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# CRIMINAL PROCEDURE: TRIAL AND APPEAL

by

*Jeffrey B. Keck\** and  
*Wm. Randell Johnson\*\**

## I. SIXTH AMENDMENT RIGHT TO COUNSEL

### A. *Right to Counsel as a Component of Due Process*

THE United States Supreme Court issued two opinions during the Survey period indirectly implicating the protections encompassed by the right to counsel guaranteed by the sixth amendment.<sup>1</sup> In *Evitts v. Lucey*<sup>2</sup> the Court determined the right of an indigent criminal appellant to effective assistance of counsel in his first appeal of right. Lucey's counsel had failed to file the Statement of Appeal required under Kentucky law when he filed his brief and the record on appeal. The Kentucky Supreme Court affirmed the dismissal of Lucey's appeal and the subsequent denial of a motion to reconsider by an intermediate-level appellate court. A federal district court later determined that Lucey had indeed received ineffective assistance of counsel on appeal and granted a conditional writ of habeas corpus ordering Lucey's release unless Kentucky either reinstated his appeal or retried him. The Sixth Circuit affirmed.<sup>3</sup>

In an opinion authored by Justice Brennan, the majority characterized Lucey's claim as arising at the intersection of two lines of cases: those holding that a criminal appellant has a fourteenth amendment<sup>4</sup> guarantee of certain minimal procedural safeguards in first appeals as of right<sup>5</sup> including the right to counsel,<sup>6</sup> and those holding that the sixth amendment provides a trial-level right to counsel,<sup>7</sup> which includes an assurance that the assistance

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1. The sixth amendment provides: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

2. 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

3. *Lucey v. Kavenaugh*, 724 F.2d 560, 562 (6th Cir. 1982).

4. U.S. CONST. amend. XIV.

5. See *Griffin v. Illinois*, 351 U.S. 12, 20 (1956).

6. See *Douglas v. California*, 372 U.S. 353, 356-57 (1963).

7. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

of such counsel will be effective.<sup>8</sup> The majority then characterized the precise question presented as being "whether the appellate-level right to counsel also comprehends the right to effective assistance of counsel."<sup>9</sup>

After briefly reviewing both lines of cases, the majority concluded that they were dispositive<sup>10</sup> and thereby inextricably intertwined the sixth amendment's literal guarantee of trial-level assistance of counsel with the fourteenth amendment's judicially crafted guarantee of counsel on appeal.<sup>11</sup> In short, the majority believed that a guarantee of counsel on appeal, absent some assurance of counsel's effectiveness, guarantees nothing since ineffective assistance would be the same or worse than no counsel at all.<sup>12</sup> Justice Brennan concluded that the adjudication of a first appeal as of right will not comply with due process of law if the appellant does not have effective assistance of counsel.<sup>13</sup> Accordingly, the majority affirmed the federal court of appeals' decision.<sup>14</sup>

According to the dissent, appeals in general are an entirely different matter from trial-level proceedings.<sup>15</sup> The sixth amendment literally "applies only to trial level proceedings."<sup>16</sup> Historically due process in criminal proceedings goes primarily to the fairness of the trial.<sup>17</sup> During his trial the defendant needs an attorney to protect his presumption of innocence against the state.<sup>18</sup> This danger dissipates in appeals taken at the option of a convicted criminal. Thus, the dissent argued that a proper analysis of precedent indicates that no constitutional right to counsel on appeal exists except under the equal protection clause, which *Lucey* did not invoke.<sup>19</sup> Thus, the majority's logic cannot properly derive a constitutional right to effective assistance of counsel on appeal.<sup>20</sup>

In *Ake v. Oklahoma*<sup>21</sup> the Court continued its extension of the principles relied on in *Lucey*. In a majority opinion written by Justice Marshall, the issue was said to be "whether the Constitution requires that an indigent de-

8. See *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

9. 105 S. Ct. at 833, 83 L. Ed. 2d at 827. The majority emphasized two limits on the scope of the question presented: first, the absence of a challenge to the federal district court's determination that *Lucey* had received ineffective assistance; and second, a stipulation in that court whereby the parties agreed that the case presented no equal protection issue. *Id.*

10. *Id.* at 834, 83 L. Ed. 2d at 827-30.

