NO. 505452

IN THE

COUNTY COURT AT LAW NO. 1

OF AUSTIN, TRAVIS COUNTY, TEXAS

STEVEN LEE DRAKE,

Appellant

v.

THE STATE OF TEXAS

Appellee.

ON APPEAL FROM MUNICIPAL COURT

OF AUSTIN, TRAVIS COUNTY, TEXAS

CAUSE No. 3425508

JUDGE JOHN VASQUEZ

BRIEF FOR APPELLANT

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ATTORNEY FOR APPELLANT

NAME OF PARTIES AND COUNSEL

The following is a complete list of the names and addresses of all parties to the trial court's final judgment in the within cause and their counsel in the trial court:

A. PARTIES AND ADDRESSES:

1. Mr. Steven Lee Drake (Appellant), 8709 Minot Circle, Austin, Texas 78748; and

2. The City of Austin (Appellee) represented by the City Attorney of the City of Austin, Texas, 700 East 7th Street, Austin, Texas.

B. COUNSEL FOR THE PARTIES IN THE TRIAL COURT:

1. Mr. Jerald C. Finney, (Counsel for Defendant Mr. Steven Lee Drake, now the Appellant); and

2. Mr. Jeff Moore, (Counsel for the City of Austin, now the Appellee).

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument before the Court on the within appeal.

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TO THE HONORABLE JUDGE OF THE COUNTY COURT AT LAW NO. 1, TRAVIS COUNTY, TEXAS:

Comes now, Steven Lee Drake, hereinafter referred to as Appellant, and submits this brief pursuant to the provisions of the Texas Rules of Appellate Procedure in support of his request that the Ordinance under which Appellant was tried be declared unconstitutional under the United States and Texas Constitutions and Texas law, or in the alternative that said ordinance be declared unconstitutional under the United States and Texas Constitutions and Texas law as applied, or in the alternative that Appellant's request for a new trial in cause No. 3425508 be granted.

STATEMENT OF THE CASE

Appellant was charged by complaint with violation of the Sign Ordinance of the City of Austin, Travis County, Texas, specifically Sections 13-2-864 and 13-1-70 of the Austin Land Development Code (CR: 00004). The complaint averred that Appellant "on or about Saturday September 02, 1995, and before the making and filing of this complaint, within the incorporated limits of the City of Austin, in Travis County, Texas, did then and there directly or indirectly cause or authorize a sign to be installed, used or maintained on a public right of way, located within the City's planning jurisdiction, contrary to sections 13-2-864 and 13-1-70 (Id.)." Appellant pled not guilty (CR: 00005, 00107; RR: 00159-53).

Four Motions to Quash the Complaint were filed on behalf of the Appellant, including two motions which challenged the constitutionality of Sections 13-2-864 and 13-1-70 under the U.S. Constitution, the Texas Constitution, and the Texas Code of Criminal Procedure (CR 93-98). The City of Austin, Travis County, Texas, Municipal Court denied the two motions to quash

which challenged the constitutionality of Sections 13-2-864 and 13-1-70 (CR: 00095, 00098; CR 00160-1-12).

On March 12, 1998 in the Municipal Court of Travis County, the Honorable John Vasquez presiding, the appellant was convicted by a jury after a plea of not guilty. The punishment was assessed by the jury at a fine of $500.00 and applicable state tax and all costs of $32.00. On that same day, the Trial Court sentenced him formally to such fine and court costs (CR: 00107). The prosecuting attorney was Jeff Moore and appellant's trial counsel was Jerald C. Finney. Appellant's counsel was and is pro bono.

ISSUES PRESENTED

1. Whether Chapter 13 of the Austin Land Development Code (the Sign Ordinance) is facially overbroad under the United States and Texas Constitutions and the laws of Texas (Point of Error No. I);

2. Whether the Sign Ordinance of the City of Austin is overbroad under the United States and Texas Constitutions and Texas law as applied to the facts of the case (Point of Error No. I);

3. Whether the Sign Ordinance unconstitutionally vague under the United States and Texas Constitutions and Texas law (Point of Error No. I);

4. Whether the case should be reversed and remanded for a new trial because Appellant was improperly denied a timely requested jury shuffle (Point of Error No. 2).

5. Whether the case should be reversed and remanded because Appellant's request for an Application Paragraph in the jury charge which applied the law to the facts was denied (Point of Error No. III).

6. Whether the case should be reversed and remanded for a new trial because prosecutorial conduct deprived Appellant of a fair trial (Point of Error No. IV).

STATEMENT OF FACTS

On the date charged, February 17, 1996, (RR: 00159-60, lines 3-9; 99, line 24 though 100, line 8), Appellant, and his family--his wife, and three children--were at about the 1900 block of IH 35 between Woodland and Oltorf on the west side of IH 35 (RR: 00159-60-61, 100, lines 1 through 19). Officers Tyson McGowan and Michael Janssen were officers with the Austin Police Department (RR: 00159-59, line 23 through 60, line 2; 99, lines 15-23). Officers McGowan and Janssen were responding to a call to that location (RR: 00159-61 Lines 17-19; 99, line 24 through 100, line 5). Officers McGowan and Janssen testified that when they arrived, about 18 of 36 crosses had been posted (RR: 00159-62-63; 103 lines 21-23). Officer McGowan testified that Appellant placed the crosses in the ground (RR: 00159-62, line 24 through 64, line 6). Officer McGowan testified that the crosses were on the public right-of-way (RR: 00159-97, lines 10-12). Appellant showed Officer Janssen a map which showed that Appellant was on public property (RR: 00159-101 line 21 through 102, line 8). Officer McGowan testified that the crosses were 50 yards of so from an abortion clinic and that the abortion clinic was set back (RR: 00159-96, line 25 through 97, line 3).

Officer McGowan testified that appellant was displaying plain white crosses 36 inches high and 18 inches wide and made from yardsticks (RR: 00159-72-75); that the crosses which were placed in the ground were standing on their own (RR: 00159-85, lines 1-6); that as far as he knew Appellant attended the

crosses at all times (RR: 00159-93, lines 16-20); and that the crosses were put there as part of Appellant's picketing activities (RR: 00159-93, lines 21-23).

Officer Janssen testified that the crosses were all plain white, the same size, the same as Defense Exhibit 1, and about half of them placed in the ground and half just laying there (RR: 00159-103, lines 10-17, 106, line 22 through 107, line 7); that as far as he knew the crosses were attended by Appellant the entire time they were in the ground (RR: 00159-107, lines 8-10); and that the crosses were put into the ground as part of Appellant's picketing activities (RR: 00159-107, lines 11-13).

Officer McGowan testified further that the crosses were not installed, used or maintained on any utility pole, traffic signal pole, traffic signal controller box, tree, public bench, street light, or any other structure (RR: 00159-76, line 15 through 78 line 1); and that none of the crosses had letters, illustrations, designs, figures, symbols, painted, printed, stamped, raised, projected, outlined, or attached in any manner (RR: 00159-83, line 12 through 84, line 25).

Officers McGowan and Janssen testified that Appellant did not fight with anyone, shout with anyone, interfere with pedestrians, obstruct a sidewalk, driveway, street, or disturb the peace in any way (RR: 00159-93, line 24 through 94, line 18; 107, line 14-24); that Appellant was peaceful and polite (RR: 00159-94 line 7); and that the only citation issued was for violation of the sign ordinance statute and no citations for obstructing a highway, street, sidewalk, or other passageway were issued (RR: 00159-95, line 21 through 96, line 2).

Appellant testified that he arrived at the location where he was cited for violation of the sign ordinance in this case at around 8:30 in the morning (RR: 00159-126, line 23 through 127, line 1); that he placed his crosses four to six feet apart in the grassy area which was the public right-of-way (RR: 00159-120, lines 4-5, 7-9); that the crosses were 50 to 75 yards from the clinic (RR: 00159-

129, line 23 through 130, line 1); that a sidewalk ran through the grassy area (RR: 00159-123, lines 8-11); that from the street to the parking lot is public right-of-way, and that the parking lot is the beginning of the property of the abortion clinic (RR: 00159-123, lines 15-24); that he never has gone onto the property of the abortion clinic (Id.); that the crosses were two to three feet from the edge of the frontage road (RR: 00159-130, lines 4-9); that he attended the crosses at all times (RR: 00159-121, lines 15-17; 126 lines 19-22); that he intended to leave them in the ground two to three hours and take them when he left (RR: 00159-121, lines 18-20; 126, lines 15-18); that his purpose was to hand out literature (RR: 00159-127, lines 1-2); that he did not stop anyone, but offered literature as people came in, and if they voluntarily stopped and wanted to talk to him, he handed his literature to them (RR: 00159-128, lines 2-9); and that he was communicating an alternative to abortion (RR: 00159-128, lines 15-17).

Appellant testified that the crosses were all plain white (RR: 00159-119, lines 19-22); that the crosses signified to him first and foremost, his belief in Jesus Christ as his Savior who died on the cross, and second the peace that Jesus Christ represents (RR: 00159-119, lines 10-13); that while he was there, he did not fight with anyone, threaten anyone, intimidate anyone, coerce anyone, and that he did not obstruct the street, sidewalk, traffic or entrance to the parking lot (RR: 00159-128, line 18 through 129, line 7). "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." Spence v. State of Washington, 418 U.S. 405, 413, 94 S.Ct. 2727, 2732, 41 L.Ed.2d 842 (1974)(Court noted that action of college student in hanging privately owned United States flag, upside down, with peace symbol affixed, out of his window on private property was a form of communication).

