MEMORANDUM

Date: September 27, 2001

To: Bill Dorsaneo

From: Frank Gilstrap

Re: Composition of en banc court

Justice Jim Taft, of the First Court of Appeals, has asked the committee to examine Rule 41.2(a) & (b), TEX.R.APP.P., which involves the composition of the en banc court. This matter was referred to the appellate rules subcommittee, and you requested this memo from me.

The en banc rule

Prior to 1997, the en banc rule read as follows:

> Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to a decision

Former Rule 79(d), TEX.R.APP.P. (superseded effective September 1, 1997)(emphasis added). In 1997 the rule was amended to read as follows:

> An en banc court consists of all members of the court who are not disqualified or recused and—if the case was originally argued before or

decided by a panel—any members of the panel who are not members of the court but remain eligible for assignment to the court.

Rule 41.2(a), TEX.R.APP.P. (emphasis added). Under this provision, a visiting justice who serves on a panel will also serve on the en banc court which reviews the panel decision. Justice Taft has criticized this provision in two recent opinions. His concerns are of two kinds. First, as a matter of policy, he argues that a visiting justice should not be able to join with a minority of the elected justices to prevail over a majority of the elected justices. Second, he questions the validity of the rule on statutory and constitutional grounds.

The policy issue: the majority of elected justices can be outvoted.

In *Polasek v. State*, 16 S.W.3d 82 (Tex.App.—Houston [1st Dist.] 2000, pet ref'd)(en banc), the defendant was convicted of criminal trespass. 16 S.W.3d at 83. On appeal he argued that he had been denied a reporter's record. *Id.* A panel of the First Court, including a visiting justice, affirmed the conviction. *Id.* The defendant requested rehearing en banc. *Id.* Under Rule 41.2(a), quoted above, the visiting justice became a member of the en banc court. *Polasek*, 16 S.W.3d at 83. As a result, the en banc court consisted of ten justices (the nine elected members of the First Court and the one visiting justice). *Id.* The en banc court divided five-to-five on the request for rehearing. *Id.* at 87. A second visiting justice was then appointed, pursuant to the tie-breaker provision of Rule 41.2(b). This raised the total number of justices to eleven (nine elected and two visiting). *Polasek*, 16 S.W.3d at 86-87. A majority of the eleven member court voted to

rehear the case en banc. *Id.* The en banc court affirmed the trial court decision by a vote of seven-to-four. *Id.* at 89 One visiting justice voted with the majority, and one voted with the minority. *Id.* at 86, 89.

In his majority opinion, Justice Taft criticized the policy behind Rule 41.2(a), which makes the visiting justice a part of the en banc court. This procedure

> created the possibility that the two visiting justices could have voted with a minority of four elected justices on this Court to defeat the will of the majority of the elected judges. Such a frustration of the will of the majority of elected justices did not happen in this case, but we point out this potential result of the change of the definition of en banc court for the consideration of the rule making committee.

Polasek, 16 S.W.3d at 87.

In *Ex parte Wilson*, 25 S.W.3d 932 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd)(per curiam), the First Court modified its en banc practice to eliminate the need for a tie-breaker. In that case, the panel again included a visiting justice. *Id.* at 932. En banc rehearing was requested, and again the visiting justice became a member of the en banc court. *Id.* Once more, "[t]he vote of the en banc court on the motion [for rehearing] resulted in a five to five tie." *Id.* But this time the court decided that no tie-breaker was needed. *Id.* at 932-933. It based its decision on the following rule:

> While the court of appeals has plenary jurisdiction, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision.

Rule 49.7, TEX.R.APP.P. (emphasis added).[1] Because six justices would be required to constitute "a majority" of an eleven member court, the motion failed because it did not receive the required six votes. *Wilson*, 25 S.W.2d at 933. Therefore, no tie-breaker was needed. *Id.* at 932.

In *Willover v. State*, 38 S.W.3d 672 (Tex.App.—Houston [1st Dist.] 2000, pet.granted), the defendant was convicted of sexually assaulting a child and sentenced to life in prison. 38 S.W.3d at 673. A panel of the First Court, including one visiting justice, reversed because the trial court had improperly excluded a videotaped interview with the complainant. *Id.* at 673-678 (panel opinion). The State moved for rehearing en banc. *Id.* at 679. Again, the visiting justice became a member of the en banc court, and again the vote on the motion for rehearing was five-to-five. *Id.* at 687 (Taft, J. dissenting from denial of en banc rehearing). Five elected justices voted for rehearing, and four elected justices and the one visiting justice voted against. *Id.* Under *Ex parte Wilson*, the motion failed because a majority of the ten member court (six members) did not vote for rehearing. *Willover*, 38 S.W.3d at 688. Thus, the motion was denied, even though the elected justices favored en banc rehearing by a five-to-four margin. *Id.*

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[1] *Cf.* former Rule 79(d)(". . . a majority of the membership of the court . . .").

Justice Taft's dissented in *Willover* repeated the concerns that he raised in *Polasek*. Before the 1997 rule change, a visiting justice who sat on a panel could not sit with the en banc court. But under the amended rule, the visiting justice was a part of the en banc court. As a result,

> [A] minority of the elected Justices, plus one visiting judge who was a member of the original panel deciding this case, are able to frustrate the will of the majority of the will of the elected Justices. This is a because a five-to-five tie does not obtain the necessary majority of the en banc court to require en banc review.

Willover, 38 S.W.3d. at 687 (Taft, J., dissenting from denial of en banc rehearing).

