1995

Criminal Procedure: Pretrial, Trial and Appeal

Robert N. Udashen

Gary A. Udashen

George R. Milner III

CRIMINAL PROCEDURE: PRETRIAL, TRIAL AND APPEAL

*Robert N. Udashen**
*Gary A. Udashen***
*George R. Milner, III****

TABLE OF CONTENTS

THIS Article reviews the major cases from the United States Supreme Court, the Texas Court of Criminal Appeals, and the Texas courts of appeals in the following areas of criminal procedure: pretrial (with the exception of confession, search, and seizure), trial and appeal.

I. CHARGING INSTRUMENTS

Babaturde Olurebi was charged with the offense of credit card abuse.[1] The indictment alleged that Olurebi used a "fictitious Chevron credit card." Olurebi moved to quash the indictment for failure to define the

* B.A., J.D., The University of Texas, Attorney at Law, Dallas, Texas
** B.A. The University of Texas; J.D., Southern Methodist University, Attorney at Law, Dallas, Texas.
*** B.A., Southern Methodist University; J.D., Oklahoma City University, Attorney at Law, Dallas, Texas.

1. Olurebi v. State, 870 S.W.2d 58 (Tex. Crim. App. 1994).

term "fictitious credit card." The trial court overruled the motion and the Houston Court of Appeals affirmed.[2]

A person commits the offense of credit card abuse if "with intent to obtain property or service, he presents or uses a fictitious credit card . . . ."[3] The Penal Code defines the term "credit card" but provides no definition for the term "fictitious credit card."[4] The Court of Criminal Appeals determined that "fictitious credit card . . . is either a credit card not issued by the purported owner or a credit card with an actual owner but issued to a non-existent cardholder."[5] This judicially devised definition of "fictitious credit card" meant that the offense alleged in the indictment could be committed in two different ways. Olurebi could have used a credit card that was not issued by Chevron or a credit card that was issued by Chevron but to a person who does not exist.

A defendant may except to the form of an indictment if the indictment fails to contain adequate information to give the defendant notice of the offense of which he is accused.[6] If the indictment does indeed provide adequate notice to allow the defendant to prepare a defense there is no defect.[7] On the other hand, if some requisite item of notice is missing from the charging instrument, the indictment is defective. This defect, however, is not reversible error unless the defect had an impact on the defendant's ability to prepare a defense.[8] This is because a form defect does not render an indictment insufficient unless the defect "prejudice[s] the substantial rights of the defendant."[9]

Generally, a charging instrument that tracks the statutory language is sufficient.[10] Further, a term that is defined by the statute need not also be defined in the charging instrument.[11] However, if the statutory language does not describe the offense in such a way as to give the defendant adequate notice, additional specificity is required in the face of a motion to quash.[12]

Applying the above principles, the *Olurebi* court concluded that the indictment did not afford the accused sufficient notice of the meaning of the term "fictitious credit card."[13] The Court of Criminal Appeals re-

2. Olurebi v. State, 818 S.W.2d 851 (Tex. App.—Houston [lst Dist.] 1991, no pet.).
3. TEX. PENAL CODE ANN. § 32.31(b)(2)(Vernon 1974).
4. TEX. PENAL CODE ANN. § 32.31(a)(2)(Vernon 1974) defines credit card as "an identification card, plate, coupon, book, number or any other device authorizing a designated person or bearer to obtain property or services on credit. [The term] includes the number or description of the device if the device itself is not produced at the time of ordering or obtaining the property or service."
5. *Olurebi*, 870 S.W.2d at 61.
6. Adams v. State, 707 S.W.2d 900, 901 (Tex. Crim. App. 1986).
7. *Id.* at 903.
8. *Id.*
9. TEX. CODE CRIM. PROC. ANN. art. 21.19 (Vernon 1989).
10. *See* DeVaughn v. State, 749 S.W.2d 62, 69 (Tex. Crim. App. 1988).
11. *Id.*; *see also Ex parte* Porter, 827 S.W.2d 324, 327 (Tex. Crim. App. 1992)(op. on reh'g).
12. *Id.*
13. *Olurebi*, 870 S.W.2d at 62.

versed and remanded to the court of appeals to determine whether this lack of notice impacted Olurebi's ability to prepare a defense, and, if so, to what extent.[14]

II. FORMER JEOPARDY

In *Ex parte Queen*[15] the Court of Criminal Appeals held that the double jeopardy clause of the United States Constitution does not bar a second trial following the granting of a motion for new trial on any ground other than insufficiency of the evidence to support the conviction.[16] Queen was convicted of burglary of a habitation. He then filed a motion for new trial asserting, among other things, that the "verdict [was] contrary to the law and evidence."[17] This motion was overruled by operation of law. Queen appealed, but the appeal was abated, and the trial court was ordered to consider a second motion for new trial.[18] Although the record is not clear, the trial court apparently granted this motion for new trial. Queen then filed an application for a writ of habeas corpus seeking to bar retrial on double jeopardy grounds because the evidence at his first trial was insufficient.

The Court of Criminal Appeals recognized that the federal and state constitutions protect against "a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction and against multiple punishments for the same offense."[19] The court, however, held that a second trial would not place Queen in jeopardy again because he had not previously been acquitted, convicted, or punished.[20] The Court of Criminal Appeals relied on its previous decision in *Lofton v. State*[21] that analogized the granting of a motion for new trial based on trial error, to the granting of a mistrial because of a hung jury.[22] Neither event terminates the defendant's original jeopardy. Consequently, when a defendant's motion for new trial is granted based upon trial error double jeopardy does not bar a retrial regardless of the sufficiency of the evidence at the first trial.[23]

The holding in *Queen* and the previous holding in *Lofton* create a somewhat curious and inefficient result. *Queen* indicates, although this may be dicta, that if a trial court grants a motion for new trial based on

14. *Id.*
15. 877 S.W.2d 752 (Tex. Crim. App.), *cert. denied*, 115 S. Ct. 910 (1994).
16. The court refused to consider whether the Texas Constitution bars a new trial because that issue was not presented to the court of appeals. 877 S.W.2d at 755 n.4.
17. *Id.* at 753.
18. *Ex parte* Timothy Hugh Queen, No. 01-91-00194-CR (Tex. App.—Houston [1st Dist.], Mar. 15, 1991)(unpublished).
19. *Ex parte Queen*; 877 S.W.2d at 754 (quoting Lofton v. State, 777 S.W.2d 96, 96-97 (Tex. Crim. App. 1989)(citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).
20. *Id.*
21. 777 S.W.2d 96 (Tex. Crim. App. 1989).
22. The *Lofton* court relied on Richardson v. United States, 468 U.S. 317 (1984) for the proposition that a defendant may be retried following a hung jury even if the evidence at the first trial was insufficient because a hung jury does not terminate jeopardy.
23. *Ex parte Queen*, 877 S.W.2d at 754-55.

grounds alleging trial error and insufficiency of the evidence that a second trial is not barred by double jeopardy. Only if a motion for new trial is granted on the specific basis that the evidence was insufficient to support the conviction is a retrial barred.[24] Yet, if a defendant appeals his conviction and challenges the sufficiency of evidence on appeal and complains of trial errors, he is entitled to an acquittal if the evidence on appeal is determined to be insufficient, even if there are also trial errors in the case.[25] The same result should apply when a trial judge reviews a conviction pursuant to a motion for new trial. Otherwise, a defendant is forced to waste the resources of the appellate courts in order to obtain the acquittal to which he is entitled.

In a significant step backward for double jeopardy jurisprudence, the Supreme Court, in *United States v. Dixon*,[26] overruled the recent case of *Grady v. Corbin*.[27] Prior to *Grady* a subsequent prosecution was barred by the double jeopardy clause unless each offense contained an element not contained in the other offense.[28] *Grady* held that a subsequent prosecution was also barred "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[29] *Dixon* returned double jeopardy jurisprudence to the same elements tests. In light of *Dixon*, the Court of Criminal Appeals reconsidered its position on whether two offenses are the same for double jeopardy purposes.[30]

Parrish v. State[31] involved a woman who was charged with speeding and driving while intoxicated arising out of the same incident. The accused was first convicted of the speeding offense. She then challenged the driving while intoxicated case on double jeopardy grounds. The Court of Criminal Appeals considered this issue in light of *Dixon*.

