1993

Criminal Procedure: Pretrial, Trial and Appeal

Kerry P. FitzGerald

Catherine Greene Burnett

CRIMINAL PROCEDURE: PRETRIAL, TRIAL AND APPEAL

*Kerry P. FitzGerald**
*Catherine Greene Burnett***

THIS Article reviews significant decisions of the Texas Court of Criminal Appeals and the Texas courts of appeals in the area of criminal pretrial, trial and appellate procedure during the 1992 Survey period.

I. PRETRIAL

A. BAIL

In *Martinez v. State*,[1] the Court of Criminal Appeals of Texas reaffirmed its position that later conviction of a felony offense renders a writ attacking pretrial confinement moot.[2] After being indicted for murder, the defendant filed an article 17.151[3] writ seeking release from jail. Although the trial judge ordered defendant released on a $10,000 personal bond, before the defendant was released, he was charged with aggravated robbery, and bail was set in that case at $30,000. Both the original murder and the aggravated robbery charge arose from the same transaction. The defendant filed a second application for writ of habeas corpus relief pursuant to article 17.151, but the trial judge denied relief.[4] The court of appeals affirmed that denial.[5] The court of criminal appeals granted the defendant's petition for discretionary review. During the pendency of the appeal, however, the defendant was convicted of the underlying offense. Hence he was no longer subject to pretrial confinement, and the appeal was rendered moot.[6]

B. DISCOVERY

In *Scott v. State*[7] the court found that the trial court did not abuse its discretion in denying a defense request to have alleged contraband tested by

---

* B.B.A., Southern Methodist University; L.L.B., University of Texas; Attorney at Law, Dallas, Texas.
** B.A., University of Texas; J.D., University of Texas; Associate Professor of Law, South Texas College of Law.

1. 826 S.W.2d 620 (Tex. Crim. App. 1992).
2. *Id.* at 620.
3. TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon Supp. 1993).
4. Martinez, 826 S.W.2d at 620.
5. Martinez v. State, 810 S.W.2d 428, 430 (Tex. App.—Houston [14th Dist.] 1991), *appeal dismissed*, 826 S.W.2d 620 (Tex. Crim. App. 1992).
6. *Martinez*, 826 S.W.2d at 620.
7. 825 S.W.2d 521 (Tex. App.—Dallas 1992, pet. ref'd).

a defense chemist.[8] While a defendant has a right under article 39.14 to have any alleged contraband tested by his own chemist if he makes a timely request for such an opportunity,[9] the motion in this case was filed moments before a pretrial hearing scheduled by virtue of article 28.01.[10] Not only was the motion not timely;[11] the defendant never attempted to show good cause for the late filing.[12]

The edict of *Brady v. Maryland*[13] continues to be ignored in some quarters. In *Earls v. State*[14] the defendant was convicted of assaulting a deputy sheriff, a jailer, while she was an inmate at the county jail. On appeal, the defendant claimed that the trial court erred in refusing to disclose exculpatory evidence in the form of written statements of seven potential witnesses. The defendant filed a timely pretrial motion requesting exculpatory evidence in the state's possession. At the hearing, the prosecutor tendered to the defendant a two page list containing the names, addresses and phone numbers of fifty-two persons interviewed by the state, without designating any of the persons possessing evidence favorable to the defendant. The prosecutor gave the defendant exculpatory statements of seven persons, both signed and unsigned, and gave another twenty statements to the trial court for an in camera inspection, contending that none were exculpatory. The trial court ruled that seven of these were not exculpatory.[15]

Among other things, the statements showed that several days before the confrontation, the defendant begged not to be on the fourth floor of the jail for fear of being assaulted by officers as retribution for having assaulted a jailer several months before; that an officer told inmates that male officers were going to that floor and would not hesitate to do violence; that immediately after the fight between the defendant and the deputy jailer, officers told the assembled inmates that they had just beaten one inmate and asked who wanted to be next; and that one of the officers made reference to an inmate thinking it funny when one of the deputies had previously been beaten up. The court found that four of the written statements were exculpatory and material.[16] The court rejected the state's argument that even if the undisclosed statements were exculpatory and material, the defendant should have discovered them herself by interviewing the persons on the list provided, notwithstanding the prosecutor's statements in open court.[17] The court emphasized that *Brady* does not require the defendant to expose the state's claims and the trial court's erroneous conclusion that the statements are not exculpatory, and that the state's position would essentially "pervert the rule in *Brady*, which requires that exculpatory evidence be disclosed, not

8. *Id.* at 525.
9. TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1979).
10. TEX. CODE CRIM. PROC. ANN. art. 28.01 (Vernon 1989).
11. *Scott*, 825 S.W.2d at 525.
12. *Id.*
13. 373 U.S. 83 (1963).
14. 818 S.W.2d 526 (Tex. App.—Houston [1st Dist.] 1991, no pet.).
15. *Id.* at 526.
16. *Id.* at 528.
17. *Id.* at 527.

withheld."[18]

In *Thomas v. State*[19] the court revisited the *Brady* turf, once again condemning the untoward conduct of a Dallas county prosecutor.[20] The prosecutor had used the eyewitness accounts of two witnesses to prove that the defendant dragged the deceased behind an apartment building and shot him, but failed to disclose another eyewitness who saw the defendant in the front of the building at the time of the murder. This third witness's testimony would have been both exculpatory evidence and impeachment evidence.[21] The court reviewed at length the history of the state's duty to disclose favorable evidence, and held that the three part test utilized to determine when a prosecutor has violated the due process clause of the Fourteenth Amendment had been met.[22] The court of criminal appeals struck a blow for due process in a very sensitive area, reversing the murder conviction and the life sentence imposed.[23]

C. CHARGING INSTRUMENTS

The Survey period included two examples of efforts by the Court of Criminal Appeals of Texas to fine tune the parameters of the state's recent authority to amend charging instruments. In *Ward v. State*[24] the court of criminal appeals held that an amendment to an indictment is an actual physical alteration of the indictment.[25] The state filed a motion to amend the indictment on the day of trial, relying on article 28.10.[26] The purpose of the state's motion was to allow the prosecution to change the name of the complainant from "Seth Haller" to "Steve Scott." The defendant argued this change constituted charging him with a new or additional offense under article 28.10(c).[27] The trial judge overruled defense objections and granted the state's motion. The written order of the trial court stated, "[t]he foregoing Motion is hereby granted, and the indictment is hereby amended."[28] However, no interlineation to the complainant's name was made on the face of the indictment. The court held that the indictment was never amended.[29]

---

18. *Id.*
19. 841 S.W.2d 399 (Tex. Crim. App. 1992).
20. *Id.* at 402.
21. *Id.* at 404.
22. *Id.* at 404. "Such a violation occurs when a prosecutor 1) fails to disclose evidence 2) which is favorable to the accused 3) that creates a probability sufficient to undermine the confidence in the outcome of the proceeding." *Id.* at 404. The court observed that the court of appeals, in its unpublished opinion affirming the judgment of conviction, applied the wrong standard of materiality in that it concluded the evidence did not create a reasonable doubt as to the defendant's guilt. *Id.*
23. *Id.* at 407.
24. 829 S.W.2d 787 (Tex. Crim. App. 1992).
25. *Id.* at 793.
26. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989).
27. Article 28.10(c) provides: "An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced." TEX. CODE CRIM. PROC. ANN. art. 28.10(c) (Vernon 1989).
28. *Ward*, 829 S.W.2d at 788.
29. *Id.* at 795.

Instead the amendment to an indictment is the actual physical alteration of the charging instrument.[30] The court recognized that such an alteration could be accomplished by many methods: for example, handwriting, typing, interlining, or striking out.[31] Regardless of the method used, it is critical that *notice* of the amendment must come from the face of the charging instrument itself.[32] This requirement is constitutionally based. Article I, section 10 of the Texas Constitution guarantees an accused the right to be informed of the nature and cause of the accusation against him in a criminal proceeding.[33] The court of criminal appeals has consistently held that such information must come from the face of the indictment.

A portion of the trial level confusion in *Ward* stemmed from the relationship between article 28.10 and article 28.11.[34] The role of article 28.11, according to the court of criminal appeals, is to "[tell] us how charging instruments are amended; that is 'with leave of the court and under its direction.' "[35] Thus, when the state files a motion for leave to amend an indictment, that motion is merely the vehicle which begins the amending process.[36] If the trial court grants the request to amend, then the "leave of court" provision has been satisfied.[37] However, "neither the motion itself nor the trial judge's granting thereof is *the amendment*."[38]

In a related decision, the court of criminal appeals in *Rent v. State*[39] was presented with an indictment that was physically amended approximately six weeks after the trial court granted the state's motion to amend. At issue in *Rent* was the date controlling determination of a defendant's right to continuance to prepare for trial following amendment of an indictment.[40] The court of criminal appeals held that the time of actual physical alteration of the charging instrument is the controlling date.[41]

Not all proposed changes to indictments are article 28.10 amendments, as shown by *Kelley v. State*.[42] The court held that changing the defendant's name is controlled by article 26.08.[43] That provision authorizes a trial court

30. *Id.* at 794.
31. *Id.* at 793 n.14.
32. *Id.* at 794.
33. TEX. CONST. art. I, § 10.
34. TEX. CODE CRIM. PROC. ANN. art. 28.11 (Vernon 1989) provides: "All amendments of an indictment or information shall be made with the leave of the court and under its discretion."
35. *Ward*, 829 S.W.2d at 793.
36. *Id.*
37. *Id.*
38. *Id.*
39. 838 S.W.2d 548 (Tex. Crim. App. 1992).
40. TEX. CODE CRIM. PROC. ANN. art. 28.10(a) (Vernon 1989) provides:
> After notice to the defendant, a matter of form or substance in an information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.

41. *Rent*, 838 S.W.2d at 551.
42. 823 S.W.2d 300 (Tex. Crim. App. 1992).
43. TEX. CODE CRIM. PROC. ANN. art. 26.08 (Vernon 1989). That provision authorizes a trial court to correct an indictment to reflect the defendant's true name. It provides:

to correct an indictment to reflect the defendant's true name.[44] Rather than constituting an amendment to the indictment, the act of changing the defendant's name is a ministerial act.[45]

The importance of *Studer v. State*[46] continues to be reflected in decisions. In *DeDonato v. State*[47] the defendant was accused of operating a sexually oriented business without a permit. On appeal, the defendant argued that the county court lacked jurisdiction because the jurisdiction of the court did not appear on the face of the charging instrument. The state replied that the defense had waived the argument under article 1.14(b).[48] The court agreed, reemphasizing that the defendant was obligated to raise any such objection in the trial court while there was still an opportunity to correct any problem.[49]

In *Whatley v. State*[50] the defendant plead guilty to aggravated robbery and the trial court, finding the enhancement paragraph to be true, set punishment at sixty years imprisonment. On appeal, the defendant argued that he should be acquitted because he was only indicted for robbery. The state conceded that the indictment only alleged the elements of robbery, omitting that the defendant had caused serious bodily injury or that the knife was a deadly weapon. The court observed that the caption of the indictment read "felony charge: agg. robbery bodily injury"[51] and that the defendant and his trial counsel had signed written admonishments from the court before pleading, which notified the defendant that he was charged with "aggravated robbery" and that the maximum punishment was ninety-nine years or life. In addition the defendant testified at the punishment phase that he was not surprised to be charged with aggravated robbery. The court held that article 1.14(b)[52] requires a defendant to object to such irregularities in an indictment as absence of an element of the offense before the trial date to preserve error.[53] In this case, as the defendant failed to object before trial and since the record showed he knew he was being charged with aggravated robbery, the defendant waived error.[54]

In *Kobos v. State*[55] the defendant moved to quash the complaint charging

---

> If the defendant, or his counsel for him, suggests that he bears some name different from that stated in the indictment, the same shall be noted upon the minutes of the court, the indictment corrected by inserting therein the name of the defendant as suggested by himself or his counsel for him, the style of the case change so as to give his true name, and the cause proceed as if the true name has recited in the indictment.

Id.

44. *Kelley*, 823 S.W.2d at 302.
45. *Id.*
46. 799 S.W.2d 263 (Tex. Crim. App. 1990).
47. 819 S.W.2d 164 (Tex. Crim. App. 1991).
48. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon 1989).
49. *DeDonato*, 819 S.W.2d at 167.
50. 822 S.W.2d 792 (Tex. App.—Corpus Christi 1992, pet. ref'd).
51. *Id.* at 793.
52. TEX. CODE CRIM. PROC. ANN. art. 1.14(b).
53. *Whatley*, 822 S.W.2d at 793.
54. *Id.* at 794.
55. 822 S.W.2d 779 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

maintaining a public nuisance on the basis that the underlying statute was unconstitutionally vague. The motion was denied. On appeal, the state asserted that the trial court was without authority to declare whether the statute was unconstitutional because service had not been made on the Attorney General of the State of Texas by virtue of Texas Civil Practice & Remedies Code, section 37.006(b).[56] The court held that service on the attorney general was not required when a criminal defendant is questioning the constitutionality of the statute.[57]

In *State v. Hall*[58] the court addressed a statute of limitations problem. The defendant was originally indicted in the district court for criminally negligent homicide of two persons. The defendant filed a pretrial motion to dismiss arguing that the district court lacked jurisdiction, and that the county court maintained exclusive jurisdiction of misdemeanors with the exception of those involving official misconduct. Following the defendant's conviction, the defendant appealed and the court of appeals reversed, holding that the indictments did not allege misdemeanors involving official misconduct.[59] The prosecutor tenaciously filed an information in the county court charging the defendant with the same offenses. The defendant filed a motion to dismiss on the basis of the two year statute of limitations for misdemeanor prosecutions, under article 12.02.[60] The county court granted the defense motion. On appeal the state argued that the statute of limitations was tolled when the initial indictments were presented in the district court.

The state argued that the district court was a court of competent jurisdiction because article 4.05[61] granted district courts jurisdiction of all misdemeanors involving official misconduct, and the original indictments alleged this type of misconduct. The court held that for purposes of article 12.05[62] a court of competent jurisdiction is a court with jurisdiction to try the case.[63] Under the reasoning of the court in *Ex parte Ward*,[64] the district court was a court of competent jurisdiction only if the indictments alleged misdemeanors involving official misconduct.[65] Neither indictment did in this case.[66] The court also rejected the state's argument that the district court was a court of competent jurisdiction by way of article V, section 12(b).[67]

In several cases the courts addressed the sufficiency of the indictments. In *Talamantez v. State*[68] each paragraph of the first count of the indictment alleged the defendant misapplied a thing of value belonging to Wilson

56. TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(b) (Vernon 1986).
57. *Kobos*, 822 S.W.2d at 780.
58. 829 S.W.2d 184 (Tex. Crim. App. 1992).
59. *Id.* at 186.
60. TEX. CODE CRIM. PROC. ANN. art. 12.02 (Vernon 1989).
61. TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon 1989).
62. TEX. CODE CRIM. PROC. ANN. art. 12.05 (Vernon 1989).
63. *Hall*, 829 S.W.2d at 187.
64. 560 S.W.2d 660 (Tex. Crim. App. 1978).
65. *Hall*, 829 S.W.2d at 187.
66. *Id.* at 188.
67. *Id.*; TEX. CONST. art. V, § 12(b).
68. 829 S.W.2d 174 (Tex. Crim. App. 1992).

