* at 415 (Hecht, J., joined by Phillips, C.J., dissenting).

[66] 932 S.W.2d 485 (Tex. 1996) (Gonzalez, J., concurring opinion on denial of application for writ of error).

[67] *Id.* at 487.

[68] *Tarrant County Water Control and Improvement Dist. No. 1 v. Fulllwood*, 963 S.W.2d 60 (Tex. 1998) (Hecht, J., dissenting from denial of application for writ of error).

[69] *In re Jerry's Chevrolet-Buick, Inc.* 977 S.W.2d 565 (Tex. 1998) (orig. proceeding) (Gonzalez, J., joined by Hecht, J., dissenting from denial of petition for writ of mandamus).

[70] Or perhaps infamous, if one were to ask his fellow Justices. *See Dallas Morning News v. 5th Ct. of App.*, 842 S.W.2d 655, 662 n.2 (Tex. 1992) (orig. proceeding) (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion); *Allen v. Pollard*, 109 Tex. 536, 539-40, 212 S.W. 468, 469 (1919) (Hawkins, J., filing statement).

[71] *See* discussion, *supra*.

[72] *See* discussion, *infra*. It may be noted that eight of the ten opinions were dissents by Justice Hecht, in which he was joined four times by Justice Owen. The other two opinions include a dissent by Justice Owen, and a dissent authored by Justice Enoch, in which he was joined by Justice Hecht.

[73] For the text of the other eight opinions, please see *Texas Workers Compensation Insurance Fund v. Serrano*, 22 S.W.3d 341 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review); *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658, 658-63 (Tex. 1999) (Enoch, J., joined by Hecht, J., dissenting from denial of petition for review as improvidently granted); *id.* at 663 (Owen, J., dissenting from denial of petition for review as improvidently granted); *In re Rio Grande Valley Gas Co.*, 8 S.W.3d 303 (Tex. 1999) (orig. proceeding) (Hecht, J., joined by Owen, J., dissenting from denial of petitions for writ of mandamus); *In re South Texas College of Law*, 4 S.W.3d 219 (Tex. 1999) (orig. proceeding) (Hecht, J., dissenting from denial of petition for writ of mandamus); *Rampart Capital Corp. v. Abke*, 1 S.W.3d 107 (Tex. 1999) (Hecht, J., joined by Owen, J., dissenting from denial of petition for review); *Rampart Capital Corp. v. Maguire*, 1 S.W.3d 106 (Tex. 1999) (Hecht, J., joined by Owen, J., dissenting from denial of petition for review); *In re Texas Workers' Compensation Insurance Fund*, 997 S.W.2d 247 (Tex. 1999) (orig. proceeding) (Hecht, J., joined by Owen, J., dissenting from denial of petition for writ of mandamus).

[74] 989 S.W.2d 363 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review).

[75] 999 S.W.2d 342, 344 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review).

Exemplifying that separate writings to docket orders have not always swayed other Justices to the separate writer's point of view, the above-quoted portion of the dissent was later cited by Associate Justice Harriet O'Neill as contradicting Justice Hecht's own dissent from her majority opinion.[76]

Besting the total from the previous year, eleven separate opinions to petitions denied review were issued in 2000.[77] Again, only a few of the opinions issued merit discussion here however.[78]

In January 2000, the Court denied rehearing of BMW's petition for writ of mandamus.[79] Justice Hecht, joined by Justice Owen, took issue with the trial court's *sua sponte* grant of new trial, which was buttressed only by the court's bald assertion that its action was "'in the interest of fairness and justice.'"[80] Justice Hecht argued that, while Texas trial courts undoubtedly possess broad discretion in granting new trials, their discretion to do so should be tempered by a requirement to state reasons for their rulings.[81] Justices Hecht and Owen renewed their dissent on the same grounds in a similar case that was presented to the Court less than four months later in *In re Volkswagen of America, Inc.*[82]

After the Court denied Volkswagen's writ of mandamus, a second trial in the case progressed, which was eventually petitioned to, and review granted by, the Court some four years later.[83] In its opinion, the Court explicitly referred to Justice Hecht's earlier dissent in the cause, but did not go so far as to adopt the prior dissent's reasoning.[84] However, it is at least arguable that the cumulative effect of the repeated dissents was to predispose the Court to grant review the third time similar facts were presented.[85]

Later that year, Justice Hecht, joined by Justice Owen, dissented from the denial of two other petitions for writs of mandamus, lamenting the Court's refusal to clarify or enforce valid contractual forum-selection clauses.[86] Four years

[76] *See In re Doe*, 19 S.W.3d 346, 360 (Tex. 1999) (orig. proceeding).

[77] It may be noted that of the eleven dissents, ten were authored by Justice Hecht (eight of which were joined by Justice Owen), and one was authored by Justice Owen (and joined by Justice Hecht).