The Court of Criminal Appeals compared the statutory elements of driving while intoxicated and speeding and also examined the pleadings in each case. Although some elements of each offense were the same, there was at least one element of each statute that was not required to be proven under the other statute.[32] Accordingly, the United States Constitution does not regard speeding and driving while intoxicated as the same offenses for double jeopardy purposes.[33] Therefore, there is no double jeopardy bar to prosecution for both offenses.[34]

---

24. *Id.* at 755.
25. Burks v. United States, 437 U.S. 1, 18-19 (1978).
26. 113 S. Ct. 2849 (1993).
27. 495 U.S. 508 (1990).
28. This test is based on Blockburger v. United States, 284 U.S. 299, 304 (1932).
29. *Grady*, 495 U.S. at 510.
30. *See* Parrish v. State, 869 S.W.2d 352 (Tex. Crim. App. 1994).
31. *Id.*
32. *Id.* at 354-55.
33. *Id.* at 355.
34. *Id.* (This case was remanded to the court of appeals to determine if the Texas Constitution bars the subsequent prosecution).

In *Hoang v. State*,[35] the Court of Criminal Appeals held that a conviction obtained in a void proceeding does not bar retrial of the case. The defendant in *Hoang* was convicted by a jury of aggravated robbery and sentenced to thirty-eight years in prison. The defendant subsequently entered a guilty plea to three other counts of aggravated robbery and received three concurrent ten year sentences. He served his time in prison and was released on parole. Subsequently, the defendant challenged his thirty-eight-year sentence on the ground that the court was without jurisdiction to try him because he was a juvenile when tried and had never been certified to stand trial as an adult. The conviction was therefore void. Consequently, the State reinstituted the proceedings so that the defendant could be properly certified to stand trial. The defendant challenged the State's authority to prosecute him for the same offense.

The question for the Court of Criminal Appeals was whether the double jeopardy clause bars successive prosecution for the same offense when the prior conviction was not in a court of competent jurisdiction.[36] Ruling that a void judgment does not bar a successive prosecution, the court reasoned that because a void conviction need not be respected, the trial judge was free to ignore it.[37] Since the previous conviction was null and void, the new prosecution is legally the first prosecution and therefore does not constitute double jeopardy.[38]

The Court of Criminal Appeals in *Hoang* did not decide whether the defendant, upon conviction in the retrial, would be entitled to credit for time served on the void convictions; whether a second conviction would violate the double jeopardy provision against multiple punishment; or whether a longer sentence imposed upon conviction after the second trial would violate the double jeopardy ban on additional or vindictive punishment for the same offense.[39]

Shute v. State[40] addressed the question of whether the State may retry a defendant for a lesser included offense following a bench trial that resulted in a conviction arising out of the same incident, but later reversed for insufficiency of the evidence. Shute was convicted of attempted capital murder in a trial before the court. He stipulated to the elements of the offense, except to the element of whether the victim was a peace officer in the lawful performance of his duty. The trial court found Shute guilty and the Court of Criminal Appeals reversed for insufficiency of the evidence. The State then indicted Shute for attempted murder arising out of the same incident.

Shute sought habeas corpus relief, which was denied.[41] The court reasoned that since the trial judge could have found Shute guilty of a lesser

35. 872 S.W.2d 694 (Tex. Crim. App. 1993), *cert. denied*, 115 S. Ct. 117 (1994).
36. *Id.* at 696-97.
37. *Id.* at 698.
38. *Id.* at 699.
39. *Id.*
40. 877 S.W.2d 314 (Tex. Crim. App. 1994).
41. *Id.* at 315.

included offense it follows that the judge necessarily found each element of the lesser offense beyond a reasonable doubt when the judge found Shute guilty of the greater offense. Following the decision in *Ex parte Granger*,[42] the court held the double jeopardy clause does not bar retrial on a lesser included offense when the first trial was a bench trial and there was sufficient evidence upon which the trial judge could have found the defendant guilty of the lesser offense.[43]

III. WAIVER OF JURY

The Court of Criminal Appeals clarified in *Townsend v. State*,[44] that a defendant's failure to execute a written waiver of trial by jury requires automatic reversal of his conviction following a trial before the court. Townsend was convicted of driving while intoxicated in a trial before the court. The court of appeals held the failure to obtain a written jury waiver violated the Code of Criminal Procedure,[45] but held that such error was harmless.[46] The Court of Criminal Appeals held that a failure of the defendant to sign and file a written jury waiver is not subject to a harm analysis.[47] The failure to file a written waiver in a bench trial requires automatic reversal of a conviction if raised on direct appeal.[48]

IV. JURY SELECTION

In a strong six to three decision, the Court of Criminal Appeals expanded the remedy for a *Batson* violation in criminal cases. In 1986, *Batson v. Kentucky*[49] held that the Equal Protection Clause of the Fourteenth Amendment prohibits the State's use of peremptory challenges to purposefully or deliberately exclude black persons from jury participation solely on account of their race. While condemning the discriminatory use of peremptory strikes, the Supreme Court in *Batson* left it to the lower courts to fashion the remedy for the improper use of peremptory strike. The two remedies available under *Batson* were the seating of the improperly struck juror or the dismissal of the entire jury array.[50]

In response to *Batson*, the Texas legislature passed article 35.261 of the Texas Code of Criminal Procedure.[51] This article purported to codify

42. 850 S.W.2d 513 (Tex. Crim. App. 1993).
43. *Shute*, 877 S.W.2d at 315.
44. 865 S.W.2d 469 (Tex. Crim. App. 1993).
45. Article 1.13(a) provides that a waiver of the right to a jury trial " . . . must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the State." TEX. CODE CRIM. PROC. ANN. art. 1.13(a)(Vernon 1977 & Supp. 1995).
46. *Townsend*, 865 S.W.2d at 469.
47. *Id.* at 470.
48. *Id.*; *cf. Ex parte* Sadberry, 864 S.W.2d 541, 543 (Tex. Crim. App. 1993)(conviction will not be set aside by habeas corpus due to failure to sign written jury form).
49. 476 U.S. 79 (1986).
50. *Id.* at 100 n.24.
51. Article 35.261 of the Texas Code of Criminal Procedure states:

Batson and provide the remedy for a violation of *Batson* by the State.[52] The sole remedy prescribed by article 35.261 was that of dismissal of the entire jury array and beginning anew the jury selection process.[53]

In *State ex rel. Curry v. Bowman*[54] the Court of Criminal Appeals decided that the remedy set out in article 35.261 may be unconstitutionally restrictive.[55] In *Bowman*, a driving while intoxicated trial, the State used three peremptory challenges to remove black jurors. The defendant made a *Batson* objection and the trial judge, Wallace Bowman of County Criminal Court No. 4 of Tarrant County, found that the State had purposefully discriminated against two of the three veniremembers. Judge Bowman disallowed the two improper strikes and ordered the two veniremembers reinstated on the panel and seated them on the jury.[56]

The State filed a petition for writ of mandamus alleging that article 35.261 required the dismissal of the entire array when the trial court found a *Batson* violation. Under the State's argument, Judge Bowman had no authority to order the two improperly struck veniremembers seated on the jury and was required by article 35.261 to dismiss the array in response to a *Batson* violation.[57]

The Court of Criminal Appeals, through Judge Overstreet, characterized the issue of the case as being, "whether the prosecution is entitled to, as a remedy, the dismissal of the array pursuant to article 35.261 when a defense *Batson* motion has been sustained and the defendant acquiesces to a remedy other than that prescribed in article 35.261(b)."[58]

(a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

(b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

TEX. CODE. CRIM. PROC. ANN. art. 35.261 (Vernon 1989).

52. *See* Hill v. State, 827 S.W.2d 860, *cert. denied*, 113 S. Ct. 297 (1992) (Tex. Crim. App. 1992). In *Hill*, the court stated that the legislature enacted article 35.261 to create uniform procedures and remedies to address claimed constitutional violations during jury selection.

53. TEX. CODE CRIM. PROC. ANN. art. 35.261(b) (Vernon 1989).

54. 885 S.W.2d 421 (Tex. Crim. App. 1993), *cert. denied*, 115 S. Ct. 184 (1994).

55. *Id.* at 424.

56. *Id.* at 423.

57. *Id.*

58. *Id.* at 422-23.