County, "to wit: use of county equipment, bulldozer and maintainer, of the value of $750.00 or more but less than $20,000.00 by using the equipment to clear brush, shape a creek, and tank dam, on property belonging to members of [appellant's] family."[69] Each paragraph alleged that the misapplication occurred on or about and between the dates of October 31, 1986 and January 31, 1988, a fifteen month period of time. The only difference between the two paragraphs was that the first alleged the defendant acted with intent too obtain a benefit for himself while the second alleged an intent to harm another. The defendant argued to the court of appeals that this count was duplicitous as it alleged several transactions over the fifteen month period, thereby joining a series of distinct offenses in each paragraph. The court held that the indictment permissibly alleged misapplication of county equipment over a period of time with intent to obtain a benefit for as long as the county equipment was being used to complete the described undertaking, and therefore, it was not duplicitous.[70]

In *State v. Moreno*[71] the defendant was charged by information with prostitution. The defendant filed a motion to quash, alleging that the term "agree" should be defined in greater detail. The information actually alleged that the defendant did knowingly agree to engage in sexual conduct, to wit: deviant sexual intercourse with x for a fee, ten dollars payable to said x, said deviant sexual intercourse being the contact of the defendant's mouth with x's penis. The court held that the information tracked the language of article 43.02(a)(1)[72] and defined the type of sexual conduct alleged.[73] Thus, the facts requested in the motion to quash were evidentiary rather than being required for the purpose of notice and plea in bar.[74] In addition, the court emphasized that virtually all of the language in the criminal information was descriptive of the alleged agreement.[75] It described what conduct was agreed to, to whom it was agreed to, and that it was agreed to for a fee. Thus, the defendant had ample notice.[76]

On the other hand, in *State v. Horstman*[77] the court affirmed the judgment of the trial court dismissing the indictment for engaging in organized criminal activity, on the grounds that the indictment failed to allege all the essential acts necessary to charge the offense and that the indictment did not state facts sufficient to constitute an offense.[78] The defendant filed a motion to quash, arguing that the indictment did not include an allegation of some overt act committed in furtherance of the combination and that it failed to name the other members of the combination. The court agreed.[79] An in-

69. *Id.* at 176.
70. *Id.* at 184.
71. 822 S.W.2d 754 (Tex. App.—Corpus Christi 1992, no pet.).
72. TEX. CODE CRIM. PROC. ANN. art. 43.02(a)(1) (Vernon 1989).
73. *Moreno*, 822 S.W.2d at 755.
74. *Id.* at 756.
75. *Id.*
76. *Id.* at 757.
77. 829 S.W.2d 903 (Tex. App.—Fort Worth 1992, pet. granted).
78. *Id.* at 906.
79. *Id.* at 905.

dictment simply does not charge the offense of engaging in organized criminal activity unless (1) it sets forth some overt act performed by the defendant and (2) two or more other members of the combination are named.[80] These are essential elements of the offense and were missing in this case, thus rendering the indictment fundamentally defective.[81]

In *Hortsman* the state tried an end run, by attempting to argue that the indictment should not have been quashed because it at least alleged some offense, that is, the offense of aggravated promotion of prostitution. The court disagreed for two reasons. First, the indictment did not in fact sufficiently charge the offense of aggravated promotion of prostitution.[82] Second, and equally as important, the court held that an appellate court is not under a duty to see if a defective indictment is sufficient to charge some other unintended offense.[83]

The court has encountered several challenges to the sufficiency of the evidence based upon amended indictments. In *Stevens v. State*[84] the defendant was convicted of aggravated sexual assault. The defendant complained that the court of appeals erred by holding that the evidence was sufficient to support the defendant's conviction despite a variance between the victim's name as alleged in the indictment and the name proven at trial. The court observed that the court of appeals opinion issued prior to the court's decision in *Ward v. State*,[85] wherein the court held that in interpreting articles 28.10[86] and 28.11,[87] an amendment to an indictment is effectuated with the permission and direction of the court, but the amendment itself is the actual alteration of the charging instrument.[88] Consequently the state's proof was not sufficient to sustain the allegations in the indictment.[89] In *Stevens* the court thought better of deciding the matter and remanded to the court of appeals in light of *Ward*.[90] Similarly, in *McHenry v. State*[91] the defendant, convicted of conspiracy to possess a controlled substance, contended on appeal that the evidence was not sufficient to sustain the conviction because a fatal variance existed between the allegations in the original indictment and the state's evidence at trial. The court of appeals rejected the defendant's argument holding that under the facts, the amendment to the original indictment was effective.[92] In this case, prior to trial, the state moved to amend the indictment, which was granted by the court which entered an order amending the indictment. However the face of the indictment was never physically altered to reflect the proposed amendment. During trial, the

80. *Id.*
81. *Id.*
82. *Id.* at 906.
83. *Id.*
84. 844 S.W.2d 753 (Tex. Crim. App. 1993).
85. 829 S.W.2d 787 (Tex. Crim. App. 1992).
86. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989).
87. TEX. CODE CRIM. PROC. ANN. art. 28.11 (Vernon 1989).
88. *Ward*, 829 S.W.2d at 793.
89. *Id.* at 794.
90. *Stevens*, 844 S.W.2d at 754.
91. 829 S.W.2d 803 (Tex. Crim. App. 1992).
92. *Id.* at 804.

court submitted a charge to the jury which included an application paragraph which set forth the allegations contained in the state's motion to amend the indictment rather than the allegations in the indictment. Once again, the court elected to summarily grant the petition for discretionary review and remand the cause to the court of appeals in light of *Ward*.[93]

In *Strickland v. State*[94] the court, relying upon *Sopido v. State*,[95] held that it was error to allow the state to amend the indictment on the day of trial to change the cause number of one of the two prior felony convictions alleged in the enhancement paragraph.[96] The court reaffirmed that the error was not subject to a harmless error analysis.[97]

In *Rasmussen v. State*[98] the defendant, conceding the state's right to amend the indictment for theft, argued that when the state altered the language from one case of cigarettes to three cases of cigarettes, the state did not charge the defendant with the same offense. The court held that the defendant was clearly charged with the same offense in both indictments.[99] The court stated the test to determine whether a defendant was charged with a different offense: "had appellant been tried and found guilty on the original indictment, would double jeopardy have barred trial on the amended indictment?"[100] In this case, the court found that double jeopardy would bar a subsequent trial.[101]

D. DOUBLE JEOPARDY

In *Ex parte Preston*[102] the court rejected a "constructive abandonment" approach to multi-count indictments.[103] In this single indictment, the defendant was charged with three counts of aggravated robbery. After the jury was impaneled and sworn, the state proceeded to trial on the second count of the indictment only. The defendant was convicted of that offense. Subsequently, the defendant was reindicted for the same offenses alleged in the first and third counts of the original indictment. The court held that this subsequent prosecution violated the defendant's federal constitutional guarantee against double jeopardy.[104]

The court recognized that the prosecution may, with consent of the trial court, dismiss, waive, or abandon a portion of the indictment.[105] If jeopardy has attached once such a dismissal, waiver, or abandonment occurs, the state

93. *Id.*
94. 827 S.W.2d 406 (Tex. App.—Corpus Christi 1992, no pet.).
95. 815 S.W.2d 551 (Tex. Crim. App. 1990).
96. *Strickland*, 827 S.W.2d at 408.
97. *Id.*
98. 822 S.W.2d 707 (Tex. App.—Fort Worth 1991, pet. ref'd).
99. *Id.* at 712.
100. *Id.*
101. *Id.*
102. 833 S.W.2d 515 (Tex. Crim. App. 1992).
103. *Id.* at 518.
104. *Id.*; U.S. CONST. amend. V.
105. *Preston*, 833 S.W.2d at 518.

is barred from later litigating those allegations.[106] The state does have a remedy if it wishes to preserve a portion of the charging instrument for a subsequent trial.[107] Such a preservation can be accomplished by taking affirmative action on the record to dismiss, waive, or abandon a portion of the charging instrument *and* obtaining permission from the trial court to do so.[108] The court will not recognize "constructive abandonment" but will recognize express actions taken to avoid later jeopardy consequences and preserve a portion of the charging instrument for a later trial.[109]

The intermediate Texas appellate courts addressed the issue of double jeopardy during the Survey period primarily in the context of successive prosecutions. An area that was particularly active centers on the relationship, for jeopardy purposes, between driving while intoxicated prosecutions and other offenses. In *Jacobs v. State*[110] the court held that the defendant's guilty plea to the driving while intoxicated charge did not bar a subsequent prosecution for involuntary manslaughter.[111] The defendant in *Jacobs* was arrested for and pleaded guilty to a charge of driving while intoxicated that was enhanced by an allegation of serious bodily injury to a passenger in his car. The passenger later died, and the defendant was indicted for involuntary manslaughter. In finding no jeopardy bar to the involuntary manslaughter prosecution, the court relied first on *Blockburger v. United States*[112] in conducting its successive prosecution analysis. The court reviewed the statutory provisions of driving while intoxicated[113] and involuntary manslaughter[114] and the charging instruments for each offense, concluding that each requires proof of a different element.[115] Significant for the court's analysis was that driving while intoxicated requires proof that the defendant was "intoxicated," while involuntary manslaughter requires proof that the defendant acted "recklessly" and "cause[d] the death of an individual."[116]

The court followed application of the "elements of the offense" analysis enunciated in *Blockburger* with a *Grady v. Corbin*[117] analysis. It reasoned that the mere act of "driving so as to cause an accident"[118] was not conduct which constitutes an offense for *Grady* purposes.[119] Rather, the central issue

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. 823 S.W.2d 749 (Tex. App.—Dallas 1992, no pet.).
111. *Id.* at 752.
112. 284 U.S. 299 (1932). The successive prosecution test from *Blockburger* centers upon: "whether each [statutory] provision requires proof of an additional fact which the other does not." *Id.* at 304.
113. TEX. REV. CIV. STAT. ANN. art. 6701l-1 (Vernon Supp. 1991).
114. TEX. PENAL CODE ANN. § 1905(a)(1) (Vernon 1974).
115. *Jacobs*, 823 S.W.2d at 751.
116. *Id.*
117. 495 U.S. 508 (1990). The successive prosecution analysis required by *Grady* considers whether "conduct constituting an offense for which the defendant has been convicted comprise an essential element of the successively prosecuted offense?" *Jacobs*, 823 S.W.2d at 751.
118. *Jacobs*, 823 S.W.2d at 751.
119. *Id.*

here was whether the state relied on the fact of the defendant's intoxication in order to establish his guilt of involuntary manslaughter.[120] A review of the involuntary manslaughter charging instrument reflected that it did not; instead, the state alleged that the defendant recklessly caused the victim's death while operating a motor vehicle by failing to maintain in a single lane of traffic and driving an unsafe speed. Thus, because the two charging instruments relied upon different conduct for the offenses, there was no jeopardy bar to the subsequent prosecution for involuntary manslaughter.[121]

Using similar analysis, the court of appeals in *Casey v. State*[122] concluded that a subsequent driving while intoxicated prosecution was not barred by a previous municipal court conviction for driving on the wrong side of the road.[123] Once again, the critical inquiry centered on the facts upon which the state had to rely to prove the essential elements of the second prosecution.[124] Here it was not necessary for the state to prove the conduct of driving on the wrong side of the road in order to establish the elements of driving while intoxicated.[125] The appellate court went even further in its analysis, reviewing the trial transcript for any references during his driving while intoxicated prosecution to the fact that the defendant had been driving on the wrong side of the road. That review reflected that the only mention of this fact occurred during non-responsive answers from the arresting officer after he had previously testified that the defendant was speeding and failed to stop at a stop sign, or in direct response to questions elicited by defense counsel. Thus, not only was the fact that the defendant was driving on the wrong side of the road not *necessary* for the state's proof, it was not *relied on* in fact.[126]

The issue of driving while intoxicated following conviction for other traffic offenses arising from the same event was also reached in *Cooper v. State*.[127] There the defendant pled guilty in Justice of the Peace Court to the traffic offenses of (1) failing to drive in a single marked lane, and (2) disregarding a police officer. The state later sought to prosecute him for the driving while intoxicated offense arising from the same transaction. The defendant filed a pretrial application for writ of habeas corpus alleging a double jeopardy bar. Then he appealed from the denial of that application. In finding no double jeopardy bar, a panel of the court of appeals concluded, "Unless the traffic offenses are lesser included offenses of DWI, or proof of their prohibited conduct is necessary to prove the prohibited conduct in a DWI offense, double jeopardy simply does not apply."[128] The court was cognizant that there was a "potential problem" under the facts for the state to be able to prove driving while intoxicated without use of the traffic offenses, but con-

120. *Id.*
121. *Id.*
122. 828 S.W.2d 214 (Tex. App.—Amarillo 1992, no pet.).
123. *Id.* at 219.
124. *Id.*
125. *Id.*
126. *Id.* at 221.
127. 828 S.W.2d 565 (Tex. App.—Houston [14th Dist.] 1992, no pet.).
128. *Id.* at 566.

cluded "that is not our concern on appeal."[129] The panel noted that the state had assured the trial court that it could not and would not use that conduct. It further observed that the defense had "several tools" to "keep that conduct out of the DWI trial."[130]

A fourth court of appeals decision to address driving while intoxicated as a subsequent prosecution for purposes of double jeopardy bar was the state's appeal in *State v. Remsing*.[131] Although the finding of no double jeopardy bar was consistent with the holdings of the other courts of appeals,[132] this opinion differs markedly in its view of the *testimonial value* of conduct underlying the original conviction.[133] The defendant was charged with driving while intoxicated and failure to drive in a single marked lane.[134] Prior to the pretrial hearing on the driving while intoxicated charge, the defendant entered a plea of no contest to the offense of failure to operate a vehicle within a designated lane. The trial judge granted the defendant's pretrial plea of double jeopardy to the driving while intoxicated charge. The state appealed. In reversing the decision of the trial court, the court of appeals relied heavily on a recent decision of the United States Supreme Court, which noted that "[p]recedents hold that a mere overlap in proof between two prosecutions does not establish a double jeopardy violation."[135] Thus, unlike *Cooper*, which contained the state's assurance that it would not rely upon proof of the conduct for which conviction had already been obtained, and unlike *Casey*, in which the appellate court carefully combed the record for trial references to such testimony, the appellate court was not concerned that testimony relating to the other traffic offense would be adduced at trial.[136] Rather, the court reasoned that merely because the prosecution may offer testimony concerning the failure to drive in a single lane in order to establish probable cause, such testimony would not elevate that conduct to an "element" of the offense of driving while intoxicated.[137] Thus there is a conflict in the circuits, at least to the extent of what subsequent use can be made of testimony concerning previously adjudicated traffic offenses occurring in the same transaction as a driving while intoxicated prosecution.

Turning from the driving while intoxicated and other traffic offenses arena, during the Survey period two courts of appeals addressed the issue of "same transaction" for other offenses, with each court concluding there was no double jeopardy violation. In *Whitten v. State*[138] the court rejected a

129. *Id.*

130. *Id.* The opinion did not specify those devices. Presumably they would include a motion in limine based on the prosecutor's pretrial assurances. The court did caution, however, that the trial court should dismiss the driving while intoxicated charge, if at trial, "the state cannot prove the DWI charge without bringing in testimony related to the prohibited conduct for which appellant has already been punished." *Id.* at 566-67.

131. 829 S.W.2d 400 (Tex. App.—Austin 1992, pet. ref'd).

132. *Id.* at 402.

133. *Id.*

134. TEX. REV. CIV. STAT. ANN. art. 6701d, § 60(a) (Vernon 1977).

135. *Remsing*, 828 S.W.2d at 403 (quoting United States v. Felix, 112 S. Ct. 1377 (1992)).

136. *Id.* at 402.

137. *Id.* at 403.

138. 828 S.W.2d 817 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

defense argument that prosecutions could not be had for possession of cocaine and possession of marijuana when both substances were found in the same baggie.[139] The crux of the defendant's special plea in bar[140] to the cocaine prosecution was that he had previously been found guilty of possession of marijuana and the state would be relying on the same evidence in the second trial, namely, his act of throwing down the bag containing both substances. This argument was rejected as meritless "because the state was not required to prove that appellant threw down a plastic baggie in either of the two prosecutions."[141]

More problematic is the decision in *Rice v. State*,[142] which involved a prosecution for burglary with intent to commit theft after the defendant had previously pled guilty and been convicted of the theft. In a split decision, two justices of the panel concluded that there was no jeopardy bar because in the burglary prosecution the state "did not prove the entirety of the conduct" for which the defendant was previously convicted in the theft prosecution.[143] Elements of the theft guilty plea conviction which were not adduced before the jury in the burglary prosecution included: (1) the value of the items taken, and (2) that they were taken without the effective consent of the owner.[144] In contrast, the dissent relied upon *Grady* to conclude that the state relied on proof of the same conduct [the theft of personal property] to establish the essential element of intent to commit theft in the subsequent burglary prosecution.[145]

Double jeopardy concerns are clearly implicated in retrials following acquittal. One variation of that concern occurs when the jury acquits a defendant of an "aggravated" charge but is unable to reach a decision on lesser included offenses. That was the fact pattern presented in *Pullin v. State*.[146] The defendant was indicted for aggravated sexual assault and tried before a jury. The jury was given the option of convicting the defendant of either aggravated sexual assault or the lesser offense of attempted aggravated sexual assault. The jury found the defendant not guilty of the aggravated assault, but was deadlocked on the issue of attempted assault.[147] The state then had the defendant reindicted on three counts: (1) aggravated sexual assault, (2) attempted aggravated sexual assault, and (3) indecency with a child. The defendant's jeopardy plea in bar was granted as to the aggravated sexual assault count, but denied as to the remaining counts. The defendant pled guilty to the indecency with a child count, and appealed, claiming a

139. *Id.* at 819.
140. TEX. CODE CRIM. PROC. ANN. art. 27.05 (Vernon 1989).
141. *Whitten*, 828 S.W.2d at 819.
142. 831 S.W.2d 599 (Tex. App.—Beaumont 1992, pet. granted).
143. *Id.* at 600.
144. *Id.*
145. *Id.* at 603.
146. 827 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1992, no pet.).
147. In a procedural twist, the facts of this case reveal that the jury never returned a verdict on the form provided by the court. By a jury note, the decision of "not guilty" to the aggravated charge was relayed to the judge, as well as information that the jury was unable to reach a verdict on the attempt charge. This position was clarified in an open court exchange between the jury foreman and the trial judge. The jury was then discharged.

double jeopardy violation. In rejecting that claim, a panel of the court of appeals held that under the facts it was clear the first jury did not decide the issue of guilt on the charge on attempted aggravated sexual assault.[148] This did not prohibit the state from reprosecuting that attempted offense or any lesser included offense.[149] The panel then concluded that indecency with a child is appropriately a lesser included offense of attempted aggravated sexual assault.[150]

