

NO. PD-1465-13

IN THE TEXAS COURT OF CRIMINAL APPEALS

THOMAS DALE DELAY
APPELLANT

VS.

THE STATE OF TEXAS
APPELLEE

TEXANS FOR PUBLIC JUSTICE
AMICUS CURIAE BRIEF

ON DISCRETIONARY REVIEW FROM
THE THIRD COURT OF APPEALS OF TEXAS AT AUSTIN
Case No. 03-11-00087-CR

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DISCLOSURE REGARDING FEES: Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, counsel for amicus curiae states that the source of any fee paid or expected is Texans for Public Justice.

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW Texans for Public Justice, a non-profit organization dedicated to consumer protection, civil justice and corporate accountability, and files its Amicus Curiae Brief in Cause Number PD-1465-13 styled, *Thomas Dale DeLay v. State of Texas*.

The purpose of this *amicus curiae* brief is to provide the Court with the arguments which explicate and support the claims of the State, remind the Court of the evil of injecting corporate money into state elections and explain why the prosecution of criminal political corruption is vital to our democracy.

STATEMENT OF THE CASE

Appellant Tom DeLay was charged by indictment in the 331st District Court, Travis County, with money laundering and conspiracy to commit money laundering. He was convicted after a jury trial and elected to have the trial court assess punishment. The trial court sentenced him on the conspiracy count to three years imprisonment and ten years of community supervision on the money laundering count. The Third Court of Appeal at Austin, by a 2-to-1 vote, reversed the conviction and remanded the case for entry of a judgment of acquittal. Chief Justice Jones dissented. *DeLay v. State*, 410 S.W.3d 902 (Tex.App.–Austin 2013).

ISSUES PRESENTED

This Court granted the State's petition for discretionary review on four grounds:

GROUND ONE: The Court of Appeals improperly invaded the province of the jury and misapplied *Jackson v. Virginia* when it found no evidence that the corporate donors intended that their funds be used in connection with any election campaign and when it held that the evidence was therefore legally insufficient to prove the "criminal proceeds" element of money laundering.

GROUND TWO: The Court of Appeals improperly invaded the province of the jury and misapplied *Jackson v. Virginia* when it found the evidence insufficient to prove the alleged "agreement to violate the Election Code" and therefore insufficient to prove the "proceeds of criminal activity" element of money laundering, despite evidence reflecting an agreement to make a dollar-for-dollar exchange of illegal corporate political contributions for contributions to specific Texas candidates.

GROUND THREE: The Court of Appeals failed to adhere to the hypothetically correct jury charge and misinterpreted the statutory definition of "proceeds" to create a new element of money laundering not found in the statute: a requirement that the dollars derived from the criminal activity must be the same dollars returned via the money laundering transaction.

GROUND FOUR: The Court of Appeals deviated from the hypothetically correct jury charge and this Court's precedent in holding that the offense of criminal conspiracy to commit money laundering required the State to establish the present existence of "a felony criminal offense which generated proceeds."

SUMMARY OF FACTS

Tom DeLay created Texans for a Republican Majority in order to elect Republicans to statewide positions in Texas with prohibited but lucrative corporate money. With his associates, John Colyandro, Jim Ellis, and corporate fundraiser Warren Robold, he garnered \$700,000 in corporate checks to illegally fund state elective campaigns. DeLay had Ellis contact Terry Nelson, Deputy Chief of Staff for the Republican National Committee (RNC), and arranged to send \$190,000 of corporate money to the Republican National State Elections Committee with the understanding that the RNC would then spend the same amount on seven Texas state campaigns, thereby concealing the scheme with apparently “clean” RNC money. DeLay was accordingly convicted of money laundering and conspiracy to commit money laundering and punished with imprisonment and community supervision.

SUMMARY OF ARGUMENT

The issue is straightforward and familiar – whether a jury could rationally find Tom DeLay guilty of money laundering and conspiracy to commit money laundering beyond a reasonable doubt. While the appellate opinion is filled with distracting sub-issues, this Court’s focus on well-established sufficiency review reveals how far the appellate court departed from appropriate analysis and why the jury was entirely rational in finding Tom DeLay guilty on all counts.