Judge Overstreet began by tracing the history of *Batson* and its progeny.[59] *Batson* itself prohibited the State's use of peremptory challenges to purposefully exclude black jurors from jury participation solely on account of their race.[60] However, *Batson* has been substantially extended by other Supreme Court cases.[61] In *Powers v. Ohio*,[62] the Supreme Court held that the defendant has standing to object to race based exclusion of jurors through peremptory challenges whether or not the defendant and the excluded jurors are the same race.[63] Likewise in *Edmondson v. Leesville Concrete Co.*[64], the Supreme Court held that *Batson* applied to private litigants in civil cases and in *Georgia v. McCollum*,[65] the Supreme Court applied *Batson* to defendants in criminal cases and prohibited a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.

Most importantly, *Powers* and *Edmondson* clearly recognized that the harm caused by a *Batson* violation is inflicted not only on the parties to the litigation, but also on the excluded juror and the entire community as well.[66] Under these cases a citizen has a right not to be excluded from a jury based on his or her race in violation of the Equal Protection Clause of the Fourteenth Amendment.[67]

In *Bowman*, Judge Overstreet focused more upon these later cases expanding *Batson*.[68] He particularly considered the rights of the excluded juror in finding article 35.261 to be too restrictive. Judge Overstreet stated that, "[i]f the only remedy is dismissal of the array, the affected veniremember is still not allowed to participate in the process."[69]

Explaining that an objection based on *Batson* is not co-extensive with an objection predicated upon article 35.261, Judge Overstreet found that ordering the improperly struck jurors seated on the jury was a proper remedy under *Batson* and its progeny.[70] Specifically, Judge Overstreet, and the court majority found that where a *Batson* objection is sustained the trial court "may fashion a remedy in its discretion consistent with *Batson* and its progeny."[71] While the court stopped short of requiring that the improperly struck jurors always be reinstated on the jury, it is clear from *Bowman* that if this is the remedy requested by the aggrieved party, the trial court should reinstate the jurors.

---

59. *Id.* at 423.
60. *Id.*
61. *Id.* at 423-24.
62. 111 S. Ct. 1364 (1991).
63. *Id.* at 1373.
64. 111 S. Ct. 2077 (1991).
65. 112 S. Ct. 2348 (1993).
66. *Powers*, 111 S. Ct. at 1370-74; *Edmondson*, 111 S. Ct. at 2081.
67. *Powers*, 111 S. Ct. at 1370-74; *Edmondson*, 111 S. Ct. at 2081.
68. *Bowman*, 885 S.W.2d at 424-25.
69. *Id.* at 425.
70. *Id.*
71. *Id.*

The United States Supreme Court also addressed the *Batson* issue during the last term. In *J.E.B. v. Alabama*,[72] the Court held that *Batson* prohibited the State's use of peremptory strikes based on gender.[73] *J.E.B.* was a civil paternity case but the ruling will apply with equal force to criminal cases.

In *J.E.B.* the State used nine of its ten strikes to remove male jurors.[74] Ultimately, an all female jury was empaneled.[75] Justice Blackmun, writing for the court, concluded that the Equal Protection Clause of the United States Constitution prohibits jury selection on the basis of gender or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man.[76] Essentially, the *Batson* rule was extended to peremptory challenges based on gender.

The court in *J.E.B.* left open whether this decision is limited to the State's use of gender based peremptory strikes. Justice O'Connor, in her concurring opinion, argues that this decision should only apply to the State.[77] However, based on *Edmonson v. Leesville Concrete Co.*, and *Georgia v. McCollum*, she expressed her doubts that this case would be limited to the State.[78]

V. EVIDENTIARY ISSUES

A. Expert Testimony in Child Sexual Abuse Cases

In a series of cases beginning with *Duckett v. State*,[79] the Court of Criminal Appeals has addressed the confusing area of the admissibility of expert testimony in child sexual abuses cases. In *Yount v. State*,[80] the court cleared away much of this confusion by making two very clear rulings.

First, *Yount* held that testimony that a particular witness is truthful is inadmissible[81] as expert testimony under Rule 702 of the Texas Rules of Criminal Evidence.[82] Secondly, Rule 702 does not permit an expert to given an opinion that a class of persons to which the complainant belongs is truthful.[83]

---

72. 114 S. Ct. 1419 (1994).
73. *Id.* at 1421-30.
74. *Id.* at 1421-22.
75. *Id.*
76. *Id.* at 1425-30.
77. *Id.* at 1430-33 (O'Connor, J., concurring).
78. *J.E.B.*, 114 S. Ct. at 1430-33.
79. 797 S.W.2d 906 (Tex. Crim. App. 1990).
80. 872 S.W.2d 706 (Tex. Crim. App. 1993).
81. *Id.* at 711.
82. Rule 702, Texas Rules of Criminal Evidence, states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Tex. R. Crim. Evid. 702.
83. *Yount*, 872 S.W.2d at 711-12.

In *Yount*, an eight-year-old complainant testified concerning sexual contact inflicted on her by the defendant. Dr. Beth Naubert, an Austin pediatrician, testified over the defendant's objection that of the hundreds of children she had examined concerning sexual abuse very few were not telling the truth.[84]

On direct appeal, the Austin Court of Appeals found error in the admission of this testimony.[85] The court of appeals based its reversal on *Duckett*.[86] In *Duckett*, the Court of Criminal Appeals analyzed the admission of expert testimony on child sexual abuse under Rule 702. The testimony at issue in *Duckett* concerned the behavioral stages that sexually abused children go through. The court concluded that the threshold determination for admitting such testimony is whether the testimony "if believed, will assist the untrained layman trier of fact to understand the evidence or determine a fact in issue . . . ."[87] *Duckett* further stated that expert testimony which decides an ultimate fact for the jury, such as a direct opinion on the truthfulness of the child, is not admissible under Rule 702.[88] Additionally, the court in *Duckett* held that Rule 403 of the Texas Rules of Criminal Evidence[89] "applies to this testimony and it may be excluded if its probative value is substantially outweighed by its prejudicial effect."[90] Lastly, the *Duckett* court held that such testimony may not be admissible unless there had been prior impeachment of the complainant.[91]

In 1993, the Court of Criminal Appeals disavowed the language of *Duckett* that had stated that impeachment of the complainant was necessary before the expert testimony was admissible. In *Cohn v. State*,[92] the court made clear that Rule 403 did not require impeachment before admissibility of expert testimony that assists the trier of fact.[93]

In *Yount*, the court further disavowed the prior impeachment requirement of *Duckett*.[94] The court held that there was nothing in the language of Rule 702 suggesting that expert testimony that is relevant as substantive evidence is inadmissible unless it serves some rehabilitative function.[95] Therefore, impeachment of the complainant is not a requirement

84. *Id.* at 707-08.

85. Yount v. State, 808 S.W.2d 633 (Tex. App.—Austin), *remanded*, 872 S.W.2d 706 (Tex. Crim. App. 1993).

86. *Duckett*, 797 S.W.2d at 906.

87. *Id.* at 914.

88. *Id.* at 914, 918-19.

89. Rule 403 of the Texas Rules of Criminal Evidence, states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. CRIM. EVID. 403.

90. *Duckett*, 797 S.W.2d at 917.

91. *Id.* at 918-19.

92. 849 S.W.2d 817 (Tex. Crim. App. 1993).

93. *Id.* at 819.

94. *Yount*, 872 S.W.2d at 706.

95. *Id.*

for admissibility of expert testimony that is otherwise admissible under Rule 702.[96]

The court in *Yount* then addressed the question of what type of expert testimony is admissible. Finding that an expert on child sexual abuse is not a "human lie detector," the court made clear that testimony that a particular witness is truthful does not assist the jury under Rule 702 and is therefore not admissible.[97] Rather, the court found that this testimony attempts to supplant the jury and that a jury is capable of determining truthfulness without expert assistance. Therefore, this type of testimony is inadmissible.[98]

In reaching this conclusion, the court stated that the first requirement for admissibility under Rule 702 is that the jury must not be qualified to intelligently, and to the best degree, determine the particular issue without the benefit of the expert witness' specialized knowledge.[99] A determination of credibility of a witness is what juries do best and therefore, the use of expert testimony on whether a person is telling the truth does not meet this threshold requirement of Rule 702.[100]

On the additional question of whether testimony that a class of persons, like children, is truthful, the court likewise found Rule 702 prohibits the testimony.[101] The court stated that an expert who testifies that a class of persons to which the victim belongs is truthful is essentially telling the jury that they can believe the victim in the instant case as well.[102] The court found that this is not expert testimony of the kind which will assist the jury under Rule 702 and is therefore inadmissible.[103]

While the *Yount* opinion dealt with child sexual abuses cases, its application of Rule 702 will be equally relevant to prosecutions for other offenses. In any case where expert testimony about the trutfulness of a person or class of persons is offered, *Yount* will likely provide an insurmountable barrier to the admissibility of the testimony.