Appellant testified that he told Officer Janssen that the crosses were a symbol of his free speech (RR: 00159-127, lines 19-23); and that Officer Janssen did not agree with him, and as he cited Appellant, Officer McGowan took up all the crosses and put them in his squad car (RR: 00159-127, line 23 through 128, line 1).

SUMMARY OF ARGUMENT

First, the Sign Ordinance is Overbroad under the United States and Texas constitutions facially and as applied. The Ordinance prevents the temporary display of attended signs and symbols in conjunction with peaceful picketing activities in a traditional public forum. The Ordinance has characteristics of laws which directly attack protected speech and also laws which indirectly attack protected speech. Therefore, both types of laws are analyzed. Using an analysis of the former, the Appellant's todisplay of crosses did not infringe upon any allowable area of state control such as interference with pedestrians or motorists, disturbing the peace, littering or any other social evil.

The Sign Ordinance is not content neutral in that it permits political signs to be displayed unattended for long periods while censoring Appellant's speech. This is impermissible under the Equal Protection Clause of the Fourteenth Amendment.

The Sign Ordinance is not a time, place, and manner restriction in that it applies anytime, anyplace, anywhere in Austin. Nor is it narrowly tailored to serve a significant government interest.

In an examination of the Sign Ordinance as an indirect statute assault on protected speech, the Ordinance again is overbroad. It is unconstitutional because it abridges the constitutional liberty of one to communicate. This is

because actions within the allowable areas of state control can be dealt with through criminal statutes which directly address those actions.

Second, the Sign Ordinance is constitutionally vague in several respects. The uses of the word "structure" in the § 13-2-50 definition of "sign" and § 13-2-864(a) are contradictory and vague. The definition of "sign" is vague. The definition of "advertising" in § 13-2-850 of the Sign Ordinance and the requirement for a "primary beneficiary" in § 13-2-864(b) when taken alone or together are vague. In using those terms, the Ordinance does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, the law does not establish determinant guidelines for law enforcement, and the law is not sufficiently definite to avoid chilling protected expression.

Third, the case should be reversed and remanded for a new trial because Appellant stated to the trial court immediately before the venire entered the courtroom that he might want a jury shuffle after he saw the venire seated and his timely request for a shuffle after the panel was seated was denied.

Fourth, the conviction should be reversed and the case remanded for a new trial because the application paragraph of the court did not apply the law to the facts of the case. Appellant requested in writing an application paragraph which would have applied the law to the facts of the case, and the trial court denied Appellant's request.

Finally, since the record contains many egregious tactics by the City Attorney, Mr. Moore, that necessarily inflamed and prejudiced the jury, the conviction should be reversed and remanded for a new trial. For example, Mr. Moore (1) compared Appellant to the KKK, (2) was allowed over objection to ask questions of the jury panel during voir dire based upon incorrect law and interpretation thereof, (3) was allowed over objection to discuss the purpose of the Ordinance with the panel during voir dire based upon his unsubstantiated

purpose for the Ordinance, (4) made improper objections which insinuated that counsel for Appellant was trying to distort the law, and (5) impeached Appellant improperly by questioning him concerning prior offenses and unadjudicated Class C misdemeanors without the door having been opened.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO QUASH NUMBERS 3 AND 4 BECAUSE THE SIGN ORDINANCE OF THE CITY OF AUSTIN, TEXAS IS VAGUE AND OVERBROAD FACIALLY AND "AS APPLIED."

The Complaints should be quashed because the Sign Ordinance of the City of Austin was vague and overbroad on its face and was also unconstitutional as applied to the First Amendment activities of defendant. Congress shall make no law * * * abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble. . . ." U.S.Const. amend. 1. The freedom of speech clause applies to the states. Cantwell v. Connecticut, 310 U.S. 296 (1940). Furthermore, the Complaints should be quashed because the Sign Ordinance of the City of Austin was overbroad and vague and also was applied to the speech activities of defendant in violation of the Texas Constitution and the Texas Code of Criminal Procedure Article 1.16 Freedom of Speech and Press. The Texas constitutional provisions guaranteeing freedom of expression are coextensive with the federal guarantees and the same analysis and principals of construction are applied in interpreting them. Gibbons v. State, 775 S.W.2d 790, 793-794, (Tex. App.--Dallas 1989, pet. ref'd).

A. Relevant Law

1. Constitutional Overbreadth Law

The freedom of speech and press are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state. Thornhill v. Alabama, 310 U.S. 88, 95, 60 S.Ct. 736. 740. 84 L.Ed. 1093 (1940). Where a willing speaker exists, the protection afforded to free speech "is to the communication, to its source and to its recipients both." Id. Our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest. Cox v. State of Louisiana, 379 U.S. 559, 574, 85 S.Ct. 476, 486 (1965).

Freedom of speech includes not only the spoken word, but also speech-related conduct, such as picketing, the wearing of arm bands and, in some recent highly publicized cases, flag burning as a type of political protest. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756. Picketing plainly involves expressive conduct within the protection of the First Amendment. Olvera v. State, 806 S.W.2d 546, 547 (Tex. Crim. App. 1991) citing Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 99, 92 S.Ct 2286, 2292, 33 L.Ed.2d 212 (1972).

The extent to which the government can control access to its property for expressive purposes depends on the nature of the forums. Reed v. State, 762 S.W.2d 640, 643 (Tex. App.--Texarkana 1988, pet. ref'd) citing Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 105 S.Ct. 3489, 87 L.Ed.2d 567 (1985); Olvera v. State, 806 S.W.2d 546 (Tex. Crim. App. 1991). Public forums are those areas which traditionally have been devoted to assembly and public debate, such as public streets, sidewalks, and parks. Id. "[The] streets are natural and proper places for the dissemination of information and

opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Thornhill v. Alabama, 310 U.S. 88, 97-98, 102, 105-106, 60 S.Ct. 736, 741-742, 744, 746, 84 L.Ed. 1093 (1940).

A study of caselaw reveals two types of penal laws which may infringe upon one's rights of speech and assembly. See Ex parte Tucci, 859 S.W.2d 1, 59-64 (Tex. 1993)(Justice Gonzalez's concurring opinion). Some laws directly infringe upon those rights. See, e.g., Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476 (1965); Olvera v. State, 806 S.W.2d 546, 548 (Tex. Crim. App. 1991); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)(Cox, Olvera, and Thornhill involved anti-picketing statutes), and other cases cited below. Other laws indirectly infringe upon those rights through enforcement of laws which criminalize the obstructing of public passageways, breaches of the peace or disturbing of the peace, littering. See, e.g., Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453 (1965)(This case was based upon the same set of facts as Cox, supra, and was tried along with that case--both cases are discussed infra) and Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

a. Laws Which Directly Attack Protected Speech

Olvera v. State, 806 S.W.2d 546, 548 (Tex. Crim. App. 1991) dealt with facial and "as applied" overbreadth challenges to a mass picketing statute which directly attacked protected speech. The court held that the statute was unconstitutional on its face and therefore did not address the "as applied challenge." Id. at 546-547. Olvera is very instructive for purposes of this case in its review of Supreme Court and picketing cases in section I. of the case and its

analysis of the statute being examined in section II. of the opinion. This section of this brief will closely follow Olvera, especially section I. of Olvera.

In analyzing the constitutional validity of anti-picketing statutes, the Supreme Court traditionally subjects restrictions on picketing to "careful scrutiny." Olvera v. State, 806 S.W.2d 546, 548 (Tex. Cri. App. 1991) citing Boos v. Barry, 485 U.S. 312, 317, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 736 (1983). For challenges under the First Amendment, the appropriate level of scrutiny hinges upon whether a statute distinguishes between prohibited and permitted speech on the basis of content. Olvera, 806 S.W.2d at 548 citing Frisby v. Schultz, 487 U.S. 474, 480, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988); Perry Education Assn. V. Perry Local Educator's Assn., 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983). Where a statute is content neutral, the State may enforce regulations of the time, place, and manner of expression that are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Olvera at 548, citing Perry, 460 U.S. at 45, 103 S.Ct. at 955. As pointed out in Section **I.B.4. Application of the Law to the Facts,** the Sign Ordinance is not a reasonable time, place, and manner restriction nor is it content neutral.

Olvera v. State, 806 S.W.2d 546 (Tex. Crim. App. 1991) analyzed the validity of an anti-picketing statute (a statute which directly criminalized certain speech). The Supreme Court has consistently rejected statutes which are overbroad or vague in attempting to effectuate a legitimate state interest. Id. citing Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)(Thornhill rejected a code on its face for prohibiting picketing businesses "for the purpose of hindering, delaying, or interfering with" the businesses. The Court noted that the "sweeping proscription of freedom of discussion" embodied within the statute prohibits speech which does not threaten life or property or the

right of privacy.); Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104 (1940)(Carlson held unconstitutional an ordinance declaring it illegal for any person to carry or display any sign or banner or badge in the vicinity of any place of business for the purpose of inducing or attempting to induce any person to refrain from purchasing merchandise or performing services or labor. The Court concluded that while the State has the power to preserve the peace and to protect the privacy, lives and property of its residents, the "sweeping and inexact" terms of the ordinance abridge "liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control; and Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)(Court noted the vagueness problem with the statute in striking it down). The Supreme Court pointed out, in a case not cited in Olvera, that although a municipality may enact regulations in the interest of the public safety, health, welfare, or convenience, these may not abridge the individual liberties secured by the constitution to those who wish to speak, write, print, or circulate information or opinion. Schneider v. State, at 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155 (One appellant, e.g., was charged with violating a law criminalizing the circulation and distribution of handbills designed, the city said, to prevent littering of the streets even though he did not litter himself--those to whom he handed the literature threw it down. The Court said that the city could achieve the same thing without violating appellant's freedom of speech by punishing those who threw the literature into the streets).