ARGUMENT

The issue before this Court has nothing to do with politics, and Appellant's suggestion that the election law complaint was partisan is totally false. The sole legal question is whether the Austin appellate court correctly applied sufficiency review. The guiding standard of review is well established and well known in law. It asks whether any rational jury could have found the defendant guilty beyond a reasonable doubt. A review of a jury verdict does not permit judges to ask themselves how they might have voted, were they among the jurors. Instead, the standard of review requires the reviewing judges to ask whether a jury hearing the case was rationally justified in finding the defendant guilty beyond a reasonable doubt. Appellate review must also consider all the evidence, and there are no exceptions to this requirement. *Jackson v. Virginia*, 443 U.S. 307 (1979). As will be argued *infra*, the two judges who could find no convincing evidence of guilt were apparently not looking very hard or adhering to basic judicial review. Guilt in this case under our laws could not be clearer.

Tom Delay is guilty of money laundering and conspiracy to commit money laundering if he directed others or conspired with others to make a transaction involving the proceeds of criminal activity with a fund value of \$100,000 or more. There is no dispute transactions were made to the tune of \$190,000 – DeLay's Texans for a Republican Majority Political Action Committee (TRMPAC) executive director

sent a check at DeLay's direction in that amount to its ally, the Republican National State Elections Committee (RNSEC), which then promptly funded Texas campaigns in precisely the same amount. The real dispute is whether this transaction involved "proceeds" of "criminal activity." Sufficiency review centers on the evidence to support these two elements.

"Proceeds" are relevant only if their involvement was criminal. Criminality is established with proof that a corporation knowingly made an unauthorized political contribution with the intent that it be used for the campaigns of state candidates. TEX. ELEC. CODE §§251.001(3); 253.003; 253.094. The proof is not only sufficient but overwhelming that representatives of corporations knowingly gave money to TRMPAC for exactly this prohibited purpose.

Reliant Energy and El Paso Energy gave TRMPAC money at a fundraiser whose purpose was plainly stated in its invitation: "Your support today will go directly to help Republican candidates in Texas successfully run and win their campaigns." RR X 274; SX 191. A Power Point presentation stated that the purpose of the PAC was to support candidates in Texas. RR VIII 153-154,174; SX 105. The Pickens Company mailed its donation to TRMPAC, noting: "All contributions ... will be used for direct campaign expenses." SX 13; RR VI 239-240.

Despite this evidence, the Court of Appeals held that "the State failed to prove

the ‘applicable culpable mental states’ for the donating corporations to support a finding of criminal intent.” *DeLay v. State*, 410 S.W.3d 902, 911 (Tex. App. – Austin 2013). The Court based its holding on corporate testimony “that they intended to comply with the law and that they made their respective donations with the intent that they be used for lawful purposes.” *Id.* According to the Austin appellate court:

[T]he corporations *primarily* gave money to TRMPAC to show their support of DeLay. Most of the corporate representatives also testified that they hoped to have the opportunity to have “face time” with DeLay to discuss policy, educate him on their particular issues of concern, and build a relationship with him.

DeLay at 909 n. 9 (emphasis added).¹ The majority’s “primarily” qualification underscores that the corporate donations were hardly limited to a little “face time” with DeLay. They were meant to be spent illegally on state campaigns.

Buyers of methamphetamine can claim their purchases were meant “primarily” to buy “face time” with their dealer. Even if true, any jury would be justified in gleaned another reason for the illegal transaction of money for drugs. It would be

¹ Insofar as the appellate court appears to condone this behavior, it bears reminding the nature of political corruption:

Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf.

Citizens United v. Federal Election Commission, 558 U.S. 310, 447-448 (2010)(Stevens, J., dissenting).

entirely rational to believe the exchange was intended to facilitate the possession and use of illegal drugs, particularly if the dealer, like DeLay, distributed leaflets, held fundraisers and made Power Point presentations trumpeting this very purpose.

Donors may have claimed they intended the contributions to be lawful, but TRMPAC's solicitations explicitly told them in writing the illegal purpose of the funds: "raising and giving funds directly to Republican candidates for state house, state senate, and potentially all statewide offices" and "[funds] will go directly to help Republican candidates in Texas successfully run and win their campaigns." TRMPAC's solicitations suggested no other purpose, leaving no evidence to support the idea that the donors' understanding was somehow limited to the "lawful purposes" some claimed. There is nothing irrational in disbelieving the self-serving and self-minimizing testimony of criminal donors.

It is not unreasonable for jurors to infer that corporate donors expected access as a reward for their illegal financial support of state electoral candidates. A jury was certainly free to rationally conclude that the purpose of their criminal donations was to give DeLay what he wanted – illegal financial muscle in state elections – in the hope of gaining privileged and private access to his public office. Indeed, given the overwhelming evidence, it might well be argued that it would be irrational for a jury to reach any other conclusion.