Double jeopardy allegations are often raised in the context of punishment assessed on retrial following reversal on appeal for grounds other than sufficiency of evidence. The defendant in *Wiltz v. State*[151] did so successfully. The defendant was convicted of attempted aggravated sexual assault and sentenced to ten years probation. Thereafter he appealed, complaining that the state had improperly exercised peremptory challenges on the basis of race. On the basis of this *Batson v. Kentucky*[152] challenge, the conviction was reversed.[153] Appellant was retried, found guilty by a jury, and sentenced by the trial court to five years incarceration. The court of appeals reversed this second conviction and remanded the cause for resentencing. The issue was whether a sentence of five years incarceration was more severe than the prior probation, and if so, whether there was evidence that the defendant's subsequent conduct justified such an increase. The state conceded that there was an absence of evidence at the second punishment hearing that would warrant the assessment of a more severe sentence.[154] However, it claimed that the second sentence [incarceration] was not more severe than the original probation. Rejecting that argument, and finding the second imposed sentence unconstitutional, the court of appeals noted: "It seems axiomatic to us that the fear that probation could be lost, merely by successfully appealing a conviction, would have a chilling effect on a defendant's decision to appeal."[155]

In a related area, the issue of use of punishment evidence and its potential for double jeopardy violations was addressed by two courts of appeal during the Survey period. *Lester v. State*[156] presented a case of first impression. There an unadjudicated offense was used as evidence of misconduct at the punishment phase of the trial of an unrelated offense occurring *prior* to the unadjudicated offense. The question on appeal was whether such use would bar any subsequent attempt to prosecute for the latter offense. The court of

148. *Pullin*, 827 S.W.2d at 2.
149. *Id.* at 3.
150. *Id.* Prior decisions of the Texas Court of Criminal Appeals had established that it was a lesser included offense of aggravated sexual assault despite the fact that indecency with a child has the additional element of specific intent to arouse or gratify the sexual desire of any person, unlike assault. *E.g.*, Cunningham v. State, 726 S.W.2d 151 (Tex. Crim. App. 1987). Therefore here, the court of appeals was only considering application of that holding to an *attempt*.
151. 827 S.W.2d 372 (Tex. App.—Houston [1st Dist.] 1992, pet. granted).
152. 476 U.S. 79 (1986).
153. Wiltz v. State, 749 S.W.2d 519 (Tex. App.—Houston [14th Dist.] 1988, no pet.).
154. Citing North Carolina v. Pearce, 395 U.S. 711 (1969).
155. *Wiltz*, 827 S.W.2d at 373.
156. 824 S.W.2d 755 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

appeals concluded it would not.[157]

The defendant was convicted of aggravated assault alleged to have occurred on April 21, 1990. During the punishment phase of that trial, the prosecution introduced testimony from a complaining witness in another cause that the defendant had sexually assaulted her on July 4, 1990 [subsequent to the date of the offense for which punishment was being assessed]. The jury was charged at punishment that it could consider such evidence only "with regards to the defendant's character and what should be the appropriate punishment in this case."[158] Following his conviction for the April assault, the defendant filed an application for writ of habeas corpus concerning the July assault. He contended that prosecution of the second assault case would subject him to double jeopardy; that is, that he had already been punished because the second assault was considered when punishment was assessed by the jury in the first assault prosecution. The defendant analogized his situation to state statutory provisions concerning trial court punishment use of unadjudicated offenses.[159]

The appellate court rejected any reliance on the statute since it applies only to *admitted* offenses.[160] It found no jeopardy violation because the fact that the defendant had his subsequent criminal activity considered by the punishment fact finder "does not equate to a trial, conviction, or punishment for that unadjudicated offense."[161] Thus the defendant was only punished for the crime for which he was on trial.[162] As a matter of policy, the court of appeals could find "no good reason why a convicted criminal should not have all of his criminal activity placed before a court or a jury in order that a proper punishment can be assessed for the crime of which he stands convicted."[163] Similarly it found no policy based reason to distinguish between consideration of subsequent conduct and consideration of prior convictions during punishment for a different offense.[164]

The use of prior convictions to change [increase] the range of possible punishment was considered in *Shipley v. State*.[165] The defendant was convicted of misdemeanor theft which had been "enhanced" by prior misde-

---

157. *Id.* at 778.

158. *Id.* at 777.

159. TEX. PENAL CODE ANN. § 12.45 (Vernon 1974 & Supp. 1991), provides in pertinent part:

> (a) A person may, with the consent of the attorney for the state, admit during the sentencing hearing his guilt of one or more unadjudicated offenses and request the court to take each into account in determining sentence for the offense or offenses of which he stand adjudged guilty.
>
> (c) If a court lawfully takes into account an admitted offense, prosecution is barred for that offense.

160. *Lester*, 824 S.W.2d at 778.

161. *Id.* at 778.

162. *Id.* at 779.

163. *Id.*

164. *Id.* at 778. That use has survived double jeopardy challenges for almost ninety years. *E.g.*, Kinney v. State, 79 S.W. 570 (Tex. Crim. App. 1904).

165. 828 S.W.2d 475 (Tex. App.—El Paso 1992, pet. ref'd).

meanor theft convictions to a third degree felony.[166] Relying on *Grady v. Corbin*,[167] the defendant argued that use of the prior convictions to enhance the offense subjected him to double jeopardy because proof of the prior convictions is a necessary "element" of the enhanced felony theft charge, and he had already been punished for that conduct. The court of appeals rejected that challenge.[168] Instead, it found that despite the fact that the prior convictions were a jurisdictional element of the felony charge, "proof of the prior convictions is not that of a traditional element of the crime alleged."[169] Because proof of the prior convictions served only to redefine the offense as a felony for purposes of conveying jurisdiction to a district court for conduct which would otherwise be classified as misdemeanor, double jeopardy prohibitions did not apply.[170] The panel reasoned that the *Grady* ban concerning multiple use of the same facts applies only to proof of the *corpus delicti* or criminal conduct giving rise to the prosecution.[171]

Lastly, four courts of appeals decisions addressed the relationship, for jeopardy purposes, between prior civil or administrative proceedings and a subsequent criminal prosecution arising from the same conduct. Two cases dealt with criminal prosecutions following prison administrative hearings and sanctions. In *Smith v. State*[172] the defendant was convicted of aggravated assault on a correctional officer and sentenced to twenty years confinement. Previously he had been subjected to a prison disciplinary hearing and found in violation of the Disciplinary Code for the same conduct [striking an officer]. As a result of that finding, limitations were placed on the defendant, including fifteen days solitary confinement, twenty days commissary restriction, and no advancement in classification. Finding no double jeopardy bar to criminal prosecution following an administrative adjudication, the court of appeals held that jeopardy protections apply to multiple *judicial* punishment.[173] A different panel of the same court of appeals reached the same result in *Quevedo v. State*,[174] concluding that double jeopardy protections do not reach to encompass imposition of disciplinary punishment.[175]

A different type of administrative proceeding was involved in *Walton v. State*,[176] but the result was the same, despite the fact that the defendant in *Walton* received a favorable administrative ruling. The defendant was charged with misdemeanor driving while intoxicated. An administrative hearing was held in municipal court to determine if the defendant's refusal to submit a specimen of breath or blood would result in suspension of his

166. TEX. PENAL CODE ANN. § 31.03(e)(4)(E) (Vernon Supp. 1992). Similar provisions apply to other misdemeanor offenses such as driving while intoxicated.
167. 495 U.S. 508 (1990).
168. *Shipley*, 828 S.W.2d at 478.
169. *Id.* at 477.
170. *Id.*
171. *Id.*
172. 827 S.W.2d 71 (Tex. App.—Houston [1st Dist.] 1992, no pet.).
173. *Id.* at 71.
174. 832 S.W.2d 422 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).
175. *Id.* at 424.
176. 831 S.W.2d 488 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

driver's license.[177] According to the defendant's application for writ of habeas corpus, the municipal judge made a finding of insufficient probable cause when refusing to suspend the license. The defendant relied on that finding to argue that the state was precluded from relitigating the issue of probable cause in the prosecution for driving while intoxicated. Although the defendant did not couch his double jeopardy challenge in collateral estoppel terms, that was the analysis used by the appellate court. Since the "issues of ultimate fact" in a license suspension hearing differ from those in a prosecution for the offense of driving while intoxicated, the court held that the doctrine of collateral estoppel did not bar the state's subsequent prosecution.[178] Also persuasive to the appellate court were the facts that the municipal judge in such a hearing is not acting in a judicial capacity and there is no full hearing at which both the state and the accused are represented by counsel.[179]

A somewhat different spin on the issue of double jeopardy arose in *Walker v. State*,[180] involving a drug prosecution following a civil forfeiture. The defendant was prosecuted for the felony offense of conspiracy to possess amphetamine. Prior to that trial, a civil forfeiture had been entered and the state took possession of $75,000 which the defendant had shown to the undercover officer from whom he was to have purchased the amphetamine. Prior to trial on the conspiracy charge, the defense entered a special plea in bar arguing that entry of the civil forfeiture constituted criminal punishment. The court of appeals rejected that claim, finding that the forfeiture was not so punitive as to negate the legislature's civil intent.[181] That finding was predicated on trial evidence that the defendant had stated he could "move as much as twenty pounds a week."[182] Thus seizure of the purchase price of one pound, in light of an offer to purchase five pounds, was not punitive under the evidence before the trial court.[183]

E. Motion for Continuance

In *White v. State*[184] the defendant was arrested as the result of an undercover sting operation and charged with delivery of cocaine. On November 17, four witnesses, including three officers involved in the arrest, testified for about two hours. The trial judge declared a mistrial because of a hung jury and set the case for a retrial on November 21. On November 20, the defendant requested a transcription of the testimony of the state's three fact witnesses from his first trial to prepare for cross-examination. When the defense learned that the transcription would be unavailable in time, a motion

177. Tex. Rev. Civ. Stat. Ann. art. 6701l-5, § 2(f) (Vernon Supp. 1992).
178. *Walton*, 831 S.W.2d at 490.
179. *Id.* The court recognized, however, that merely because a hearing is "administrative," application of collateral estoppel is not precluded. *Id.* The issue of potential application was further clouded in this case because no record was made of the municipal court proceeding.
180. Walker v. State, 828 S.W.2d 485 (Tex. App.—Dallas 1992, pet. ref'd).
181. *Id.* at 491.
182. *Id.* at 490.
183. *Id.*
184. 823 S.W.2d 296 (Tex. Crim. App. 1992).

for continuance was filed on November 20. It was overruled the next day because of the short duration of the testimony of the first trial, the fact the first trial had occurred only four days earlier, and the fact that all the persons involved in the first trial, including the court reporter, were also participating in the second trial. The judge did allow defense counsel to review with the court reporter any testimony from the first trial if a conflict with prior testimony arose at the retrial. Prior to commencement of the second trial, defense counsel testified that while the testimony was generally fresh in his mind, he did not recall specific testimony which would hamper him in the impeachment of certain witnesses. The jury assessed a twenty-five year prison term in the retrial and the court of appeals affirmed, stating in part that while the defendant was indigent and did have a constitutional entitlement to a free transcription of the state's witnesses' testimony from the earlier mistrial, the defendant was not harmed by the denial of the motion for continuance.[185] The court observed that the defendant did not, at retrial, request any readback from the prior trial.[186]

The court of criminal appeals held that prior to retrial, the defendant was entitled to a transcription of the testimony of the state's witnesses who testified at his first trial.[187] The court recognized that as these critical state's witnesses would establish the elements of the offense, it "must be presumed that inhibiting appellant's ability to impeach such witnesses through their specific prior testimony unconstitutionally impaired appellant's defense."[188] In addition the court found that the availability of a court reporter for "readbacks" of prior testimony was not a sufficient alternative to providing the defendant with specific testimony necessary to conduct an efficient impeachment.[189]

The court found a distinct violation of due process in the overruling of a motion for continuance in *Petrick v. State*.[190] The jury was picked on Thursday and testimony began on Friday at 10:29 a.m.. The state had subpoenaed six witnesses to testify. Presuming that it would take all day Friday for the state to put on its case, defense counsel told out of state alibi witnesses to be in court on the following Monday. At 2:30 p.m. on Friday, the state, after examining the third witness, rested. The defense called one of the officers who investigated the case and then at 2:45 p.m. on Friday, made an oral motion for continuance until Monday morning, which constituted a delay of two hours and fifteen minutes in reality. Defense counsel advised the court that these witnesses were expected to testify to the defendant's alibi and that there were no other witnesses who could do so. Affidavits of the alibi witnesses were attached to the motion for new trial, which indicated that the defendant was in Missouri on the date the crime was committed.

185. White v. State, 828 S.W.2d 15 (Tex. App.—El Paso 1990), *rev'd*, 823 S.W.2d 296 (Tex. Crim App. 1992).
186. *Id.*
187. *White*, 823 S.W.2d at 300.
188. *Id.*
189. *Id.* (citing Britt v. North Carolina, 404 U.S. 226, 229 (1971)).
190. 832 S.W.2d 767 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

The court of appeals concluded that the testimony of the alibi witnesses might have been quite favorable to the defense, particularly in light of the victim's questionable identification of the defendant, and therefore held that the trial court abused its discretion in denying the defendant's motion for continuance.[191] Clearly, this opinion promoted substance over form, and recognized a serious due process violation.[192] While the court acknowledged that Texas had not yet adopted the federal standard to determine when a trial court abuses its discretion in denying a continuance to present defense witnesses, the court found the federal standard instructive in this case.[193] The federal standard included the following factors:

> (1) the diligence of the defense in interviewing witnesses; (2) the diligence of the defense in procuring the witnesses' presence; (3) the probability of procuring their testimony within a reasonable time; (4) the specificity with which the defense is able to demonstrate their expected knowledge or testimony; (5) the degree to which such testimony is expected to be favorable to the accused; and (6) the unique or cumulative nature of their testimony.[194]

The court also noted that the defense attorney had interviewed the alibi witnesses, obtained their affidavits and had made extensive travel arrangements. Because the witnesses could not afford to miss work, counsel tried to accommodate them by having them come to Houston on the day they were likely to testify.

F. PUNISHMENT ELECTION

In *Saldana v. State*[195] the defendant was convicted in 1987 on pleas of guilty to two counts of aggravated sexual assault, two counts of indecency with a child, and incest. The trial court set punishment at fifteen years and ten years in prison on the aggravated sexual assault counts, to be served consecutively, and at five years each on the other counts, to run concurrently. On appeal, the court remanded the two aggravated sexual assault convictions for reassessment of punishment because the charges against the defendant were misjoined in two indictments. Upon remand, the trial court denied defendant's motion to have a jury assess punishment, ruling that he had waived his right to a jury at the time he entered his original pleas of guilty. Punishment was again assessed at fifteen years on each count. The court held that article 44.29(b)[196] "created a right to chose either jury or court assessment of punishment after such a remand, notwithstanding the choice at the original trial.[197] The language in article 44.29 (b), "[i]f the defendant elects, the court shall empane[l] a jury for the sentencing stage of

191. *Id.* at 771.
192. *Id.*
193. The federal standard was set forth in United States v. Uptain, 531 F.2d 1281, 1287 (5th Cir. 1976).
194. *Id.*
195. 826 S.W.2d 948 (Tex. Crim. App. 1992).
196. TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (Vernon 1989).
197. *Saldana*, 826 S.W.2d at 950.

the trial in the same manner as the jury is empaneled by the court for other trials before the court,"[198] entitles a defendant who had not elected a jury assessment of punishment prior to commencement of voir dire at its original trial to receive jury assessment after reversal for error at the punishment phase.[199]

II. TRIAL

A. WAIVER OF JURY TRIAL

In the misdemeanor prosecution involved in *State ex rel. Tim Curry v. Carr*[200] the state refused to consent to the jury waiver, relying on the provisions of article 1.13(a).[201] The respondent trial judge denied the state's request that the case be tried before a jury and set the case for a trial before the court. The court held that effective September 1, 1991, article 1.13(a) was amended to apply to "any offense other than a capital felony in which the state notifies the court and the defendant that it will seek the death penalty."[202] Thus, the state's consent to a trial before the court is necessary in both felonies and misdemeanors.[203]

B. MOTION TO SHUFFLE JURY PANEL

In *Jones v. State*[204] the court revisited the perennial complaint that the defendant was denied his absolute right to a jury shuffle upon timely request. In *Jones* after the jury panel was qualified, exempted and sworn and after the parties examined the panel in numerical order, the defendant was afforded the opportunity to shuffle the jury panel and declined. The state requested that the panel be shuffled and the trial court obliged, pursuant to article 35.11.[205] After the first shuffle was accomplished and prior to the state's voir dire, the defendant requested orally and by written motion that the jury panel be reshuffled, which was denied. The court of appeals held that the defendant had an absolute right to shuffle, assuming a timely motion. The court of criminal appeals held that article 35.11 does provide that a defendant is guaranteed that the jury panel will be shuffled once, at either his request or the state's, but does not mandate that a defendant be allowed to reshuffle the panel after the state has caused the panel to be shuffled.[206] The court held that there is no "absolute right" to shuffle the jury panel in circumstances existing in this case, where the defendant had the opportunity to view the original panel, declined to exercise his right to shuffle, and the shuf-

198. TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (Vernon 1989).
199. *Saldana*, 826 S.W.2d at 950.
200. No. 71,514 (Tex. Crim. App., Oct. 14, 1992) (not designated for publication).
201. TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (Vernon 1989).
202. *Curry*, No. 71,514 (Tex. Crim. App., Oct. 14, 1992) (not designated for publication).
203. *Id.*
204. 833 S.W.2d 146 (Tex. Crim. App. 1992).
205. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon 1989).
206. *Jones*, 833 S.W.2d at 149. This rule assumes no misconduct in the state shuffle similar to that in Stark v. State, 657 S.W.2d 115 (Tex. Crim. App. 1983).

file at the state's request was done in the courtroom.[207]

In *Turner v. State*[208] the defendant was convicted of capital murder and sentenced to life. During jury selection, 117 potential jurors were called, but as the courtroom was unable to accommodate that many people, the group was broken down into about four panels. The court addressed the panel members who were then given instructions to return for individual appointments when individual voir dire took place. After that time, the motion to shuffle was presented. Article 35.11 creates a statutory privilege allowing the parties in a criminal trial to have the names of the prospective jurors shuffled.[209] The parties must be allowed an opportunity to view the venire seated in proper sequence and then have the option to have the names shuffled.[210] However, it was not the intent of the statute to have the names shuffled based on information obtained during voir dire, gleaned from jury information cards and/or biographical questionnaires.[211] The court recognized that a refusal of a timely motion to shuffle was automatically reversible error, but therein lay the problem in this case: the motion to shuffle was presented after voir dire had commenced.[212] Voir dire commences when the state begins its examination of prospective jurors, not when the judge begins his/her initial instructions.[213] The state won by default.

