



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,916

In re the State of Texas, ex rel. Jennifer A. Tharp, Relator

**ON RESPONDENT'S MOTION FOR REHEARING OF STATE'S PETITION
FOR A WRIT OF MANDAMUS IN CAUSE NO. CR2011-325 IN THE
433RD DISTRICT COURT OF COMAL COUNTY**

**MEYERS, J., filed a statement dissenting to the denial of Respondent's
Motion for Rehearing.**

DISSENT

Article 37.07, Section 2(b), provides that punishment shall be assessed by the judge unless the defendant elects jury assessment in writing before the commencement of the voir dire examination of the jury panel. This was not the case when *Rojas v. State*, 404 S.W.2d 30 (Tex. Crim. App. 1966) was decided. Back then, a defendant could request that the jury assess punishment after the jury returned a guilty verdict. Therefore, *Rojas* really does not apply to this case and should not have been relied upon by the majority. Additionally, because we have no case law indicating that the defendant's

waiver of his right to jury-assessed punishment was improper, the State failed to demonstrate a clear right to the mandamus relief it sought. Therefore, I would grant Respondent’s motion for rehearing and reconsider our holding in this case.

I respectfully dissent to the majority’s denial of the motion for rehearing.

Filed: February 27, 2013

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