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Criminal Procedure: Pretrial, Trial and Appeal

M. Scott Barnard

Edwin T. Aradi

Kevin N. Barrett

Jesse Z. Weiss

CRIMINAL PROCEDURE: PRETRIAL, TRIAL AND APPEAL

*M. Scott Barnard**
*Edwin T. Aradi***
*Kevin N. Barrett****
*Jesse Z. Weiss*****

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THIS article will review the most significant decisions rendered during the last term by the Texas Court of Criminal Appeals and the United States Supreme Court. Both courts continue the trend of deciding the merits of the case if the error has been substantially preserved.

* Trinity University, B.A., 1994, Southern Methodist University School of Law, J.D., 1997, cum laude. Mr. Barnard is an associate with Akin, Gump, Strauss, Hauer & Feld, L.L.P., in the litigation and white collar crime sections. He served as an assistant district attorney for the Dallas County District Attorney's Office in 2000.

** University of Oklahoma, B.A., 1995; University of Texas, J.D., with honors, 2000. Mr. Aradi is an associate with Akin, Gump, Strauss, Hauer & Feld, L.L.P., in the litigation section. He served as an assistant district attorney for the Dallas County District Attorney's Office in 2001-2002.

*** Baylor University, B.B.A., 1981, St. Mary's University School of Law, J.D., 1987. Mr. Barrett is an associate with Akin, Gump, Strauss, Hauer & Feld, L.L.P.'s litigation section and a former criminal defense attorney.

**** University of Texas, B.A., 1995, University of Iowa College of Law, J.D., 1999. Mr. Weiss is an associate with Akin, Gump, Strauss, Hauer & Feld, L.L.P., in the litigation and appeals sections. He served as judicial clerk to Hon. Kathleen Bletz, Chief Justice, Minnesota Supreme Court, in 1999-2000.

I. PRETRIAL

A. INDICTMENT

In *Santana v. State*, the defendant appealed his conviction for Class A misdemeanor mischief arising out of his unpaid siphoning of electrical power from a utility line.[1] The court first held that, under Texas Penal Code § 28.03,4 the State did not need to prove pecuniary loss as an element of Class A misdemeanor criminal mischief because the defendant's conduct was within the class described in section 28.03(b)(3)(B), *i.e.*, tampering with a public utility.[2] The court also held that any variance between the information and the evidence at trial was not material or prejudicial.[3] The information charged that defendant diverted power from a meter and prevented power from being correctly registered. The defendant claimed that this varied from the evidence at trial because he could not have diverted power from the meter because it was broken and that he did not prevent power from being registered because he never actually tampered with the meter. The court held that the defendant did not sustain his burden of demonstrating surprise or prejudice because the information informed the defendant of the charge against him sufficiently to prepare for trial and would prevent appellant from being prosecuted again from diverting the electricity that was the subject of the current prosecution.[4]

Hopkins v. State,[5] dealt with an appeal of a district court's denial of Defendant's motion to quash complaint and information. Appellant argued that Texas Code of Criminal Procedure article 21.21(6) requires that an information show that the charged offense was committed on a date prior to the filing of the information. In *Hopkins*, the complaint and information, charging driving while intoxicated, were filed approximately seven hours after the offense occurred. The Court held that article 21.21(6) requires only that an information reflect that the offense was committed before the information was filed. Here, the combination of the state's "on or before" language, together with the state's use of past tense ("did . . . operate"), sufficiently reflected that the offense was committed prior to filing.

In *Gollihar v. State*,[6] when faced with a sufficiency of the evidence issue based on the difference between the proof and the indictment, the court held only a "material" variance will render the evidence insufficient. Accordingly, "[a]llegations giving rise to immaterial variances may be disregarded in the hypothetically correct charge, but allegations giving rise to material variances must be included."[7]

1. 59 S.W.3d 187 (Tex. Crim. App. 2001).
2. *Id.* at 195.
3. *Id.*
4. *Id.* at 195-96.
5. 46 S.W.3d 896 (Tex. Crim. App. 2001).
6. 46 S.W.3d 243, 257 (Tex. Crim App. 2001).
7. *Id.*

B. VOIR DIRE

In *Wamget v. State*, the court of criminal appeals addressed whether race may be a factor in exercising a peremptory challenge if coupled with a non-racial reason.[8] During voir dire the prosecutor stated that he chose to exercise a peremptory challenge on a venireperson because she spoke up more during the defense's voir dire, because she was unemployed, and because she was born in Liberia.[9] The defendant argued that the prosecutor's reference to Liberia was an improper reason for exercising a strike under *Batson v. Kentucky*.[10] In affirming the trial court and the court of appeals, the court of criminal appeals held that the defendant had failed to sustain its burden of showing that the excluded juror was a member of a particular ethnicity because ethnicity or ancestry does not equate with a person's place of birth.[11]

In *Johnson v. State*, the court of criminal appeals held that the process used to demonstrate harm caused by the denial of a challenge for cause did not change by the promulgation of Rule 44.2(b) of the Texas Rules of Appellate Procedure.[12] This rule states that "[a]ny other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[13] Before the promulgation of this rule, harm was shown when the appellant used a peremptory challenge to cure the erroneous denial, exhausted his peremptory challenges, was denied a request for an additional peremptory challenge, and identified an objectionable venireperson who sat on the jury.[14] The court explains that there is no burden to show harm by a defendant who appeals, but rather it is the responsibility of the appellate court to assess harm after reviewing the record.[15] The court finds that in this particular case (but not necessarily in all cases) the defendant showed harm through the demonstration of the usual steps and thus his substantial rights had been affected.[16]

In *Wadrip v. State*, the appellant appealed his conviction for capital murder.[17] The jury answered a special issue finding that the defendant's conduct was deliberate.[18] The court first holds that the deliberateness special issue is reviewed under the factual sufficiency standard of review because, unlike future dangerousness, it requires a finding of historical fact.[19] The court goes on to reject appellant's insufficiency challenge, finding that appellant's admitted anger and his urge to "lash out" was

8. No. 926-00, 2001 Tex. Crim. App. LEXIS 64 (Tex. Crim. App. Sept. 12, 2001).
9. *Id.* at *2.
10. *Id.* at *2 (citing Batson v. Kentucky, 476 U.S. 79 (1986)).
11. 2001 Tex. Crim. App. LEXIS, at *22.
12. 43 S.W.3d 1, 2 (Tex. Crim. App. 2001).
13. TEX. RULE APP. PROC. § 44.2(b).
14. *Johnson*, 43 S.W.3d at 2.
15. *Id.* at 4.
16. *Id.* at 7.
17. 56 S.W.3d 588 (Tex. Crim. App. 2001).
18. This special issue is no longer submitted in trials for offenses committed on or after September 1, 1991. TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(b), (g) (Vernon 2001).
19. *Wadrip*, 56 S.W.3d at 599-91.

indicative of deliberateness. The court also rejected defendant's challenge to the insufficiency challenge to the jury's affirmative finding of future dangerousness, holding that the circumstances of the charged offense can be among the factors considered in assessing the likelihood of a defendant to harm others in the future.[20]