The validity of the en banc rule.

In his *Willover* dissent, Justice Taft also made three arguments as to why Rule 41.2(a) is invalid. *See Willover,* 38 S.W.3d at 687-688.

In his principal argument, Justice Taft says that the rule conflicts with Section 22.223(b) of the Government Code. In making this argument, he refers to his majority opinion in *Polasek*. There he noted that, prior to 1997, "the practice of [the First] Court had been to include only elected judges of [that] Court in en banc decisions." *Polasek*, 16 S.W.3d at 87 (emphasis added, footnote deleted). This practice was based on both a rule and a statute. The rule reads as follows:

> Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to make a decision

Former Rule 79(d), TEX.R.APP.P. (superseded effective September 1, 1997)(emphasis added). And the statute says that

> When convened en banc, a majority of the membership of the court constitutes a quorum and the occurrence of the majority of the court sitting en banc is necessary for a decision.

TEX.GOV'T CODE § 22.223(b)(emphasis added). *See Polasek*, 16 S.W.3d at 87. In 1997, the Court of Criminal Appeals repealed former Rule 79 and replaced it with the current Rule 41.2(a). This new rule expressly allows a visiting justice to serve on the en banc court, as we have seen. But the Legislature did not repeal section 22.223(b) of the Government Code. The new rule and the old statute thus appear to conflict.

"[W]hen a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code section 22.004" (for the Supreme Court) or section 22.108 (for the Court of Criminal Appeals.). *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex.2000)(per curiam). The latter provision reads as follows:

> The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases, except that its rules may not abridge, enlarge or modify the substantive rights of a litigant.

TEX.GOV'T CODE, § 22.108(a)(emphasis added).[2] The validity of current Rule 41.2(a), depends, therefore, on whether the above provision gave the Court of Criminal Appeals the power to repeal section 22.223(b) of the Government Code, which is quoted on page 6 above. *Willover*, 38 S.W.3d at 687-688.

In Justice Taft's view, the Court of Criminal Appeals did not have that power. He concludes that a repeal of section 22.223(b) of the Government Code would "abridge, enlarge or modify the substantive rights of a litigant." *Willover*, 38 S.W.3d at 687 (quoting TEX.GOV'T CODE § 22.108(a)). This is because, as he stated in his *Willover* dissent, "the change [of the en banc] rule will determine which litigant wins." 38 S.W.3d at 687.

In making this argument, Justice Taft refers to his majority opinion in *Polasek*. In that case the criminal defendant had claimed that he was deprived "of a meaningful record on appeal." *Polasek*, 16 S.W.3d at 88. The court had rejected his contention and affirmed his conviction. *Id.* at 87. In the process, the court invalidated the 1997 amendment to Rule 13.1(a), TEX.R.CIV.P., which requires court reporters to

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[2] *See generally State v. Hardy*, 963 S.W.2d 516, 519-523 (Tex.Crim.App. 1997). *Cf.* TEX.GOV'T CODE, § 22.004(a) ("The supreme court has the full rulemaking power and the

make a full record of the proceedings "unless excused by agreement of the parties." *Polasek*, 16 S.W.3d at 88. In so doing, the court ruled that "the new rule is at odds with an existing statute," *Polasek*, 16 S.W.3d at 88, and that it amounted to "an enlargement of a defendant's substantive rights." *Id.* at 89. Accordingly, the court held "that Rule 13.1(a) is void." *Id.* Indeed, it was on this particular point that the en banc court divided.[3]

In his next argument, Justice Taft's says that "the Texas Constitution provides that the justices on the courts of appeals shall be elected by the qualified voters of their respective districts." *Willover*, 38 S.W.2d at 688 (citing TEX.CONST., art. V § 6). But in *Polasek*, the First Court expressly ruled that a visiting justice could sit on a on panel. *Polasek*, 16 S.W.3d at 85-86.[4] If the Texas Constitution allows a visiting justice to serve on a panel, then why doesn't it also allow a visiting justice to sit on an en banc court?

In his third argument, Justice Taft notes that the procedure under the current rule is different from the procedure under Rule 35(a), FED.R.APP.P., which

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practice and procedure in civil actions, except that its rules may not abridge, enlarge or modify the substantive rights of a litigant.").

[3] *Cf. Polasek*, 16 S.W.3d at 89-90 (Robertson, J., concurring); *Id.* at 90-91 (Price, J., dissenting). *Note also Tanguma v. State*, No. 13-99-490-CR, 2001 WL 378388 at **1-2 (Tex.App.—Corpus Christi May 17, 2001, pet.filed)(expressly disagreeing with *Polasek*).

[4] *Cf. Polasek*, 16 S.W.3d at 91 (O'Conner, J., dissenting)("I also agree with the appellant that the appointment of visiting judges violates the Texas Constitution article 5, section 6, which requires the election of judges.").

"provides that the en banc court is composed of the circuit judges who are on regular, active service." *Willover*, 38 S.W.3d at 688. He further notes that "in *O'Conner v. First Court of Appeals*, 837 S.W.2d 94 (Tex.1992), the supreme court supported its decision by pointing out that it was consistent with the federal rule guiding the circuit court of appeals upon which this state's panel system was modeled." *Willover*, 38 S.W.2d at 688.[5]

Recommendation

The Court of Criminal Appeals has granted the petition for discretionary review in *Willover*. Accordingly, the committee should await that court's opinion before considering further action in this area.

[5] (citing *O'Conner*, 837 S.W.2d at 96).