C. JURY SELECTION

In *Woolridge v. State*,[214] the court struck down a trial court ruling which limited defense counsel's ability to voir dire prospective jurors on their definitions of "reasonable doubt."[215] During jury selection at the defendant's murder trial, the prosecutor stated to the panel, "[a]nd our law has never had a state court case that says beyond a reasonable doubt means one thing or another. . . . *I can tell you what it doesn't mean*. . . . In other words, if you were *convinced*, you would be obligated to return a verdict of guilty of murder."[216] During defense counsel's examination of the jury panel, counsel twice attempted to ask a specific potential juror about the term "reasonable doubt." The first time, defense counsel asked what "reasonable doubt" meant to the juror in the context of the juror's prior civil jury service, the prosecutor's objection to the question was sustained. Later, defense counsel told the panel that federal judges do give a definition of reasonable doubt and

207. *Jones*, 833 S.W.2d at 149. The court observed that the term "reshuffled" has caused some confusion in past cases. *Id.* at n.4. The court noted that there were at least two situations in which a defendant had the right to have the jury panel reshuffled: first, if the original shuffle was caused by someone other than the state, such as the trial judge or other court personnel; second, when the "reshuffle" really amounted to the defendant's first statutorily authorized shuffle. *Id.*

208. 828 S.W.2d 173 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

209. *Id.* at 176.

210. *Id.*

211. *Id.*

212. *Id.* at 176-77.

213. *Id.* at 177.

214. 827 S.W.2d 900 (Tex. Crim. App. 1992).

215. *Id.* at 905-06.

216. *Id.* at 901-02.

relayed that definition. Returning to the same juror, defense counsel asked, "*[i]s that close to what you believe beyond a reasonable doubt means?*"[217] Once again, the prosecutor's objection was sustained. The court concluded the trial judge abused his discretion by restricting the defendant's voir dire examination.[218] The question at issue was not repetitious, and it was not in an improper form.[219] Although a trial judge may impose restrictions to curtail the length of voir dire, the judge may not prohibit a proper question when it is first asked.[220] In contrast, trial judges are authorized to prohibit questions which substantially repeat other questions already posed by the same party or questions which are asked after the prospective juror has stated his position clearly and without reservation.[221]

Woolridge was tried before the court of criminal appeals determined that a definition of "reasonable doubt" must be given in every jury trial.[222] Merely because no definition will be given for a term in the court's charge "does not render a prospective juror's understanding of that term irrelevant."[223] Instead, the court concluded that the juror's understanding of the term "becomes more crucial" to an intelligent exercise of peremptory challenges "because there is no definition to guide what could be a juror's skewed perception of the term."[224] Moreover, because disallowance of a proper question denies the defendant the ability to intelligently exercise his peremptory challenges, a harmless error analysis is inappropriate.[225] Since the harm lies in denial of the ability to intelligently exercise peremptory strikes, requiring a reviewing court to undergo a harm analysis[226] is fruitless.[227]

In *McCarter v. State*[228] the court reviewed the complaint that the trial judge abused its discretion in limiting defense voir dire to thirty minutes. The court at the outset noted competing constitutional rights, on the one hand, the right to counsel which included the right to question prospective jurors in order to intelligently and effectively exercise peremptory challenges and challenges for cause during the jury selection process, and on the other hand, the right of the trial judge to impose reasonable restrictions on the exercise of voir dire examination.[229] Because the judge terminated the voir dire while the defense attorney was asking general questions of the venire, the two pronged test announced in *De la Rosa v. State*[230] was used: (1) whether the defendant attempted to prolong the voir dire; (2) whether the

217. *Id.* at 903. Once again, the prosecutor's objection was sustained.
218. *Id.* at 906.
219. *Id.*
220. *Id.* at 905-06.
221. *Id.* at 906.
222. Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991). The required jury instruction in *Geesa* is prospective in application only. *Id.* at 165.
223. *Woolridge*, 827 S.W.2d at 906.
224. *Id.*
225. *Id.*
226. TEX. R. APP. P. 81(b)(2).
227. *Woolridge*, 827 S.W.2d at 906-07.
228. 837 S.W.2d 117 (Tex. Crim. App. 1992).
229. *Id.* at 119.
230. 414 S.W.2d 668, 671 (Tex. Crim. App. 1967).

questions the party was not permitted to ask were proper voir dire questions.[231] Before the trial court terminated the voir dire, the defense attorney had asked the venire general questions concerning the defendant's expected testimony, law enforcement officers, anti-drug organizations, experiences with African-Americans, the presumption of innocence, the concept of mere presence, criminal records, victims of crime, and drug addiction. Numerous responses were elicited. At the conclusion of the thirty minute time limit, the defense attorney requested additional time to explore the following issues with the venire: problems with drugs in the venire members' immediate family, prior criminal jury experience, association/relationship with police officers, and people accused of a crime by a police officer. The state did not object during the defense voir dire. The state did contend on appeal that the defendant sought to cover areas previously covered during the judge's or the state's voir dire, a meritless position as the defense may not be precluded from the traditional voir dire examination simply because the questions asked are repetitious of those asked by the court and prosecutor.[232] The court further found that the questions not permitted to be asked were proper voir dire questions.[233] The court observed that had the trial judge determined that either party was prolonging the voir dire, the appropriate remedy would have been to call the attorneys to the bench and instruct them to expedite the process.[234] The judgment of conviction was reversed because the error in the denial of a proper question, which prevents the intelligent exercise of one's peremptory challenges, constitutes an abuse of discretion and is not subject to a harm analysis under Rule 81(b)(2).[235]

The defendant's complaint based upon time constraints found less favor in *Tobar v. State*.[236] The trial judge terminated the voir dire after forty five minutes as the defendant attempted to question venire members individually. The court of appeals therefore reviewed the complaint in view of the *De la Rosa* standard and a third factor: whether the record showed that the jury included veniremen whom the defendant was not permitted to examine.[237] The court found that the defendant was not denied the opportunity to effectively examine the panel or unfairly prohibited from conducting his inquiry.[238] Defense counsel had the responsibility to appropriately budget his time within the reasonable limits set by the court.[239] Clearly, the court did not appreciate how defense counsel spent his time, or the fact that he reserved individual questioning for the very end of voir dire.[240]

---

231. *McCarter*, 837 S.W.2d at 121.
232. *Id.*
233. *Id.* at 122.
234. *Id.*
235. *Id.*; TEX. R. APP. P. 81(b)(2).
236. 833 S.W.2d 296 (Tex. App.—Corpus Christi 1992), *vacated*, No. 1081-92 (Tex. Crim., March 31, 1993).
237. *Id.* at 298.
238. *Id.*
239. *Id.*
240. *Id.* at 298-99.

In *Orosco v. State*[241] the state asked the panel generally whether there was anyone who felt that only one witness testifying was just not enough to convince them beyond a reasonable doubt; and then in an individual voir dire examination, the state asked whether if only one witness was called by the state and that witness testified believably to all the elements of the offense, could the venire person return a guilty verdict. The defense objected that the illustration was an impermissible attempt to bond the venire persons to a certain set of facts. The court held that the prosecutor's questions inquired whether the prospective jurors could, rather than would, convict on the testimony of one eye witness, which is a proper subject of inquiry.[242]

In *Maddux v. State*[243] the defendant questioned the venire at length about their general willingness to consider probation in a murder prosecution. Counsel asked venire persons if, in the event of a conviction of murder, they could consider as little as five years probation and no fine in the proper case, and to those who replied in the affirmative, whether they were thinking only of a mercy killing situation. The defense counsel then asked whether "in a hypothetical case where there was a murder conviction and a child had died, how many of you would still be able to consider probation?"[244] The state's objection was sustained. The court held that while defense counsel could legitimately question the venire persons about their willingness to consider probation in a murder case, the defendant was not entitled to ask a hypothetical question that was based on the facts peculiar to the case on trial.[245] To show an abuse of discretion, a defendant must demonstrate that the question he sought to ask was proper, which is defined as a question that seeks to discover a juror's view on an issue applicable to the case.[246] The court distinguished prior cases which resulted in reversals when the trial court forbad certain questioning on the ground that "defense counsel had been precluded from determining jury bias in favor of categories of persons who would be *witnesses*: e.g., nun versus lay person . . .,[247] police officer versus ordinary citizen . . .,[248] white woman versus black man."[249] The court emphasized that if the present case had involved an aggravated sexual assault on a child or some other offense in which the child complainant was a prospective witness, defense counsel would have been entitled to question the venire members concerning bias for or against the child witness.[250] However, as counsel had been liberally permitted to question the venire regarding their willingness to consider probation in a proper case, and as the additional inquiry

241. 827 S.W.2d 575 (Tex. App.—Fort Worth 1992, pet. ref'd), *cert. denied*, 113 S. Ct. 425 (1992).

242. *Id.* at 578.

243. 825 S.W.2d 511 (Tex. App.—Houston [1st Dist.] 1992, pet. granted).

244. *Id.* at 513.

245. *Id.* at 515.

246. *Id.* at 514.

247. Nunfio v. State, 808 S.W.2d 482 (Tex. Crim. App. 1991).

248. Hernandez v. State, 508 S.W.2d 853 (Tex. Crim. App. 1974).

249. *Maddux*, 825 S.W.2d at 515 (citing Abron v. State, 523 S.W.2d 405 (Tex. Crim. App. 1975).

250. *Id.* at 515.

sought to commit venire members to consideration of probation in this specific case that would be tried before them, involving a murder, the trial court did not abuse its discretion in preventing defense counsel from asking the question.[251]

In *T.K.'s Video, Inc. v. State*[252] the court found no abuse of discretion when the court disallowed defense questions of the venire as to how they felt about seeing sexually explicit movies, those that explicitly portrayed people engaging in sexual relations.[253] However the trial court, after sustaining the state's objection as to the question asked, opined that the question could be asked more directly. The defense was afforded the opportunity to question the venire as to their feelings about there being adult movie stores, whether they had an open mind about being able to see one of these types of video tapes, and how they felt about others they knew who might have seen an x-rated movie. The court observed that a question asked of individual venire members may be so broad that, rather than seeking particular information from a particular panel member, it presents a general topic for discussion and constitutes a global fishing expedition.[254] However the defendant's rights were not abridged in view of the more specific questions permitted of the venire members.[255]

The defendant in *Spelling v. State*[256] complained of a juror's failure to disclose information during voir dire. This case was a retrial on punishment only and involved a murder prosecution for the death of the decedent's three month old son. Evidence at the hearing on the motion for new trial showed that one of the jurors, while a member of the venire, had stated to another member that she hoped that the case would not be one dealing with child abuse because she had two grandchildren who had been abused, that it had caused her some trouble later and that she would have to give life because she felt strongly about it. She said nothing during the voir dire examination about what had happened to her grandchildren or its effect on her. Her juror information sheet stated that neither she nor any member of her family had ever been a victim of a crime. She answered in the negative to the question, "Is there anything we should know that might bear on your ability to be a fair and impartial juror?"[257] During the voir dire examination, no one asked her or any of the other venire members whether they or anyone in their family had been the victim of violence or abuse and whether it would affect their ability to serve as a fair an impartial juror.

The court recognized that "[w]hen a partial, biased, or prejudiced juror is selected without fault or lack of diligence on the part of defense counsel, who has acted in good faith upon the answers given to him during voir dire not

251. *Id.*
252. 832 S.W.2d 174 (Tex. App.—Fort Worth 1992, pet. ref'd).
253. *Id.* at 177.
254. *Id.*
255. *Id.*
256. 825 S.W.2d 533 (Tex. App.—Fort Worth 1992, no pet.).
257. *Id.* at 536.

knowing them to be inaccurate, good ground exists for a new trial."[258] However it is the obligation of the defense counsel "to ask questions calculated to bring out information which might be said to indicate a juror's inability to be impartial and truthful."[259] The court recognized that the juror information sheet contained inaccurate information, but emphasized that defense counsel was not diligent because he did not ask either the panel as a whole or the juror individually "the more specific question of whether they could not serve as a fair and impartial juror due to violence or abuse on them or someone in their family."[260] This specific question would have likely produced an accurate answer from the juror.[261] The court concluded that it was not "reasonable for counsel to rely on the broad, general questions contained in the juror questionnaire due to the likelihood, as demonstrated here, of an inaccurate answer."[262]

The defendant in *Vaughn v. State*[263] prevailed when the court held that jury bias was established as a matter of law thanks to the lack of any in-depth questioning of the challenged juror.[264] After the trial court swore and impaneled the jury, the juror in question advised the bailiff that she thought she knew the defendant from high school. The bailiff conveyed the information to the trial court who then questioned the juror outside the presence of the other jurors. After the juror said that she was sure she knew the defendant from high school, the court asked if she could be fair and impartial in view of that knowledge. She stated "no." The trial court asked her if she knew the defendant personally, if she knew of his reputation in the community, and if she socialized with him in high school. The juror responded "no" to all three questions. The court told the juror she was still on the jury and overruled the defendant's motion to quash the panel, treated on appeal as a motion for mistrial. Under these facts, bias was established as a matter of law, particularly because the record did not show that juror was asked or that she ever stated or indicated in any way that she could set aside her feelings concerning the defendant.[265] Without such a showing, the trial court had no discretion to determine whether her bias actually existed and had to remove her from the jury.[266]

In the alternative, the court considered whether the trial court still retained discretion to overrule the defendant's challenge for cause without an indication by the juror that she could set aside her feelings.[267] In actuality, the trial court never asked the juror the basis of her opinion. The court assumed that unless her bias was based upon one of three questions asked of her, her bias could not exist to such a degree as to warrant disqualification.

258. *Id.*
259. *Id.*
260. *Id.* at 537.
261. *Id.*
262. *Id.*
263. 833 S.W.2d 180 (Tex. App.—Dallas 1992, pet. ref'd).
264. *Id.* at 184.
265. *Id.* at 185.
266. *Id.*
267. *Id.*

Ultimately the court held that as the trial court "failed to determine the basis for Alexander's [the juror's] inability to be fair and impartial or whether she could lay that opinion aside, it abused its discretion in not dismissing her."[268] Proceeding with the harm analysis, the court noted that if a defendant makes a challenge for cause prior to the jury's impanelment and if the trial court erroneously overrules it, to establish error, the defendant must show that he exhausted all of his peremptory challenges and that the defendant was forced to accept an objectionable juror.[269] If, after impanelment but prior to the jury's verdict, the defendant discovers that a biased or prejudiced juror was selected without fault or lack of diligence on the part of defense counsel, it is an abuse of discretion for the trial court not to grant a motion for new trial.[270] In this case the court asked whether any panel member knew the defendant or any other participant, and no panel member responded. Thus the question of impartiality was addressed.[271] The court held that the defendant was deprived of his right to peremptorily challenge this juror.[272]

D. BATSON CHALLENGES

Application of the United States Supreme Court's decision in *Batson v. Kentucky*[273] continued to be the source of much litigation at the appellate level during the Survey period. In *Hill v. State*[274] the court considered when a *Batson* challenge is timely under the Texas system. In Texas, the timeliness of a *Batson* challenge is controlled by article 35.261.[275] The court has previously held that article 35.261 was "intended to create uniform procedures and remedies to address claimed constitutional violations during jury selection."[276] Thus, whenever a claim is made that members of a jury panel were peremptorily challenged on the basis of race, the procedures of that article must be followed.[277] That statute specifies that a *Batson* challenge can be made in a timely fashion "[a]fter the parties had delivered their lists . . . and before the court has impaneled the jury."[278] By its decision to enact article 35.261, the Texas legislature elected to have only one remedy for a *Batson* violation: calling a new array.[279] An examination of the legislative history of the article reflects that the remedy was chosen to eliminate any possible bias toward the prosecution which could exist if the remedy selected were to seat a panel member whom the state had just struck.[280] In

268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 185-86.
272. *Id.* at 186.
273. 476 U.S. 79 (1986).
274. 827 S.W.2d 860 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 297 (1992).
275. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).
276. State v. Oliver, 808 S.W.2d 492, 496 (Tex. Crim. App. 1991).
277. *Id.*
278. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).
279. *Id.*
280. *Hill*, 827 S.W.2d at 864.