Thornhill explained:

> "A threat [like that caused by requiring licensure of printing which censures comments on matters of public concern] is inherent in a penal statute * * * which does not aim specifically at evils within the allowable area of State control but, on the contrary,

> sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview * * * .
>
> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period * * * .
>
> "[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

310 U.S. 88, 97-98, 102, 105-106, 60 S.Ct. 736, 741-742, 744, 746, 84 L.Ed. 1093 (1940).

On the same day that Thornhill was decided, the United States Supreme Court, held unconstitutional a statute which declares it unlawful for any person to carry or *display* any sign or banner in the vicinity of any place of business for the purpose of inducing or attempting to induce any person to refrain from purchasing merchandise or performing services or labor. Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104 (1940)(emphasis mine). The Court concluded that while the State has the power to preserve the peace and to protect the privacy, lives and property of its residents, the "sweeping and inexact" terms of the ordinance abridge "liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control." Id., at 112-113, 60 S.Ct. at 748-749. Examples of substantive evils within the allowable area of state control are obstructing or unreasonably interfering with ingress to and egress for enumerated public places, blocking

sidewalks, obstructing traffic, littering streets, committing assaults, and engaging in countless other forms of anti-social conduct. See Olvera, 806 S.W.2d at 548-549, citing Coates v. Cincinnati, 402 U.S. 611, 91, S.Ct. 1686, 29 L.Ed.2d 214 (1971) and Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

The Supreme Court has consistently held that statutes must be narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. See Olvera at 548, 549 citing Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965)(The Court upheld the statute which prohibited picketing near a courthouse with intent to obstruct justice focusing upon the State's legitimate interest in protecting the judicial system from pressures which picketing near a courthouse might create, and the narrowly drawn requirement of an intent to obstruct justice effectuated that interest.); Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968)(The Court rejected a First Amendment challenge to a statute prohibiting picketing or mass demonstrations which obstruct or unreasonably interfere with free ingress to or egress from public premises, including state property, county or municipal courthouse, city hall and jails), Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)(The Court upheld a statute which prohibited disruptive behavior (noise) on or around an elementary or secondary school which disturbs or tends to disturb order at the school), and Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed. 333 (1988)(Holding that the narrowing construction of a lower court of a statute restricting communicative activity within 500 feet of a foreign embassy permitted police dispersal only of congregations that are directed at an embassy and only where the police reasonably believe that a threat to the security or peace of the embassy was present.).

There is also an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal; for regulation of conduct that involves freedom of speech and assembly not to be so broad in scope as to stifle First Amendment freedoms, which "need breathing space to survive" * * *; [and] for appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct * * *. Cox v. State of Louisiana, 379 U.S. 559, 574, 85 S.Ct. 476, 486 (1965)[This case, in which the Court overturned the conviction of appellant for violating a Louisiana statute which punished people for picketing near a courthouse, was based on the same set of facts as the "disturbing the peace" and "obstructing a public passage" charges involved and set forth in Cox v. State of Louisiana, 379 U.S. 536, 85 S.Ct. 453 (1965)(See **I.A.1.b. Laws Which Indirectly Attack Protected Speech**, infra)].

b. Laws Which Indirectly Attack Protected Speech

Municipal legislation meant to keep community streets open and available for movement of people and property is constitutional so long as the legislation does not abridge constitutional liberty of one to impart information through speech and the distribution of literature. Schneider v. State, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939). Crimes may be punished by law, but the freedom of speech and the press may not be abridged in the guise of regulations by the city meant to prevent littering, fraud, or to promote the public health, welfare, or convenience. Id.. While declaring laws unconstitutional which infringe upon first amendment rights, the Court has made clear what a city may do to punish evils within the allowable areas of state control:

> "[A] city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited."

Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) cited in Olvera v. State, 806 S.W.2d 546 (Tex. Crim. App. 1991).

The state of Louisiana both directly [see Cox v. State of Louisiana, 379 U.S. 559, 574, 85 S.Ct. 476, 486 (1965) which is cited under **I.A.1.a. Laws which Directly Attack Protected Speech**, supra] and indirectly [see Cox v. State of Louisiana, 379 U.S. 536, 85 S.Ct. 453 (1965)] attempted unsuccessfully to deny freedom of speech to picketers. The United States Supreme Court ruled against the state in both cases. Louisiana indirectly tried to abridge appellant's freedom of speech and assembly by charging him with violation of "disturbing the peace" and "obstructing a public passage" penal statutes. 379 U.S. 536, 85 S.Ct. 453 (1965). As to the "breach of the peace" charge, the Court stated that its independent examination of the record, which it is required to make, shows no conduct which the State had a right to prohibit as a breach of the peace. Id. at 545, 85 S.Ct. at 459. In addressing the "obstructing a public passage" conviction, the Court addressed the issue of the "right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly." Id. at 554, 85 S.Ct. at 464. There was no doubt that a sidewalk was obstructed by the picketers. Id at 553, 85 S.Ct. at 464. The Court said that the statute, as applied, violated the appellant's Constitutional guarantees of freedom of speech and assembly. Id. at 558, 85 S.Ct. at 466.

2. Vagueness Law

It is well established that criminal laws must be sufficiently clear in at least three respects. Long v. State, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996). First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. Id. citing Grayned v. Rockford, 408 U.S. 104, 108, 92, S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972) and Kramer v. Price, 712 F.2d 284 (5th Cir. 1983), grant of relief affirmed, 723 F.2d 1164 (5th Cir. 1984). Second, the law must establish determinant guidelines for law enforcement. 931 S.W.2d at 287 citing Grayned, 408 U.S. at 108-109, 92 S.Ct. at 2298-2299 and Kramer, 712 F.2d at 176-177. Finally, where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. 931 S.W.2d at 287 citing Grayned, 408 U.S. at 109, 92 S.Ct. at 2299. "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness 'demands a greater degree of specificity than in other contexts.'" 931 S.W.2d at 287-288 citing Kramer, 712 F.2d at 177. Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." 931 S.W.2d at 288 citing Grayned 408 U.S. at 109, 92 S.Ct. at 2299 (internal ellipses and quotation marks omitted).

B. The Application of the Sign Ordinance to Appellant's Speech Activity in this Case Violates the Law

1. The Sign Ordinance

Appellant was charged with violating §§ 13-2-864 and 13-1-70 of the Code of the Land Use Code of the City of Austin, Texas. § 13-2-864 provides in pertinent part:

§ 13-2-864 PLACEMENT OF SIGNS ON UTILITY POLES OR IN PUBLIC RIGHT-OF-WAY PROHIBITED.

(a) No person shall, either directly or indirectly, cause or authorize a sign to be installed, used, or maintained on any utility pole, traffic signal pole, traffic signal controller box, tree, public bench, street light, or any other structure located on or over any public property or public right-of-way, located within the city's planning jurisdiction, except as authorized by this article.

(b) The primary beneficiary of any sign installed in violation of this section shall be presumed to have authorized or caused, either directly or indirectly, the installation, use, or maintenance of the sign in violation of this section and shall be guilty of a violation of this Land Development Code.

(c) The City Manager or any person designated by the City Manager shall have the authority and the duty to remove, or cause to be removed, any sign or other advertising device installed, used, or maintained on or over any public property or public right-of-way in violation of this section. Notwithstanding any other provisions of this article, no notice is required to be given to any owner or beneficiary of a sign removed under authority of this section, either before the removal or before any subsequent disposition or destruction of such sign.

§ 13-2-850 of the Land Use Code of the City of Austin defines "sign" as follows:

SIGN means any surface, display, design, or device visible from public right-of-way on which letters, illustrations, designs, figures, or symbols are painted, printed, stamped, raised, projected, outlined, or attached in any manner whatsoever so that the same is used for advertising purposes. The term "sign" includes the supporting structure of the sign.

§ 13-2-850 of the Land Use Code of the City of Austin defines "advertising" as follows:

ADVERTISING means to seek, attract, or direct the attention of the public to any goods, services, or merchandise whatsoever, or to publish messages designed to inform or persuade the public.

§ 13-2-862 of the Land Use Code of the City of Austin exempts political signs from the coverage of the Ordinance:

(a) A sign described in this section may be installed, moved, structurally altered, structurally repaired, maintained, or used in any sign district without first obtaining a sign installation permit from the Building Official. A sign described in this section shall comply with all applicable restrictions and limitations imposed by this section, all other requirements of this article and this Code, and any other applicable law.

(l) *Political Signs.* A political is any device announcing or promoting the candidacy of one or more persons for elective public office, or concerning any political issue appearing or which is to appear on the ballot in any public election. A political sign shall be removed no later than 30 days after the election or referendum to which the sign applies. Maximum sign area or a political sign authorized by this subsection is 32 square feet. A political sign authorized by this subsection shall include the name and address of the person or persons responsible for installation and removal of the sign.

§ 13-2-887 of the Land Use Code of the City of Austin gives structural requirements for signs under the Code which requirements include:

(a) A sign other than a wall sign shall be designed, installed, and maintained so that it will withstand a horizontal pressure of 30 pounds per square foot of exposed surface.

(d) All signs must be designed and installed in accordance with the Building Code.