11. Whether the sixth amendment's right to counsel alone would be dispositive is questionable. As observed in the dissent, the words "prosecution" and "defense" would appear to limit application of the sixth amendment to trial-level proceedings only. *Id.* at 842-43, 83 L. Ed. 2d at 838 (Rehnquist, J., dissenting). Furthermore, the Constitution does not expressly guarantee either a right of appeal or a right to counsel on appeal. *Id.* at 843, 83 L. Ed. 2d at 838-39.

12. *Id.* at 834, 83 L. Ed. 2d at 830.

13. *Id.* at 836 n.7, 83 L. Ed. 2d at 830 n.7 (citing *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (per curiam), and *Ross v. Moffitt*, 417 U.S. 600, 618 (1974)).

14. 105 S. Ct. at 841, 83 L. Ed. 2d at 831.

15. 105 S. Ct. at 843, 83 L. Ed. 2d at 838 (Rehnquist, J., dissenting).

16. *Id.*

17. *Id.* at 843, 83 L. Ed. 2d at 839.

18. *Id.* at 843, 83 L. Ed. 2d at 838 (citing *Ross v. Moffitt*, 417 U.S. at 610-11).

19. *Id.* at 843, 83 L. Ed. 2d at 839.

20. *Id.*

21. 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.”<sup>22</sup> Ake was tried for two counts of murder in the first degree, a crime punishable by death in Oklahoma, and for two counts of shooting with intent to kill. Prior to trial, Ake’s behavior was so bizarre that the trial judge sua sponte ordered a psychiatric examination in order to determine if Ake was competent to stand trial. Ake was initially committed to the state mental hospital, but the trial court later ruled that he was competent to stand trial so long as he continued to receive an anti-psychotic drug. Ake’s attorney informed the trial judge that his client would raise an insanity defense and asked the court to arrange to have a psychiatrist examine Ake with respect to his mental condition at the time of the offense, or to provide funds to enable the defense to arrange for such an examination. The trial judge rejected Ake’s request.

At the guilt/innocence phase of trial, Ake’s sole defense was insanity; however, neither side presented expert testimony regarding Ake’s sanity at the time of the offense. The jury rejected the defense of insanity and found Ake guilty on all counts. At the sentencing proceeding, the state asked for the death penalty. No new evidence was presented. Ake had no expert witness to rebut the testimony of the state’s psychiatrist, who had examined him and testified at the guilt/innocence phase that he was dangerous to society. The jury sentenced Ake to death on the two murder counts and to 500 years imprisonment on each of the remaining counts. On appeal to the Oklahoma Court of Criminal Appeals,<sup>23</sup> Ake argued that, as an indigent defendant, the state should have provided him with the services of a court-appointed psychiatrist. The Oklahoma court held that the state does not have the responsibility of providing such services to indigents charged with capital crimes and affirmed the convictions and sentences.<sup>24</sup>

The Court initially observed that courts have long recognized that when an indigent defendant in a criminal proceeding confronts the state’s judicial power, the state must act to assure that the defendant receives a fair opportunity to present his defense.<sup>25</sup> In support of this proposition Justice Marshall briefly reviewed both lines of cases relied on by the majority in *Lucey*.<sup>26</sup> The Court then concluded that “[m]eaningful access to justice has long been the consistent theme of these cases” which further require “access to the raw

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22. 105 S. Ct. at 1090, 84 L. Ed. 2d at 58.

23. 663 P.2d 1 (Okla. Crim. App. 1983).

24. *Id.* at 6.

25. 105 S. Ct. at 1093, 84 L. Ed. 2d at 61.