Hill the court concluded that because the only remedy is calling a new array, it is not necessary for the jury panel to remain in the courtroom because, regardless of the decision of the trial court to sustain or overrule the objection, only one remedy is statutorily available.[281] Thus, the court concluded there is no logical reason to require that an objection to the prosecution's strike be lodged before the venire is discharged.[282] As a matter of Texas law, an objection is timely if it occurs after the jury panel has been dismissed, but before the jury is sworn.[283]

In a related claim, the court addressed the question of when a *Batson* challenge is timely in a capital murder prosecution. In *McGee v. State*[284] the court concluded that a defendant may make his peremptory showing of the discriminatory effect of the prosecutor's strikes at any time prior to the jury's being sworn.[285] The procedures in capital jury selection differ from non-capital cases. Owing to the unique structure of jury selection in capital cases, the court recognized that it is difficult to establish the specific time that jury lists are "delivered to the clerk" in the words of the statute.[286] Similarly, a jury itself is not "impaneled" until its members have been both selected and sworn;[287] however, the scenario of typical capital murder voir dire is the trial court practice of swearing in each individual juror as the juror is accepted by prosecution and defense. Nonetheless, the court of criminal appeals concluded that this trial court practice does not "change" the determination of when the jury itself is sworn.[288]

Reaching the merits of a *Batson* claim, the court in *Linscomb v. State*[289] held that a prima facie case can be established by the high number of peremptory strikes used by the state against minorities.[290] This decision reaffirms the principle that the defendant's burden of establishing a prima facie case should not be an onerous task. In a delivery of cocaine prosecution, the jury panel included six African Americans. Although two of the six panel members actually served as jurors, all of the remaining African American members of the venire were excluded by state peremptory challenges. When the defendant raised a *Batson* challenge, the prosecutor refused to reveal her reasons for striking those members of the panel by claiming that the defendant had not established a prima facie case of racial discrimination. The court of criminal appeals held that such a prima facie case was made.[291] Recognizing that "the bare fact of strikes exercised against persons of a certain race does not necessarily reveal the work of a racially prejudiced

281. *Id.*
282. *Id.*
283. *Id.*
284. 825 S.W.2d 709 (Tex. Crim. App. 1992).
285. *Id.* at 710
286. Rousseau v. State, 824 S.W.2d 579, 581 (Tex. Crim. App. 1992).
287. *Id.*
288. *Id.*
289. 829 S.W.2d 164 (Tex. Crim. App. 1992).
290. *Id.* at 166.
291. *Id.*

mind,"[292] the court further recognized that what might be "revealing" was the "repetition of such strikes in suspiciously large numbers — numbers larger than one would expect if race had nothing to do with it."[293]

The court of criminal appeals also reaffirmed its commitment to the proposition that in reaching the merits of a *Batson* challenge, it is not relevant that some members of the race in question were *not* struck by the state.[294] Similarly, it is not relevant that some members of that race actually served on the defendant's jury.[295] Neither fact is sufficient to address the underlying concerns of *Batson*.[296] The critical focus of a *Batson* inquiry is whether the state exercised its peremptory challenges against *even one* venire member because of race.[297] The court cautioned that what is sufficient to constitute a prima facie case should not be confused with sufficiency of evidence to finally dispose of the issue: "In determining, therefore, whether a *prima facie* case is reflected on the record, courts are not to resolve the question of deliberate racial discrimination on its merits by assessing the probative weight of competing inferences or conflicting evidence. They are simply to decide whether the issue has been raised."[298]

Concerning the sufficiency of evidence to support a claim of racially motivated peremptory challenges, the court in *Young v. State*[299] clarified that the defendant is not required to present a comparative analysis of the prosecutor's questioning of challenged and unchallenged prospective jurors.[300] The court characterized such a comparative analysis as merely an analytical tool.[301] As such it is a devise used by either party on appeal to show that the ruling of the trial court was or was not supported by the voir dire record.[302] Thus, it is not necessary for a defendant to request that the trial court make a finding on the *Batson* challenge based on a comparison analysis in order to have that evidence considered on direct appeal.[303]

The court of criminal appeals repeated its position that *Batson* challenges can be raised by a non-racial minority defendant. In *Turner v. State*[304] the intermediate appellate court decision had been issued prior to the court of criminal appeals' opinion in *Mead v. State*,[305] holding that under *Powers v. Ohio*[306] a white defendant could raise an equal protection claim as to the

292. *Id.*
293. *Id.*
294. *Id.* at 167.
295. *Id.*
296. *Id.*
297. *Id.* "We start from the proposition that the United States Constitution is offended by so much as a single strike exercised on the basis of race." *Id.* at 166.
298. *Id.*
299. 826 S.W.2d 141 (Tex. Crim. App. 1991).
300. *Id.* at 146.
301. *Id.* at 145.
302. *Id.*
303. *Id.* at 146.
304. 827 S.W.2d 333 (Tex. Crim. App. 1992).
305. 819 S.W.2d 869 (Tex. Crim. App. 1991).
306. 111 S. Ct. 1364 (1991).

exclusion of minority veniremen.[307] It was clear from the record in *Turner* that the trial court did not consider the defendant's *Batson* challenge because he was white and complaining of the exclusion of several minority veniremen.[308] Because the court of appeals did not address that issue, the cause was remanded.

During the Survey period the court of criminal appeals also revisited the issue of establishing a sufficient prima facie case on a *Batson* challenge so as to require the challenged party to come forward with race neutral explanations. *Rosseau v. State*,[309] a capital murder prosecution, reaffirms that the court of criminal appeals will not review the issue of whether a defendant has established a prima facie case of discrimination *unless* the trial court's ruling on that issue stops the fact finding process.[310] In *Rosseau* the court found the defendant's prima facie case sufficiently established when all twelve capital murder jurors had been selected, the jury as a whole had not been sworn, and the defense presented evidence to support the objection which had been first raised and overruled immediately following the state's strike. The defense evidence was that seven of the thirteen strikes used by the state were against black and Hispanic panel members. The trial court had restricted the fact finding process concerning one of those jurors because of a mistaken belief that the defense was objecting for the first time on *Batson* grounds only to another panel member's exclusion. These two facts taken together [the pattern of state strikes and the restriction on the fact finding process] were sufficient to establish a prima facie case. The appeal was abated with instructions to conduct a full adversarial hearing.[311]

Turning to the merits of explanations offered by the state for its exercise of peremptory challenges, the court of criminal appeals approved some as race neutral and rejected others. *Wright v. State*[312] involved an insufficiently race neutral explanation. All eight black veniremembers were challenged and removed from the jury panel; the state exercised strikes against four of these veniremen. The prosecutor offered reasons for her peremptory challenges to three black panel members, but neglected to include a specific rationale for the fourth struck panel member. She stated in general terms that she exercised all her challenges based on what the jurors had told her and upon how she believed they would consider the facts in the case. A review of the voir dire proceedings revealed that during the state's questioning, the particular panel member for whom the prosecutor did not give a specific explanation had answered that a friend of his son had a drug problem, that he attempted to find the friend help for that problem, and that he eventually had to fire him because of it. However, because this colloquy occurred during the voir dire examination and was not offered during the *Batson* hearing as a race neutral explanation, it could not be considered after the fact as being such an

307. Turner v. State, 827 S.W.2d 333, 334 (Tex. Crim. App. 1992).
308. *Id.*
309. 824 S.W.2d 579 (Tex. Crim. App. 1992).
310. *Id.* at 581.
311. *Id.* at 584.
312. 832 S.W.2d 601 (Tex. Crim. App. 1992).

explanation.[313] Thus, in the absence of a race neutral explanation, the trial court's finding of no racial consideration was clearly erroneous.[314]

In contrast, the state's explanation survived a *Batson challenge* in *Harris v. State*,[315] a capital murder prosecution. The court of criminal appeals held the following explanations sufficiently race neutral so as to support the trial court's finding of no purposeful discrimination:[316] (1) the panel member's brother was on felony probation; (2) the panel member would hold the state to proof beyond any and all doubt in answering the punishment issues; and (3) two panel members indicated they could never answer "yes" to the punishment issues. These reasons were racially neutral, logically related to the case to be tried, and based directly on the juror's responses.[317]

In contrast to the Texas Court of Criminal Appeals, the reported decisions of the intermediate appellate courts during the Survey period all found sufficiently race neutral explanations to support the trial court's ruling. In *McHenry v. State*[318] the state's explanation for the strike was that the juror had been arrested for traffic tickets and his son had been arrested for drug related activity. *Diaz v. State*[319] involved a challenge based on juror dress and demeanor. *Newsome v. State*[320] upheld as sufficiently race neutral strikes based upon: (1) a venire member's inability to properly complete the juror information card;[321] (2) a panel member from New York who the prosecutor concluded would thus be hardened to crime; (3) a panel member who was a teacher and thus could be considered to have a liberal bent.

Significantly, in *Newsome*, the defense was unable to secure the prosecutor's notes, made in preparation for the *Batson* hearing, for purposes of cross examination. The appellate court was not persuaded that the prosecutor's acknowledgement during cross examination that his notes would constitute his statement of specific reasons was sufficient to bring those notes under the purview of Texas Rule of Criminal Evidence 614(f). Thus, unlike *Whitsey v. State*,[322] in which the defendant was able to challenge the prosecutor's explanations based in part because the letter "B" had been placed next to the name of each black panel member, the defense could not meet its burden of proving the explanations pretextual.

Lastly, in *Rodriguez v. State*[323] the court of appeals pointedly illustrated

313. *Id.* at 605.
314. *Id.*
315. 827 S.W.2d 949 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 381 (1992).
316. Under the clearly erroneous standard for review of *Batson* challenges, an appellate court should defer to the findings of the trial judge unless the reviewing court is left with a firm conviction that a mistake has been committed. Williams v. State, 804 S.W.2d 95, 101 (Tex. Crim. App. 1991), *cert. denied*, 111 S. Ct. 2875 (1991).
317. Harris v. State, 827 S.W.2d 949, 955 (Tex. Crim. App. 1992), *cert denied*, 113 S. Ct. 381 (1992).
318. 823 S.W.2d 667 (Tex. App.—Dallas 1992), *vacated*, 829 S.W.2d 803 (Tex. Crim. App. 1992).
319. 823 S.W.2d 702 (Tex. App.—El Paso 1992, no pet.).
320. 829 S.W.2d 260 (Tex. App.—Dallas 1992, no pet.).
321. Placing date of birth in the box labeled "place of birth."
322. 796 S.W.2d 711, 726 (Tex. Crim. App. 1989).
323. 832 S.W.2d 727 (Tex. App.—Houston [1st Dist.] 1992, no pet.).

the fact-based nature of a *Batson* challenge. The defendant objected to the jury on *Batson* grounds claiming that he was Hispanic and the prosecutor had struck the only two Hispanic panel members. However, the jury itself was selected from the first nineteen veniremen. The two potential jurors at issue were in positions 25 and 32. Thus, the complained of strikes had no impact on the composition of the jury, and were not grounds for relief.[324]

E. OPENING STATEMENTS

Several decisions encompassed situations in which a trial court denied the defense the right to make an opening statement. In *Moore v. State*[325] the prosecutor declined to make an opening statement, following which the defense requested the right to make an opening statement before the state put on its evidence, which request was denied. The defense later declined the court's invitation to present an opening statement at the beginning of the defense testimony. In *Boston v. State*[326] the state waived it's opening statement and the trial court denied the defense request to make an opening statement.

In each situation, the state argued procedural default: (1) as the state waived opening statement, the defense had no right to make an opening prior to the state's evidence, under article 36.01(B);[327] (2) the defendant failed to preserve error by not specifying the grounds for the request and by not objecting to the trial courts denial of the request; (3) the defendant waived error because the record did not show what the defendant might have said if the trial court had granted the defense; or (4) the defendant waived the error because the defendant did not make an opening statement prior to the presentation of defense evidence.

Each opinion emphasized that the trial court had no discretion in the matter, that defense counsel had the absolute right to choose the point at which the opening statement was to be made. In other words, a defendant had the right to make an opening statement before the state presented it's evidence even if the state waived it's right to an opening statement under the statute. The courts dispensed with any need for the defense to make a formal bill of exception to preserve error.

Finally, the courts emphasized that article 36.01(a)(5)[328] specifically permitted the defendant in his opening statement to tell the jury the defenses relied upon and the facts expected to be proved. Disallowance of the right to make an opening statement essentially disrupted the jury's orderly evaluation of evidence. The jury could not evaluate the state's evidence while considering the defense's position. Neither court could conclude beyond a reasonable doubt that the error made no contribution to the conviction

324. *Id.* at 729.
325. 829 S.W.2d 390 (Tex. App.—Dallas 1992, rev. granted, without pet.).
326. 833 S.W.2d 334 (Tex. App.—Waco 1992, pet. filed).
327. TEX. CODE CRIM. PROC. ANN. art. 36.01(b) (Vernon 1989).
328. TEX. CODE CRIM. PROC. ANN. art. 36.01 (Vernon 1989).

under Rule 81(b)(2).[329]

In *Bomer v. State*[330] the prosecutor in his opening statement said that an unknown citizen informant was "in fear of retaliation" and "going to remain anonymous" and that "I believe the evidence will show that this person wanted to remain anonymous."[331] The defendant objected that the matter was "extraneous," which was overruled; however the court sustained defense objections during trial when the prosecutor asked if the informant wanted to be unknown. The court of appeals concluded that given the brevity of the harmful statement about retaliation and the strength of the evidence against the defendant, the improper statement was not so harmful that it could not have been cured by an instruction.[332] The court did admonish the state from making opening statements as to damaging facts the state knows it cannot prove,[333] a matter of little consolation to this defendant.

F. JUROR QUESTIONING OF WITNESSES

The practice of permitting jurors to question witnesses by means of submitting written questions to the court was addressed by several courts of appeals during the 1991 survey, but no court banned the practice. In *Morrison v. State*[334] the court found that the questionable benefits of the practice did not outweigh the far reaching hazards presented, and held that "the practice of permitting jurors to become active participants in the solicitation of evidence by questioning witnesses" was not permissible, and further, was not subject to a harm analysis.[335] The court recognized that there were various procedural and theoretical implications which remained unanswered,[336] but emphasized that any change in the system may only come through the rule making power of the court of criminal appeals or by the legislature.

G. MOTION TO REOPEN TESTIMONY

Article 36.02[337] has been interpreted to mean that a trial court errs when

329. TEX. R. CRIM. APP. P. 81(b)(2).
330. 827 S.W.2d 65 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd.).
331. *Id.* at 67.
332. *Id.* at 68.
333. *Id.* at 67.
334. 845 S.W.2d 882 (Tex. Crim. App. 1992).
335. *Id.* at 889.
336. Examples of the procedural and theoretical implications mentioned by the court were: "what is the permissible scope of juror? Should be jurors be told of the reasons for exclusion of a submitted question? Should a witness be recalled if a juror thinks of a question after that witness has been dismissed? If a juror's questions indicates that the juror is becoming prematurely impartial should the judge declare a mistrial? Should jurors be allowed to question a defendant who chooses to take the stand? Especially troublesome is the possibility the juror partiality may arise as the result of a single question or may arise in one juror as the result of another's questions, however impartial those questions may appear." *Id.* at 888.
337. TEX. CODE CRIM. PROC. ANN. art. 36.02 (Vernon 1989). Under this provision, the trial court abuses its discretion by refusing to reopen the evidence when the following conditions are met: (1) the witness was present and ready to testify; (2) the request to reopen was made before the charge was read to the jury and final arguments were made; (3) the court had some indication of what the testimony would have been, and was satisfied that the testimony was material and bore directly on the main issues; and (4) there was no showing that introduc-

he refuses a request to reopen for the purpose of producing relevant and admissible evidence, notwithstanding its weight or the issue upon which it is offered, provided that the request is timely under the statute and does not threaten to unduly impede the trial. But the decision to reopen is left to the sound discretion of the trial court.[338]

In *Sims v. State*[339] the defense requested permission to reopen to show that a certain witness had just been indicted for possession of cocaine based on his testimony in the case on trial. However, the defense never obtained a ruling on the request and never demonstrated the materiality of the evidence or even that it was admissible.

In *Lucious v. State*[340] the defendant complained on appeal that he was prohibited from testifying after making a request to reopen the testimony. After the court noted the necessary conditions preceding to the applicability of article 36.02[341] the court held that no timely motion to reopen had been presented.[342] In this case, as the trial court began reading the charge to the jury, the defendant interrupted, complaining that his objections had been overruled. The defendant was removed from the courtroom. The defendant, while being escorted out, told the bailiff to tell his attorney of his desire to testify. The defendant was returned to court after the charge was read and before final arguments but continued to disrupt the proceedings. At one point he stated in an outburst that he desired to take the stand. The defendant was removed from the courtroom a second time.

The court of appeals assumed that the defendant's message was timely related to the defendant's counsel, but noted that there was no timely motion to reopen presented to the court and no showing of the substance and materiality of the defendant's testimony. As a matter of fact, the trial court did not learn of the nature of the defendant's testimony until the hearing in the motion for new trial, a point in time when the only relief available was the granting of a new trial. Defendant's counsel testified that appellant's message was relayed in the form of an inquiry, not a demand or request; and that defense counsel did not present a motion to reopen because throughout the trial the defendant had expressed the desire not to testify in view of his prior felony convictions and his belief that the prosecution could not prove it's case.