§ 13-2-890 of the Land Use Code of the City of Austin requires, in pertinent part:

(a) A sign authorized under § 13-2-862 may be installed, moved, structurally altered, or structurally repaired without a permit. No other sign shall be installed, moved, structurally altered, or structurally repaired until a sign installation permit has been issued by the Building Official. A sign installation permit is not required for routine maintenance, nonstructural repair, or re-facing of an existing sign.

(c) The fee for a sign installation permit shall be established by separate ordinance and is nonrefundable.

§ 13-1-70 sets punishment for violation of the Sign Ordinance of the City of Austin, Texas as fine only.

2. Appellant's Motions to Quash Numbers 3 and 4

A hearing was held on March 11, 1998 on Appellant's Motions to Quash the Complaints No. 3 and No. 4 (CR 00093-00098; RR 00160-1-12). Motion to Quash No. 3 stated, in part:

> The Complaints are legally defective since the Sections on which they are based, Sections 13-2-864 and 13-1-70, are vague and overbroad as applied to the activities of defendant and violate the First and Fourteenth Amendments to the United States constitution, Article I of the Texas Constitution, and Article 1.16 of the Texas Code of Criminal Procedure. The Complaint violates the right of speech under the First amendment to the U.S. Constitution, as enjoined on the States under the Due Process Clause of the 14th Amendment to such Constitution, and deprive Defendant of liberty without due process of law under the 14th Amendment.

(CR 00094).

Motion to Quash No. 4 stated, in part:

> The Complaints are legally defective since the Sections on which they are based, Sections 13-2-864 and 13-1-70, are vague and overbroad and violate the First and Fourteenth Amendments to the United States Constitution, Article I § 8 of the Texas Constitution, and Article 1.16 of the Texas Code of Criminal Procedure. The Complaint violates the right of speech under the First amendment to the U.S. Constitution, as enjoined on the States under the Due Process Clause of the 14th Amendment to such Constitution, and deprive Defendant of liberty without due process of law under the 14th Amendment.

(CR: 00097).

Appellant's Motions to Quash the Complaints No. 3 and No. 4 were denied (CR: 00095 and 00098; RR: 00160-1-12).

3. Application of the Law to the Facts

The Sign Ordinance of the City of Austin is vague and overbroad on its face and as applied, under the United States and Texas Constitutions and Texas Law.

The Sign Ordinance of the City of Austin (the Sign Ordinance) aims directly at speech. Obviously, signs communicate. The Sign Ordinance is not aimed directly at picketing which is protected by the federal and state constitutions and state law. Rather, it aims at "signs," but not all "signs," as defined in the Sign Ordinance. By charging Appellant for violation of the Sign Ordinance for placing his crosses in conjunction with his other picketing activities, the City of Austin wishes to include protected speech in the definition of "signs." The display of crosses was just part of Appellant's picketing activities (RR: 00159-93, lines 21-23; 107, lines 11-13). Appellant was not cited for any of his other picketing activities (RR: 00159-95, line 21 through 96, line 2). The Sign Ordinance is either so broad on its face that the placement of any "sign," except those which are excepted by the statute, even as part of legitimate picketing, is prohibited by the statute, or is overbroad in its application to the facts of this case.

a. Overbreadth Analysis--Direct Violation of Protected Speech

There must be a realistic danger that a statute will significantly compromise recognized First Amendment protections of parties not before the

court for it to be facially challenged on overbreadth grounds. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984))(citations to United States Supreme Court cases omitted). Since pro-life picketing of abortion clinics and other types of picketing, marches, gatherings, and demonstrations on public forum property is widespread, especially in Austin, Texas, the capital city of Texas, and since the Sign Ordinance and the resultant possibility that the Sign Ordinance will interfere with constitutionally protected speech in the form of the display of signs or symbols on public forum property, the Sign Ordinance is vulnerable to a facial challenge on overbreadth grounds.

Even though the statute seems to be an indirect violation of Appellant's protected speech, it could be construed to be a direct violation for the reasons given above. With the principles discussed in **I.A.1.a. Laws Which Directly Attack Protected Speech** above, we turn to the Sign Ordinance.

The City of Austin seeks to take away Appellant's freedom of speech, as did the municipality in Carlson v. People of State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104 (1940) which sought to enforce an ordinance which directly infringed on appellant's freedom of speech. Carlson declared unconstitutional a municipal ordinance which declared it unlawful for any person, in or upon any public street, highway, sidewalk, alley or other public place * * * to carry or *display* any sign or banner in the vicinity of any place of business for the purpose of inducing or attempting to induce any person to refrain from purchasing merchandise or performing services or labor. Id. (emphasis mine). The City of Austin charges Appellant with violation of the Sign Ordinance by asserting that Appellant's crosses come within the definition of "sign" in the Sign Ordinance. Surfaces, displays, designs, or devices as defined in the definition of "sign" must be used for "advertising" purposes. See definition of "Sign", § 13-2-

850 of the City of Austin Code. "Advertising" means to seek, attract, or direct the attention of the public to any goods, services, or merchandise whatsoever, or to publish messages designed to inform or persuade the public. Definition of "advertising" in City of Austin Code § 13-2-850. Appellant, in communicating an alternative to abortion to those who voluntarily stopped to talk to him, was attempting to induce persons to refrain from purchasing the services of the abortion clinic (RR: 00159-128, lines 2-9, 15-17). The display of the crosses was part of Appellant's picketing activity (RR: 0159-93, lines 21-23; 107, lines 11-13). Appellant in this case contended at trial that the crosses were not signs. (RR: 00159-119-121). He testified that he did not seek to attract or direct the attention of the public to any goods, services, or merchandise and that he did not intend to direct the attention of the public to any goods, services, or merchandise (RR: 00159-121, lines 6-14). In Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 LED 2d 842 (1974) Appellant had displayed an American flag upside down out of his apartment window with a peace symbol attached. Id. at 405-406, 94 S.Ct. at 2728. The Court noted, and the state had conceded, that appellant engaged in a form of communication. Id. at 409, 94 S.Ct. at 2729-2730. This indicates that the display of a cross, in the circumstances of this case no less a symbol than the American flag, is a form of communication. The application of the Sign Ordinance to prohibit the display of the crosses under the facts of the case violates Appellant's right to freedom of speech and the rights of the people to whom the speech was directed just as the ordinance in Carlson directly violated the rights of Appellant and those to whom the speech was directed. The lower courts in Carlson upheld a statute that directly violated appellant's rights by upholding a municipal ordinance which declared it unlawful for any person to carry or *display* any sign or banner in the vicinity of any place of business for the purpose of inducing or attempting to induce any person to refrain from

purchasing merchandise or performing services or labor. 310 U.S. at 111, 60 S.Ct. at 748. The City of Austin here attempts to violate Appellant's freedom of speech through a municipal ordinance which is being used to declare it unlawful for any person to display any sign in the vicinity of a place of business for the purpose of inducing or attempting to induce any person to refrain from purchasing the services of that business. Picketing and carrying signs are clearly protected speech. Carlson and other caselaw indicate that displaying signs and symbols seems to be protected. What if a picketer merely stops to rest five minutes and leans his sign or symbol on a structure such as his beverage cooler, or himself as he sits to rest, or a bench or utility pole, or other structure located within the public right-of-way? The United States Supreme Court reversed the lower courts in Carlson and in many other cases, some of which are cited above.

The Texas Court of Criminal Appeals has likewise upheld the right to *peaceably* communicate in the public forum. See, e.g., Olvera, 806 S.W.2d 546 (emphasis mine). The display of the crosses was part of Appellant's peaceful picketing activities (RR: 00159-93, lines 21-23; 107, lines 11-13). The witnesses for the state testified that Appellant's activities were peaceful. The officer did not charge Appellant with violation of any statute or ordinance other than violation of the Sign Ordinance of the City of Austin (RR: 00159-95, line 21 through 96, line 2). The police officers testified that Appellant did not fight with anyone, shout at anyone, interfere with pedestrians, obstruct a sidewalk, driveway or street, or disturb the peace in any way, and that appellant was peaceful and polite (RR: 00159-93, lines 24 through 94, line 18; 94, line 7; 107, line 14-24). Had Appellant been guilty of blocking sidewalks, obstructing traffic, interfering with the view of motorists entering a parking lot, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct, the City could legally have punished him through the enforcement of

ordinances or statutes already enacted which are directed with reasonable specificity toward the conduct to be prohibited. Had the crosses rendered passage into the parking lot, on the sidewalk, on the street, or into the abortion clinic unreasonable or hazardous, the officer could have cited Appellant for violation of Texas Penal Code § 42.03 Obstructing Highway or Other Passageway, in the event Appellant refused to remove the crosses. Texas Penal Code § 42.04 makes clear that § 42.03 had the crosses placed by Appellant rendered passage into the parking lot unreasonable or hazardous, Appellant could have been cited under § 42.03 for a Class B Misdemeanor had he refused to remove the crosses. Nor did the officer cite Appellant for disorderly conduct under Texas Penal Code § 42.01 Disorderly Conduct, which allows an officer to cite an individual in the event of certain breaches of the peace. This would have been the proper way to protect the city's interests. Had Appellant been guilty of an evil within the allowable areas of state control, as explained in Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), the court could have enforced these or other sections of the Texas Penal Code or perhaps city or county ordinances designed to directly address such problems. Evil within the allowable areas of state control include molestation or interference with person and vehicles, obstruction of pedestrians and automobiles, threatening or intimidating or coercing anyone, making loud noises, unpeaceful and disorderly conduct, acts of violence, and breaches of the peace. See, e.g., Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104 (1940), Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940), Olvera v. State, 806 S.W.2d 546 (Tex. Crim. App. 1991).