26. *Id.* at 1093-94, 84 L. Ed. 2d at 61-62. Justice Marshall noted the *Lucey* Court’s discussion of the role played by due process in such cases. *Id.* at 1093 n.3, 84 L. Ed. 2d at 62 n.3. In a final footnote Justice Marshall explained that the Court would not consider the applicability of either the sixth amendment or the equal protection clause because the due process clause guaranteed to Ake the assistance of a psychiatrist. *Id.* at 1099 n.13, 84 L. Ed. 2d at 68 n.13. Nevertheless, the majority’s reliance on sixth amendment cases in both *Lucey* and *Ake* should not be overlooked. The sixth amendment right to counsel, and, in turn, the judicially crafted right to effective assistance of counsel both at trial and on appeal, appears to be a flexible component of the guarantee of due process, as the Court has employed the latter in both cases.

materials integral to the building of an effective defense."<sup>27</sup> Having determined that, historically, fundamental fairness entitles indigent defendants to the basic tools of an adequate defense or appeal necessary to implement a fair presentation of their claims within the adversary system, Justice Marshall then wrote that to require the judicial system to provide these basic tools is merely the beginning of the inquiry.<sup>28</sup> The Court also had to decide whether, and under what conditions, the participation of a psychiatrist is of great enough importance to the preparation of a defense to require that the state provide competent psychiatric assistance.<sup>29</sup>

Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.<sup>30</sup>

The majority viewed the compelling private and state interests in obtaining accurate dispositions as paramount to any governmental interest in denying the assistance of a psychiatrist.<sup>31</sup> Moreover, the pivotal role psychiatry has come to play in criminal proceedings requires assistance of a competent psychiatrist whenever a defendant's mental condition is an issue in order to assure an accurate disposition of the case. The majority was convinced that if a defendant demonstrates the significance of his sanity at the time of the offense, the state must at least assure the defendant the aid of "a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense."<sup>32</sup> The majority further indicated that this right to trial-level assistance of a psychiatrist encompassed the issue of future dangerousness in the punishment phase of capital cases, as well as the issue of sanity in general in the guilt/innocence phase of all criminal proceedings.<sup>33</sup>

Applying the standards discussed to the facts before it, the majority concluded that both Ake's sanity at the time of the offense and his future dangerousness were likely to become significant factors in his defense: therefore, the denial of the assistance of a psychiatrist on both issues deprived him of due process.<sup>34</sup> Chief Justice Burger concurred in the judgment, but would

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27. *Id.* at 1094, 84 L. Ed. 2d at 62.

28. *Id.*

29. *Id.*

30. *Id.* (citations omitted).

31. *Id.* at 1094-97, 84 L. Ed. 2d at 62-66.

32. *Id.* at 1097, 84 L. Ed. 2d at 66. The Court emphasized that its concern was that the indigent defendant have access to a competent psychiatrist for the purposes discussed. The Court expressly stated that it did not hold that an indigent defendant has a constitutional right to choose his own psychiatrist. The Court left the decision on how to implement the defendant's right of access to a psychiatrist to the state. *Id.* Texas law has essentially already implemented this right. See generally TEX. CODE CRIM. PROC. ANN. arts. 46.01-.03 (Vernon 1979). In particular, see TEX. CODE CRIM. PROC. ANN. art. 46.03, § 3 (Vernon Supp. 1986).

33. 105 S. Ct. at 1097-98, 84 L. Ed. 2d at 66-67.

34. *Id.* at 1098-99, 84 L. Ed. 2d at 68. In so holding, the majority expressly declined to say whether any of the three factors originally discussed, alone or together, were necessary to its finding. *Id.* at 1098-99 n.12, 84 L. Ed. 2d at 68 n.12.

have confined the Court's opinion to capital cases only. Justice Rehnquist generally dissented on the ground that due process does not extend nearly as far as the majority would have it, at least not under the facts of the case before the Court.<sup>35</sup> To the extent that Texas statutory law at least in part provides the right to assistance of a psychiatrist,<sup>36</sup> the *Ake* Court's analysis would seem unnecessary to an assertion of that right in Texas. *Ake* may, however, clarify certain limitations of that right as afforded in Texas.