In *Jester v. State*, the court of appeals held that consideration is an element of the gambling offenses.[21] Appellant was convicted on five counts of misdemeanor gambling based on the use of eight-liner machines at his store. Considering that the definitions for "bet, gambling device, and lottery" all include consideration, the court held that consideration must be found as an element for conviction.[22] The court further found, however, that appellant was not entitled to his requested jury instruction on consideration because it was merely a negative definition of consideration, an element the state was required to prove beyond a reasonable doubt.[23] Finally, the court held that there was sufficient evidence of consideration because the jury was free to believe that the distribution of phone cards in exchange for customer's bets was merely a pretense to evade the law and thus did not negate the element of consideration.[24]

In *Standefer v. State*, the court of criminal appeals addressed whether asking a juror during voir dire "would you presume someone guilty if he or she refused a breath test on their refusal alone?" was an improper attempt to commit the juror.[25] The court first defines a commitment question as one that attempts to bind a juror to a verdict based on a hypothetical set of facts.[26] The court then states that commitment questions, while usually improper, may be proper if the law requires a certain type of commitment from jurors, *e.g.* whether they can consider the full range of punishment. Finally, to be a proper commitment question, it must contain "only those facts necessary to test whether a prospective juror is challengeable for cause."[27] Applying these principles to the question asked by defense counsel, the court found the question objectionable because a breath test refusal may be used to convict a defendant charged with driving while intoxicated and "[a]bsent statutory direction a challenge for cause based upon the sufficiency implications of an item of evidence would be inappropriate."[28]

20. *Id.* at 594.
21. 64 S.W.3d 553 (Tex. App.—Texarkana Dec. 5, 2001, no pet. h.).
22. *Id.* at *5.
23. *Id.* at *8.
24. *Id.* at *12.
25. 59 S.W.3d 177 (Tex. Crim. App. 2001).
26. *Id.* at 179.
27. *Id.* at 182.
28. *Id.* at 183.

II. TRIAL

A. EVIDENCE

Mata v. State,[29] is an appeal of a district court's denial of appellant's motion to suppress, after State's expert based testimony that appellant was legally intoxicated at the time of his arrest for suspicion of DWI on retrograde extrapolation of Appellant's blood alcohol content two hours after his arrest. The court explained Texas Rule of Evidence Rule 702's requirements that (1) the expert must be able to clearly explain the application of the science to the court; (2) the expert must demonstrate some understanding of the difficulties inherent in retrograde extrapolation; (3) the expert must demonstrate awareness of the risks and subtleties of retrograde extrapolation; and (4) the expert must be able to apply the science consistently and clearly.[30] Moreover, the court must consider: (1) the length of time between the offense and the subsequent tests; (2) the number and timing of the tests given; and (3) whether the expert knew of any individual characteristics of the defendant tending to alter the typical assumptions employed in retrograde extrapolation (e.g., high body weight). Noting that the expert's testimony in this case was based on no knowledge of any individual characteristics of the defendant and only a single breath test, conducted more than two hours after arrest, the court concluded that the State had not proven reliability by clear and convincing evidence. The court of criminal appeals remanded to the court of appeals for a determination of the harm caused appellant by admission of the expert's testimony.[31]

Maxwell v. State[32] dealt with an appeal to determine whether the district court committed reversible error in failing to permit appellant to impeach a key State witness by attempting to show that the witness was serving deferred adjudication probation at the time of trial. Here, the witness was serving deferred adjudication probation for a 1996 charge of possession of cocaine and had been convicted of possession of marijuana in 1998, thus violating the terms of his deferred adjudication. The court reversed the court of appeals' affirmance, holding that the introduction of a witness' potential motive, bias, or interest through evidence of his deferred adjudication probation was permissible, and it remanded the case to the court of appeals for a harm analysis.[33]

In *Bustamante v. State*,[34] during the defendant's murder trial, in which he had not testified, his counsel asked a State's witness what types of gangs were in Bustamante's neighborhood. The State objected, and the judge stated "as soon as I hear from the defendant, we'll get into it."[35]

29. 46 S.W.3d 902 (Tex. Crim. App. 2001).
30. *Id.* at 916.
31. *Id.* at 917.
32. 48 S.W.3d 196 (Tex. Crim. App. 2001).
33. *Id.* at 200.
34. 48 S.W.3d 761 (Tex. Crim. App. 2001).
35. *Id.*

The court of appeals held that comments by the judge were excluded from analyses based on *McCarron v. State*,[36] which held that error arises only when comments as to the defendant's failure to testify are made after the defendant closes his case. The court reversed, holding that this was a misapplication of *McCarron*, in which timing of the comment was relevant, not dispositive.[37]

In *Vasquez v. State*,[38] the appellant contended that evidence was insufficient to support jury's deadly weapon finding because the only testimony purporting to establish this fact came from an accomplice, and was otherwise uncorroborated, and that Texas Code of Criminal Procedure art. 38.14 requires corroboration. The court of appeals held that the article requires corroboration where the deadly weapon finding is entered because of the jury finding appellant guilty as charged in the indictment.[39] Nevertheless, the court of appeals found sufficient corroborating evidence in the record. The court of criminal appeals affirmed, holding that because the court of appeals found non-accomplice evidence connecting appellant to the crime charged, there was no need for non-accomplice corroborating testimony connecting him to the use of a deadly weapon.[40]

1. Fourth Amendment

In *Hernandez v. State*, the court of criminal appeals reversed the lower court's determination that admission of evidence seized in violation of the Fourth Amendment was non-constitutional error.[41] Appellant was convicted for possession of cocaine with the intent to deliver. The court of appeals found that the evidence was seized in violation of appellant's Fourth Amendment rights and should have been excluded, but that such error was non-constitutional.[42] In reversing, the court of criminal appeals held that because exclusionary rules are constitutionally based as they are "derived from liberties and restrictions contained in the amendments" the harm analysis based on an error in the admission of evidence obtained in violation of the Fourth Amendment must be the constitutional standard of Texas Rule of Criminal Procedure 44.2(a).[43]

In *Illinois v. McArthur*, police officers, with probable cause to believe respondent McArthur had hidden marijuana in his home (a statement from his wife), prevented him from entering the home, unless accompanied by a police officer, for about two hours while they obtained a search warrant.[44] Once they obtained the search warrant, the officers found drug paraphernalia and 2.5 grams of marijuana.

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36. *Id.* at 764 (citing McCarron v. State, 605 S.W.2d 589 (Tex. Crim. App. 1980)).
37. *Id.* at 766.
38. 56 S.W.3d 46, 47 (Tex. Crim. App. 2001).
39. *Id.*
40. *Id.* at 48.
41. No. 861-00, 2001 Tex. Crim. App. LEXIS 104 (Tex. Crim. App. Nov. 14, 2001).
42. *Id.* at *2.
43. *Id.* at *5-6.
44. 531 U.S. 326 (2001).