H. COURT'S CHARGE

In *Biggins v. State*[343] the court held that in order for the defendant to be

tion of the testimony would have impeded the trial or interfered with the orderly administration of justice. Gibson v. State, 789 S.W.2d 421, 423 (Tex. App.—Fort Worth 1990, pet. ref'd.).

338. Cain v. State, 666 S.W.2d 109 (Tex. Crim. App. 1984).

339. 833 S.W.2d 281 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd.).

340. 828 S.W.2d 118 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

341. TEX. CODE CRIM. PROC. ANN. art. 36.02 (Vernon 1981).

342. Lucious v. State, 828 S.W.2d 118, 121 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

343. 824 S.W.2d 179 (Tex. Crim. App. 1992).

convicted as a party, the law of parties must be incorporated within the application paragraph authorizing the jury's verdict.[344] The defendant was convicted of unlawful delivery of a controlled substance. Evidence at trial showed that someone other than the defendant made the actual delivery. The evidence further showed that the defendant acted only as a party. In the abstract portion of the court's instruction to the jury, the law of parties was defined. However, that law was not incorporated into the application paragraph. Because of that defect, the evidence was insufficient to support the only verdict of guilty which the jury was authorized to return under the charge given.[345]

A different spin to the question was presented in *State v. Lee*,[346] a case in which the defendant complained that the evidence was insufficient to support a voluntary manslaughter conviction. The court held that the defendant was estopped from objecting to the sufficiency of the evidence to support the voluntary manslaughter charge in that the defendant had specifically requested the submission of this lesser included offense to murder.[347] In *Johnson v. State*[348] the court reversed the judgment of conviction for attempted capital murder, holding that the evidence was sufficient to warrant a jury instruction on the lesser included offenses of third degree aggravated assault and first degree aggravated assault.[349] In determining whether the jury should have been instructed on a lesser included offense, the court relied on the two step analysis enunciated in *Royster v. State*.[350] The capital murder conviction in *Ross v. State*[351] was reversed for the trial court's refusal to instruct the jury on involuntary manslaughter.[352] The court, in addition, observed that the determination of whether a particular offense is a lesser included offense of the offense charged is made without regard to the punishment involved. One offense may be a lesser offense of another even if it carried the same penalty. The court emphasized that the included offense need not be "lower" in the sense that it provided a lesser punishment. The word "lesser" does not refer to the punishment range but to the factor that distinguishes the included offense from the offense charged, i.e., "less than

344. *Id.* at 180.

345. *Id.* This decision reaffirms the commitment of the court of criminal appeals to two decisions: Jones v. State, 815 S.W.2d 667 (Tex. Crim. App. 1991) and Walker v. State, 823 S.W.2d 247 (Tex. Crim. App. 1992), *cert. denied*, 112 S. Ct. 1481 (1992). In each case the court of criminal appeals held that in order for the jury to be authorized to convict the defendant as a party, the law of parties must be incorporated within the application paragraph of the jury charge. *Biggins*, 824 S.W.2d at 180. In declining to overturn *Jones* and *Walker*, the court of criminal appeals noted that the "State has not presented any argument not previously considered by this Court." *Id.*

346. 818 S.W.2d 778 (Tex. Crim. App. 1991).

347. *Lee*, 818 S.W.2d at 781. *See also* Richardson v. State, 832 S.W.2d 168 (Tex. App.—Waco 1992, pet. ref'd.) (in attempted murder case, defendant acquiesced in submission of lesser included offense of aggravated assault of which defendant was convicted).

348. 828 S.W.2d 511 (Tex. App.—Waco 1992, pet. ref'd).

349. *Johnson*, 828 S.W.2d at 515.

350. 622 S.W.2d 442 (Tex. Crim. App. 1981).

351. No. 69,206 (Tex. Crim. App., December 9, 1992).

352. *Id.*

all facts, less serious injury or risk of harm, less culpable mental state, or an attempt."

Several cases were reversed because of defective court instructions. In *Fisher v. State*[353] the court held that the instruction to find the driver guilty, if evidence established beyond a reasonable doubt that the driver intentionally or knowingly operated the vehicle without the effective consent of the owner, was not proper as it failed to require proof that the driver knew that he did not have the effective consent of the owner.[354] In *Hernandez v. State*[355] the court held that the defendant did not have the burden of demonstrating in a driving-while-intoxicated prosecution that he had a valid drivers license before he was entitled to an instruction that the jury could recommend that this drivers license not be suspended under article 42.12, section 13(g).[356] In *Vasquez v. State*[357] the court found that the instruction on the defensive necessity should have been given to the jury in a prosecution for possession of a firearm by a felon.[358]

I. JAIL CLOTHES AND THE PRESUMPTION OF INNOCENCE

In *Randle v. State*[359] the defendant timely objected to being tried before the jury in jail attire. The trial court stated on record that the jail had no clothes which would fit the defendant, nor did the court, and that normally the defendant's family would bring civilian clothes for the occasion, but had not.[360] The trial court inquired of the jury panel whether the fact that the defendant was dressed in jail clothing "would cause them to feel that he was automatically guilty," and instructed the panel not to hold it against the defendant.[361] The court of appeals rejected this contention, particularly because the defendant had requested a speedy trial and could have moved for a continuance or a postponement, and did not, and because the trial court had appropriately instructed the jury.[362]

The court of criminal appeals reversed the conviction, finding that compelling a defendant to stand trial in jail clothes violated the defendant's right to a fair trial and his right to be presumed innocent.[363] The court concluded that in the face of the defendant's objection, "it is the duty of the trial court, the accused's attorney, the state's attorney, and the peace officers in control of the accused to offer the accused an opportunity to wear civilian clothes."[364] The court concluded that the defendant's attorney fulfilled his

353. 829 S.W.2d 403 (Tex. App.—Fort Worth 1992, pet. ref'd.).
354. *Id.* at 404.
355. 842 S.W.2d 294 (Tex. Crim. App. 1992).
356. *Hernandez*, 842 S.W.2d at 296; TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13(g) (Vernon 1989).
357. 830 S.W.2d 948 (Tex. Crim. App. 1992).
358. *Vasquez*, 830 S.W.2d at 951.
359. 826 S.W.2d 943 (Tex. Crim. App. 1992).
360. *Id.* at 944.
361. *Id.*
362. *Id.*
363. *Id.* at 946.
364. *Id.*

obligation by objecting, in timely fashion, to his client's being placed before the jury in jail clothes.[365] In contrast, both the trial court and the prosecutor "breached their duty by proceeding to voir dire over objection."[366]

In *Green v. State*[367] the defendant was convicted of aggravated sexual assault of a child and then placed in custody. The next day, additional testimony was developed before the jury. At some time prior to final arguments, the deputies, believing the defendant was being returned to court for sentencing, did not allow the defendant to dress in street clothes and paraded him down a hallway past the room where the jury was situated. At this time the defendant was wearing jail clothing, hand cuffs and shackles. The state asked for sixteen to fifty years in prison and the jury returned a ten year verdict.

At the motion for new trial hearing, one juror testified that she and other jurors saw the defendant walk passed the room but that no juror mentioned those facts during deliberations and that seeing the defendant dressed in jail clothing and restraints did not affect their verdict. The appellate record was silent on the incident. No objection was raised and no jury instruction requested. On appeal, the defendant presented no statement or argument of how he was harmed. The court noted that the court of criminal appeals has held such incidents are not reversible error per se, nor automatically require a mistrial and that in this case the defendant being seen outside the courtroom in shackles and jail clothing distinguished the case from those in which a defendant was forced to appear in the courtroom before the jury in such attire.[368] As there was no showing of harm, no reversible error was found.[369]

J. JURY SEPARATION

The court in *Hood v. State*[370] found reversible error when the trial court permitted the jurors to separate after the charge had been read to the jury at the first stage of the trial over the defendant's objections under article 35.23.[371] Mandatory language of article 35.23[372] raises a presumption of harm that the state must seek to rebut, during trial or in a hearing on the motion for new trial. The state never attempted to rebut the presumption during trial; no motion for new trial was filed. The court concluded that the type of error presented in this case was not an error subject to harm analysis under Rule 81 (b)(2) as the record did "not reveal any concrete data from which an appellate court (could) meaningfully gauge or quantify the effect of

365. *Id.*
366. *Id.*
367. 829 S.W.2d 938 (Tex. App.—Fort Worth 1992, no pet.).
368. *Green*, 829 S.W.2d at 939.
369. *Id.*
370. 828 S.W.2d 87 (Tex. App.—Austin 1992, no pet.).
371. *Hood*, 828 S.W.2d at 96. TEX. CODE CRIM. PROC. ANN. art. 35.23 (Vernon 1989).
372. TEX. CODE CRIM. PROC. ANN. art. 35.23 (Vernon 1989).

the error."[373] The court limited it's holding to the facts of this case.[374]

K. PUNISHMENT HEARING

In *Issa v. State*[375] the court of criminal appeals held that after an adjudication of guilt has been made, the defendant is entitled to a punishment hearing.[376] The defendant was charged with felony theft, and, pursuant to a plea bargain, placed on deferred adjudication probation for five years. Prior to the expiration of that period the state filed a motion to revoke, and a contested hearing was held. At the conclusion of the state's evidence at that hearing on the motion to revoke, the defendant moved for a judgment denying revocation based on a claim of insufficient evidence. When the trial judge denied that motion, the defendant responded, "Defendant rests."[377] When the state objected during the defendant's closing argument, the defendant asked permission to reopen the case and present testimony from his supervising probation officer, who had not previously been called to testify. The trial judge denied this request. At the conclusion of final argument, the trial judge revoked the defendant's probation, sentencing him to a prison term. When defense counsel stated, "I thought the probated sentence was for five years,"[378] the prosecutor responded that the judge had the power to give the maximum sentence upon revocation of deferred adjudication. The trial judge recessed the hearing and immediately left the bench. In a motion for new trial, filed within the statutory time limit after the revocation hearing, the defendant objected to the immediate sentencing.

The court of criminal appeals interpreted article 42.12, section 3d(b),[379] which provides that following an "adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of probation, and defendant's appeal continue as if the adjudication of guilt had not been deferred," as entitling the defendant to a punishment hearing following an adjudication of guilt.[380] At such a punishment hearing, the trial judge must permit a defendant the opportunity to present punishment evidence.[381] Error in *Issa* was not waived because defense counsel objected at the first opportunity.[382]

One of the most significant decisions rendered by the court of criminal appeals during the Survey period was *Grunsfeld v. State*,[383] wherein the trial court allowed evidence of unadjudicated, extraneous offenses during the punishment phase in the trial of a non capital offense.[384] The court held that

373. *Hood*, 828 S.W.2d at 96.
374. *Id.*
375. 826 S.W.2d 159 (Tex. Crim. App. 1992).
376. *Id.* at 161.
377. *Id.* at 160.
378. *Id.*
379. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3d(b) (Vernon 1981).
380. *Issa*, 826 S.W.2d at 161.
381. *Id.*
382. *Id.*
383. 843 S.W.2d 521 (Tex. Crim. App. 1992).
384. *Grunsfeld*, 843 S.W.2d at 522.

article 37.07(3)(a)[385] as amended, does not allow admission of unadjudicated extraneous offense evidence in the punishment phase of a trial on a non capital offense. The court observed that even if deemed relevant to sentencing by the trial court, this type of evidence is not admissible at punishment "unless (1) it is permitted by the Rules of Evidence, and (2) if the evidence sought to be admitted is evidence of an extraneous offense, it satisfies article 37.07 (3)(a)'s definition of prior criminal record."[386]

In *Ortiz v. State*[387] the court revisited the admissibility of victim impact evidence during the punishment hearing, emphasizing that the evidence must bear some relationship to the defendant's personal responsibility and moral guilt.[388] The court held that evidence as to the victim's trauma and it's consequences in this aggravated sexual assault case was properly admitted.[389] In *Garrett v. State*[390] the court was careful to distinguish however that evidence of the after-effects of a crime, while admissible at the punishment hearing, is generally not admissible at the guilt/innocence stage.[391] While improperly admitted in *Garrett*, the evidence was found to be harmless error.[392]

In *Garrett v. State*[393] the cause was remanded for a new trial on the punishment phase only. The trial court failed to order a presentence investigation, a matter which could not be waived by the defendant's failure to object, under article 42.12, section 9(i).[394] This provision requires such an investigation if it appears to the court through it's own observation or on suggestion of a party, that the defendant may have a mental impairment, as was the case in *Garrett*.[395]

The case of *Borders v. State*[396] is unique for the very reason that it is on the books to begin with in this state. *Borders* presented the issue of whether the defendant preserved error by his motion for new trial concerning his right to present evidence on the issue of punishment prior to the trial court's assessment of punishment.[397] The record showed that the trial court briefly reviewed the evidence, found the defendant guilty and immediately imposed punishment at twenty years. Only at this juncture did the trial court pause and ask if there was any reason why sentence should not be pronounced. Defense counsel responded in the negative, and the trial court sentenced defendant to twenty years in prison and a fine for possession of cocaine. On appeal, the court held that article 37.07[398] required the trial court to afford

385. TEX. CODE CRIM. PROC. ANN. art. 37.07 3(a) (Vernon 1989).
386. *Grunsfeld*, 843 S.W.2d at 522.
387. 825 S.W.2d 537 (Tex. App.—El Paso 1992, no pet.).
388. *Ortiz*, 825 S.W.2d at 541.
389. *Id.* at 542.
390. 815 S.W.2d 333 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd.).
391. *Garrett*, 815 S.W.2d at 337.
392. *Id.* at 338.
393. 818 S.W.2d 227 (Tex. App.—San Antonio 1991, no pet.).
394. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 9(i) (Vernon Supp. 1991).
395. *Garrett*, 818 S.W.2d at 228.
396. 846 S.W.2d 834 (Tex. Crim. App. 1992).
397. *Id.* at 834.
398. TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon 1989).

the defendant the opportunity to present evidence regarding punishment, after it had found the particular defendant guilty.[399] Defense counsel did not waive the right to present punishment evidence by not objecting at trial.[400] The matter was preserved by raising an objection in a timely filed motion for new trial.[401]

Unique cases involving the propriety of an affirmative finding of a deadly weapon were presented in *English v. State*[402] and *Ex parte Petty*.[403] In *English* the jury answered a special issue in the affirmative, that the defendant used or exhibited a deadly weapon, to-wit: his Chevrolet pickup during the commission of the offense. The facts showed that the defendant's pickup truck collided with a vehicle operated by the decedent at the intersection of two roads in Longview. Both drivers were alcohol-intoxicated at the time of the collision. The defendant registered a .33 and the victim a .20 blood/alcohol. The defendant was charged with involuntary manslaughter and felony D.W.I., and was convicted of D.W.I. upon the state's election. The defendant complained about the submission of the "deadly weapon issue" to the jury because of the lack of evidence that the defendant used a deadly weapon in the commission of the offense. The defendant argued that there was no evidence he ran a red light, was speeding or otherwise operated his truck in a reckless or negligent manner. The state pointed to the blood alcohol level and the twenty eight hundred pounds of pickup truck. The court observed that the evidence in other similar cases[404] revealed some special relationship between the instrument found to be a deadly weapon by reason of the manner of its use, and the "associated felony offense" for which the accused was tried.[405] In previous cases involving the use of a motor vehicle, the facts were distinguishable because the vehicle was intentionally, recklessly or negligently used as a weapon by the accused.[406] The evidence in the instant case did not demonstrate such use.[407] One reasonable hypothesis still available, according to the court, was that the defendant had the right of way (green light) at the intersection and that the intoxicated victim drove his vehicle through a red light into the path of the defendant's truck immediately before the collision occurred.[408] The court concluded that this reasonable hypothesis had not been excluded by the evidence and therefore the jury's finding that the defendant exhibited or used a deadly weapon during the commission of the felony D.W.I. was not a rational finding.[409]

In *Ex parte Petty* the court held that the felon's possession of a deadly

399. *Borders*, 846 S.W.2d at 835-36.
400. *Id.* at 836.
401. *Id.*
402. 828 S.W.2d 33 (Tex. App.—Tyler 1991, pet. ref'd).
403. 833 S.W.2d 145 (Tex. Crim. App. 1992).
404. The primary authorities included Patterson v. State, 769 S.W.2d 938 (Tex. Crim. App. 1989), and Morgan v. State, 775 S.W.2d 403 (Tex. App.—Houston [14th Dist.] 1989, no pet.).
405. *English*, 828 S.W.2d at 38.
406. *Id.*
407. *Id.*
408. *Id.* at 39.
409. *Id.*

weapon (a handgun) did not, in and of itself constitute "use" during the commission of the felony offense of unlawfully possessing a deadly weapon.[410] In order to "use" a deadly weapon for affirmative finding purposes, the weapon must be utilized to achieve an intended result, namely, the commission of a felony offense separate and apart from "mere" possession.[411] In the instant case, the weapon was not used in furtherance of any collateral felony.[412] Thus the finding of a deadly weapon was ordered stricken.[413] The court reached a similar result in *Narron v. State*,[414] wherein the defendant was convicted of possession of a prohibited weapon, the weapon being a short barreled firearm.