B. Extraneous Acts Evidence

Whether the limitation of evidence contained under Rule 404(b) of the Texas Rules of Criminal Evidence[104] reaches only acts of misconduct was

96. *Id.*
97. *Id.* at 710-11.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 711-12.
102. *Id.*
103. *Id.*
104. Rule 404(b), Texas Rules of Criminal Evidence, states:
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided, upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction.

the subject of the Court of Criminal Appeals opinion in *Bishop v. State*.[105] In *Bishop*, the evidence showed that the victim was attacked by a man with a knife who threatened her and forced her to engage in numerous acts of oral, anal and vaginal intercourse. The victim was also forced to fondle herself. Additionally, the evidence showed that the assailant did not ejaculate during the attack.[106]

During the appellant's case in chief, the State, over objection, was allowed to ask the defendant's ex-wife whether he had liked to engage in anal intercourse, whether he had required her to fondle herself and whether the defendant was capable of performing sexually for an extended period of time without ejaculating.[107]

On appeal, the Beaumont Court of Appeals reversed,[108] finding the evidence was more prejudicial than probative under Rule 403 of the Texas Rules of Criminal Evidence.[109] The court of appeals also found that this testimony, while not amounting to an extraneous offense, did rise to the level of extraneous misconduct and therefore, fit under Rule 404(b).[110]

At the Court of Criminal Appeals, the State argued that the acts testified to by the defendant's wife did not constitute misconduct and that Rule 404(b) did not apply.[111] This argument was rejected by the court.

The Court of Criminal Appeals found that the plain language of Rule 404(b) speaks to "other crimes, wrongs or acts," and that there is no requirement that the evidence must be that of another criminal offense or even misconduct in order to fall within the purview of Rule 404(b).[112] The court stated that the intent of the rule is to prevent the introduction of evidence to prove the character of a person in order to show that he acted in conformity with that character.[113] According to the court, this prohibition applies as equally to evidence of extraneous acts or transactions as it does to evidence of extraneous offenses.[114] Therefore, the testimony in this case was found to be evidence of extraneous acts and Rule 404(b) did apply.[115]

The Court of Criminal Appeals ultimately agreed with the court of appeals that this testimony was inadmissible and harmful and the case was remanded to the trial court for a new trial.[116] In the court's opinion, the testimony was more prejudicial than probative and was inadmissible. The

---

TEX. R. CRIM. EVID. 404(b).

105. 869 S.W.2d 342 (Tex. Crim. App. 1993).

106. *Id.* at 344.

107. *Id.*

108. Bishop v. State, 837 S.W.2d 431 (Tex. App.—Beaumont 1992), *remanded*, 869 S.W.2d 342 (Tex. Crim. App. 1993).

109. *Id.*

110. *Id.*

111. *Bishop*, 869 S.W.2d at 345.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 345-47.

court noted that the State had substantial evidence tying the defendant to the crime and that the testimony of the defendant's ex-wife was not particularly useful in pinpointing the defendant as the offender because the practices described were not especially unique to the defendant. Additionally, although these practices were not criminal offenses, they were considered improper, immoral and highly offensive by some segments of the population so that the testimony could have unduly prejudiced some jurors against the defendant.[117]

C. Admissibility of Extraneous Offenses

In an exercise of judicial independence, the Court of Criminal Appeals has interpreted the Texas Rules of Criminal Evidence in a way contrary to the interpretation given an identical rule by the United States Supreme Court. In *Harrell v. State*[118] the court held that the standard for admissibility of extraneous offense evidence at the guilt-innocence phase of the trial is proof beyond a reasonable doubt. This ruling requires the same standard of proof for admissibility of extraneous offense evidence as is required for consideration of that evidence by the jury.[119]

In reaching this conclusion, the court interpreted Rule 104 of the Texas Rules of Criminal Evidence[120] as requiring proof beyond a reasonable doubt before extraneous offense evidence was admissible. This interpretation was at odds with the interpretation given to Rule 104 of the Federal Rules of Evidence[121] on the same question in *Huddleston v. U.S.*[122]

---

117. *Id.* at 346-47.

118. 884 S.W.2d 154 (Tex. Crim. App. 1994).

119. Harrell was concerned with extraneous offense evidence at the guilt-innocence phase of a trial under Texas Rules of Criminal Evidence, Rule 404(b). However, Texas Code of Criminal Procedure, art. 37.07, § 3(a) now requires that extraneous offenses or bad acts be proven beyond a reasonable doubt before they are admissible at the punishment phase of a trial.

120. Rule 104(a) and (b) of the Texas Rules of Criminal Evidence states:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Tex. R. Crim. Ev. 104(a), (b).

121. Rule 104(a) and (b), Federal Rules of Evidence, provides:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Fed. R. Evid. 104(a), (b).

122. 485 U.S. 681 (1988).

Huddleston held that evidence of an extraneous offense is admissible under Federal Rule 104(b) if the jury could reasonably conclude by a preponderance of the evidence that the defendant committed the extraneous offense.[123]

In declining to follow the *Huddleston* Court's interpretation of Rule 104, the Court of Criminal Appeals in *Harrell* noted that Texas has long required a jury instruction that the jury not consider the extraneous offense evidence unless they found beyond a reasonable doubt that the defendant committed the offense.[124] The court concluded that the standard for admissibility of the evidence should be the same as the jury's standard for its consideration.[125] Speaking for the court, Judge Maloney stated that it made no sense for the trial court to, on the one hand, admit evidence of an extraneous offense using a certain standard for admissibility, but then, on the other hand, instruct the jury not to consider that same evidence unless it uses a different standard.[126]

D. Horizontal Gaze Nystagmus Test

The simmering controversy over the admissibility of the horizontal gaze nystagmus (HGN) test in DWI prosecutions was put to rest by the Court of Criminal Appeals in *Emerson v. State*.[127] In *Emerson*, by taking judicial notice of various scientific studies, the court concluded that the HGN test is admissible in DWI prosecutions as a reliable indicator of intoxication.[128] However, the HGN test, under *Emerson*, is not admissible as an indicator of a precise blood alcohol level.[129]

The horizontal gaze nystagmus test involves an officer observing the movement of a subject's eyes while a stimulus, such as a pen light, is moved in front of the subject's eyes. The officer observes the eyes for an inability to pursue the object smoothly. He also watches the subject's eyes for a distinct or pronounced nystagmus, or involuntary rapid oscillation of the eyes, at the eye's maximum horizontal deviation. Additionally, the officer looks for an angle of onset of nystagmus of less than or equal to forty-five degrees.[130]

The defendant in *Emerson* was arrested for DWI and among the tests given by the officer was the HGN test.[131] Her objection to its admissibility was overruled. On appeal, the Corpus Christi Court of Appeals held that the trial court did not abuse its discretion in admitting the HGN

123. *Id.* 485 U.S. at 689.
124. *Harrell*, 884 S.W.2d at 158; *see also* Ernster v. State, 105 Tex. Crim., 422, 308 S.W.2d 33, 34-35 (1957); Nichols v. State, 138 Tex. Crim. 324, 136 S.W.2d 221 (1940); Vaughn v. State, 135 Tex. Crim. 205, 118 S.W.2d 312 (1938); Miller v. State, 122 Tex. Crim. 59, 53 S.W.2d 790, 791-92 (1932); Lankford v. State, 93 Tex. Crim. 442, 248 S.W. 389 (1923).
125. *Harrell*, 884 S.W.2d at 158-60.
126. *Id.* at 158.
127. 880 S.W.2d 759 (Tex. Crim. App. 1994), *cert. denied*, 115 S. Ct. 323 (1994).
128. *Id.* at 768-69.
129. *Id.* at 769.
130. *Id.* at 765-66.
131. *Id.* at 761-62.

testimony.[132] In support of its holding, the appeals court cited *Finley v. State*[133] and *Lancaster v. State*.[134] The courts in *Finley* and *Lancaster* both held that testimony by a police officer concerning a defendant's performance on the HGN test was admissible as lay opinion testimony on the issue of whether the defendant was intoxicated.[135]

The Court of Criminal Appeals in *Emerson* disagreed with the conclusion that HGN was admissible as lay opinion testimony.[136] Finding that the HGN test is based on a scientific theory, the court treated it as novel scientific evidence and applied the test set out in *Kelly v. State*.[137]