Because the Sign Ordinance is not content neutral in that it provides for many exceptions for different kinds of signs, including an exception to political campaign signs, it must be subjected to a very high level of scrutiny. See Olvera

at 548. The level of scrutiny depends upon whether a statute distinguishes between prohibited and permitted speech on the basis of content. Id. The Sign Ordinance is not content neutral since it gives exceptions for many signs containing certain types of communication. Signs which are exempted include *temporary construction, real estate, or development signs* (exempted for specified lengthy periods); *directional signs; government signs; holiday signs; incidental signs; information signs; memorial signs; menu boards; nameplates; point-of-sale signs; political signs; flag or banner; temporary wall signs, window or door surface signs; neighborhood signs; small signs.* City of Austin Code § 13-2-862. §§ 13-2-862(a) and (l) and 13-2-900 allow political signs supporting political candidates (political speech) and with a maximum sign area of 32 square (much larger and more obstructive than the crosses which Appellant displayed) to be installed, moved, structurally altered, structurally repaired, maintained, or used in any sign district without first obtaining a sign installation permit from the Building Official. See also, RR: 11059-71, lines 1-25. We ask the court to take judicial notice of this and the fact that these signs are often displayed in large numbers on the public right-of-way next to driveways, entrances to parking lots, and at many other types of locations and remain unattended at such locations day and night for considerable periods of time before and after elections. Appellee in Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (discussed in more detail below) argued that "Los Angelas could have written an ordinance that would have had a less severe effect on expressive activity such as theirs (political campaign signs) by making a variety of other more specific exceptions to the ordinance such as signs carrying certain types of messages (such as political campaign signs), for signs posted during specific time periods (perhaps

during political campaigns), and certain other exemptions." Id., at 815, 104 S.Ct. at 2134. The Court, in its reply to this argument, asserted:

> "An assertion that 'Jesus Saves,' that 'Abortion is Murder,' that every woman has the 'Right to Choose,' or that 'Alcohol Kills,' may have a claim to constitutional exemption from the ordinance that is just as strong as 'Roland Vincent--City Council.' To create an exception for * * * political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination."

Id. at 816, 104 S.Ct. at 2134-2135. That is exactly what the City of Austin has done in its Sign Ordinance. Under the Equal Protection Clause of the Fourteenth Amendment, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. Police Department of City of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972)(Holding a Chicago ordinance unconstitutional under the Equal Protection Clause of the Fourteenth Amendment in a case where the equal protection claim was closely intertwined with First Amendment interests); . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Id. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. Id. Mr. Justice Black called an attempt by a government to pick and choose among the views it is willing to have discussed in picketing activities "censorship in its most odious form, unconstitutional under both the First and Fourteenth Amendments." Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) cited in 408 U.S. 92, 98-99, 92 S.Ct. 2291. Carey v. Brown, 477 U.S. 455, 100 S.Ct. 2286, 65

L.Ed.2d 263 (1980) reaffirmed Mosley. The Court affirmed the holding of the Court of Appeals that an Illinois statute which selectively proscribed peaceful picketing on the basis of the placard's message was overbroad both on its face and as applied in violation of the Equal Protection Clause of the Fourteenth Amendment. Id.

When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tuned to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. Id. at 4611-462, 100 S.Ct. 2290-2291. The only possible distinctions between Appellant's speech and political speech favor of Appellant's speech. That the Austin Sign Ordinance allows those political signs to be displayed at will by political candidates and their workers, and left unattended for several weeks in large clusters sometimes near driveways and at the side of road intersections makes clear that the city is not worried about the obtrusiveness of signs much larger than the crosses which Appellant intended to display attended for two to three hours, and It further demonstrates that certain people are concerned only with censoring Appellant's views in violation of his rights to freedom of speech. To achieve that end, they seek an overbroad application of the Sign Ordinance. This argument is further strengthened by the admissions of Officers McGowan and Janssen. They testified that they had seen the permanent white crosses which are placed in the public right-of-way in medians and at the sides of streets and highways of the city of Austin and that they had never removed any of such signs or cited anyone for placing them (RR: 00159-66-68, 104-105). The City of Austin Code § 13-2-864(c) states, "Notwithstanding any other provisions of this article, no notice is required to be given to any owner or beneficiary of a sign removed under authority of this section, either before the removal or before any

subsequent disposition or destruction of such sign." All this indicates that the police officers may have been selectively charging Appellant through an overbroad application of the ordinance because they, or others, were opposed to Appellant's communication. The assessment of the United States Supreme court in Thornhill may likely have played out in this case. As the Court said:

> "A threat [like that caused by requiring licensure of printing which censures comments on matters of public concern] is inherent in a penal statute * * * which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview * * * ."

310 U.S. 88, 97-98, 102, 105-106, 60 S.Ct. 736, 741-742, 744, 746, 84 L.Ed. 1093 (1940).

Even if the statute were content neutral, the Sign Ordinance is not a time, place or manner restriction. Reasonable time, place, and manner regulations of picketing may be necessary to further significant government interests. Mosley, 408 U.S. at 98, 92 S.Ct. at 2291. The Austin Sign Ordinance applies across the board, any where, any time, any place. The ordinance describes permissible picketing not in terms of time, place, and manner, but in terms of subject matter. Thus, as Mosely put it, "The regulation 'thus slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" 408 U.S. at 99, 92 S.Ct. at 2292 citing cases.

Appellant contends that the immediately preceding portion of the brief which deals with content regulation is determinative, but returns to the Olvera analysis so as to dispose of all issues which he anticipates.

The Supreme Court has consistently rejected statutes which are overbroad or vague in attempting to effectuate a legitimate state interest. Olvera v. State, 806 S.W.2d 546, 548 (Tex. Crim. App. 1991) citing Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)(The Court rejected a code on its face for prohibiting picketing businesses "for the purpose of hindering, delaying, or interfering with" the businesses. The Court noted that the "sweeping proscription of freedom of discussion" embodied within the statute prohibits speech which does not threaten life or property or the right of privacy.). Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104 (1940)(The Court held unconstitutional an ordinance declaring it unconstitutional for any person to carry or display any sign or banner or badge in the vicinity of any place of business for the purpose of inducing or attempting to induce any person to refrain from purchasing merchandise or performing services or labor. The Court concluded that while the State has the power to preserve the peace and to protect the privacy, lives and property of its residents, the "sweeping and inexact" terms of the ordinance abridge "liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control); and Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)(Court noted the vagueness problem with the statute in striking it down).

Nor is the sign ordinance narrowly tailored to serve a significant government interest. See Olvera at 548, 549 citing Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965)(Upholding the statute which prohibited picketing near a courthouse with intent to obstruct justice focusing upon the State's legitimate interest in protecting the judicial system from

pressures which picketing near a courthouse might create, and the narrowly drawn requirement of an intent to obstruct justice effectuated that interest.); Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968)(Rejecting a First Amendment challenge to a statute prohibiting picketing or mass demonstrations which obstruct or unreasonably interfere with free ingress to or egress from public premises, including state property, county or municipal courthouse, city hall and jails); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)(Upholding a statute which prohibited disruptive behavior (noise) on or around an elementary or secondary school which disturbs or tends to disturb order at the school); Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed. 333 (1988)(Holding that the narrowing construction of a lower court of a statute restricting communicative activity within 500 feet of a foreign embassy permitted police dispersal only of congregations that are directed at an embassy and only where the police reasonably believe that a threat to the security or peace of the embassy was present.). Members of City Council v. Taxpayers for Vincent, upheld an ordinance which prohibited posting of signs on public property because municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression and which served safety interests or traffic problems in many of its applications. 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). As pointed out above, the Sign Ordinance facially and as applied reaches all signs and symbols displayed on the public right-of-way, whether or not they block sidewalks, obstruct traffic, interfere with the view of motorists entering a parking lot, litter streets, commit assaults, or engage in countless other forms of anti-social conduct. Neither Appellant's picketing activities nor his crosses infringed upon allowable areas of state control including molestation or interference with persons and vehicles, obstruction of pedestrians and

automobiles, threatening or intimidating or coercing anyone, making loud noises, unpeaceful and disorderly conduct, acts of violence, safety interests, and breaches of the peace. Unlike the statutes upheld in Cox, 379 U.S. at 560, 85 S.Ct. at 478, and Cameron, 390 U.S. 611, 88 S.Ct. 1335, where narrowly tailored restrictions required, respectively, an intent to obstruct justice and unreasonable interference with ingress to and egress from public places, the Sign Ordinance provides no such limitations to its proscriptions.

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) is inapposite to the Sign Ordinance which (1) operates to exclude signs on the public road right-of-way, unlike the ordinance in Taxpayers for Vincent, (2) excludes signs from a public forum, unlike the exclusion of signs from utility poles and crosswires in Taxpayers for Vincent, (3) operates to exclude attended signs and symbols placed for a short time (2-3 hours) unlike the unattended political signs left for indefinite and long periods in Taxpayers for Vincent, and (4) operates to exclude the placement of signs and symbols used in connection with protected picketing activity unlike the political signs in Taxpayers for Vincent. The signs in Taxpayers for Vincent were 15 by 44 inch cardboard signs which were attached to utility poles at various locations by draping them over crosswires which support the poles and stapling the cardboard together at the bottom. Id., at 792-793, 104 S.Ct. at 2122. Acting under authority of the Municipal Code, city employees routinely removed all posters attached to utility poles and similar objects covered by the ordinance, including the signs of Appellee. Id., at 793, 104 S.Ct. at 2122. For a one week period mentioned by the Court, 1,207 signs were removed from public property, most of which were commercial signs but some of which were political signs. Id. The large number of illegally posted signs constituted a clutter and visual blight, created a potential safety hazard, and blocked views and otherwise caused traffic

hazards. Id., at 794, 104 S.Ct. at 2123. Some property such as utility poles [and utility crosswires] covered by the ordinance in Taxpayers for Vincent does not constitute public forum. Id., at 814, 104 S.Ct. at 2133. Although traditional public forum property, such as the streets, parks, and public places, occupies a special position in terms of First Amendment protection, the First Amendment does not guarantee access to non-public forum property which is owned or controlled by the government. Id., at 813-814, 104 S.Ct. at 2133-2134. The Sign Ordinance encompasses situations wholly unrelated to violence, coercion, or conduct otherwise dangerous to the populace. Therefore, it impermissibly reaches a substantial amount of protected conduct.