L. PROCEDURE IN CAPITAL CASES

In *Ex parte Mathes*[415] the court of criminal appeals applied collateral estoppel principles in a capital murder punishment phase context.[416] The defendant was charged in separate indictments with the capital murders of two individuals killed in the course of commission of the same robbery. In his first trial the defendant was convicted of the capital murder of the first victim; however, the jury answered "no" to the second special issue, and hence the death penalty was not imposed.[417] The state then announced its intent to try the defendant for the capital murder of the second victim, once again seeking the death penalty. The defendant filed an application for writ of habeas corpus, seeking to bar litigation of the second special issue: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[418] The court of criminal appeals held that the jury's negative answer to the issue of future dangerousness made during the first trial was the functional equivalent of an acquittal of the death penalty.[419] Thus collateral estoppel prevents the state from seeking the death penalty for the murder of the second victim.[420] The court reasoned that whether there is a probability that the defendant would constitute a continuing threat to society "is an issue of ultimate fact, the resolution of which in a bifurcated proceeding is determinative of the judgment and sentence of the trial court."[421] The effect of the jury's negative answer to the second capital punishment special issue is that the prosecution failed in its burden of proof.[422] Significantly, in the punishment phase of capital murder prosecution, reviewing courts are not dealing

410. *Petty*, 833 S.W.2d at 146.
411. *Id.* at 145.
412. *Id.*
413. *Id.* at 146.
414. 835 S.W.2d 642 (Tex. Crim. App. 1992).
415. 830 S.W.2d 596 (Tex. Crim. App. 1992).
416. *Id.* at 598.
417. Mathes v. State, 765 S.W.2d 853, 855 (Tex. App.—Beaumont 1989, pet. ref'd).
418. *Id.*
419. *Mathes*, 830 S.W.2d at 598.
420. *Id.*
421. *Id.*
422. *Id.*

with general verdicts. Rather, the court is confronted with resolution of "controlling issues."[423] During the first trial the defendant prevailed on an essential ultimate fact determinative of the death penalty; thus, the state could not force the defendant to " 'run the gauntlet' a second time in the hope that a different jury might find that evidence stipulated to be the same as in the first trial more convincing."[424]

III. THE APPEAL

A. MOTION FOR NEW TRIAL

Texas Rule of Appellate Procedure 30(b) provides the grounds upon which a new trial should be granted.[425] Included among the nine listed reasons are allegations of jury misconduct.[426] In *Buentello v. State*[427] the court of criminal appeals was called upon to address the interplay of Rule 30(b) with Texas Rule of Criminal Evidence 606(b),[428] to determine if the jurors' discussion of applicable parole law violated the defendant's right to a fair and impartial trial, and whether the jurors could impeach their verdict by testimony concerning their mental processes during deliberations.[429] Central to the court's decision in *Buentello* was the need to determine if Rule 606(b) had changed Texas criminal practice concerning claims of jury misconduct.[430] Rule 606 concerns the competency of jurors as witnesses. It provides, in part, that a juror may not testify as to any matter or statement occurring during the course of jury deliberation or give evidence about the juror's thought process.[431] Trial counsel in *Buentello* filed a motion for new trial with supporting affidavits from two jurors alleging jury misconduct and receipt of other evidence. At the motion for new trial hearing, two jurors testified about discussions during penalty state deliberations concerning the applicability of early release on parole to appellant. The court of criminal appeals held that adoption of Texas Rule of Criminal Evidence 606(b) didn't

423. *Id.*
424. *Id.* at 599.
425. TEX. R. APP. P. 30(b).
426. *Id.*; TEX. R. CRIM. EVID. 606(b).
427. 826 S.W.2d 610 (Tex. Crim. App. 1992).
428. TEX. R. CRIM. EVID. 606(b).
429. *Buentello*, 826 S.W.2d at 611.
430. *Id.* Prior to the effective date of the Texas Rules of Criminal Evidence and Texas Rules of Appellate Procedure, motions for new trial were governed by article 40.03 of the Texas Code of Criminal Procedure. *Id.* Article 40.03 was repealed by Texas Rules of Appellate Procedure, effective September 1, 1986 (Acts 1985, 69th Leg., ch. 685, § 4). *Id.* n.2.
431. TEX. R. CRIM. EVID. 606(b). Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify as to any matter relevant to the validity of the verdict or indictment. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Id.

change the law with respect to testimony that would be permitted in order to impeach a jury's verdict.[432] In so doing, the court noted that "the test for admission of juror testimony at a hearing on a motion for new trial is not whether the conduct constitutes an 'overt act,' but whether the matter sought to be elicited is deemed by the trial court to be relevant to the validity of the verdict."[433] The court further held that its prior test, adopted in *Sneed v. State*,[434] "is still a viable means of determining whether a jury's discussion of parole law constitutes reversible error."[435] Under *Sneed*, to show reversible error based on a jury's discussion of a parole law, the defendant must show the existence of five factors: (1) a misstatement of the law; (2) asserted as a fact; (3) by one professing to know the law; (4) which is relied upon by other jurors; (5) who for that reason changed their vote to a harsher punishment.[436]

In *State v. Scott*[437] the defendant was convicted of arson. The critical issue was whether the fire was intentionally set or was the result of an electrical mishap. In a motion for new trial, the defendant claimed jury misconduct based upon statements made by one of the jurors, an electrician with extensive experience who communicated to the jury during deliberations many facts based on his own experience, including the fact that the fire could not have started the way the defendant said it did. The trial court granted the motion for new trial and the state appealed. The court held that the juror's testimony constituted "other evidence" received by the jury which was adverse or harmful to the defendant, justifying the affirmative relief granted.[438] By footnote the court observed that the written order granting the amended motion for new trial was not in the record, a fact of little moment in this case because the parties agreed that a written order had been actually entered by the court as required by Texas Rule Appellate Procedure 31(e)(3).[439] In *Rasbury v. State*[440] the court reviewed a complaint of jury misconduct based upon a juror's misstatement of the law of self-defense and its effect on another juror in a murder prosecution. The court held that evidence which had been excluded by the trial court but nevertheless developed by the defense on a bill of exception during the motion for new trial hearing to be admissible, and remanded the case for a full evidentiary hearing on the motion for new trial with expedited instructions.[441]

---

432. *Buentello*, 826 S.W.2d at 614.
433. *Id.*
434. 670 S.W.2d 262 (Tex. Crim. App. 1984).
435. *Buentello*, 826 S.W.2d at 614.
436. *Sneed*, 670 S.W.2d at 266.
437. 819 S.W.2d 169 (Tex. App.—Tyler 1991, pet. ref'd).
438. *Id.* at 172.
439. *Id.* at 170 n.1; TEX. R. APP. P. 31(e)(3).
440. 832 S.W.2d 398 (Tex. App.—Fort Worth 1992, pet. ref'd).
441. *Id.* at 402. The court's holding relied heavily upon Buentello v. State, 826 S.W.2d 610 (Tex. Crim. App. 1992).

B. RIGHT TO COUNSEL

In *Buntion v. Harmon*[442] the defendant filed a writ of mandamus seeking to direct the trial judge in a capital murder case to vacate an order replacing court appointed trial counsel with new counsel on appeal. Determining that the petitioner was entitled to writ relief, the court found that "[t]here must be some principled reason, apparent from the record, to justify a trial judge's sua sponte replacement of appointed counsel."[443] A trial judge does not have discretion, over objection by the defendant and trial counsel, to replace counsel for the appeal when the only justification is the "trial judge's personal 'feelings' and 'preferences'."[444] Although an indigent defendant does not have a right to counsel of his own choosing, once counsel has been appointed, the trial judge is obligated to respect the attorney-client relationship created as a result of that appointment.[445]

C. NOTICE OF APPEAL

The court of criminal appeals continued to address the issue of adequacy of notice of appeal from a plea of guilty in *Riley v. State*.[446] When her motion to suppress evidence was denied, the defendant pled guilty to two possession of controlled substance charges. In accordance with the terms of a plea bargain, the trial judge assessed a probated punishment and fine in each case. The defendant filed a written notice of appeal stating only that she wished to appeal and that she was indigent and desired appointed counsel. Absent from the written notice of appeal were any Rule 40(b)(1)[447] statements that either the trial court granted permission to appeal or that the matters being appealed were raised by written motion and ruled on before trial.[448] The state did not complain of the sufficiency of the written notice of appeal to invoke the court of appeal's jurisdiction to consider non-jurisdictional defects until the intermediate appellate court reversed for lack of probable cause.

As a preliminary matter, the court of criminal appeals found that the state's complaint of a defect in a notice of appeal is timely made when raised

442. 827 S.W.2d 945 (Tex. Crim. App. 1992).
443. *Id.* at 949.
444. *Id.*
445. *Id.*
446. 825 S.W.2d 699 (Tex. Crim. App. 1992).
447. TEX. R. APP. P. 40(b)(1).
448. Rule 40(b)(1) provides, in pertinent part:

> Notice of appeal shall be given in writing filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order; but if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to article 1.15, Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, *in order to prosecute an appeal from a non-jurisdictional defect or error that occurred prior to entry of the plea the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial.*

Id. (Emphasis added).

for the first time in a Motion for Rehearing in the court of appeals.[449] However, simultaneously it found the notice sufficient when the entire appellate record was considered.[450] Included in that record was an order signed by the trial judge and styled, "Order Limiting Defendant's Appeal." That order contained recitations that the defendant had been assessed punishment in accordance with a plea bargain, that the trial court allowed appeal pursuant to article 44.02[451] and that a motion to suppress challenging the legality of the arrest and subsequent search was raised before trial. Despite the fact that the notice of appeal did not incorporate the order, either physically or by reference, the presence of that order in the appellate record was sufficient to permit the court of appeals to determine that it could address non-jurisdictional defects on appeal.[452]

A more narrow approach was taken by the court of criminal appeals in addressing the adequacy of the state's written notice of appeal in another case. In *State v. Muller*[453] the court held that the literal language of article 44.01[454] "requires the elected 'prosecuting attorney' (and not his assistant) to 'make' the state's notice of appeal."[455] This making of the notice of appeal can be accomplished in either of two manners: (1) the elected prosecuting attorney physically signs the notice, or (2) the elected prosecuting attorney personally and expressly authorizes an assistant to file a specific notice of appeal on his behalf.[456] Although the court acknowledged that the literal wording of the statute places a significant burden on the prosecuting attorney, the court was bound by the plain meaning of the clear and unambiguous statue.[457] Thus, in *Muller*, the notice of appeal in a driving while intoxicated case filed by an assistant district attorney, following the trial judge's suppression of intoxilyzer results, was defective.[458] Moreover, this defect was not one of appellate procedure, and hence an error which could be corrected by filing an amended notice of appeal.[459] Rather, it was a "failure to abide by the substantive statutory requirements" which resulted in the failure of the appellate court's jurisdiction to be invoked.[460]

D. Bond Pending Appeal

In *Ex parte Crouch*[461] the state brought forward the question of whether article 44.04(b)[462] must be construed to require the denial of post trial bail when a defendant has been convicted of one of the offenses listed under sec-

449. *Riley*, 825 S.W.2d at 700.
450. *Id.* at 701.
451. TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon 1979).
452. *Riley*, 825 S.W.2d at 701.
453. 829 S.W.2d 805 (Tex. Crim. App. 1992).
454. TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon 1979).
455. *Muller*, 829 S.W.2d at 811-12.
456. *Id.* at 812.
457. *Id.* at 811.
458. *Id.* at 812.
459. *Id.*
460. *Id.*
461. 838 S.W.2d 252 (Tex. Crim. App. 1992).
462. TEX. CODE CRIM. PROC. ANN. art. 44.04(b) (Vernon 1989).

tion 481.107(b) through (e) of the Texas Health and Safety Code,[463] regardless of whether the defendant was a repeat felony offender as described in that statute.[464] The court sustained the state's contention, holding that the plain language of the statute made it clear that the legislature intended to deny bail to the convicted felon where punishment exceeded fifteen years confinement or where defendant had been convicted of an offense so listed without reference to the repeat offender definition.[465]

E. APPELLATE RECORD

In *Greenwood v. State*[466] the court clarified the relationship between appellate rules permitting a partial statement of facts and challenges to sufficiency of the evidence to sustain a conviction. Texas Rule of Appellate Procedure 53(d) allows a defendant to bring a limited appeal in a criminal case.[467] The defendant in *Greenwood* did so, then argued that there was insufficient evidence to support his conviction for misdemeanor assault when the presumptions of Rule 53(d) were applied. The court rejected that claim, holding that Rule 53(d) presumptions do not apply to sufficiency challenges.[468] The presumptions do not apply because in a sufficiency challenge, it is the responsibility of the appellate court to review the *entire* record in a light most favorable to the prosecution to determine if any rational trier of fact could have found the essential elements of the crime beyond a responsible doubt.[469] This responsibility is constitutionally mandated.[470] When only a partial record is presented to the reviewing court, consideration of *all* relevant evidence in a given case is impossible.[471] However, as shown in *Perez v. State*,[472] different considerations apply when the defendant is *unable* to supply a complete statement of facts despite good faith and due diligence.[473] In *Perez* the defendant was convicted of capital murder and sentenced to death in 1983. At that time, article 40.09[474] governed. Disposition of the defendant's claim would now be controlled by Texas Rule of Appel-

463. TEX. HEALTH & SAFETY CODE ANN. § 481.107(b)-(e).
464. *Crouch*, 838 S.W.2d at 254.
465. *Id.*
466. 823 S.W.2d 660 (Tex. Crim. App. 1992).
467. Rule 53(d) provides:

> If appellant requests or prepares a partial statement of facts, he shall include in his request or proposal a statement of the points to be relied on and shall thereafter be limited to such points. If such statement is filed, there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal. Any other party may designate additional portions of the evidence to be included in the statement of facts.

TEX. R. APP. P. 53(d).
468. *Greenwood*, 823 S.W.2d at 661.
469. *Id.*
470. Jackson v. Virginia, 443 U.S. 307 (1979).
471. *Greenwood*, 823 S.W.2d at 661.
472. 824 S.W.2d 565 (Tex. Crim. App. 1992).
473. *Id.* at 567.
474. TEX. CODE CRIM. PROC. ANN. art. 40.09 (repealed 1986).

late Procedure 50 (effective September 1, 1986).[475] Under either provision, a similar result would be compelled. The attorney in *Perez* objected to the record when he found missing portions and sections which he believed did not accurately reflect what occurred at trial. At that point it was discovered that the court reporter had lost the trial tapes and records of "everything," from the trial other than voir dire. The defendant and prosecutor could not agree on how to correct the alleged errors or how to make substitutions for the missing portions of the statement of facts. The court held that the proper remedy would be the granting of a new trial.[476] Significantly, by so doing, the court rejected arguments that a harmless error analysis should be applied to such error.[477] Reasoning that the function of a harmless error analysis is to protect against interference with the integrity of a trial, the court concluded that failure to provide a complete appellate record does not impact the internal integrity of a trial, "but instead interferes with the judicial process by blocking an appellate court's ability to assess the record of a trial."[478]

In *Vincent v. State*[479] a hearing was held on the defendant's financial situation and the trial court's denial of court-appointed counsel on appeal and a free record. On appeal, the court held that the evidence justified a finding that the defendant had intentionally disposed of all of his property subsequent to his conviction such as to bring about his own indigency and thus justified the trial court's ruling.[480] The court relied upon the factors listed in article 26.04(b)[481] including the defendant's income, his source of income, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, if any, spousal income, if any, and whether the defendant has posted or has been capable of posting bail.[482]

A similar result occurred in *Tafarroji v. State*[483] wherein the trial court ordered the defendant to pay a one thousand dollar deposit for the statement of facts, finding him to be only partially indigent. The defendant, however, made no pretense of exercising any degree of diligence. The defendant did not file a pauper's oath until more than a year after filing notice of appeal. Indigency, in the absence of diligence, will not sustain the defendant's claim for a free statement of facts.[484] In addition, the court noted that the evidence adduced at the hearing did not support his claim of indigency.[485] The fact that the defendant had other creditors did not create an indigency status.[486] The court found the defendant did not make out a prima facie show-

475. TEX. R. APP. P. 50.
476. *Perez*, 824 S.W.2d at 568.
477. *Id.*
478. *Id.*
479. 817 S.W.2d 190 (Tex. App.—Beaumont 1991, no pet.).
480. *Id.* at 191.
481. TEX. CODE CRIM. PROC. ANN. art. 26.04(b).
482. *Vincent*, 817 S.W.2d at 191.
483. 818 S.W.2d 921 (Tex. App.—Houston [14th Dist.] 1991, no pet.).
484. *Id.* at 923.
485. *Id.*
486. *Id.*

ing of indigency and therefore the trial court did not abuse its discretion in denying the claim of indigency.[487]

F. THE STATE'S APPEAL

In addition to cases discussing the adequacy of the prosecution notice of appeal,[488] the court of criminal appeals decided three cases during the Survey period which clarify the scope of prosecutorial appellate review. In *State ex rel. Sutton v. Bage*[489] the court strictly construed the provisions of article 44.01(d)[490] and Rule 41(b)(1)[491] concerning the timeliness of the state's notice of appeal. The issue which the state sought to appeal in *Sutton* was the granting of a motion to quash an indictment for organized criminal activity. Although the trial judge stated in open court that the motion was granted, he did not physically sign the order at that time. The prosecution was unaware that the order had been signed until thirteen days after it had been filed with the district clerk, 17 days after the date of signing.