In *Kelly*, the court had admitted DNA evidence under Texas Rule of Criminal Evidence 702,[138] as expert testimony. Explaining that the threshold determination under Rule 702 is whether the expert testimony is helpful to the trier of fact, the court applied the same analysis used in *Kelly*.[139]

In order for scientific evidence to be found helpful and thus admissible, the basis for the testimony must be reliable.[140] If it is found reliable, it may still be inadmissible under Texas Rule of Criminal Evidence 403 if its probative value is substantially outweighed by unfair prejudice, confusion of the issues, misleading of the jury, undue delay, or presentation of cumulative evidence.[141]

In *Kelly*, the court explained that to be considered reliable, evidence based on a scientific theory must satisfy three criteria:

1. the underlying scientific theory must be valid;
2. the technique applying the theory must be valid; and
3. the technique must have been applied properly on the occasion in question.[142]

The court in *Emerson* concluded that HGN is based on a valid scientific theory by taking judicial notice of the studies and scientific literature concerning the test.[143] The court concluded that taking judicial notice of this material on appeal was proper even though it was not part of the appellate record.[144]

---

132. 846 S.W.2d 531 (Tex. App.—Corpus Christi 1993), *aff'd*, 880 S.W.2d 759 (Tex. Crim. App. 1994), *cert. denied*, 115 S. Ct. 323 (1994).

133. 809 S.W.2d 909 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

134. 772 S.W.2d 137 (Tex. App.—Tyler 1988, pet. ref'd).

135. *Finley*, 809 S.W.2d at 914; *Lancaster*, 772 S.W.2d at 138-39.

136. *Emerson*, 880 S.W.2d at 763.

137. 824 S.W.2d 568 (Tex. Crim. App. 1992).

138. Rule 702 of the Texas Rules of Criminal Evidence states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." TEX. R. CRIM. EVID. 702.

139. *Kelly*, 824 S.W.2d at 568-573.

140. *Id.* at 572.

141. *Id.*

142. *Id.* at 573.

143. *Emerson*, 880 S.W.2d at 764-68.

144. *Id.* at 764-65.

The court found that the scientific materials addressing the issue have reached the uniform conclusion that the consumption of alcohol has a cognizable effect on human eye movement.[145] Following the lead of several other states that have considered the issue,[146] the court concluded that the technique employed in the HGN test is a reliable indicator of intoxication.[147] However, the court also concluded that the HGN technique is not a sufficiently reliable indicator of precise blood alcohol content and was not admissible for that purpose.[148]

Additionally, the *Emerson* court found that in order for testimony concerning a defendant's performance on the HGN test to be admissible, it must be shown that the witness testifying is qualified as an expert on the HGN test.[149] This qualification is met by a showing that a law enforcement officer has received a practitioner certificate issued by the state of Texas to administer the HGN test.[150] And lastly, the court concluded that none of the factors under Rule 403 outweighed the probative value of the evidence.[151]

In dissent, four judges took issue with the majority's application of the judicial notice doctrine. They argued that the use of judicial notice was improper because the information that the court was taking judicial notice of was not commonly known or accepted. The dissenters contended that the majority was simply using judicial notice to relieve the State of its burden of proof to establish admissibility of the evidence under Rule 702.[152]

E. Statements Against Penal Interest

Under Texas Rule of Criminal Evidence 803(24),[153] a statement against penal interest is an exception to the hearsay rule only when corroborating circumstances clearly indicate the trustworthiness of the statement. In

145. *Id.* at 768.

146. *Id.* at 767; *see also* State v. Superior Court, 718 P.2d 171 (1986); State v. Murphy, 451 N.W.2d 154 (Iowa 1990); State v. Clark, 762 P.2d 853 (Mont. 1988), State v. Bresson, 554 N.E.2d 1330, 1334 (Ohio 1990).

147. *Emerson*, 880 S.W.2d at 768-69.

148. *Id.* at 769.

149. *Id.*

150. *Id.*

151. *Id.* at 769-70.

152. *Id.* at 770-76.

153. Rule 803 (24) of the Texas Rules of Criminal Evidence states:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Tex. R. Crim. Evid. 803(14).

Davis v. State,[154] the Court of Criminal Appeals addressed the test for determining whether there is sufficient corroboration.

Elisha Davis was charged with two cases of delivery of cocaine. The defendant's brother, James Royal, told the defendant's mother that he, not the appellant Davis, had sold the drugs in question. When Royal was called as a witness he claimed his right against self-incrimination. The defendant then called a third person, Patrick Ivory, who testified that he was an eyewitness to the drug transaction and that Royal, not the defendant, had sold the drugs. The defendant then attempted to have his mother testify that Royal had confessed his guilt to her, but her testimony was excluded based on a violation of the sequestration rule and also on the ground that her testimony would constitute hearsay.[155]

The Court of Criminal Appeals initially found that the trial court erred in excluding the mother's testimony under the theory that the sequestration rule had been violated.[156] Then the court analyzed whether the mother's testimony about Royal's confession was admissible as an exception to the hearsay rule under Rule 803(24).

According to the *Davis* opinion, the first inquiry "is whether the statement tended to expose the declarant to criminal liability."[157] Since Royal's statement implicated himself in the crime for which the defendant was being prosecuted, it was one that "so far tended to subject him to . . . criminal liability . . . that a reasonable man would not have made the statement unless he believed it to be true."[158]

The court then stated that this was their first opportunity to set forth a standard to be applied in determining the existence of corroborating circumstances for purposes of Rule 803(24).[159] The rule itself requires that the circumstances must be sufficiently convincing to "clearly indicate the trustworthiness of the statement."[160] For this reason, the court stated that the focus of the inquiry "is on verifying to the greatest extent possible the trustworthiness of the statement so as to avoid the admissibility of a fabrication."[161]

In determining the proper factors, the court examined federal authority analyzing the parallel federal rule.[162] Following the lead of the federal courts, the Court of Criminal Appeals determined that no definite test

154. 872 S.W.2d 743 (Tex. Crim. App. 1994).
155. *Id.* at 744-45.
156. *Id.* at 745-46.
157. *Id.* at 747.
158. *Id.*
159. *Id.*
160. TEX. R. CRIM. EVID. 803(24).
161. *Davis*, 872 S.W.2d at 748.
162. Rule 804(3) of the Federal Rules of Evidence states:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate

exists by which to gauge the existence of corroborating circumstances for purposes of Rule 803(24).[163] Rather, several factors are to be considered in making the determination of whether there is sufficient corroboration. These factors include whether the guilt of the declarant is inconsistent with the guilt of the accused, whether the declarant was so situated that he might have committed the crime, the timing of the declaration and its spontaneity, the relationship between the declarant and the party to whom the declaration was made and the existence of independent corroborating facts.[164]

Additionally, the court held that evidence which undermines the reliability of the statement, as well as evidence corroborating its trustworthiness may be considered.[165] However, the court emphasized that in making this determination the trial court is not to engage in a weighing of the credibility of the in court witness, since this is the role of the jury.[166] Moreover, the burden lies with the party seeking to admit the statement, and the test is not an easy one; the evidence of corroborating circumstances must clearly indicate trustworthiness.[167]

Applying this test to the facts of *Davis*, the court found that the trial court erred in concluding that the circumstances were not sufficiently corroborative to clearly indicate the trustworthiness of the brother's statement.[168] Among the factors weighing in favor of this conclusion was the independent testimony of Ivory corroborating the brother's testimony and alibi witnesses supporting the defendant's innocence. The court found that the State's testimony that would undermine the reliability of the brother's statement, such as the officer's identification of the defendant as the person who sold him the drugs or the brother's possible motive in making the statement to help the defendant were matters to be tested on cross-examination but did not call for disallowing of the testimony.[169]

VI. JURY INSTRUCTIONS

How to define and apply culpable mental states in a "result of conduct" offense has engendered much recent confusion in the opinions of the Court of Criminal Appeals. In *Cook v. State*,[170] the court wiped away the confusion with a clear opinion that establishes the proper way to deal with the culpable mental states in the "result of conduct" offenses.

---

the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(3).

163. *Davis*, 872 S.W.2d at 748.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 749.

169. *Id.*

170. 884 S.W.2d 485 (Tex. Crim. App. 1994).