The circuit court granted defendant's motion to suppress the evidence as the fruit of an unlawful seizure, that is, "the refusal to let him reenter his home unaccompanied."[45] The State appealed. The appellate court affirmed; the Illinois state court denied the State leave to appeal, and the Supreme Court granted certiorari. The Supreme Court held that given the nature of the intrusion and the law enforcement interests at stake, the brief seizure of the premises was reasonable and did not violate the Fourth Amendment. The Court found that since the police had probable cause to believe drugs were on the premises, the evidence would have been destroyed if McArthur had been allowed to reenter the trailer alone, the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy, and the restraint was for a limited time that was no longer than necessary, the search was reasonable.[46]

In *Ferguson v. City of Charleston*, the petitioners, ten maternity patients at the Medical University of South Carolina ("MUSC") who were arrested after testing positive for cocaine in urine tests administered by the hospital pursuant to a policy developed in conjunction with the police department, sued MUSC, hospital personnel and various state, city, and police officials.[47] The patients claimed that the tests were warrantless, nonconsensual searches conducted for criminal investigation purposes, and therefore, unconstitutional. Respondents contended that the searches were consensual, and that even if there was no consent, the searches were reasonable because they were justified by a non-law enforcement purpose.

The district court held that the tests were not done for an independent purpose, since there was an agreement that the police would be called if drug tests were positive.[48] The district court instructed the jury that unless they found that the tests were consensual, they were required to find for the petitioners. The jury found for the respondents. The Fourth Circuit affirmed. The Supreme Court reversed and remanded the Fourth Circuit's judgment. The Court held that the tests were "searches" within the meaning of the Fourth Amendment and that in view of the hospital policy's law enforcement purpose, the test and the reporting of positive tests to the police were unreasonable searches absent the patient's consent. The Court found that patients undergoing tests at a hospital have a reasonable expectation that the results of any tests will not be shared with non-medical personnel without the patient's consent.[49]

In *Atwater v. City of Lago Vista*,[50] the appellant was arrested for failing to wear a seatbelt, which is a fine-only offense in Texas. The officer arrested appellant and took her to jail. Appellant plead no contest, but she

45. *Id.* at 326.
46. *Id.* at 331-32.
47. 532 U.S. 67 (2001).
48. *Id.* at 73-74
49. *Id.* at 78.
50. 532 U.S. 318 (2001).

appealed based on the Fourth Amendment right to be free from unnecessary seizure. The United States Supreme Court rejected appellant's request to make a new rule of constitutional law that would prohibit officers from making an arrest, even with probable cause, if the conviction was a fine only offense and there was no need for immediate detention. Acknowledging the somewhat egregious facts of this particular case, the Court refused to create standards for the Fourth Amendment that would lead to sensitive case-by-case determinations of the officer's need and, as a result, found the arrest satisfied the constitutional requirements.[51]

In *Badgett v. State*,[52] appellant was arrested for suspicion of drunk driving after a car accident and refused to give a blood sample voluntarily, so one was taken at the hospital pursuant to §724.012(b) of the Texas Transportation Code against appellant's wishes. Appellant filed a motion to suppress the sample which was denied. On appeal, the court of criminal appeals reversed and remanded the case because the sample was not given in compliance with § 724.012(b). Under § 724.012(b), to take a blood sample: 1) there has to be a life-threatening accident; 2) the defendant must be arrested for DWI; and 3) the arresting officer have had reason to believe that the accident happened as a result of the offense. The court of criminal appeals held that the officer's belief must be based upon specific and articuable facts apart from the accident and the driver's intoxication and, as a result, the case was reversed and remanded to get the basis of the officer's belief regarding causation.[53]

In *Garcia v. State*,[54] police officers responded to an anonymous tip that Defendant was in the possession of marijuana. Police followed defendant's truck and eventually stopped the vehicle. While pursing the vehicle, a child inside repeatedly looked back at the police officer tailing the truck. At the stop, the child had its seat belt on, but one of the passengers did not have his seat buckle fastened and the driver could not produce valid insurance. Upon questioning the driver about possession of marijuana, he consented to the searching of his residence and another car, leading the police to find over 400 pounds of marijuana. Defendant filed a motion to suppress, which was denied, and then plead guilty. The court of appeals reversed the trial court's ruling on the motion to suppress, finding that the police did not have reasonable suspicion to stop the car. The court of criminal appeals agreed, finding that the mere fact that the child passenger looked back several times was not enough to support a stop for failing to wear a seat belt. Accordingly, the court held that there was not enough evidence to support the officer having reasonable suspicion to stop the truck based on a belief the child was not wearing a seat belt.[55]

51. *Id.* at 347.
52. 42 S.W.3d 136, 137 (Tex. Crim. App. 2001).
53. *Id.* at 138-39.
54. 43 S.W.3d 527 (Tex. Crim. App. 2001).
55. *Id.* at 531-32.

In *Amir v. State*,[56] the defendant appealed a denial of a motion to suppress in which the defendant argued that the Houston Police Department's search of the premises exceeded the scope of the warrant. The premises at issue was a building divided into two halves, each with its own address. Police search the side of the building covered by the warrant and continued into the other side of the building where they found cocaine, paraphernalia and a gun. Relying in part on similar federal cases such as *United States v. Prout*,[57] the court of criminal appeals held that the search was valid because the record indicated that the defendant had manipulated the address of the second area and that the second area was at one point listed as defendant's residence.[58]

2. *Fifth Amendment*

In *Griffith v. State*, the appellant argued that his constitutional rights were violated by the admission, as substantive evidence of guilt, of a recording of his request for counsel when he was asked to take a breath-alcohol test as part of a DWI investigation.[59] The court of criminal appeals first held that because the appellant's statements were not produced by custodial interrogation, the appellant had no Fifth Amendment right to counsel, and consequently there was no constitutional right infringed.[60] Similarly, the defendant's Sixth Amendment right to counsel had not attached because appellant did not become an "accused" protected by the Sixth Amendment simply because the State had detained him with the intent of filing charges against him.[61] Finally, appellant had not been compelled to testify against himself in violation of the Fifth Amendment because appellant had in no way been coerced into requesting an attorney.[62]

In *Burden v. State,* the court of criminal appeals held that a defendant charged with promotion of obscenity need not know that a videotape is obscene to be convicted, but need only know the material's content and character.[63] The statute making promotion of obscenity a crime still contains a scienter requirement as it states that a person commits an offense if "knowing its content and character, he promotes . . . with intent to promote any obscene material or obscene device."[64] Additionally, the court held that it was not error for the trial court to exclude the defendant's proffered evidence obtained from the internet because he failed to demonstrate a resemblance between the proffered evidence and the allegedly obscene materials and because he did not present proof that the

56. 45 S.W.3d 88 (Tex. Crim. App. 2001).
57. *Id.* at 91 (citing United States v. Prout, 526 F.2d 380 (5th Cir. 1976)).
58. *Id.* at 89.
59. 55 S.W.3d 598 (Tex. Crim. App. 2001).
60. *Id.* at 603.
61. *Id.* at 604.
62. *Id.* at 607.
63. 55 S.W.3d 608, 614 (Tex. Crim. App. 2001).
64. TEX. PENAL CODE § 42.23 (West 2001).

internet materials were accepted in the community.[65]

In *State v. Boyd*, appellees were charged with failure to report a hazing incident which occurred on the campus of Texas A&M University.[66] The trial court granted appellees' motion to dismiss the charge based upon its determination that Texas Education Code Annotated, section 37.152(a)(4) is unconstitutional as applied to the appellees. The court of appeals affirmed the trial court's dismissal of the charge. The Court of Appeals stated that section 37.152(a)(4) of the Texas Education Code compelled disclosure of such information from the appellees and that it created a real and appreciable risk of self-incrimination and was therefore unconstitutional.[67]