Political donations for access to a powerful politician may be corrupt, but they aren't criminal. On the other hand, corporate donations for state political campaigns have long been criminal. These two purposes, one perfectly legal and the other perfectly criminal, are not mutually exclusive. Donors likely contemplated both. Given the explicitness of the stated purpose of the funds, a jury could rationally believe the brochures and similar evidence were persuasive proof that donors understood that their money would be illegally spent on state elections, with access to DeLay as their reward.

Rather brazenly, the Austin appellate court cherry-picked the self-serving testimony of corporate representatives, endorsed it as truthful and found the jury's verdicts to be irrational because jurors came to a different conclusion. This review thoroughly mutilates well-established sufficiency analysis and reflects a profound judicial disrespect for juries. Equally troubling is the Austin appellate court's omission of at least of one of the more damning proofs of DeLay's guilt – his own words.

DeLay admitted to prosecutors in a recorded statement heard by the jury that he approved TRMPAC's money laundering, specifically the \$190,000 exchange of illegal "dirty" corporate money for the same amount of apparently legal "clean" money for the purpose of donating to the campaigns of state candidates. SX 235 at 71-76. This evidence may be why the jury found him guilty of money laundering. There is nothing

irrational in finding guilty a person who admits his crime, particularly when the confession is substantiated by overwhelming evidence.

The Austin court of appeals mentions DeLay's admissions nowhere in its opinion. Instead, the two-judge majority found no evidence of any sort of agreement to illegally transfer corporate money to Texas candidates:

There was no evidence that TRMPAC or RNSEC treated the corporate funds as anything but what they were, corporate funds with limited uses under campaign finance law. Rather, when viewed in the light most favorable to the verdict, the evidence showed an agreement to two legal monetary transfers: that TRMPAC transfer corporate money to RNSEC for use in other states and not in Texas in exchange for RNSEC transferring funds to Texas candidates out of a hard money account. Rather than supporting an agreement to violate the Election Code, the evidence shows that the defendants were attempting to comply with the Election Code limitations on corporate contributions.

DeLay at 913.

For the Austin appellate court, testimony suggesting good-faith and more salutary motivations was enough to refute even DeLay's own admissions. Under its approach, a defendant convicted of capital murder would be entitled to an appellate acquittal on the grounds that he meant nothing criminal by stealing another's property and that he was attempting to comply with the homicide statutes by not immediately killing his victim. Good faith and ignorance of the law are not and have never been the touchstone of criminal liability. The Third Court's analysis is faithless to the

fundamental principles of criminal law as well as the standard for sufficiency review.

The appellate court was also impressed with the fact that the RNSEC kept a separate account, rendering the whole arrangement legal in its view:

[T]he RNSEC issued the checks to the candidates from a separate, segregated account—a hard money account—which did not include corporate money. [citations omitted]. The sources of the funds in RNSEC’s hard money account, such as contributions from individuals, were not “tainted.” RNSEC deposited the corporate funds of \$190,000 in a soft money account and those funds were not commingled with the hard money account or otherwise used in Texas. Thus, the State failed in its burden to prove that the funds that were delivered to the seven candidates were ever tainted.

DeLay at 914-915.

The appellate court’s rationale that the laundering of illegal corporate donations becomes legal so long as two accounts are used to dry-clean the money will be good news to money launderers if adopted by this Court. Under this logic, members of the Mafia would be immune from money laundering statutes so long as they became meticulous book-keepers, and careful segregation of drug money from other cash would shield gangs and cartels from prosecution. These analogies underscore the severe distortion of the sufficiency review in this case and strenuously counsel this Court against adoption of the Third Court of Appeals’ standardless analysis.

The Austin appellate court also ignored entirely the co-conspirator testimony of Terry Nelson, deputy chief of staff for the Republican National Committee (RNC).

Jim Ellis, one of DeLay's subordinates, told Nelson that TRMPAC could not use its corporate money in state campaigns (because it is a felony). Ellis proposed an exchange: TRMPAC would send \$190,000 corporate dollars to the RNC, and the RNC would cut specified checks in the same amount to state candidates in Texas. RR IX 212-213. DeLay wanted it done, Ellis told Nelson, dollar-for-dollar. RR IX 215. A review of this portion of the record might have clued the appellate court that this sort of arrangement constitutes what is commonly known in criminal law as money laundering and conspiracy to commit money laundering.