Lawrence Cook was charged with intentional murder pursuant to Texas Penal Code section 19.02(a)(1)[171] and was convicted by a jury of the lesser included offense of voluntary manslaughter.[172] Following affirmance of the conviction by the Dallas Court of Appeals,[173] the Court of Criminal Appeals granted discretionary review to determine whether the trial court correctly refused the appellant's request to limit the definitions of the applicable culpable mental states to the result of the defendant's conduct.[174]

The indictment accused the defendant of knowingly and intentionally causing the death of the decedent by stabbing the decedent with a knife.[175] The definitional portions of the jury instructions contained the entire definitions of intentionally and knowingly under Texas Penal Code section 6.03.[176] The application paragraphs on both the murder and voluntary manslaughter portion of the jury charge stated that the defendant was guilty if, among other elements, the jury found that the defendant did intentionally or knowingly cause the death of the decedent.[177]

The defendant objected to the jury instructions based on the failure of the instructions to limit the definitions of "intentionally" and "knowingly" to the result of the offense only. The objection was overruled by the trial court.[178]

---

171. Section 19.02(a)(1) of the Texas Penal Code states: "(a) A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual." TEX. PENAL CODE § 19.02(a)(1)(Vernon 1994).

172. Voluntary manslaughter is defined in § 19.04 of the Texas Penal Code as follows:

> (a) A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.
>
> (b) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.
>
> (c) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.
>
> (d) An offense under this section is a felony of the second degree.

TEX. PENAL CODE § 19.04 (Vernon 1994).

173. Cook v. State, 827 S.W.2d 426 (Tex. App.—Dallas 1992, no pet.).

174. *Cook*, 884 S.W.2d at 485.

175. *Id.* at 486.

176. "Intentionally" is defined in § 6.03 of the Texas Penal Code as follows:

> (a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

TEX. PENAL CODE § 6.03 (Vernon 1994).

177. *Cook*, 884 S.W.2d at 486.

178. *Id.*

The Dallas Court of Appeals affirmed, holding that there was no error in the jury charge because the offense of intentional murder required a finding of both an intent to engage in the conduct and an intent to cause the result.[179]

In finding that the court of appeals was wrong, the Court of Criminal Appeals discussed its cases dealing with this issue.[180] Beginning with *Beggs v. State*,[181] including *Alvarado v. State*,[182] *Kelly v. State*[183] and *Haggins v. State*,[184] the courts have held that in "result of conduct" offenses, such as injury to a child and injury to an elderly person, it was error not to limit the culpable mental states of intentionally and knowingly to the result of the conduct.[185] In *Alvarado*, the court noted that homicide and other assaultive proscriptions were "result of conduct" offenses and that the culpable mental states apply only to the result of the conduct.[186] The court explained in *Alvarado* that the nature of the conduct in these offenses is inconsequential to commission of the crimes as long as it includes a voluntary act. What matters is that the conduct is done with the required culpability to effect the result the legislature had specified.[187]

Against this history, the Court of Criminal Appeals' opinion in *Kinnamon v. State*,[188] appeared to go in a different direction. Kinnamon was charged with capital murder, which was clearly a "result of conduct" offense. However, the *Kinnamon* court found that in a prosecution for a "result of conduct" offense, "not only must an accused be found to have intended to engage in the act that caused the death, he also must have specifically intended that death result from that conduct."[189] The *Kinnamon* court then held that since the application paragraph of the charge restricted the definition of intentional to its factual context, i.e., that the appellant intentionally caused the death, there was no error.[190] This was the result in *Kinnamon* even though the complete definition of intentionally was given in the jury instructions.[191]

In *Turner v. State*,[192] a plurality of the Court of Criminal Appeals recognized that *Kinnamon* was wrongly decided and suggested *Alvarado* as the proper standard.[193] However, in *Turner*, there was no objection to

179. Cook v. State, 827 S.W.2d 426 (Tex. App.—Dallas 1992), *remanded*, 884 S.W.2d 485 (Tex. Crim. App. 1994).
180. *Cook*, 884 S.W.2d at 487-88.
181. 597 S.W.2d 375 (Tex. Crim. App. 1980).
182. 704 S.W.2d 36 (Tex. Crim. App. 1985).
183. 748 S.W.2d 236 (Tex. Crim. App. 1988).
184. 785 S.W.2d 827 (Tex. Crim. App. 1990).
185. *Cook*, 884 S.W.2d at 487-88.
186. *Alvarado*, 704 S.W.2d at 39.
187. *Id.* at 39-40.
188. 791 S.W.2d 84 (Tex. Crim. App. 1990).
189. *Id.* at 88-89 (citing Morrow v. State, 753 S.W.2d 372 (Tex. Crim. App. 1988)).
190. *Id.* at 87-89.
191. *Id.* at 89.
192. 805 S.W.2d 423, 430-32 (Tex. Crim. App. 1991) (Miller, J., concurring opinion on rehearing).
193. *Id.* at 430.

the incorrect culpable mental state definitions and, finding no egregious harm under *Almanza v. State*,[194] the plurality voted to affirm the conviction.[195]

In *Cook*, the Court of Criminal Appeals specifically overruled *Kinnamon* and resurrected *Beggs*, *Alvarado*, *Kelly*, and *Haggins* as stating the proper rule.[196] The court specifically found that "[m]urder is an offense which requires that the culpable mental state accompany the result of the conduct, rather than the nature of the conduct."[197] Under *Cook*, a jury instruction which defines intentionally or knowingly as they relate to the nature of the conduct as well as the result of the conduct is error.[198] Additionally, the court found that in a "result of conduct" offense, an intent to engage in conduct is not an explicit element to be proven and the jury should not be charged on the engaging in conduct section of the culpable mental states.[199] The only way that the engage in conduct requirement has any bearing is in determining whether there was a voluntary act or omission.[200] However, this question is not part of the culpable mental state definitions, but is dealt with under a separate section of the Texas Penal Code.[201]

The finding of error in the jury charge did not compel reversal of the case. Instead, the court remanded the case to the court of appeals for a harm analysis.[202]

VII. MOTION FOR NEW TRIAL

In *Connor v. State*, James Connor entered a guilty plea to three violations of the Texas Securities Act.[203] His punishment was assessed at ten years imprisonment probated for ten years. Connor was represented by retained counsel at his trial. Following his trial, Connor wrote two letters to the trial judge complaining that his guilty plea was involuntarily entered and that his attorney did not effectively represent him. The letters were not verified or supported by affidavits. The trial court construed the letters as a motion for new trial, held a hearing, and then denied the re-

194. 686 S.W.2d 157 (Tex. Crim. App. 1984) (opinion on State's motion for rehearing).
195. *Turner*, 805 S.W.2d at 432.
196. *Cook*, 884 S.W.2d at 490-92.
197. *Id.* at 490.
198. *Id.* at 491.
199. *Id.* at 491-92.
200. *Id.*
201. Section 6.01 of the Texas Penal Code states:

> (a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.
>
> (b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.
>
> (c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 of this code provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

TEX. PENAL CODE § 6.01 (Vernon 1994).
202. *Cook*, 884 S.W.2d at 491-92.
203. 877 S.W.2d 325 (Tex. Crim. App. 1994).

quest for a new trial. Connor was not represented by an attorney at the hearing nor did an attorney assist him in the preparation of a motion for new trial.

The Austin Court of Appeals affirmed the denial of Connor's motion for new trial.[204] The Austin Court of Appeals held that Connor's motion for new trial was insufficient as a pleading because it was not verified or supported by an affidavit.[205] Consequently, there was no motion actually before the trial court.[206] The lack of counsel at the hearing on the so-called motion for new trial was therefore not error.[207]

The Court of Criminal Appeals examined the proceedings in Connor's case in a broader manner than did the court of appeals. The Court of Criminal Appeals construed Connor's complaint to be not only that he was unrepresented at the hearing on the motion for new trial but also that he did not have legal assistance in the preparation of a motion for new trial.[208] The Court of Criminal Appeals, however, did not decide whether Connor was entitled to assistance in the preparation of a motion for new trial but remanded the case to the court of appeals so that court could make that determination.[209]

Before remanding Connor's case the Court of Criminal Appeals pointed out that a hearing on a motion for new trial is a critical stage of the proceedings at which a defendant is entitled to be represented by counsel.[210] The court also opined that an attorney could "hopefully" help avoid jurisdictional problems by preparing a motion for new trial with a proper verification and affidavits where necessary.[211] Finally, the court indicated that the court of appeals should determine whether Connor knowingly and intentionally waived his right to counsel if the court of appeals decides that Connor was entitled to an attorney to assist him in the preparation of a motion for new trial.[212]

Surely, upon remand, the court of appeals will hold that Connor was entitled to the assistance of an attorney in the preparation of a motion for new trial. That seems to be the implication of the opinion from the Court of Criminal Appeals. It makes no sense to say that a defendant is entitled to an attorney at trial, at a hearing on a motion for new trial, and on appeal, but not in the preparation of a motion for new trial. Connor's fate will most likely rest on the determination of whether he effectively waived his right to counsel, and not on whether he was entitled to counsel at all.