The court of criminal appeals reversed the court of appeals judgment. The court found that while the court of appeals correctly determined that section 37.152(a)(4), standing alone, violates the Fifth Amendment, the court of appeals, however, failed to sufficiently analyze the immunity provision to the hazing statute contained in the Texas Education Code Annotated section 37.155 (Vernon 1996). The immunity from civil or criminal liability granted in section 37.155 is "sufficient to remove any real or appreciable hazard of self-incrimination and to compel reporting over a claim of privilege."[68]

In *Nonn v. State*,[69] appellant was convicted of capital murder and appealed on the basis that the trial court erred in admitting appellant's confession made in Illinois into evidence at trial. The court of criminal appeals drew comparisons to *Davidson v. State*,[70] in that the court there held that the rule of conflict-of-law resolution is that the law of the forum in which the judicial proceeding is held determines the admissibility of evidence. However in this case, the court of criminal appeals held that these statements should not have been admissible at trial. The focus was on article 38.22 which deals with electronic recordings and does not make any distinction between in-state and out-of-state oral statements. Since the appellant's confession in Illinois did not comply with article 38.22, the confession was improper and should not have been admitted into evidence. Accordingly, the court vacated the decision and remanded the case for a new trial.[71]

3. *Sixth Amendment*

In *Thompson v. State*, following appellant's conviction for murder the State introduced evidence that appellant, while awaiting trial in prison, had sought to hire someone to murder the State's two key witnesses.[72]

65. *Burden*, 55 S.W.3d at 616-17.
66. 38 S.W.3d 155, 156 (Tex. Crim. App. 2001).
67. *Id.* at 156.
68. *Id.*
69. 41 S.W.3d 677 (Tex. Crim. App. 2001).
70. *Id.* (citing Davidson v. State, 25 S.W.3d 183 (Tex. Crim. App. 2001)).
71. *Id.* at 185.
72. No. 73,431, 2001 Tex. Crim. App. LEXIS 87 (Tex. Crim. App. Oct. 24, 2001).

The State, relying on a tip from another inmate, utilized an undercover officer to tape record appellant attempting to solicit someone to murder witnesses. Appellant claimed that the admission of the tape recording violated his Sixth Amendment right to counsel because the State knew defendant was awaiting trial and yet did not disclose that he was being interrogated by the State. The court agreed. While it is true that such informants may be used to elicit evidence pertaining to criminal conduct that has not yet been charged, here the evidence was used *in the same case* to help the State establish that appellant posed a continuing threat to society.[73]

In *Thumann v. State*, the court of criminal appeals upheld appellant's conviction for theft.[74] The court initially found that there was sufficient evidence on which to base appellant's conviction because even if the jury believed that appellant was a business partner of the victim, a partner does not have the right to deal with partnership property as his own, *i.e.*, sell it and retain the proceeds.[75] The court also found that the defendant was not entitled to a jury instruction on the defense of ownership because this instruction would do nothing more than negate the consent element of the theft offense.[76]

B. JURY CHARGE

In *Johnson v. State*,[77] the court of criminal appeals vacated and remanded the defendant's sentence when the trial court denied two of the defendant's challenges to jury members for cause. The court of criminal appeals held that the defendant had properly shown harm by: 1) using peremptory challenges to remove the venire members; 2) exhausting his peremptory challenges; 3) requesting additional peremptory challenges and was denied; 4) identifying two objectionable venire members who ultimately sat on the jury; and 5) indicating on the record that he would have used additional peremptory challenges to strike these two objectionable jury members. Because Defendant showed harm in the trial court's ruling, the Court granted Defendant a new trial.

In *Ferrel v. State*, the court of criminal appeals expounded on the defendant's entitlement to jury instructions on defenses and on lesser-included offenses.[78] The appellant was convicted of aggravated assault for striking and killing a fellow bar patron with a beer bottle.[79] Defendant requested, and was denied, jury instructions on self-defense and the lesser-included offense of misdemeanor assault. The court held that in order to be entitled to an instruction on misdemeanor assault there must be some evidence that the victim did not suffer serious bodily injury and

73. *Id.* at *26.
74. 62 S.W.3d 248 (Tex. App.—Houston [1st Dist.] 2001, no pet. h.).
75. *Id.* at 252.
76. *Id.*
77. 43 S.W.3d 1 (Tex. Crim. App. 2001).
78. 55 S.W.3d 586 (Tex. Crim. App. 2001).
79. *Id.* at 587.

that the defendant did not use or exhibit a deadly weapon.[80] Because the evidence conclusively showed that the victim had, in fact, been killed, the defendant was not entitled to the lesser-included offense instruction.[81] Finally, the court held that because the defendant used deadly force, he was not entitled to the self-defense instruction he requested under section 9.31 of the Texas Penal Code because that section is reserved for cases involving non-deadly force.[82]

In *Hammock v. State*,[83] the appellant contended that Texas Rule of Evidence 105(a) does not require that an objection and request for limiting instruction be made at the time the testimony in question is admitted, in order for one to be entitled to a limiting instruction. The court disavowed *Garcia v. State*[84] to the extent that it held that an objection to admission of testimony is required before a limiting instruction can be requested. However, the court declined to disavow *Garcia*'s requirement that a limiting instruction must be requested at the time the objectionable testimony is admitted. The court's underlying rationale was that limiting instructions that are requested long after the objectionable testimony is admitted are simply not effective.[85]

C. PUNISHMENT

In *Scott v. State*, the appellant claimed that the State had unlawfully enhanced a subsequent charge with a successfully completed deferred adjudication.[86] Appellant pled guilty in 1991 to the offense of indecency with a child and received deferred adjudication probation, which he completed successfully. He was later convicted of aggravated sexual assault, and the trial court permitted the State to use appellant's prior deferred adjudication to enhance appellant's sentence.[87] The trial court relied on section 12.42 of the Texas Penal Code, which provides that a life sentence must be assessed to a defendant who commits aggravated sexual assault if the defendant has been convicted of a sexual offense enumerated in the section, including indecency with a child.[88] However, prior to a 1997 amendment of section 12.42, a deferred adjudication was not considered a conviction under section 12.42.[89] Because the amendment occurred subsequent to appellant's conviction, application of the section violated the ex post facto clause of the United States Constitution.[90]

In *Jordan v. State*, the appellant pled guilty to the second degree felony of delivery of more than one but less than four grams of cocaine and was

80. *Id.* at 589.
81. *Id.* at 591.
82. *Id.* at 592.
83. 46 S.W.3d 889, 890 (Tex. Crim. App. 2001).
84. 887 S.W.2d 862 (Tex. Crim. App. 1994).
85. *Hammock*, 46 S.W.3d at 893.
86. 55 S.W.3d 593, 595 (Tex. Crim. App. 2001).
87. *Id.* at 595.
88. TEX. PENAL CODE ANN. § 12.42(c)(2)(A), (c)(2)(B) (Vernon 2001).
89. *Scott*, 55 S.W.3d at 595-96.
90. *Id.* at 597-98.

placed on deferred adjudication community supervision.[91] Later, the district court revoked Jordan's community supervision. Immediately after the revocation of community supervision, and during the same proceeding, Jordan plead guilty to the unauthorized use of a motor vehicle, a state jail felony. The prior conviction (the revocation) was then used to permit a two-year sentence of incarceration on the unauthorized use of a motor vehicle charge under the then existing version of Texas Code of Criminal Procedure, article 42.12 § 15.