Nor is there a reasonable narrowing construction available to save the statute from its facial overbreadth. Where a statute is impermissibly overbroad on its face, [the court] need not invalidate it if it is susceptible to a narrowing construction consistent with its language and apparent purpose. Olvera, 806 S.W.2d at 552 citing Moorehead v. State, 807 S.W.2d 577, 581 (Tex. Crim. App. 1991) and Dubuisson v. State, 572 S.W.2d 694, 699 (Tex. Crim. App. 1978). Just as with the statute in Olvera, there are no terms in the Sign Ordinance to narrow or define in such a way as to prevent the ordinance from reaching a substantial amount of protected conduct. The definition of "advertising", for example, reaches any sign communication which "publish messages designed to inform or persuade the public." City of Austin Code § 13-2-850. Furthermore, additional restrictions in the Sign Ordinance would prevent the display of Appellant's crosses under the circumstances of this case. A sign other than a wall sign shall be designed, installed, and maintained so that it will withstand a horizontal pressure of 30 pounds per square foot horizontal pressure. City of Austin Code § 13-2-887(a)[Appellant asks the court to take judicial notice of City of Austin Code § 13-2-887(a)and (c)]. All signs must be designed and

installed in accordance with the building code. City of Austin Code § 13-2-887(c). To require a license or permit would therefore effectively totally eliminate Appellant's ability to display his crosses in conjunction with his picketing activities. Therefore, the Sign Ordinance is overbroad on its face.

Alternatively, the Sign Ordinance is overbroad "as applied" for all the reasons given above.

b. Overbreadth Analysis--Indirect Violation of Protected Speech

As in Cox v. State of Louisiana, 379 U.S. 536, 85 S.Ct. 453 (1965), it can be argued that the Sign Ordinance does not specifically aim at protected speech but that the City of Austin indirectly attempts to deny freedom of speech. If the Sign Ordinance does not directly aim at signs used in conjunction with picketing activity, on its face and as applied in this case, it indirectly abridges the First Amendment liberty of those who wish to display crosses in conjunction with peaceful picketing activity.

Even if the purpose of the Sign Ordinance is to keep community streets open and available for movement of people and property or to prevent littering, fraud, to promote the public health, welfare, or convenience, to prevent breaches of the peace or other crimes, it is constitutional only so long as it does not abridge constitutional liberty of one to impart information through speech and the distribution of literature. See Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed..2d 214 (1971); Cox v. State of Louisiana, 379 U.S. 536, 85 S.Ct. 453 (1965).

As noted above, Appellant was peaceful and polite (RR: 00159-94, line 7). He did not obstruct or block a sidewalk, driveway, street, or disturb the

peace in any way (RR: 00156-93, line 24 through 94, line 18; 107, lines 14-24). He and his crosses were on the public right-of-way. (RR: 00159-97, lines 10-12). The crosses were put into the ground as part of Appellant's picketing activities (RR: 00159-93, lines 21-23; 107, lines 11-13). The crosses were 36 inches high and 18 inches wide, and were made of yardsticks. (RR: 00159-72-75). They were plain white, all the same size, and all the same as Defense Exhibit 1 (Id.). See RR: 00159-73, lines 1-25 for admission of Defendant's Exhibit 1. The crosses were placed four to six feet apart in the grassy area which is the public-right-of-way (RR: 00159-120, lines 4-5, 7-9). A sidewalk ran through the grassy area (RR: 00159-123, lines 8-11). From the street to the parking lot is public right-of-way and the parking lot is the beginning of the abortion clinic property (RR: 00159-123, lines 15-24). Furthermore, his crosses were 50 to 75 yards from the business (the abortion clinic) he was picketing (RR: 00159-96, line 27 through 97, line 3; 129, line 23 through 130, line 1). Appellant attended the crosses at all times (RR: 00159-93, lines 16-20; 107, lines 8-10; 121, lines 15-17 through 126, lines 19-22). He intended to leave them in the ground two or three hours and take them when he left (RR: 00159-121, lines 18-20; 126, lines 15-18). He did not stop anyone, but offered literature as people came in, and if they voluntarily stopped and wanted to talk to him, he handed his literature to them (RR: 00159-128, lines 2-9). He was communicating an alternative to abortion (RR: 00159-128, lines 15-17).

Obviously, the City of Austin attempts to abridge Appellant's freedom of speech in applying the Sign Ordinance to his crosses in this case. The Court is required to make an independent examination of the record. See Cox, 379 U.S. at 545, 85 S.Ct. at 459 (1965). Such an examination will show no conduct which the City of Austin had a right to prohibit. Therefore, the Sign Ordinance is either overbroad on its face or as applied.

c. Vagueness Analysis

Whether the statute is vague under the United States and Texas Constitutions and Texas law is to be determined by the principles given in Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996) as discussed under **I.A.2. Vagueness Law** supra.

The Sign Ordinance does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, it does not establish determinant guidelines for law enforcement, and, where First Amendment freedoms are implicated, the law is not sufficiently definite to avoid chilling protected expression.

First, the contradiction of the use of the word "structure" in the § 13-2-50 definition of "sign" and the § 13-2-864(a) use of the word "structure" does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited nor does it establish determinant guidelines for law enforcement The conduct forbidden in the Sign Ordinance is the installation, use, or maintenance of all "signs" on any "utility pole, traffic signal pole, traffic signal controller box, tree, public bench, street light, or any other structure located on or over any public property or public right-of-way, located within the city's planning jurisdiction, except as authorized by this article." City of Austin Code § 13-2-864(a). § 13-2-864(a) therefore seemingly criminalizes installation of a sign on some structure already located on or over any public property or right-of-way. Id. On the other hand, the definition of "sign" in the Sign Ordinance states that the term "sign" includes the supporting structure of the sign. See definition of "sign" in City of Austin Code § 13-2-850. Appellant's crosses were placed in the ground (RR: 00159-62, line 24 through 64, line 6; 103, lines 10-17; 106 line 22 through 107, line 7). Officer McGowan testified that the crosses were not

installed, used, or maintained on any utility pole, traffic signal pole, traffic signal controller box, tree, public bench, street light, or any other structure (RR: 00159-76, line 15 through 78 line 1). Does "supporting structure" include freestanding symbols such as plain white crosses displayed as part of Constitutionally protected speech for only two or three hours and attended at all times? What if a picketer who is carrying a sign or symbol decides to rest, sits down, and leans the sign against himself, his cooler, or puts it into the ground? Does he or his cooler become a structure causing him to violate the Sign Ordinance. Because the use of and definition of the term "structure" in the Sign Ordinance are in conflict, the Sign Ordinance is vague on this point. A person of ordinary intelligence cannot know whether conduct such as that of Appellant is covered by the ordinance.

Second, the definition of "sign" does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited nor does it establish determinant guidelines for law enforcement. "Sign" means "any surface, display, design or device visible from public right-of-way on which letters, illustrations, designs, figures, or symbols are painted printed, stamped, raised, projected outlined, or attached in any manner whatsoever so that the same is used for advertising purposes. City of Austin Code § 13-2-850. Does this include a plain white cross? Officer McGowan testified at trial that the crosses did not have letters, illustrations, design, or figures on them (RR: 00159-83, lines 9-19). However, when asked if the crosses had symbols on them he replied, "Yes, the cross is a symbol" (RR: 00159-83, lines 20-21). When asked again if symbols were painted on the crosses, he said, "there were no symbols painted on the cross, but it does include the structure which is a symbol itself" (RR: 00159-83, lines 22-23).

Finally, the dilemma of the person of ordinary intelligence and the law enforcement community is increased by a seeming contradiction in the ordinance. The definition of "advertising" in § 13-2-850 of the Sign Ordinance and the requirement for a "primary beneficiary" in § 13-2-864(b) when taken alone or together cannot be understood by a person of ordinary intelligence nor do they establish determinant guidelines for law enforcement when applied to placement of plain white crosses or other types of communicative devices placed in the ground in conjunction with picketing activities. The Sign Ordinance forbids installation, use, or maintenance of "signs" on any structure located on or over any public property or public right-of-way, except as authorized. City of Austin Code § 13-2-864(a). "Sign" is defined in the Sign Ordinance. See City of Austin Code § 13-2-850. The Sign Ordinance presumes that the person who installed any sign in violation of § 13-2-864 to be a "primary beneficiary." City of Austin Code § 13-2-864(a). Common knowledge tells us that a "primary beneficiary" is a person first in line to receive a benefit. Appellant testified that he did not benefit in any way by placing the crosses (RR: 00159-120, lines 10-12). "Benefit" means as a noun: "**2 a :** something that promotes well-being: ADVANTAGE **b :** useful aid: HELP **3 a :** financial help in time of sickness, old age, or unemployment **b :** a payment or service provided for under an annuity, pension plan, or insurance policy **4 :** an entertainment or social event to raise funds for a person or cause." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 106 (10th ed. 1995). "Benefit" means as a verb: "to be useful or profitable to or to receive benefit." Id. Appellant testified that he could not benefit in any way by placing the signs (RR: 00159-120, lines 10-12). The State produced no evidence to show that Appellant benefited in any way from the placement of the crosses. To come within the coverage of the Sign Ordinance, a "sign" as defined in the Sign Ordinance must be used for "advertising" purposes.