The Court of Appeals also perceived no "proceeds" of criminal activity because "the funds were only 'derived from' the money-swap agreement after the transactions were complete, if at all." *DeLay* at 914. This distracting assertion distorts the focus and record.

"'Proceeds' means funds acquired or derived directly or indirectly from, produced through, or realized through...an act." TEX. PENAL CODE §34.01(4). The proceeds were the corporate donations intended for state campaigns put into the TRMPAC account and the RNC funds indirectly produced through the illegal donations. Insofar as a court would require the invention of a completed "predicate criminal activity," the State's evidence met this demand. But for one ignored argument, this survey of the proof would ordinarily end the sufficiency inquiry.

Appellant insists his “number one argument” regarding sufficiency was his claim that the jury could not rationally conclude that the checks were funds. (Appellant’s brief, pp. 41-44). Odd that the majority opinion never addressed Appellant’s primary point. This omission seems ready-made to permit the appellate court to address sufficiency piecemeal, thereby extending the suspension of this case in the appellate purgatory both parties would like to escape. Worse, as Appellant argues, the “law of the case” doctrine may require the appellate court to decide again that “checks” are not “proceeds” or “funds,” rendering a remand without addressing this minor issue pointless. Because the issue is part of the sufficiency analysis, this Court should address this easily-resolved claim in the course of its sufficiency review.

“Proceeds” means “funds.” TEX. PENAL CODE §34.01(4). In turn, “funds” includes coin and paper money, certificates, and notes.² TEX. PENAL CODE §34.01(2). The remaining question, then, is whether a jury could rationally consider the checks to be proceeds or funds under the facts of this case.

This Court should settle the question at this stage so that a remand to the appellate court is for resolution of issues other than sufficiency. Otherwise, the Court

² The Legislature often enumerates items it fears will be considered excluded if it does not specifically name them. Here, lawmakers sought to ensure that launderers of foreign money, coin and paper money, and more exotic certificates and notes did not escape the sweep of the money laundering statute. It is unlikely they ever anticipated anyone would argue that checks can never be “funds.” When it became an issue, lawmakers immediately clarified what was already intended.

is merely inviting the Austin court of appeals to embark on another misguided excursion into the minutiae of banking law. The issue whether a jury could rationally conclude the checks were funds is not a difficult metaphysical puzzle, and this Court should promptly solve it in the interests of justice and judicial economy.

Anyone who has written checks at a fundraiser understands the checks are the “proceeds” or “funds” sought to be raised at the event. DeLay certainly understood the checks written to TRMPAC for various state campaigns were proceeds – after all, they funded his illegal scheme to corporately elect his selected candidates. If the checks were not funds, the donors might well have wondered what else they might be and why they were asked to give them up. The jury was more than justified in concluding the players understood their checks to be the funds that would illegally fuel the campaigns of state candidates.

Appellant’s insufficiency claim can be summed up: corporate donors gave checks which were somehow not funds at fundraisers strictly limited to the purpose of access to DeLay and not in any way for the advertised illegal purpose of funding state elective campaigns. Two judges at the court of appeals actually endorsed this ridiculous scenario. It is ludicrous that politically saavy corporate representatives made huge donations for no other purpose than to educate a congressman, utterly oblivious how a political action committee named “Texans for a Republican Majority” might

spend the proceeds. This Court wisely exercised its discretionary review of the appellate court's far-flung departure from the accepted and usual course of judicial proceedings.

The appellate opinion is a strained, unnecessarily complex read. Contrived secondary issues are given extensive discussion as the review drifts far from the essential question – whether the jury was rational in concluding the State met its burden of proof beyond a reasonable doubt. This Court should not be distracted by these creative, ancillary issues or the conflation of sufficiency review with statutory construction. It should treat sufficiency review in this case no differently than any other and faithfully conduct the familiar *Jackson v. Virginia* inquiry.

The State bore the burden of proving that DeLay directed others or conspired with others to make a transaction involving the proceeds of criminal activity with a fund value of \$100,000 or more. The proceeds of criminal activity began when DeLay collected corporate donations into TRMPAC for state elective campaigns – long condemned in law, as DeLay and his associates knew. DeLay admitted to this scheme. Nelson substantiated DeLay's personal involvement in these criminally corrupt practices. DeLay was blatant in the execution of his design to circumvent election law and his ambition to become kingmaker to various state candidates. There is nothing irrational about concluding, as twelve jurors did, that Tom DeLay is guilty of money

laundering and conspiracy to commit money laundering. On the contrary, it is well perceived.³

It is worth affirming why generations of American and Texan statesmen have fought against corporate domination of elections. This effort began with the Founding Fathers who viewed the influence of moneyed interests as corrupt and pregnant with the danger to create “the dependency of public officeholders on private interests[;]” the Framers were so concerned about this threat to democracy they “discussed corruption [and undue influence] more often in the Constitutional Convention than factions, violence, or instability.” *Citizens United*, 558 U.S. at 447-448 (Stevens, J., dissenting)(citations and internal quotations omitted). In this spirit, President Theodore Roosevelt called for legislation to prohibit all corporate money in campaigns, and Congress ultimately passed the Tillman Act in 1907 which banned corporate contributions from federal elections.