In summary, *Ake v. Oklahoma* and *Evits v. Lucey* demonstrate the willingness of a majority of the Supreme Court, acting under the guise of due process, to extend the sixth amendment right to assistance of counsel to include both the right to effective assistance of counsel on appeal and the right to the assistance of a psychiatrist at a trial in which the defendant's mental condition is an issue. As Justice Rehnquist's dissent in *Lucey* suggested, whether due process or the sixth amendment comprehends either right is questionable. Thus, the cautious practitioner should heed Justice Rehnquist's dissent in *Lucey* and include an equal protection argument, as well as sixth amendment and due process arguments, in support of either of the newly found rights.

### B. Right to Counsel During Hypnotic Interviews

*Ake* and *Lucey* only peripherally addressed the right to counsel as a subsidiary consideration for ensuring meaningful access to justice in the interest of affording due process. Just as the right to counsel is a factor for consideration in determining the scope of the right to due process, the degree of confrontation involved is likewise an important factor for use in assessing the full extent of the right to counsel. The Texarkana court of appeals' recent decision in *Zani v. State*<sup>37</sup> illustrates the latter factor. *Zani* involved the murder of a convenience store attendant. Two witnesses reported to police officers that on the date of the offense a person matching *Zani*'s description waited on them at the convenience store. Both witnesses were subsequently placed under hypnosis to refresh their memories of the morning in question. At this session one witness's description of the person who waited on them was generally consistent with *Zani*'s features. The witness was not, however, aware of the suspicion directed toward *Zani*. The state did not permit *Zani*'s attorney to attend the hypnotic sessions. At trial, despite a motion to suppress, the court permitted the witness to identify *Zani* and to testify that he saw *Zani* in the convenience store behind the cash register on the morning of the murder.<sup>38</sup>

After holding that the witness's post-hypnotic identification testimony was not tainted by the pre-trial identification processes at the time of the hypnotic sessions<sup>39</sup> the court of appeals generally addressed the absence of

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35. *Id.* at 1099, 84 L. Ed. 2d at 69 (Rehnquist, J., dissenting).

36. *See supra* note 32.

37. 679 S.W.2d 144 (Tex. App.—Texarkana 1984, pet. granted).

38. *Id.* at 149-50.

39. *Id.* Post-hypnotic identification testimony by a non-defendant witness is admissible

Zani's attorney from those sessions.<sup>40</sup> The court initially observed that the extent of the sixth amendment right to counsel depends, in part, on the necessity of counsel in coping with adversarial confrontations.<sup>41</sup> In order to illustrate this point, the court pointed out that the right to counsel does not extend to pre-trial photographic identification displays that include the defendant's picture.<sup>42</sup> Comparing this situation to hypnotic sessions such as in the instant case, the court noted the defendant's absence in both cases and concluded that a defendant does not have the right to the presence of an attorney during a hypnotic session that involves a non-defendant witness.<sup>43</sup> Although obviously dicta, the court's terse analysis should provide a useful reference for determining the extent of the sixth amendment right to counsel in terms of the degree of confrontation involved.

### C. Right to Self-Representation

Zani also complained on appeal that the trial court improperly denied him the right to represent himself.<sup>44</sup> Although Zani's request for appointed counsel was initially granted, he later represented himself at a venue hearing. When it became apparent that Zani did not know how to proceed at the venue hearing and was unable to represent himself competently, the trial court removed him from the role of counsel and ordered his previously appointed counsel to resume full representation.<sup>45</sup> The court of appeals opined that the right to self-representation recognized in *Faretta v. California*<sup>46</sup> is necessarily tempered by the requirement that the right be exercised knowingly and intelligently, and in a manner so as not to interfere with the orderly administration of justice.<sup>47</sup> The court of appeals concluded that Zani was not fully aware of the consequences of self-representation, that he did not intelligently choose self-representation, and that self-representation at the venue hearing would only have resulted in undue disruption and delay. The court of appeals therefore held that the trial court's decision to remove Zani from the role of counsel violated neither the intent nor the language of *Faretta*.<sup>48</sup> Thus, *Zani* suggests that judicially recognized sixth amendment right to self-representation is far from absolute, and may, under certain circumstances, be properly denied.