Both the statutory provisions and appellate rules provide that the state's notice of appeal must be given within fifteen days. However, the statute expresses that time frame as fifteen days "after the date on which the order, ruling, or sentence to be appealed *is entered by the court,*"[492] whereas the appellate rule speaks to the date "an appealable order *is signed by the trial judge.*"[493] The court reconciled any perceived conflict between the provisions by concluding that the triggering mechanism is the physical act of signing or rendering an order by the trial judge.[494] Establishing a concrete, definite starting point for appellate timetables, the court concluded, would best serve the interest of all parties.[495] Accordingly, the court found no conflict between the statute and appellate rule.[496]

Favorable for the prosecution was the court's decision in *State v. Garrett*,[497] holding that the trial judge's order forcing the state to elect a theory of prosecution was an appealable order under the terms of article 44.01.[498] The defendant in *Garrett* was indicted for the felony offense of delivery of cocaine in an indictment which alleged three theories of delivery: actual transfer, constructive transfer, and offer to sell. Based on the defendant's motion to quash, the trial judge set aside the indictment on the theory that it failed to provide adequate notice of the type of delivery that the state would attempt to prove.

Holding that the trial judge's action was in effect the dismissing of an

487. *Id.*
488. *See* discussion *infra* part III.C.
489. 822 S.W.2d 55 (Tex. Crim. App. 1992).
490. TEX. CRIM. PROC. ANN. art. 44.01(d) (Vernon 1993).
491. TEX. R. APP. P. 41(b)(1) (amended 1989).
492. TEX. CODE CRIM. PROC. ANN. art. 44.01(d) (emphasis added).
493. TEX. R. APP. P. 41(b)(1) (emphasis added).
494. *Sutton*, 822 S.W.2d at 57.
495. *Id.*
496. *Id.*
497. 824 S.W.2d 181 (Tex. Crim. App. 1992).
498. *Id.* at 183.

indictment, the court of criminal appeals concluded that it was an appealable action under the direct language of the statute.[499] Although the defendant's motion might be characterized as merely an effort to compel the state to elect its theory of prosecution, the appellate court must look to the *effect* of the trial court's action.[500] In *Garrett* the effect of the order granting the defense's motion to quash was to terminate the state's prosecution of an indictment returned by a grand jury. Such actions are directly controlled by the literal language of the statute setting forth the circumstances under which the state is entitled to appeal a pretrial order.[501]

Similarly favorable to the state was the court's decision in *Price v. State*,[502] allowing the prosecution to seek discretionary review from an intermediate court of appeals' decision abating for consideration of new trial issues and alternatively ordering a new hearing on punishment.[503] The *Price* court affirmed the aggravated robbery conviction on issues of guilt or innocence. However, it also attempted to abate the appeal by ordering the trial court to hold a hearing on the defendant's motion for new trial. Alternatively, the lower court's decision stated that should a new trial hearing not be conducted within that thirty-day time frame, the judgment would be reversed and the cause remanded for a new punishment hearing. The prosecution sought discretionary review on an issue it claimed was dispositive: that the lower appellate court failed to address the issue raised by the state of whether the original motion for new trial had been timely presented in the trial court. Central to the state's claim was its argument that the timeliness of the motion was dispositive of the case, and therefore had to be addressed by the court of appeals. The court of criminal appeals agreed.[504] *Price* represents a departure from two prior decisions of the court of criminal appeals holding that it would not enter a state's petition for discretionary review filed after an order of abatement.[505] Owing to the alternative nature of relief in the court of appeals' written decision, the case is distinguishable from classic interlocutory orders such as abatements for findings of fact and conclusions of law.[506]

In *State v. Kaiser*[507] the state attempted to appeal from a pretrial preliminary ruling on the use of "child outcry" testimony under article 38.072.[508]

499. *Id.* at 184. Article 44.01(a) provides that the state may appeal an order of the trial court in a criminal action if that order "dismisses an indictment, information or complaint or any portion of an indictment, information or complaint."

500. *Id.* at 183.

501. *Id.* at 183-84.

502. 826 S.W.2d 947 (Tex. Crim. App. 1992).

503. *Id.* at 948.

504. *Id.*

505. Williams v. State, 780 S.W.2d 802 (Tex. Crim. App. 1989); Measeles v. State, 661 S.W.2d 732 (Tex. Crim. App. 1983). Central to the decision in each case was the court's characterization of the order of abatement as an interlocutory order. The rationale in these decisions was that such interlocutory orders did not decide a case and hence were not final decisions from which discretionary review could lie.

506. *Price*, 826 S.W.2d at 948.

507. 822 S.W.2d 697 (Tex. App.—Fort Worth 1991, pet. ref'd).

508. TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 1989).

The court held that the appeal was not an appeal from an order granting a "motion to suppress evidence, a confession, or an admission" pursuant to article 44.01(a)(5)[509] and dismissed the appeal for want of jurisdiction.[510] The state argued that the Texas statute should be construed to allow the state to appeal any pretrial evidentiary ruling of the trial court. The court distinguished between the suppression of evidence because of constitutional principle such as the Fourth Amendment and evidence excluded because it is in some manner suspect or untrustworthy.[511] The court held that by using the term "suppress" alone, and not in conjunction with the broader term "exclude," the legislature meant to limit the state's appeal to those instances in which evidence was suppressed, in the technical sense, not merely excluded.[512] Finally the court noted that the trial judge did not even state that the evidence would be inadmissible at trial.[513] Instead, he stated that if the state attempted to introduce the testimony without complying with the notice requirements, he would sustain an objection based on hearsay.[514]

In *State v. Cuellar*[515] the court held that the state had no right to appeal an order granting a motion to quash a revocation of probation.[516] The state did, however, have the right to appeal the court's order terminating probation and discharging the defendant, but in this case, the court found an adequate legal basis for the court's discharge order and therefore affirmed it.[517]

In *State v. Evans*[518] the court held that the state had the right to appeal a trial court order allowing a defendant to withdraw his plea of no contest, on the basis that the trial court's order granting the motion to withdraw had the precise effect of granting a new trial, thus returning the case to the posture it had been in before the plea was accepted.[519] The court also held that the trial court had the discretion to permit a defendant to withdraw a plea of no contest after the sentence had been pronounced, on the basis that Rule 30 (b)[520] was illustrative, not exhaustive, as to the grounds for a new trial.[521]

G. AVAILABILITY OF APPEAL

The court of criminal appeals revisited the scope of the right to appeal deferred adjudication proceedings[522] in *Olowosuko v. State*.[523] It reaffirmed that in deferred adjudication proceedings, no appeal may be taken from a

509. TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5) (Vernon Supp. 1991).
510. *Kaiser*, 822 S.W.2d at 698-99.
511. *Id.* at 700.
512. *Id.*
513. *Id.* at 701.
514. *Id.* at 701-02.
515. 815 S.W.2d 295 (Tex. App.—Austin 1991, no pet.).
516. *Id.* at 297.
517. *Id.* at 298.
518. 843 S.W.2d 576 (Tex. Crim. App. 1992).
519. *Id.* at 578.
520. TEX. R. APP. P. 30(b).
521. *Evans*, 843 S.W.2d at 578.
522. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5 (Vernon 1993).
523. 826 S.W.2d 940 (Tex. Crim. App. 1992).

determination to proceed with an adjudication of guilt.[524] Such an appeal is expressly barred by the statutory language of article 42.12, section 5(b).[525] However, recent statutory changes[526] do permit an *immediate* appeal for rulings on pre-trial motions in a deferred adjudication context, in compliance with article 44.02.[527] Thus the central issue to be resolved in any appeal in a deferred adjudication context is identification of "the precise matter a defendant seeks to appeal."[528] If the defendant is challenging the trial court's decision to proceed with an adjudication of guilt, there is an absolute statutory bar to consideration of the issue on appeal.[529]

Following a hearing on the state's motion, the trial judge found the defendant guilty and imposed a six-month jail time sentence. The defendant's serious constitutional challenge that his right to counsel was violated could not be raised on a direct appeal from the decision to adjudicate his guilt.[530] Similarly, if the defendant complains on appeal that the various conditions of probation were impermissibly vague or indefinite and hence unenforceable, appellate review is precluded.[531] In contrast, a defendant may appeal rulings on pre-trial motions in compliance with article 44.02.[532]

H. STANDARD OF REVIEW

When a defense has been raised at trial, what role should a reviewing court play in gauging the sufficiency of evidence? That was the issue resolved by the court of criminal appeals in *Adelman v. State*.[533] The defendant was prosecuted for the false imprisonment of her adult mentally ill son. Representing herself during a trial to the court, the defendant relied on the defense of justification. The court of appeals reversed the conviction, finding the evidence insufficient based on its review of evidence supporting the justification defense.[534] The court of criminal appeals rejected that review and held that the proper analysis on appeal is "whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of [the offense] beyond a reasonable doubt and also would have found against appellant on the [defensive] issue beyond a reasonable doubt."[535] It is not the role of the appellate

524. *Id.* at 942.
525. *Id.*
526. TEX. CODE CRIM. PROC. ANN. art. 44.01(j) (Vernon 1993).
527. TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979).
528. *Olowosuko*, 826 S.W. 2d at 941.
529. *Id.* at 942. *Accord* Phynes v. State, 828 S.W.2d 1 (Tex. Crim. App. 1992). In *Phynes v. State*, application of the statutory bar is troublesome because the adjudication hearing was conducted when the defendant's lawyer was not present. The defendant had entered a plea of guilty to misdemeanor possession of marijuana and been placed on deferred adjudication for six months. Before the end of that probationary term, the state moved to adjudicate guilt.
530. *Phynes*, 828 S.W.2d at 2.
531. *Olowosuko*, 826 S.W.2d at 942 n.1.
532. *See supra* text accompanying 527.
533. 828 S.W.2d 418 (Tex. Crim. App. 1992).
534. Adelman v. State, 731 S.W.2d 143 (Tex. App.—Houston [1st Dist.] 1987), *rev'd*, 828 S.W.2d 418 (Tex. Crim. App. 1992).
535. *Adelman*, 828 S.W.2d at 421 (quoting Saxton v. State, 804 S.W.2d 910 (Tex. Crim. App. 1991)).

court to decide if the defendant's actions were justified.[536] Rather, that determination is one properly made by the finder of fact.[537] By finding the defendant guilty, the trier of fact implicitly rejected her defense.[538] Upon conviction, the duty of the appellate court is to determine if the explicit and implicit findings by the trier of fact are rational under legal standards, and thus support the conviction.[539] Cautioning that the reviewing court should not substitute its opinion of witness credibility or the weight to be given testimony for that of the trier of fact, the court of criminal appeals reviewed the trial evidence and concluded: "Although some hypothetical, rational trier of fact could have accepted appellant's defense in this case, another trier of fact could have rejected that defense beyond a reasonable doubt and such finding would be legally sufficient to support the conviction. Therefore, the court of appeals should have upheld the conviction."[540]

I. NATURE OF COURT OF APPEALS REVIEW

In related decisions, the court of criminal appeals considered challenges to the nature and depth of intermediate appellate court review. The consistent holding in each case was that appellate courts have a duty to address all issues raised by a party before the courts can deny that party relief.[541] In *Weatherford v. State*[542] the court of appeals had sustained the defendant's search and seizure challenges without addressing the state's dual contentions that the challenge had not been preserved, and that any error was harmless.[543] The court of criminal appeals remanded to the intermediate appellate court for consideration of those grounds.[544]

A similar result occurred for the defendant when the court of appeals affirmed an aggravated sexual assault conviction without addressing the defendant's alternative claim on appeal that the victim's written statement to the police was improperly admitted because it constituted bolstering.[545] In *Wood v. State*[546] the court of criminal appeals remanded to the intermediate appellate court stressing that Rule 90(a)[547] requires that the written opinion of the reviewing court address every issue raised and necessary to final disposition of the case.[548]

536. *Id.*
537. *Id.*
538. *Id.* at 422.
539. *Id.*
540. *Id.* at 423.
541. *See* Weatherford v. State, 828 S.W.2d 12, 13 (Tex. Crim. App. 1992); Wood v. State, 828 S.W.2d 13, 14 (Tex. Crim. App. 1992).
542. 828 S.W.2d 12 (Tex. Crim. App. 1992).
543. Weatherford v. State, 822 S.W.2d 217 (Tex. App.—Eastland 1991), *vacated*, 828 S.W.2d 12 (Tex. Crim. App. 1992).
544. *Weatherford*, 828 S.W.2d at 13.
545. Wood v. State, 822 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1991), *vacated*, 828 S.W.2d 13 (Tex. Crim. App. 1992). The court of appeals did address and reject the defendant's challenge to admissibility of the statement based on hearsay grounds. *Id.* at 216.
546. 828 S.W.2d 13 (Tex. Crim. App. 1992).
547. TEX. R. APP. P. 90(a).
548. *Wood*, 828 S.W.2d at 14.

J. REMAND AND RETRIAL CONSIDERATIONS

The court of criminal appeals addressed the scope of review upon remand in *Williams v. State*.[549] The court of criminal appeals had earlier remanded the defendant's capital murder appeal to the court of appeals to determine whether an out of court statement made by an accomplice was made in furtherance of an ongoing conspiracy.[550] On remand, the court of appeals held the statements were not made in furtherance of the conspiracy and thus were admissible pursuant to Rule 801 (e)(2)(E).[551] However the court of appeals went further and also held that the statements *were* admissible under the exception of the hearsay rule which allows admission of statements against interest;[552] that argument had not been made by either the defense or prosecution during the course of the appeal. The court of criminal appeals concluded that this second finding improperly exceeded the scope of its remand order.[553] Once again, the case was remanded.[554] The conclusion from *Williams* total appellate history: upon remand, the reviewing court is strictly limited to consideration of the specific issues on which remand was granted.[555]

In a related area, in *Janecka v. State*[556] the court narrowly construed when a party may raise a new claim for alleged error occurring on remand.[557] The defendant's capital murder appeal was originally abated and remanded to the trial court to allow the defendant to make a showing of harm based on the ruling of his motion to quash the indictment.[558] The remand was necessary because the test for harmless error had been established by the court after the time that the defendant's case was tried.[559] On remand, the trial court appointed a special master to preside over the hearing. The state did not object to that appointment at the time it was made, but rather, chose to fully participate in the proceeding before the master. Following that hearing, the trial judge adopted the findings of fact and conclusions of law made by the special master. The court of criminal appeals reversed the capital murder conviction based on the defendant's demonstration of harm.[560] It was on rehearing from that decision that the state first alleged the trial judge lacked authority to appoint a special master. The state's theory was that, unlike a post conviction writ of habeas corpus scenario,[561] no statute gives authority to Texas judges to appoint a special master

549. 829 S.W.2d 216 (Tex. Crim. App. 1992).
550. Williams v. State, 790 S.W.2d 643, 645 (Tex. Crim. App. 1990).
551. Williams v. State, 815 S.W.2d 743, 747 (Tex. App.—Waco 1991), *rev'd*, 829 S.W.2d 216 (Tex. Crim. App. 1992); TEX. R. CRIM. EVID. 801(e)(2)(E).
552. *Williams*, 815 S.W.2d at 747-48; TEX. R. CRIM. EVID. 803(24).
553. *Williams*, 829 S.W.2d at 217-18.
554. *Id.* at 218.
555. *Id.* at 217-18.
556. 823 S.W.2d 232 (Tex. Crim. App. 1990).
557. *Id.* at 243.
558. Janecka v. State, 739 S.W.2d 813, 842 (Tex. Crim. App. 1987).
559. *Id.* The test for harmless error had been set forth in Adams v. State, 707 S.W.2d 900 (Tex. Crim. App. 1986).
560. *Janeka*, 823 S.W.2d at 238.
561. TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977).

to conduct hearings in a case on direct appeal. Thus, the state contended, the entire proceeding was void from its inception. The court of criminal appeals never reached that issue. Instead, it noted that "[h]ad the state objected at the time the master was appointed, or perhaps on submission before this Court, we might have reached the merits of its claim."[562] However, raising a claim for the first time on rehearing from a decision following remand was not timely.[563]

On retrial following reversal for error occurring at the punishment phase, a defendant is entitled to make a new jury election.[564] In *Saldana v. State*[565] the court of criminal appeals held that a defendant is *not* bound by his waiver of a jury at the original trial when the cause has been remanded for another punishment hearing pursuant to article 44.29(b).[566] In reaching that decision, the court noted that the legislature did not specifically restrict the terms of article 44.29(b) to fact patterns in which punishment was assessed by a jury in the original trial. The court concluded that a "fair reading" of the statutory language is that the defendant has the right to elect jury assessment of punishment following remand.[567] Moreover, that statutory interpretation is not disputed by the legislative history of article 44.29(b).

562. *Janecka*, 823 S.W.2d at 243.
563. *Id.* at 244.
564. *See* Saldana v. State, 826 S.W.2d 948, 951 (Tex. Crim. App. 1992).
565. 826 S.W.2d 948 (Tex. Crim. App. 1992).
566. *Id.* at 951; TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (Vernon 1993).
567. *Saldana*, 826 S.W.2d at 951.