Texas was a leader in the effort to shield elections from the massive reserves of corporations. Legendary Texan Alexander Terrell was the sponsor of the 1903 legislation which first banned corporate contributions to Texas candidates for political office. Gould, Lewis L., *Alexander Watkins Terrell: Civil War Soldier, Texas*

³ As an historical note, both Ellis and Colyandro evidently perceived the evidence was sufficient enough – after all, they pled guilty to accepting illegal campaign contributions and making an illegal campaign donation.

Lawmaker, American Diplomat (University of Texas Press 2004). He warned as early as 1885, “When corporations obtain control of government, they use the law as an instrument to perpetuate their power,” and accurately predicted that “vast sums” would be used to “corrupt the ballot.” *Address of A.W. Terrell on private corporations delivered before the literary societies of the University of Missouri, June 1, 1885* (Warner & Co. 1885). These efforts by statesmen throughout our history reflect the long-standing concern over “the corrosive influence of concentrated corporate wealth” and the necessity of banning corporate funds for candidates in order to “protect the integrity of the marketplace of political ideas.” *FEC vs. Mass Citizens for Life*, 479 U.S. 238, 257 (1986).⁴

These laws safeguard elections from the improper use of money to influence results and are meant to prevent corporations from effectively picking and owning the

⁴ As the Supreme Court has explained:

Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political “free trade” does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

FEC v. Mass Citizens for Life, 479 U.S. at 257-258 (citations omitted).

people's representatives. The ban on corporate donations is a form of self-protection of our democracy against this ever-looming power. *Burroughs v. United States*, 290 U.S. 534, 545 (1934). The struggle to free democratic elections from corporate influence continues today, and that struggle includes the prosecution of power-hungry politicians who seek to sell public offices and legislative bodies to corporations and savage a law so vital to our democracy.

Tom DeLay sold his office to corporations. DeLay and the corporations conspired to illegally fund state elective campaigns. DeLay benefitted personally by becoming a kingmaker to these state candidates. But the corporations were kingmakers as well, buying up politicians like DeLay for the low price of financing their personal ambitions. Corporations got the better of this bargain, with one of the most powerful politicians in the country servicing their private economic and political interests so that he might personally become ever more powerful.

DeLay's corporate allegiance made him indistinguishable from any other corporate toady. But his abandonment of the public interest made him stand out as something especially despicable. He used a public office entrusted to him by the people to advance corporate interests and politically enrich himself. He enthusiastically engaged in the crime of money laundering to achieve these corrupt ends. The Founding Fathers themselves would have convicted Tom DeLay.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae prays that this Court reverse the Court of Appeals' decision rendering acquittals, restore the two convictions, and remand this cause to the Court of Appeals for consideration of Appellant's remaining non-sufficiency points of error.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Keith S. Hampton".

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CERTIFICATE OF COMPLIANCE: Pursuant to Texas Rule of Appellate Procedure 9.4(i), I hereby certify with my signature above, based on the computer program used to generate this brief, that this brief contains 3306 words, excluding words contained in those parts of the brief that Rule 9.4(i) exempts from inclusion in the word count. I further certify by my signature above that this brief is printed in a conventional, 14-point typeface except for footnotes, any and all of which are printed in a conventional, 12-point typeface.

CERTIFICATE OF SERVICE: By affixing my signature above, I hereby certify, in compliance with Rule 11(d) of the Texas Rules of Appellate Procedure, that a true and correct copy of the foregoing *Amicus Curiae Brief* was delivered to all the parties electronically to Appellant's lead attorney, the Honorable Brian Wice, at wicelaw@att.net. The brief will also be served today by email, personal delivery or United States Mail to the Honorable Lisa McMinn, State Prosecuting Attorney, P.O. Box 12405, Austin, Texas, 78711 and the Honorable Holly Taylor, on this day, June 3, 2014.