The court of appeals held that the trial court could not impose a prison sentence on the defendant for the motor vehicle charge, since the cocaine charge was not final. The court of criminal appeals affirmed the court of appeals decision. The court held that at the time the trial judge sentenced the appellant to state jail in connection with the primary offense of unauthorized use of a motor vehicle, the appellant still had the opportunity to file a motion for new trial in the proceedings involving the drug delivery charge, therefore the prior conviction was not final and could not be used to deny the appellant community supervision in the primary offense.[92]

In *Orrin Waits v. State*,[93] appellant was convicted of a state-jail felony, possession of a controlled substance. The jury found the enhancement allegations to be true and appellant was sentenced to fifteen years. The court of appeals affirmed, holding that section 12.42(a)(2) of the Texas Penal Code permits two sequential prior felony convictions, one of which is for a state-jail felony, to enhance a non-aggravated state-jail felony to a second-degree felony. The court remanded for consideration in light of the holding in *Campbell v. State*,[94] issued two months before this case, that the terms "felony" and "state-jail felony," as used in section 12.42.(a)(2), are mutually exclusive.[95]

In *Ex parte Millard*,[96] Millard brought a writ of habeas corpus to have the court decide the question of whether a state inmate who is accidentally released while serving two consecutive sentences is entitled to credit on both sentences for the time in which he was unconfined. Millard was erroneously paroled through no fault of his own. He was not eligible for parole on the first sentence because the second sentence was to begin whenever the first sentence terminated, and he was not eligible for parole on the second sentence because he had not yet served enough of it. The court held that Millard was entitled to receive credit for his unconfined time.[97]

In *Pettigrew v. State*,[98] appellant was convicted in 1995 of aggravated sexual assault and was given ten years of community supervision in lieu of

91. 36 S.W.3d 871 (Tex. Crim. App. 2001).
92. *Id.* at 877.
93. 46 S.W.3d 888 (Tex. Crim. App. 2001).
94. 49 S.W.3d 874 (Tex. Crim. App. 2001).
95. *Id.* at 889.
96. 48 S.W.3d 190 (Tex. Crim. App. 2001).
97. *Id.* at 193-94.
98. 48 S.W.3d 769, 770 (Tex. Crim. App. 2001).

a ten-year sentence. Appellant subsequently committed a murder and was sentenced to 75 years. The district court revoked his community supervision and sentenced him to ten years for the 1995 assault, stacking the sentence onto the 75-year murder sentence. The court of appeals held that the sentences could not be stacked because the assault conviction was prior to the murder conviction, stacking is dependent on the order of convictions, and only subsequent convictions can be stacked. The court of criminal appeals reversed, holding that, for purposes of stacking, a case can be treated as a "conviction" when the sentence is either suspended or imposed.[99] Therefore, for purposes of stacking, the district court had the discretion to treat the assault conviction as occurring when the sentence was suspended, or when it was imposed.

In *Lofton v. State*,[100] the court of criminal appeals held that the trial court did not err in not including lesser included offenses in the jury charge and that, as a result, the defendant suffered some harm. The test espoused by *Wesbrook v. State*[101] requires: (1) that the lesser-included offense must be included within the proof necessary to establish the offense charged, and (2) some evidence must exist in the record to permit a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser included offense. The defendant, who was convicted for assault of a public servant, claimed he was entitled to an instruction regarding the lesser included offense of resisting arrest. The court of criminal appeals found that since the defendant had struck the arresting officer in the face twice prior to the arrest, there was no reason for the jury to believe that resisting arrest was a viable alternative to assault of a police officer. Since the second prong of the *Wesbrook* test was not met, the conviction was allowed to stand.

In *Campbell v. State*, the appellant was convicted in district court of possession of cocaine weighing less than one gram with the intent to deliver,[102] an unaggravated state jail felony punishable under section 12.35(a) of the Texas Penal Code. After appellant pled true to allegations of two prior state jail felony convictions, the jury assessed punishment at eight years confinement. Campbell appealed, complaining that the trial court erred by instructing the jury that under section 12.42(a) of the Texas Penal Code the range of punishment for an unaggravated state jail felony punishable under section 12.35(a) with two prior sequential state jail felony convictions is two to twenty years confinement, a second degree felony rather than two to ten years, a third degree felony. The court of appeals affirmed the appellant's conviction. The court of criminal appeals reversed and remanded for a new punishment hearing. The court held that as used in subsection 12.42(a) the terms "felony" and "state jail felony" are mutually exclusive; a defendant charged under subsection

99. *Id.* at 771.
100. 45 S.W. 3d 649 (Tex. Crim. App. 2001).
101. 29 S.W.3d 103 (Tex. Crim. App. 2000).
102. *Campbell*, 49 S.W.3d at 874-75.

12.36(a) who has previously acquired only state jail felony convictions, whether sequential or non-sequential, must be punished for a third degree felony under subsection 12.42(a)(1), rather than a second degree felony under subsection 12.42(a)(2).[103]

In *Carroll v. State*, Appellant pled guilty in district court to two counts of delivery of marijuana.[104] The trial court accepted her pleas and sentenced her to concurrent five year sentences and a $5,000 fine. Defendant appealed her sentence, alleging that the trial court erred by coercing her to testify at the sentencing phase of her hearing. The court of appeals initially reversed and remanded, but thereafter, withdrew its opinion and affirmed the lower court decision.

Upon review to the court of criminal appeals, the court found that the appellant's guilty plea did not waive her right against self-incrimination as to sentencing. The court recognized that the law at the time of the appellant's plea was unsettled on this matter. It became settled with the United States Supreme Court's decision in *Mitchell v. United States*.[105] In Mitchell, the Supreme Court ruled that although the witness has pleaded guilty to a crime charged but has not been sentenced, his constitutional privilege remained unimpaired. In the instant case, although the appellant was warned about the waiver of her right to silence in the guilt phase, she did not receive a similar warning in the sentencing phase. In fact, the trial court told her that she did not have any such right. From the facts before it, the court stated it could not conclude that the appellant knowingly, voluntarily, or intelligently waived her Fifth Amendment right against self-incrimination. Neither could the court conclude, after *Mitchell*, that the trial court may consider invocation by the appellant of her right to silence as a circumstance against her when determining her punishment. The case was reversed and remanded.[106]

In *Cooper v. State*,[107] appellant attempted to negate a plea bargain he entered into for his felony offense because he claimed it was not knowing and voluntary because the trial court did not fully admonish appellant about his waiver of a right to appeal. The court of criminal appeals upheld appellant's sentence, holding that the voluntariness of a guilty plea cannot be raised on appeal from a plea-bargained conviction because the legislature barred this type of appeal in a 1977 amendment to Texas Code of Criminal Procedure article 44.02. Additionally, the court reasoned that a cost-benefit analysis leans in favor of denying such appeals because the number of felony cases in which a plea is not entered into voluntarily is relatively small compared to the glut of meritless appeals the court would be faced with if such an appeal was allowed.[108]