Id. "'Advertising' means to seek, attract, or direct the attention of the public to any goods, services, or merchandise whatsoever, or to publish messages designed to inform or persuade the public." City of Austin Code § 13-2-850. The application of "advertising" as defined in the Sign Ordinance to Appellant's placement of crosses as part of his picketing activities is inconsistent with § 13-2-864(b) which requires a primary beneficiary of the sign. "Advertising," as applied by the City of Austin requires no benefit to anyone, whereas § 13-2-864(b) requires a primary beneficiary. How can a person of ordinary intelligence or law enforcement officers understand such an inconsistency? Thus, "advertising," as defined by the sign ordinance, does not seem to require one who places "signs" to benefit from such placement. Furthermore, plain white crosses placed at the side of a road obviously attract the attention of the public. But to what goods, services, or merchandise? In this case it is obvious that the crosses attracted the attention to either the Appellant or to the clinic or both. Else, why would the police have been called? Any picketing activity attracts attention. Signs carried by a picketer attract attention. Symbols placed in the ground attract attention. Do such crosses publish messages designed to inform or persuade the public? Of what do such crosses inform or persuade the public? Appellant testified that he did not intend to publish messages designed to inform or persuade the public and that he did not mean to seek or attract or direct the attention of the public to any goods, services, or merchandise (RR: 00159-120, line 13 through 121, line 14).

Because of the above problems in the Sign Ordinance, the law is not sufficiently definite to avoid chilling protected expression. Even though the law is uncertain in its applicability to the display of symbols and/or signs in connection with peaceful picketing, what person is going to continue to engage in such activity after being cited for violating the Sign Ordinance for engaging in

such activity when he cannot determine the meaning to be attached to the ordinance in relation to his particular activity?

Clearly, for the above reasons, the Sign Ordinance is unconstitutional under the United States and Texas Constitutions and under Texas Law because it is not sufficiently clear to give a person of ordinary intelligence an opportunity to know what is prohibited.

For the same reasons, the Sign Ordinance does not establish determinate guidelines for law enforcement. Because of the uncertainty created by such an indefinite ordinance, protected expression is chilled when the ordinance is enforced against a picketer who displays signs and/or crosses in connection with protected picketing activity. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process. Cotton v. State, 686 S.W.2d 140, 145 (Tex. Crim. App. 1985). A law must be sufficiently definite that its terms and provisions may be known, understood and applied; otherwise, it is void and unenforceable. Id.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A JURY SHUFFLE.

The case should be reversed and remanded for a new trial because Appellant stated to the trial court immediately before the venire entered the courtroom that he might want a jury shuffle after he saw the venire seated (RR: 00159-3, lines 3-16), and he timely requested a shuffle after the panel was seated (RR: 00159-3-7).

It is automatic reversible error for the trial court to refuse a timely urged motion by the accused or his counsel to shuffle the names of the members of the jury panel. Yanez v. State, 677 S.W.2d 62, 69 (Tex. Crim. App. 1984).

Compliance with Texas Code of Criminal Procedure Article 35.11 requires the trial court to afford Defendant the opportunity to view the venire seated in the courtroom in proper sequence and thereafter to allow Defendant an opportunity to exercise his or her option to have the names shuffled. Davis v. State, 782 S.W.2d at 214 (Tex. Crim. App. 1989). That the trial court give a defendant an opportunity to shuffle after he sees the panel seated is important. See, e.g., Eldridge v. State, 666 S.W.2d 357 (Tex. App.--Dallas1984, pet. ref'd). A motion to shuffle is untimely if presented after the voir dire has commenced. 782 S.W.2d 211, 214. The policy behind designating the beginning of voir dire as the time limit for requesting a jury shuffle was stated by the Texas Court of Criminal Appeals:

> The soundness of requiring such a motion to be made before voir dire begins is apparent. To allow either party to request a shuffle of the names of the jury panel after voir dire begins would be disruptive and unduly prolong the trial. Further it would permit such an election to be based on information already elicited on voir dire. Clearly this was not the intent of the legislature.

Alexander v. State, 523 S.W.2d 720 (Tex. Crim. App. 1975). [F]or purposes of Article 35.11, voir dire in a non-capital murder case commences when the State begins its examination of the prospective jurors; it does not begin when the judge begins his or her initial instructions. 782 S.W.2d at 214. Examination by the prosecution begins when the prosecution addresses questions to the panel. Scott v. State, 805 S.W.2d 613 (Tex. App.--Austin 1991)(Judge ordered bailiff to shuffle jury cards, panelists were seated according to shuffle, trial judge made introductory remarks, then the court directed the prosecution to begin its voir dire examination, but defendant requested a jury shuffle before prosecution could address any questions to the panel).

As in Scott, 805 S.W.2d 613 the judgment of the trial court should be reversed and case remanded for a new trial because the Appellant timely requested a shuffle which was denied by the trial court. In addition, Judge Vasquez did not give Appellant an opportunity to shuffle the panel before asking the prosecutor to proceed with his voir dire (RR: 00159-3-7). Before the day of trial, Appellant filed a written Motion to Shuffle Jurors (CR: 00031-00032). At trial, Appellant informed Judge Vasquez that he might want a jury shuffle after he saw the panel seated (RR: 00159-3, lines 3-5). After the panel was seated, Judge Vasquez asked the state and the defense if they were ready (RR: 00159-3, lines 17-19). Both state and defense said they were ready (RR: 00159-3, lines 20-25). Judge Vasquez then made his initial remarks and instructions to the jury (RR: 00159-4-6). He then asked the prosecution if he were ready to proceed with his voir dire examination (RR: 00159-6, lines 24-25). The prosecution immediately began to speak to the jury (RR: 00159-7, line 1 et. seq.). At the same time, attorney for Appellant approached the bench asking for a shuffle (RR: 00159-7, lines 4-6). Judge Vasquez asked the prosecution to approach the bench (RR: 00159-7, lines 12-14). After conversation with the prosecution and attorney for the Appellant, Judge Vasquez denied Appellant's Motion for a shuffle (RR: 00159-8-9).

It should be noted that Appellant contended that he requested a jury shuffle which was not in the transcript immediately after the venire was seated and before the Judge Vasquez began speaking to the panel (CR: 00154).

As in Scott, 805 S.W.2d 613, Appellant's Motion for a shuffle was made after the court called on the prosecution to begin its voir dire examination but before the prosecution could address any questions to the panel--in this case, immediately as the prosecution began speaking. Clearly, allowing the shuffle would not have violated rules or policy regarding jury shuffle. It would not have

been disruptive to have allowed the requested shuffle, it would not have unduly prolonged the trial, and would it not have permitted the election for a shuffle to be based on information already elicited on voir dire. Therefore, the trial court erred in denying the request for a shuffle which is automatic reversible error.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S WRITTEN REQUESTED APPLICATION PARAGRAPH BEFORE THE CHARGE WAS READ TO THE JURY.

The conviction should be reversed and remanded for a new trial because the application paragraph of the court did not apply the law to the facts of the case. See CR: 00104-00105. Appellant requested in writing an application paragraph which would have applied the law to the facts of the case (CR: 00135-00136; RR: 00159-146, line 20 through 155, line 4). The Trial Court denied Appellant's request (CR: 00105; RR: 00159-154, line24 through 155, line 4).

In jury trials, criminal defendants are entitled to "a written charge distinctly setting forth the laws applicable to the case." Gonzales v. State, 800 S.W.2d 621, 624 (Tex. App.--Dallas 1990) citing Tex. Code Crim. Proc. Ann. art. 36.14. " Texas courts interpret this principle "to require the [trial] court in its instructions to apply the law to the very facts of the case before it." Beggs v. State, 597 S.W.2d 375, 379 (Tex. Crim. App. 1980). An abstract instruction is not enough. Gonzales v. State, 800 S.W.2d at 624 citing Nugent v. State, 749 S.W.2d 595, 598 (Tex. App.--Corpus Christi 1988, no pet.). It may not be reversible error to apply the law to the facts in language different from the defendant's requested charge, but the complete failure to apply the law to the very facts of the case despite an objection or requested charge is reversible error. Id. citing Williams v. State, 547 S.W.2d 18 (Tex. Crim. App. 1977)." [A] charge

should affirmatively lead and dispel confusion, and a charge that does not apply the law to the facts fails to give such guidance. Venegas v. State, 660 S.W.2d 547, 549 (Tex. App.--San Antonio 1983) citing Williams v. State, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977). [

Requests for special instructions must be written. Tex. Code Crim. Pro. art. 36.15. Requests for special instructions must be made before the final charge is read to the jury. Id. If the accused preserves the error by timely action in the trial court, reversal is required if the error is "calculated to injure the rights of the defendant." Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984). This means simply that there must be "some harm," which in turn means only that the error not be harmless. Id. at 171. In making this determination, "the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole." Id. If the appellate court cannot conclude beyond a reasonable doubt that the charging error made no contribution to the conviction, it must reverse the judgment of the trial court. Gonzales, 800 S.W.2d 621 citing Tex. R. App. Pro. 81(b)(2) [now Rule 44.2(a)] and Nugent, 749 S.W.2d at 599. In applying the harmless error rule, the appellate court focuses on the integrity of the process leading to conviction rather than on the propriety of the outcome. 800 S.W.2d 621at 624 citing Harris v. State, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989). The appellate court focuses on whether the issue might possibly have prejudiced the jurors' decision making process. Id.