[78] For the text of the other seven opinions, please see *Dickinson Arms-Reo, L.P. v. Campbell*, 35 S.W.3d 633 (Tex. 2000) (Hecht, J., joined by Owen, J., dissenting from denial of petition for review); *Daimler-Benz Aktiengesellschaft v. Olson*, 53 S.W.3d 308 (Tex. 2000) (Hecht, J., joined by Owen, J., dissenting from order of the Court striking petition for review) (commenting that the "obviation of [the] sheer waste [the] … nonproductive focus on 'fine points of appellate procedure' [causes]… is much, much harder than it looks" (citing Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 410-11 (1906), *reprinted in* 8 BAYLOR L. REV. 1, 19-20 (1956)); *Gaylord Broadcasting Co. v. Francis*, 35 S.W.3d 599 (Tex. 2000) (Hecht, J., dissenting from denial of petition for review); *In re Gaylord Broadcasting Co.*, 22 S.W.3d 848 (Tex. 2000) (orig. proceeding) (Hecht, J., joined by Owen, J., dissenting from denial of petition for writ of mandamus); *Todd Shipyards v. Perez*, 35 S.W.3d 598 (Tex. 2000) (Hecht, J., joined by Owen, J., dissenting from denial of petition for review); *In re Texas Farmers Insurance Exchange*, 12 S.W.3d 807 (Tex. 2000) (orig. proceeding) (Hecht, J., joined by Owen, J., dissenting from denial of petition for writ of mandamus); *In re Avila*, 22 S.W.3d 349 (Tex. 2000) (orig. proceeding) (Hecht, J., dissenting from denial of petition for writ of mandamus).

[79] *In re Bayerische Motoren Werke, AG*, 8 S.W. 326 (Tex. 2000) (orig. proceeding) (Hecht, J., joined by Owen, J., dissenting from denial of motion for rehearing of petition for writ of mandamus).

[80] *Id.* at 327.

[81] *Id.* at 331.

[82] 22 S.W.3d 462 (Tex. 2000) (orig. proceeding) (Hecht, J., joined by Owen, J., dissenting from denial of petition for writ of mandamus).

[83] *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 901-02 (Tex. 2004).

[84] *See id.* at 902 n.1.

[85] It is also entirely arguable that the first two denials were inapposite to the eventual grant in *Ramirez* as the first two cases were petitions for writ of mandamus, reviewed under a much stricter standard—available only when a trial court clearly abuses its discretion and when there is no adequate remedy on appeal—than are petitions for review, such as was *Ramirez*. *See Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

[86] *In re GNC Franchising, Inc.*, 22 S.W.3d 929 (Tex. 2000) (orig. proceeding) (Hecht, J., joined by Owen, J., dissenting

later however, their concerns were squarely validated when three other Justices were persuaded to adopt the reasoning from *In re GNC* in the Court's 2004 opinion in *In re AIU Insurance Co.*, issued by Justice Owen.[87]

Perhaps the best example of the impact a separate docket order opinion can have on the eventual disposition of that particular case is Justice Owen's dissent from the denial of the petition for review in *Yzaguirre v. KCS Resources*,[88] in which she was joined by Justice Hecht. In her dissent, Justice Owen expressed her belief that "justice ha[d] been denied by the Court's inaction,"[89] especially in a case presenting the important and non-unique issue of the measurement of natural gas royalties. Just over two months later, the Court reversed course, granted rehearing as well as review,[90] and subsequently issued a unanimous decision disposing of the cause on the precise issue Justice Owen identified in her earlier dissent.[91]

One other separate opinion to a Court docket order that bears mentioning in these pages is Justice Owen's writing in *In re Woman's Hospital of Texas, Inc.*, in which she was joined by Justice Hecht and Associate Justice Scott A. Brister.[92] Within three months of the issuance of Justice Owen's opinion, the Legislature had amended its omnibus civil practice and justice bill, H.B. 4,[93] to include a provision to remedy the issues identified in her separate opinion.[94]

Since 2001, only nine separate writings to the Court's denial of a petition have been issued,[95] but it is interesting to note that the practice itself has now been employed by a majority of the currently serving Justices,[96] and by ten former Justices still in practice.[97] This is in sharp

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from denial of petition for writ of mandamus, and referencing his dissent in *In re Kennedy Funding, Inc.*, 43 Tex. Sup.Ct. J. 897, 899 (June 22, 2000) (No. 00-0533)).

[87] *See In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004).

[88] 66 S.W.3d 212 (Tex. 2000) (Owen, J., joined by Hecht, J., dissenting from denial of petition for review).

[89] *Id.* at 213. In her dissent, Justice Owen also noted the Court's earlier denial of petition for review, as well as its denial of the motion to publish the court of appeals' opinion in the similar case of *De los Santos v. Coastal Oil & Gas Corp*, 43 Tex. Sup. Ct. J. 93, 94 (Nov. 11, 1999) (No. 99-0967) (order denying petition for review); 43 Tex. Sup. Ct. J. 1127, 1133 (Aug. 24, 2000) (No. 99-0967) (order denying motion to publish opinion of the court of appeals).