---

204. Connor v. State, 809 S.W.2d 560, 564 (Tex. App.—Austin 1991, no pet.).
205. *Id.*
206. *Id.*
207. *Id.*
208. 877 S.W.2d at 326.
209. *Id.* at 327.
210. *Id.* at 326.
211. *Id.* at 327.
212. *Id.* at 327 n.4.

Even if an attorney prepares a motion for new trial for a convicted defendant, that is no guarantee that the motion will be done correctly. In *Jordan v. State*[213] an attorney filed a motion for new trial alleging that the previous trial attorney was ineffective. The trial judge denied the motion without holding a hearing. The Court of Criminal Appeals recognized that where the motion for trial and the supporting affidavit reflect that reasonable grounds exist for finding that relief could be granted on the motion, a hearing must be held on the motion.[214] This is required even if the motion and affidavit do not contain every component legally required to establish relief.[215] Where, however, the motion and affidavit are merely conclusory and do not allege specific facts, the trial judge does not abuse his discretion in refusing to hold a hearing on the motion.[216]

The Texas Rules of Appellate Procedure define a "new trial" as "the rehearing of a criminal action after a finding or verdict of guilt has been set aside upon motion of an accused."[217] The effect of granting a new trial is to restore "the case to its position before the former trial including, at the option of either party, arraignment or pretrial proceedings initiated by that party."[218] The Rules do not specifically authorize granting a new trial as to punishment only. In fact, since the Rules speak in terms of setting aside a verdict or finding of guilt and restoring a case to its position before the former trial, it could be argued that the Rules authorize only a complete new trial and do not authorize a trial court to hold a new punishment hearing only. This is the conclusion reached by the Eastland Court of Appeals in *State v. Bates*.[219] The Fourteenth Court of Appeals, however, came to the opposite conclusion.[220] That court recognized that the Rules of Appellate Procedure have not been interpreted in a rigid, literalistic manner.[221] Relying on what the court perceived as good public policy expressed in the Code of Criminal Procedure's authorization to appellate courts to reverse and remand causes for new trials on the issue of punishment,[222] the court held that trial courts possess the same power to grant a new trial as to sentencing only.[223] The Court of Criminal Appeals will have to decide whether trial courts really possess such a power in the absence of statutory authorization.

---

213. 883 S.W.2d 664 (Tex. Crim. App. 1994).

214. *Id.* at 665.

215. *Id.*; *see also* Vera v. State, 868 S.W.2d 433, 436 (Tex. App.—San Antonio 1994, no pet. h.)(a defendant is not required to present a prima facie case in order to obtain a hearing on a motion for new trial).

216. *Id.*

217. TEX. R. APP. P. 30(a).

218. TEX. R. APP. P. 32.

219. 833 S.W.2d 643 (Tex. App.—Eastland 1992, pet. granted).

220. State v. Hight, 879 S.W.2d 111 (Tex. App.—Houston [14th] 1994, pet. granted).

221. *Id.* at 113 (citing State v. Gonzales, 855 S.W.2d 692, 694-95 (Tex. Crim. App. 1993) for its holding that a motion for new trial may be granted in the interest of justice).

222. TEX. CODE CRIM. PROC. ANN. art. 44.29(b)(Vernon 1979 & Supp. 1995).

223. 879 S.W.2d at 113.

VIII. APPEAL

Rule 40(b)(1) of the Texas Rules of Appellate Procedure describes the procedure that must be followed in order to appeal from a negotiated guilty plea.[224] Despite the Rule's seeming simplicity, appellants and the courts have encountered numerous difficulties in applying it.

In *Davis v. State*[225] the defendant entered a plea of nolo contendere to a charge of aggravated possession of amphetamine. His punishment was assessed at seven years imprisonment in accordance with a plea agreement entered into by the defendant, his attorney, and the prosecutor. The defendant gave a general notice of appeal and then challenged on appeal the sufficiency of the evidence to support his conviction. The court of appeals reviewed the sufficiency claim because it is a defect occurring after entry of the plea.[226] The Court of Criminal Appeals reversed and dismissed the appeal for lack of jurisdiction because the defendant's notice of appeal did not comply with Rule 40(b)(1).[227] According to the Court of Criminal Appeals, Rule 40(b)(1) should be read to bar an appeal for a nonjurisdictional defect occurring before or after entry of the plea unless the notice of appeal states that the trial court granted permission to appeal or it specifies that the matters raised on appeal were first raised by written motion and ruled on before trial.[228] According to the court, reading the Rule this way makes it consistent with the admonition required by the Code of Criminal Procedure prior to accepting a guilty plea.[229]

Reading Rule 40(b)(1) the way the Court of Criminal Appeals does in *Davis* rewrites the Rule to bar an appeal for a nonjurisdictional defect occurring after entry of the plea.[230] Judge Clinton, in a very well-rea-

---

224. Texas Rules of Appellate Procedure 40(b)(1) reads in pertinent part as follows:

> . . . 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 for a nonjurisdictional 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.

TEX. R. APP. P. 40(b)(1).

225. 870 S.W.2d 43 (Tex. Crim. App. 1994, no pet. h.).

226. Davis v. State, 773 S.W.2d 404, 406 (Tex. App.—Fort Worth 1989, pet. granted).

227. 870 S.W.2d at 47.

228. *Id.* at 46.

229. *Id.*, referring to art. 26.13(a)(3) of the Texas Rules of Criminal Procedure, that reads as follows:

> (a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of: . . . (3) the fact that if the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, the trial court must give its permission to the defendant before he may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial . . . .

TEX CODE CRIM. PROC. ANN. art. 26.13(a)(3) (Vernon 1989 & Supp. 1995).

230. *Id.* at 50 n.4 (Clinton, J., dissenting).

soned dissent in *Lyon v. State*,[231] makes the court's error in interpretation very clear. *Lyon*, like *Davis*, was an appeal from a plea bargained conviction. The trial judge specifically denied Lyon permission to appeal. Lyon therefore filed a general notice of appeal and proceeded on appeal to challege the trial judge's right to hear the case because of his relationship to the victim, the voluntariness of his plea, the failure of the trial court to properly admonish him, the ineffective assistance of his trial attorney, a conflict of interest of his trial attorney, and the sufficiency of the evidence to support his conviction. The Court of Criminal Appeals held that the only issue that could be raised on appeal was the trial judge's relationship to the victim since that was a jurisdictional issue.[232] The majority considered all of the other defects or errors to be nonjurisdictional and thus not justiciable on appeal absent the permission of the trial judge to raise them on appeal.[233] Judge Clinton pointed out in dissent that Rule 40(b)(1) applies only to plea agreements that comply with article 1.15 of the Code of Criminal Procedure.[234] Article 1.15 is a statutory mandate to review the sufficiency of the evidence. Review of the sufficiency of the evidence and compliance with article 1.15 arises after entry of the plea and thus is not barred by Rule 40(b)(1).[235]

Rule 40(b)(1) was intended to abrogate the so-called *Helms* rule.[236] Rule 40(b)(1) allows an appellate court to address nonjurisdictional issues that arose before entry of the plea thus broadening a defendant's appellate rights from a guilty plea.[237] The *Helms* rule bars consideration of such issues on appeal from a non-negotiated guilty plea.[238] The *Helms* rule has never been extended to cover asserted error occurring at or after entry of a non-negotiated plea.[239] It would be strange indeed to hold that by pleading guilty a defendant waived error that had not yet occurred.[240] Yet, that is exactly what the Court of Criminal Appeals did in *Davis* and

---

231. 872 S.W.2d 732, 737 (Tex. Crim. App. 1994).

232. *Id.* at 736.

233. *Id.*

234. Article 1.15 of the Texas Code of Criminal Procedure reads in pertinent part as follows:

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; provided, however, that it shall be necessary for the State to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same.

TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon 1977 & Supp. 1995).

235. 872 S.W.2 at 741 (Clinton, J., dissenting).

236. *Id.* at 734 (referring to Helms v. State, 484 S.W.2d 925 (Tex. Crim. App. 1972) that held that a guilty plea waives all non-jurisdictional defects that arose before entry of the plea).