In *Ex parte Busby*, the applicant was convicted in June 1988 of theft

103. *Id.* at 878.
104. 42 S.W.3d 129, 130 (Tex. Crim. App. 2001).
105. 526 U.S. 314 (1999).
106. *Id.*
107. 45 S.W.3d 77 (Tex. Crim. App. 2001).
108. *Id.*

and sentenced to 10 years in prison.[109] On March 18, 1988, 64 days later, the applicant filed a motion for shock probation. On August 16, 1988, more than 180 days after the sentence was executed the court granted the motion. Subsequently, the applicant's probation was revoked. Applicant filed a post-conviction writ of habeas corpus contending that the trial court did not have jurisdiction to release him to shock probation, and therefore, he is entitled to credit for the time he spent released from August 16, 1988 until August 1992. The court of criminal appeals granted the applicant's writ. The court held that when a defendant makes a proper and timely request for shock probation, but the trial court's order is made after it has lost jurisdiction and is therefore void, the defendant will be entitled to time credit for the time spent on release due to the erroneous order.[110]

III. APPEAL

In *Vidaurri v. State*,[111] appellant pled guilty to a felony charge of indecency with a child and received ten years deferred adjudication probation pursuant to a plea bargain. Subsequently, the State alleged that appellant had violated three conditions of his probation and moved to proceed with adjudication. The appellant pled that all three alleged violations were untrue, and he was adjudicated guilty of the original charge and sentenced to twelve years. The court of appeals held that rule 25.2(b)(3) of the Texas Rules of Appellate Procedure limits a defendant's right to appeal on an issue separate from defendant's conviction (i.e., the truth of defendant's probation violations). The defendant had failed to preserve error by timely objecting or moving for a new trial. The court of criminal appeals reversed the first of these holdings and affirmed the second. As to the first, the court reasoned that defendant's appeal was based on the sentence received for the adjudication of guilt, not on his probation violations, and therefore Rule 25.2(b)(3) did not limit his right to appeal. As to the second, the court held that appellant waived his statutory right to have a separate punishment hearing wherein he could present evidence by failing to timely object, and that objections based on deprivation of punishment hearings were not limited by Rule 25.2(b)(3) because they addressed the process of sentencing, rather than the conviction itself.[112]

In *Nix v. State*,[113] appellant pled no contest to misdemeanor theft and was given deferred adjudication probation. No record was made of the proceeding, and no appeal was timely filed. Appellant subsequently violated his probation conditions and was sentenced to one year. The court of appeals held it had no jurisdiction because appellant had neither objected nor moved for a new trial at the probation proceeding, and the

109. No. 73,797, 2001 Tex. Crim. App. LEXIS 20 (Tex. Crim. App. Mar. 20, 2001).
110. *Id.* at *6.
111. 49 S.W.3d 880, 881 (Tex. Crim. App. 2001).
112. *Id.* at 886.
113. No. 793-00, 2001 Tex. Crim. App. LEXIS 52 (Tex. Crim. App. 2001).

court of criminal appeals affirmed. Appellant argued that his case fell within one of the exceptions to *Manuel v. State*,[114] which held that one could appeal on issues relating to the plea proceedings only if appeal was taken immediately after deferred adjudication is entered. The exceptions are where the judgment is void, or where the claim is cognizable on a writ of habeas corpus. The court held that *Manuel* was statutorily-derived, did not create a new rule, and that appellant waived his right to appeal the plea proceedings because he failed to timely file an appeal.[115]

In *Salazar v. State*, the appellant was convicted by a jury of capital murder for the death of his girlfriend's two-year old daughter and was sentenced to death.[116] On direct appeal to the court of criminal appeals the appellant, in points of error six through nine, claimed that the trial court erred in denying him a new trial because the jury's extrinsic to the record discussion of inaccurate parole information during jury deliberations constituted jury misconduct. The appellant claims this deprived him of his Sixth Amendment right to a fair and impartial trial, and violated his Fourteenth Amendment due process rights and his rights under Article 1, section 10 of the Texas Constitution. The court of criminal appeals found that because the evidence presented was conflicting and inconsistent, the court could not say that the trial court abused its discretion in concluding that the factors set forth in *Sneed v. State*[117] were not met and in denying the appellant's motion for new trial. The *Sneed* case holds that a jury's discussion of parole constitutes reversible error when a defendant shows: (1) a misstatement of law; (2) asserted as a fact; (3) by one who professes to know the law; (4) and is relied upon by other jurors; and (5) who for that reason changed their vote to a harsher punishment.[118]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In *Garcia v. State*, the appellant claimed he was denied ineffective assistance of counsel when, during the punishment phase following appellant's conviction for murder, his counsel solicited testimony from the appellant's expert witness that included damaging testimony on the relationship between race—appellant is Hispanic—and a subject's continuing danger to others.[119] The record did not show what counsel's reasons for the questioning were, and such questions could have been an attempt to place before the jury all the factors it should use in its assessment of future dangerousness and to persuade the jury that despite any negative factors the appellant would not be a future danger if sentenced to life in prison.[120] The court thus held that given appellant's lengthy and violent criminal record, it could not say that counsel's conduct could not be con-

114. 994 S.W.2d 658 (Tex. Crim. App. 1999).
115. *Id.*
116. 38 S.W.3d 141, 144 (Tex. Crim. App. 2001).
117. 670 S.W.2d 262 (Tex. Crim. App. 1984).
118. *Sneed*, 670 S.W.2d at 266.
119. 57 S.W.3d 436, 438 (Tex. Crim. App. 2001).
120. *Id.* at 440-41.

sidered sound trial strategy.[121] The court also held that there was sufficient evidence to support the jury's finding that appellant was a continuing threat as the evidence showed that appellant had multiple prior convictions, including an assault charge while he was incarcerated.[122]

In *Ex parte Lonzada-Mendoza*, the court held that as long as the defendant is informed at some time about the ability to pursue further appellate review, even if it is in an initial appointment letter before the court renders an opinion, it satisfies the tests of *Stickland v. Washington* and *Ex parte Wilson*.[123]

In *Mann v. State*, the court of criminal appeals held that a defendant may be found to have used a deadly weapon in a prosecution for a third offense of driving while intoxicated.[124] A deadly weapon finding limits a defendant's eligibility for community supervision and parole.[125] The court did not explain its reasoning, but rather adopted the court of appeals decision without further comment.[126]

In *Glover v. United States*, the petitioner, who was convicted on labor racketeering, money laundering, and tax evasion, filed a motion to correct sentence, asserting that his counsel's failure to argue for grouping of certain offenses under the Sentencing Guidelines, which added from 6-21 months to his sentence, constituted ineffective assistance of counsel.[127] The district court denied the motion determining the 6-21 month increase was not significant enough to amount to prejudice under *Strickland v. Washington*.[128] The Seventh Circuit affirmed.