[90] *See* Order granting rehearing and petition for review, 44 Tex. Sup. Ct. J. 315, 316 (Jan. 11, 2001) (No. 00-0829).

[91] *Compare Yzaguirre*, 66 S.W.3d at 212, *with Yzaguirre v. KCS Res.*, 53 S.W.3d 368, 371-72 (Tex. 2001).

[92] 141 S.W.3d 144 (Tex. 2004) (orig. proceeding) (Owen, J., joined by Hecht and Brister, J.J., concurring with in part and dissenting from in part the denial of petition for writ of mandamus).

[93] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §1.04, 2003 Tex. Gen. Laws 847, 849.

[94] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(9) (Vernon Supp. 2005); *see also In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 n.59 (Tex. 2004). In fairness to the Legislature's agility in responding to the concerns of its constituents, it is worth noting that some thirty-one law firms were retained by parties to the consolidated petitions for writ of mandamus. *See In re Woman's Hosp. of Tex., Inc.*, 141 S.W.3d at 144-46.

[95] *See Olveda v. Sepulveda*, ___ Tex. Sup. Ct. J. ___, 2006 WL 508659 (Mar. 3, 2006) (No. 04-0707 (O'Neill, J., dissenting from denial of petition for review); *Castillo v. Price Constr., Inc.*, 49 Tex. Sup. Ct. J. 217, 228, 2005 WL 3454747 (Dec. 16, 2005) (No. 04-0625) (O'Neill, J., dissenting from denial of petition for review); *Dolcefino v. Stephens*, 181 S.W.3d 741 (Tex. 2005) (Hecht, J., joined by Wainwright, J., dissenting from denial of petition for review); *In re Woman's Hospital*, 141 S.W.3d at 144 (Owen, J., joined by Hecht and Brister, J.J., concurring with in part and dissenting from in part the denial of petition for writ of mandamus); *Global Drywall Sys., Inc. v. Coronado Paint Co., Inc.*, 104 S.W.3d 538 (Tex. 2003) (Enoch, J., joined by O'Neill and Schneider, J.J., dissenting from denial of petition as improvidently granted).; *In re R.D.Y.*, 92 S.W.3d 433 (Tex. 2002) (Hecht, J., joined by Owen and Jefferson, J.J., dissenting from denial of motion for rehearing of denial of petition for review); *Montes v. City of Houston*, 66 S.W.3d 267 (Tex. 2001) (Hecht, J., joined by Owen, J., concurring with the denial of petition for review); *In re S.*, 52 S.W.3d 735 (Tex. 2001) (Owen, J., joined by Hecht, J., dissenting from denial of petition for review); *Wagner & Brown v. Horwood*, 53 S.W.3d 347 (Tex. 2001) (Hecht, J., joined by Owen and Abbott, J.J., dissenting from denial of motion for rehearing of petition for review).

[96] Chief Justice Jefferson, as well as Justices Hecht, O'Neill, Wainwright, and Brister have either authored or joined in separate opinions to docket orders. *See* sources cited *supra* note 95.

[97] Senator Cornyn, Justice Owen, Judge Schneider,

contrast to the mere handful of Justices who favored the technique just a decade ago.[98]

On balance, it appears that neither Chief Justice Phillips' fear that such dissents would "do significant harm,"[99] nor Justice Hecht's concern that public announcement of docket order votes "could lead an unscrupulous Justice to postur[e] for ulterior reasons"[100] have come to pass. For that matter however, it is not entirely apparent whether Justice Hecht's hope that such writings "would make Justices more deliberate and accountable"[101] has been achieved either. What is clear is that the practice of issuing separate writings to Court docket orders has been a part of the Court's tapestry of opinions for over a century, and that close inspection of these writings may divulge appellate issues the Court may subsequently find persuasive.

Appellate poets –
Slumbering now – awake soon
To pen more haiku.
-- Pam Baron

In honor of Japan winning the World Baseball Classic, the Poetry Competition Division of the Appellate Section has decided to reprise the Appellate Haiku Contest for 2006. Watch for details in June.

Congressman Doggett, Attorney General Abbott, current Gubernatorial candidate Gammage, and former Justices Enoch, Gonzalez, Hightower, and Spector. *See* discussion, *supra.*

[98] *See* discussion, *supra.*

[99] *See Dallas Morning News v. 5th Ct. of App.*, 842 S.W.2d 655, 661 (Tex. 1992) (orig. proceeding) (Phillips, C.J., joined by Cook, Hecht, and Cornyn, J.J., separate opinion).

[100] *See Maritime Overseas Corp. v. Ellis*, 977 S.W.2d 536, 541 (Tex. 1996) (per curiam) (Hecht, J., dissenting from denial of application for writ of error).

[101] *See id.* at 540.