The application paragraph in this case, Paragraph VII of the charge , does not apply the law to the facts of the case. Paragraph VII of the charge as given to the jury read as follows:

"Now bearing in mind the foregoing instructions and definitions, if you believe from the evidence beyond a reasonable doubt that the Defendant, STEVEN LEE DRAKE, on or about the 17th day of February, 1996, within Austin, Travis County, Texas, did then and there directly cause or authorize a sign to be installed, used or maintained on a public right of way, located within the City's Planning Jurisdiction,, contrary to sections 13-2-864 and 13-1-70, of the code of the City of Austin, 1992, as amended, then you will find the Defendant 'Guilty' of the offense charged and so say by your verdict."

(CR: 00104-00105). The remainder of paragraph VII deals with "reasonable doubt." Id. Section 13-2-864 of the Code of the City of Austin in pertinent part reads as follows:

§ 13-2-864 PLACEMENT OF SIGNS ON UTILITY POLES OR IN PUBLIC RIGHT-OF WAY PROHIBITED.

(a) No person shall, either directly or indirectly, cause or authorize a sign to be installed, used, or maintained on any utility pole, traffic signal pole, traffic signal controller box, tree, public bench, street light, or any other structure located on or over any public property or public right-of-way, located within the city's planning jurisdiction, except as authorized by this article.

(b) The primary beneficiary of any sign installed in violation of this section shall be presumed to have authorized or caused, either directly or indirectly, the installation, use, or maintenance of the sign in violation of this section and shall be guilty of a violation of this Land Development Code.

Section 13-1-70 of the Code of the City of Austin gives the punishment for a violation of Section 13-2-864.

It was not disputed that the charge submitted to the Trial Court was written by the state (RR: 00159-146, lines 20-24). Appellant objected to the application paragraph (RR: 00159-146, line 20 through 155, line 4). Appellant

submitted a written request, Defendant's Requested Instruction Number Nine, to be substituted for the application paragraph in the charge offered by the prosecutor (Id. and CR: 00135-00136). The Trial Court overruled Appellant's requested instruction. (CR: 00136; RR: 00159-154, line 24 through 155, line 4).

As Appellant pointed out to the Trial Court , the application paragraph left out significant portions of the statute (RR: 00159-147-48). The Trial Court quoted the law in paragraph V of the charge (CR: 00103-00104). However, paragraph V does not give the section number of the statute being quoted. In the application paragraph, paragraph VII, the section number is given along with only a portion of the statute. A critical portion of the statute is not included in the application paragraph. As the Appellate Court pointed out in Gonzales, 800 S.W.2d at 624 (Tex. App.--Dallas 1990) the failure to apply the [relevant law] to the facts may have confused the jury.

Beggs, 597 S.W.2d at 379 pointed out that a failure to apply the law to the facts is "calculated to injure the rights of the defendant" (V.A.C.C.P., Article 36.19) to a trial by jury; it deprives him of a neutral unbiased application of the law, leaving that function to the partisan advocacy of opposing counsel. Id. As noted above, reversal is required if their error is "calculated to injure the rights of the defendant" which means simply that there must be "some harm." Almanza, 686 S.W.2d 157, 171.

Here, the jury very likely may have been confused as to the legal basis on which to reach their verdict. For that reason, and all the other reasons given in this section of the brief, the case should be reversed and remanded for a new trial.

IV. THE CONVICTION OF APPELLANT SHOULD BE REVERSED BECAUSE PROSECUTORIAL CONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL.

Since the record is contains many egregious tactics by the City Attorney, Mr. Moore, that necessarily inflamed and prejudiced the jury, the conviction should be reversed and remanded for a new trial. Although Mr. Moore's inflammatory and prejudicial actions differed from those of the prosecutor in Dakin v. State, 632 S.W.2d 864 (Tex. App.--Dallas 1982, pet. ref'd)(Continued improper questions and sidebar remarks denied defendant a fair trial), the case should be reversed and remanded for a new trial because they could serve no other purpose than to influence the jury. See also, Morris v. State, 755 S.W.2d 505 (Tex. App.--Houston [1st Dist.] 1988)(Considering the argument as a whole, the statements of the prosecutor could serve no other purpose than to influence the jury.); Scruggs v. State, 782 S.W.2d 499 (Tex. App.--Houston [1st Dist.] 1989, pet. ref'd)(Reversal required where prosecutor three times asked questions designed to place inadmissible evidence before the jury).

In voir dire, the Prosecutor, Mr. Moore, compared Appellant and pro-life demonstrators to the "KKK" (RR-00159:19, lines 9-15). Mr. Moore and Appellant's Attorney, Mr. Finney, approached the bench and the issue was addressed, Appellant objected, Judge Vasquez granted Mr. Finney's objection and request for an instruction, and as it ended up, Judge Vasquez suggested an apology and Mr. Moore apologized (RR-00159:19, line 16 through 21, line 24). This comparison of the Appellant to the KKK was highly inflammatory and prejudicial. As pointed out in brief above, Appellant was totally peaceful in all his activity at the scene of the alleged crime.

In voir dire, Mr. Moore argued, in effect, incorrect law of reasonable time, place, manner restrictions, and content neutrality (RR: 00159: 22, line 1 through

24, line 22). Mr.. Finney's objection was overruled, and Mr. Moore was allowed to argue the law of reasonable time, place, manner restrictions, and content neutrality. Id. As pointed out in this brief above, Mr. Moore's interpretation of the law was incorrect on both issues: the Sign Ordinance is not a reasonable time, place, and manner restriction, and it is not content neutral.

Mr. Finney's objection to Mr. Moore discussing with the jury panel the purpose of the Sign Ordinance without referencing anything in the Ordinance as to the purpose of the Ordinance was overruled, and Mr. Moore was allowed to continue in a way that was highly misleading and prejudicial (RR: 00159: 25, line 4 through 28, line 18).

During Mr. Finney's cross-examination of Officer McGowan, Mr. Moore made an improper objection which made it look as though Mr. Finney was trying to distort the law; and the objection was discussed at length at the bench. (RR: 00159: 78, line 5 through 80, line 21). Mr. Moore repeated this tactic again two times. (RR: 00159: 80, line 22 through 82, line 23; 87: line 24). This was misleading and inflammatory to the jury in that it struck at Appellant by improperly suggesting that Mr. Finney was trying to mislead the jury.

Mr. Moore improperly questioned Appellant about other criminal charges, incorrectly stated that Appellant testified that he never had any other criminal charges, and stated that Mr. Finney had opened the door to questions about another pending violation of the Sign Ordinance charge. (RR: 00159: 130, line 21 through 136, line 17). Judge Vasquez instructed the jury that questioning was for purposes of impeachment only (RR: 00159: 133, lines 20 - 134, line 1). Appellant's testimony had been that he had never had anything above a traffic ticket or a Class C misdemeanor filed against him (RR: 00159: 116, lines 11-14). He never testified under direct that he had never been convicted or charged with a Class C misdemeanor. Mr. Finney pointed this out to Judge Vasquez (RR:

00159: 134, lines 18-22) who overruled Mr. Finney's objection and later told the jury in effect that this was done for the limited purpose of showing that Appellant [lied] earlier (RR: 00159: 134, lines 23-24). Nor did Mr. Finney open the door to questioning about Class C Misdemeanor charges or convictions. Nonetheless, Mr. Moore was allowed to and did question Appellant about such charges. This was highly prejudicial and inflammatory, and in and of itself is grounds for mistrial.

Judge Vasquez allowed Mr. Moore, over Mr. Finney's objection, to question Appellant about using alternative means of communicating (RR: 00159: 137, lines 14-1139, line 23).

To allow the above tactics was highly prejudicial and inflammatory (especially when analyzed cumulatively) and distorted the law, thereby denying Appellant a fair trial and Due Process under the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

Appellant respectfully that the Court grant the following relief to him:

A. Reverse the Trial Court's Judgment and Render judgment holding unconstitutional under the United States and Texas Constitutions and the laws of Texas Chapter 13 of the Austin Land Development Code (the Sign Ordinance) of the City of Austin and Order that the Complaint be dismissed o the ground of such unconstitutionality and unlawfulness (Point of Error No. I);

B. If the Court does not grant the relief requested in Paragraph A, Reverse the Trial Court's Judgment and Render judgment acquitting the Appellant of the charge on the ground that the Sign Ordinance of the City of Austin is unconstitutional and unlawful under the United States and Texas Constitutions

and Texas law as applied to the facts of the case, or that the Sign Ordinance does not apply to the complained of conduct of Appellant (Points of Error No. I);

C. If the Court does not grant the relief requested in the above paragraphs, Reverse the Trial Court's Judgment and Remand the cause for a new trial (Points of Error No. II, III, and IV);

D. Grant to appellant such other, and further, relief to which he is entitled justly or which the Court believes to be necessary or appropriate in the interests of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I served a true copy of the foregoing Brief on the State of Texas in the within cause by delivering the same to the offices of the City of Austin, Texas at 700 East 7th Street, Austin, Texas 78701.

Date: July 23, 1998

Jerald C. Finney