237. *Id.* at 735.

238. Jacks v. State, 871 S.W.2d 741, 743 (Tex. Crim. App. 1994).

239. *Id.* at 744 (remanded to court of appeals to consider asserted error occurring at punishment stage of trial).

240. *Id.* at 743.

Lyon. Nowhere does Rule 40(b)(1) prohibit the raising of errors that occur *after* entry of a guilty plea. The majority of the Court of Criminal Appeals reads such a prohibition into the Rule apparently in an effort to reduce the number of appeals from guilty pleas. Such an imaginative reading of the Rule is not justified by a desire to lighten the appellate workload.[241]

When a trial court excludes evidence, the party offering the evidence has the right to make an offer of proof in question and answer form.[242] In *Kipp v. State*,[243] the Court of Criminal Appeals was faced with the question of whether this rule applies to a hearing held outside the presence of the jury on the competency of a child to be a witness. The issue arose because the Rules of Criminal Evidence state that a trial court is "not bound by the rules of evidence except those with respect to privileges" in determining whether a person is qualified to be a witness.[244] The Court of Criminal Appeals held that irrespective of any conflict in the Rules of Criminal Evidence the right to perfect a bill of exception in question and answer form as authorized by the Rules of Appellate Procedure is absolute and a trial court does not have discretion to deny a request to make such a bill.[245]

The Texas Constitution confers upon courts of appeals appellate jurisdiction over factual sufficiency questions.[246] The Constitution draws no distinction between criminal cases and civil cases. The question thus arises as to whether the courts of appeals should review the factual sufficiency of the evidence in a criminal case and then reverse a criminal conviction if the judgment is so against the overwhelming weight of the evidence as to be clearly wrong and unjust.

---

241. It also smacks of a violation of due process to bar a challenge to the voluntariness of a guilty plea absent permission from the trial court to raise such a challenge and to thereby allow an involuntary guilty plea to bar a challenge to truly nonjurisdictional defects or errors without complying with Rule 40(b)(1). *See* Boykin v. Alabama, 395 U.S. 238 (1969)(it is error to accept guilty plea without affirmative showing on record that it is voluntarily and intelligently entered).

242. TEX. R. CRIM. EVID. 103(b) provides:

> The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may, or at request of a party shall, direct the making of an offer in question and answer form.

Rule 52(b) of the Texas Rules of Appellate Procedure provides in pertinent part as follows:

> When the court excludes evidence, the party offering same shall soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The court may, or at the request of a party shall, direct the making of the offer in question and answer form.

TEX. R. APP. P. 52(b).

243. 876 S.W.2d 330 (Tex. Crim. App. 1994).

244. TEX. R. CRIM. EVID. 104(a).

245. 876 S.W.2d at 333.

246. TEX. CONST. art. V, § 6 provides that decisions of the courts of appeals "shall be conclusive on all questions of fact brought before them on appeal or error."

The legal sufficiency of the evidence to support a criminal conviction is reviewed pursuant to the standard set forth in *Jackson v. Virginia*;[247] that is, whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. On issues upon which a criminal defendant has the burden of proof, such as an affirmative defense or incompetency, the courts of appeals have exclusive authority to determine whether a jury finding is against the great weight and preponderance of the evidence.[248] The Court of Criminal Appeals has no jurisdiction to review such a decision by a court of appeals.[249]

The Court of Criminal Appeals has not yet decided whether the courts of appeals have jurisdiction to make the same type of factual sufficiency review regarding the elements of the offense that must be proved by the state as they do in connection with matters that must be proved by the defense. The courts of appeals continue to grapple with this issue while they await guidance from the Court of Criminal Appeals. The courts of appeals are currently divided over this issue. Some courts of appeals believe that the Texas Constitution authorizes a general factual review of the evidence[250] and others believe that the *Jackson v. Virginia* legal standard of review should control.[251] Ultimately the Court of Criminal Appeals will have to define the limits of the courts of appeals' authority. Should the Court of Criminal Appeals decide that the courts of appeals do indeed have the power to review the factual sufficiency of the evidence to support a criminal conviction, the Court of Criminal Appeals will then have to decide such interesting questions as whether the principles of double jeopardy bar the retrial of a defendant whose case was reversed because the evidence was factually insufficient to support his conviction.[252]

IX. COLLATERAL ATTACK

The Supreme Court has been less than sympathetic over the last several years to persons seeking to collaterally attack criminal convictions. The Supreme Court deviated from that trend this last term in *McFarland v. Scott*.[253] McFarland was convicted of capital murder and sentenced to death. McFarland exhausted his direct appeals and then sought appointment of counsel in the trial court so that he could pursue post-conviction

247. 443 U.S. 307, 318 (1979); Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991).
248. Meraz v. State, 785 S.W.2d 146, 149 (Tex. Crim. App. 1990).
249. *Ex parte* Schussler, 846 S.W.2d 850, 852 (Tex. Crim. App. 1993).
250. Stone v. State, 823 S.W.2d 375, 377 (Tex. App.—Austin 1992, pet. ref'd, untimely filed); Hernandez v. State, 867 S.W.2d 900, 905 n.2 (Tex. App.—Texarkana 1993, no pet. h.).
251. Clewis v. State, 876 S.W.2d 428, 436 (Tex. App.—Dallas 1994, pet. granted); McClure v. State, 879 S.W.2d 161, 165 (Tex.App.—Fort Worth 1993, pet. ref'd); Moosani v. State, 866 S.W.2d 736, 738 (Tex. App.—Houston [14th Dist.] 1993, pet. granted).
252. *Cf.* Burks v. United States, 437 U.S. 1 (1978); Greene v. Massey, 437 U.S. 19 (1978).
253. 114 S. Ct. 2568 (1994).

relief. The trial court declined to appoint counsel for McFarland as did the Texas Court of Criminal Appeals. McFarland then filed a pro se motion in the United States District Court for the Northern District of Texas asking that an attorney be appointed to assist him in the preparation of a motion challenging his conviction and sentence under 28 U.S.C. section 2254.[254] The district court denied McFarland's motion for appointment of counsel because no action was pending pursuant to 28 U.S.C. section 2254. The United States Court of Appeals for the Fifth Circuit affirmed. The Supreme Court reversed, holding that the district court had the authority to appoint counsel to represent McFarland and to stay McFarland's scheduled execution while McFarland's attorney prepared a proper application for a writ of habeas corpus.[255] The Supreme Court concluded that an indigent resident of death row is entitled to legal assistance in the preparation of a habeas corpus application.[256] The Supreme Court pointed out that this right necessarily includes a right for counsel meaningfully to research and present a defendant's habeas claims.[257] Thus, a district court may stay a defendant's execution to effect this right.[258]

In *Herrera v. Collins*,[259] the Supreme Court indicated, without a decision, that the execution of a truly innocent person would violate due process. Taking a cue from the Supreme Court, the Court of Criminal Appeals held in *State ex rel. Holmes v. Third Court of Appeals*,[260] that a claim by a condemned murderer that newly discovered evidence establishes his innocence of the crime of which he was convicted is cognizable in a habeas corpus attack on his conviction. In order to be entitled to a hearing on such a claim, the petitioner must meet the threshold standard that the newly discovered evidence, if true, would create a doubt as to the efficacy of the verdict and make it probable that the verdict would be different.[261] Once that threshold showing is met, the applicant must establish at a hearing that, based on consideration of the newly discovered evidence in light of the entire record, no rational trier of fact could have found guilt beyond a reasonable doubt in order to be entitled to relief.[262]

The underlying rationale for *Holmes* is not particularly clear. It is therefore difficult to predict whether the Court of Criminal Appeals will

254. 28 U.S.C. § 2254 (1988) is the statute that authorizes a person convicted of a state offense to challenge the conviction in federal court.

255. 114 S. Ct. at 2574. The Supreme Court relied on 21 U.S.C. § 848 (q)(4)(B)(1988) that provides:

> In any post conviction proceeding under section 2254 or 2255 of title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

256. *Id.* at 2578-579.

257. *Id.* at 2580.

258. *Id.*

259. 113 S. Ct. 853 (1993).

260. 885 S.W.2d 389 (Tex. Crim App. 1994).

261. *Id.* at 398.

262. *Id.* at 399.

allow non-capital felony defendants to raise claims of innocence on habeas corpus. In all likelihood, such an extension of *Holmes* will turn on the court's determination of whether newly discovered evidence of innocence causes a felon's conviction to violate the United States Constitution.