The Supreme Court, in a unanimous decision, held that the Seventh Circuit erred in engrafting onto the prejudice branch of the *Strickland* test a requirement that any increase in sentence meet a certain standard of significance. The court took notice that the Seventh Circuit appeared to rely on *Lockhart v. Fretwell*,[129] for the holding that there is no relief when the increase in sentence is not so significant as to render the outcome of the sentencing fundamentally unfair. The court explained that *Lockhart* does not replace the *Strickland* analysis when the ineffective assistance of counsel deprives a defendant of a substantive or procedural right. The Seventh Circuit incorrectly relied on *Lockhart* to deny relief to a defendant who might show ineffective assistance of counsel affecting a sentencing calculation, because the increase in the sentence does not meet some baseline standard of prejudice. In fact the court's jurisprudence suggests that any amount of actual jail time has Sixth Amendment

121. *Id.* at 441.
122. *Id.* at 442.
123. 956 S.W.2d 25 (Tex. Crim. App. 1997).
124. 58 S.W.3d 132 (Tex. Crim. App. 2001).
125. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(2) (Vernon 2001); TEX. GOV'T CODE ANN. §§ 508.145, 508.149, 508.151 (Vernon 2001).
126. *See* Mann v. State, 13 S.W.3d 89, 91-92 (Tex. App.—Austin 2000).
127. 531 U.S. 198 (2001).
128. 466 U.S. 668 (1984).
129. 506 U.S. 364 (1993).

significance.[130]

In *Miller v. State*, a jury convicted appellant of delivery of less than one gram of cocaine.[131] Appellant also pled true to two enhancement paragraphs. The court sentenced her to six years confinement. Appellant appealed, arguing that the trial court erred when it excluded as irrelevant evidence that the offense was committed under duress.

Appellant testified that she had been threatened with harm if she did not deliver cocaine to the undercover officer in the case. She testified that she felt her life was in danger. Appellant further sought to introduce testimony that shortly after the commission of the offense, the person who had threatened her harm assaulted her. However, because the assault happened after the delivery of the cocaine, the trial court believed it to be irrelevant and barred its admission. The court of appeals affirmed the lower court decision. The court of criminal appeals found that the evidence was relevant to the appellant's duress defense. The testimony of the subsequent assault tended to make a consequential fact (the delivery of the cocaine under duress) more probable than it was without the testimony. Therefore, the trial court abused its discretion by excluding the testimony as irrelevant based on when the assault occurred.[132]

Kirtley v. State[133] appellant pled guilty to murder and was given ten years deferred adjudication community supervision. He subsequently violated the terms of supervision and was sentenced to 30 years. The court of appeals affirmed the judgment. The court of criminal appeals granted appellant's petition for discretionary review to determine whether it was error for the court of appeals to have held that the reporter's record from appellant's punishment hearing was not necessary to resolve his appeal under rule 34.6(f) of the Texas Rules of Appellate Procedure. The court reversed and remanded, holding that rule 25.2(b)(3) of the Texas Rules of Appellate Procedure did not support appellant's claim that he received ineffective assistance of counsel at the punishment hearing, because the rule does not apply to appeals challenging issues "unrelated to" the conviction, i.e., issues related to the punishment phase. Therefore, the reporter's record was "necessary to the appeal's resolution" pursuant to Rule 34.6(f), and it was error for the court of appeals to hold that the record was not necessary.[134]

V. HABEAS CORPUS

In *Ex parte Weise*, the applicant filed a pretrial writ of habeas corpus, claiming that the information charging him with illegal dumping was unconstitutional because it did not allege a culpable mental state.[135] The

130. *See Glover*, 531 U.S. 198 (2001).
131. 36 S.W.3d 503, 504 (Tex. Crim. App. 2001).
132. *Id.* at 508.
133. 56 S.W.3d 48, 49 (Tex. Crim. App. 2001).
134. *Id.*
135. 55 S.W.3d 617 (Tex. Crim. App. 2001).

court of criminal appeals reaffirmed its holdings in *Ex parte Matthews*[136] and *Ex parte Tamez*[137] that habeas corpus is not available before trial to test the sufficiency of the complaint, information, or indictment unless the defendant is charged with a statute which is unconstitutional on its face or the charge is barred by limitations.[138] Here, the applicant did not claim that the statutes under which he was charged were unconstitutional, but only that they were unconstitutional as applied in the charging instrument. Hence, the charging instrument was subject to a motion to quash, and not the subject of a writ of habeas corpus.[139]

In *Ex parte Seidel*,[140] the appellee was arrested for felony driving while intoxicated and was released on felony bond. The district court dismissed the prosecution and bail because of the state's failure to present indictment or information. The appellee was then charged with misdemeanor driving while intoxicated in county court for the same incident. The appellee filed a special plea of collateral estoppel and a pre-trial writ of habeas corpus arguing the prosecution was barred by double jeopardy. The county court granted appelle's application, stating that since the prosecution was dismissed with prejudice, the state was barred from filing a lesser charge from the same incident. The state appealed. The court of appeals affirmed. The court found that while the state was not barred from filing subsequent charges, the state waived this error when it failed to appeal the district court's dismissal of the prosecution.

The court of criminal appeals reversed and remanded the judgment of the court of appeals. The court held that the court of appeals erred in failing to recognize that the district court judge's dismissal of the prosecution "with prejudice" was beyond the scope of his authority, and therefore that part of the judgment was void.[141] Further, the court stated that since the trial court's dismissal was void, it may be attacked by either direct appeal or collateral attack.[142] Therefore, the State was not required to appeal the district court's dismissal "with prejudice" in order to bring a subsequent prosecution.

In *Ex parte Boyd*, the court of criminal appeals held that a finding that the defendant selected his victim because of bias or prejudice against a group of which the victim is a member must be made by a jury, not the court.[143] The appellant was convicted of aggravated assault, and the trial court made an affirmative finding of bias or prejudice, which had the affect of increasing appellant's punishment range to the next highest category of offense. The court held that such a finding violated appellant's

136. 873 S.W.2d 40 (Tex. Crim. App. 1994).
137. 38 S.W.3d 159 (Tex. Crim. App. 2001).
138. *Weisse*, 55 S.W.3d at 620-21.
139. *Id.* at 621.
140. 39 S.W.3d 221 (Tex. Crim. App. 2001).
141. *Id.*
142. *Id.*
143. 58 S.W.3d 134, 136 (Tex. Crim. App. 2001).

rights under *Apprendi v. New Jersey*,[144] in which the United States Supreme Court held that juries must assess facts that increase the prescribed range of penalties to which a defendant is exposed.[145]

In *Ex parte Russell*, appellant contended that the Texas Department of Criminal Justice failed to properly credit time he served after being detained for parole violator warrants.[146] Appellant was convicted for possession of cocaine and was sentenced to five years confinement after his community supervision was revoked.[147] After he was released from mandatory supervision, appellant applied for a writ of habeas corpus, contending that his mandatory supervision should have already expired had he been properly credited for time he was confined in the present cause on parole violator warrants.[148] Under the Texas Government Code, time-credit claims must first proceed through an administrative process rather through a writ of habeas corpus.[149] However, the statutory provision only refers to "inmates."[150] Because appellant was already released on mandatory supervision he was not an "inmate" for purposes of section 501.0081, and he was free to pursue his time-credit claim through a writ of habeas corpus.[151]

In *Jordan v. State*,[152] appellant pled guilty to theft and was placed on community supervision; he pled guilty to robbery in a separate cause and was placed on deferred adjudication community supervision. The State filed motions to revoke in both causes based on appellant's cocaine possession. The district court granted both motions, and appellant filed a motion for a new trial, contending that his pleas were involuntary. Following a hearing, the district court denied the motion. The court of appeals held that it was without jurisdiction because appellant should have raised the involuntariness claim in an appeal of the imposition of community supervision. The court of criminal appeals affirmed, rejecting prior cases which held that the original conviction could be attacked on a revocation proceeding if the claims would be cognizable on a writ of habeas corpus, because such cases created unnecessary confusion and failed to promote judicial economy. To file a writ of habeas corpus an appellant must follow the procedure outlined in article 11 of the Texas Code of Criminal Procedure.

In *Tyler v. Cain*,[153] appellant filed a state petition for postconviction relief, contending that a jury instruction in his trial permitted the jurors to allow conviction without proof beyond a reasonable doubt, which is un-

144. 530 U.S. 466 (2000).
145. *Boyd*, 58 S.W.3d at 136.
146. 605 S.W.3d 875, 876 (Tex. Crim. App. 2001).
147. *Id.*
148. *Id.*
149. TEX. GOV'T CODE ANN. § 501.0081 (Vernon 2001).
150. *Id.* at § 501.0081(b) and (c).
151. *Russell*, 605 S.W.3d at 877.
152. 54 S.W.3d 783 (Tex. Crim. App. 2001).
153. 533 U.S. 656 (2001).

constitutional under *Cage v. Louisiana*.[154] The district court denied relief, and the Texas Court of Criminal Appeals affirmed. Appellant moved the Fifth Circuit for permission to file a second habeas application, as required by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[155] and the motion was granted. The federal district court denied relief; and although the Fifth Circuit affirmed, it noted that the district court erred by failing to determine whether appellant had satisfied AEDPA's requirement that district court's dismiss habeas claims in a second or subsequent application unless the applicant "shows" that the "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The Court affirmed the Fifth Circuit, holding that the *Cage* rule was not made retroactive within the meaning of the statute.

In *Ex parte Williams*,[156] the defendant was improperly sentenced to ten years probation when Defendant was in fact not eligible for probation. After the sentencing and after realizing the error, the trial judge revoked the defendant's probation and sentenced him to ten years in prison. The defendant filed a post-conviction writ of habeas corpus and the court of criminal appeals denied it. The court relied in part on *Speth v. State*,[157] which holds that community supervision is not a sentence or part of a sentence. This meant that defendant's reliance on *Heath v. State*[158] was misplaced because the court's improper grant of probation was not an "illegal sentence" of the type addressed by *Heath*. Further, the court held that the improper grant of probation does not entitle an appellant to a habeas relief because there is no harm since defendant was not entitled to probation in the first place. Finally, defendant's argument that he would have not pled guilty if he had known he would not have received probation is too speculative for the court to indulge, since the improper aspect of the probation could not have affected the voluntariness of defendant's plea.

VI. MANDAMUS

In *State v. Court of Appeals for the Fifth District*, the State filed a petition for writ of mandamus seeking an order directing the court of appeals to vacate an order which granted the real party in interest, David Beck, mandamus relief on the ground that article 44.04(b) of the Texas Code of Criminal Procedure was unconstitutional as applied to him.[159] The court of appeals held that the trial court had a ministerial duty to hold the statute unconstitutional as applied to Beck. The court of criminal appeals held that the court of appeals abused its discretion in ordering the man-

154. 498 U.S. 39 (1990) (*per curiam*).
155. 28 U.S.C. § 2244(b)(2)(A).
156. No. 73-845, 2001 LEXIS Tex. Crim. App. ___ (Tex. Crim. App. April 11, 2001).
157. 6 S.W.3d 530 (Tex. Crim. App. 1999).
158. 817 S.W.2d 335 (Tex. Crim. App. 1991).
159. 34 S.W.3d 924 (Tex. Crim. App. 2001).

damus relief.[160] A court of appeals abuses its discretion if the relator fails to show in the court of appeals that 1) he has no other adequate remedy at law; and 2) under the relevant facts and law, the act to be compelled is purely ministerial. The court determined that the act sought to be compelled was not ministerial. A ministerial act requires that the Relator have a clear right to the relief sought and not involve the exercise of judicial discretion. In the instant case, there was no clear right to the relief sought as to justify mandamus relief. Since the constitutionality of article 44.04(b) as applied to the facts of the instant case was an issue of first impression, the holding of the court of appeals would have required the exercise of judicial discretion.[161]

VII. CONFLICT OF LAWS

In *Gonzalez v. State*,[162] the defendant confided in a pastor while in California that he had done something "real bad." After the pastor warned the defendant that if there was a victim involved, it could not be kept secret, the defendant proceeded to confess to a murder. The defendant objected to this testimony at trial, claiming that the communication was privileged under Texas Rule of Evidence 505, but the trial court let it in by applying section 1032 of the California Evidence Code. The court of appeals affirmed the trial court's decision, applying the "most significant relationship test" and finding that California law controls because the communication occurred in California. The court of criminal appeals affirmed, stating that the privileges are unlike other rules of evidence and procedure in their peculiar purpose of preserving a substantive right.

VIII. FOURTEENTH AMENDMENT DUE PROCESS

In *Fiore v. White*, the United States Supreme Court, in a per curiam decision, held that the conviction and continued incarceration of a defendant based upon conduct that a state statute, as properly interpreted, did not prohibit, violated due process.[163] Petitioner, Fiore, was convicted of operating a hazardous waste facility without a permit. The Commonwealth of Pennsylvania conceded that Fiore did have a permit, but claimed he had deviated from its terms so dramatically that he nonetheless had violated the statute. The lower courts agreed, and the Pennsylvania Supreme Court declined to review Fiore's case. After Fiore's conviction became final, the Pennsylvania Supreme Court agreed to review the case of Fiore's co-defendant David Scarpone, who was convicted of the same crime. The Pennsylvania Supreme Court overturned Scarpone's conviction on the ground that the statute meant *without* a permit and that deviation from one's permit was not the same as operating without a permit.

160. *Id.* at 927.
161. *Id.* at 928.
162. 45 S.W.3d 101 (Tex. Crim. App. 2001).
163. 121 S. Ct. 712.

However, the Pennsylvania courts refused to grant Fiore collateral relief, and Fiore brought a federal habeas corpus action. The district court granted the writ. The Third Circuit reversed, believing the Pennsylvania Supreme Court in the *Scarpone* case had announced a new rule of law inapplicable to Fiore's case. In responding to the United States Supreme Court's certified question, the Pennsylvania Supreme Court made clear that its decision in *Scarpone* was not new law, but instead it clarified the law at the time Fiore's conviction.

The Supreme Court found that the Due Process Clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving all the elements beyond a reasonable doubt and that the failure to possess a permit was a basic element of the crime for which Fiore was convicted.[164] The state offered no evidence to that basic element; therefore, Fiore's conviction violated due process.

164. *Id.* at 714.