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when the totality of the circumstances surrounding the hypnotic session shows that the session was not so impermissibly suggestive as to give rise to a substantial likelihood of an unreliable or incorrect identification." *Id.* (citing *Vester v. State*, 684 S.W.2d 715 (Tex. App.—Amarillo 1983, pet. granted)).

40. 679 S.W.2d at 150.

41. *Id.* (citing *United States v. Ash*, 413 U.S. 300 (1973)).

42. 679 S.W.2d at 150 (citing *Garcia v. State*, 626 S.W.2d 46 (Tex. Crim. App. 1981) (en banc), and *Green v. State*, 510 S.W.2d 919 (Tex. Crim. App. 1974)).

43. 679 S.W.2d at 150.

44. *Id.* at 148.

45. *Id.* at 148-49.

46. 422 U.S. 806, 807 (1975). See U.S. CONST. amends. VI, XIV.

47. 679 S.W.2d at 148-49.

48. *Id.* at 149.

D. *Ineffective Assistance of Counsel at Trial*

In *Strickland v. Washington*<sup>49</sup> the Supreme Court addressed for the first time a claim of actual ineffectiveness of counsel in a case that went to trial.<sup>50</sup> The seemingly landmark two-part test enunciated in *Strickland*,<sup>51</sup> however, was little more than a restatement of the test already applied by the various Texas courts.<sup>52</sup> Thus, Texas courts, for the most part, accorded *Strickland* little more than nodding recognition during the current Survey period. Moreover, rather than having to alter existing policy in order to conform with the *Strickland* test, the Texas judiciary focused on the ultimate scope of its current test concerning ineffectiveness claims. Although largely unstated, the major issue quickly became whether an isolated incident of error on the part of trial-level counsel could constitute ineffective assistance of counsel.

In *Ingham v. State*<sup>53</sup> wherein the defendant alleged that counsel had failed to object to the introduction of improper evidence, the court of criminal appeals indicated that it was mindful of, but declined to apply, the two-pronged *Strickland* test.<sup>54</sup> After briefly discussing previous decisions concerning the right to effective assistance of counsel,<sup>55</sup> the majority cited *Strickland* as support for the proposition that a court must be highly deferential when examining counsel's performance, and must make every effort "to eliminate the distorting effects of hindsight."<sup>56</sup> In addition, the majority expressly stated that "an isolated failure to object to certain procedural mistakes or improper evidence does not constitute ineffective assistance of counsel."<sup>57</sup> Upon reviewing the "totality of the representation"<sup>58</sup> the majority held that the defendant had failed to demonstrate ineffective assistance of counsel.<sup>59</sup>

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49. 104 S. Ct. 2052, 80 L. Ed. 2d 274 (1984).

50. See Keck, *Criminal Procedure: Trial and Appeal, Annual Survey of Texas Law*, 39 Sw. L.J. 495, 497-99 (1985) [hereinafter cited as *1985 Annual Survey*].

51. The Supreme Court held that a defendant must show both that his attorney's performance fell below an objective standard of reasonably professional judgment and the existence of a reasonable probability that but for counsel's deficient performance the proceeding would have led to a different result. The Court defined reasonable probability as a "probability sufficient to undermine confidence in the outcome." 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

52. See *1985 Annual Survey*, *supra* note 50, at 498 n.25.

53. 679 S.W.2d 503 (Tex. Crim. App. 1984).

54. *Id.* at 509.

55. 679 S.W.2d at 509 (citing *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980) (en banc) and *Ex parte Prior*, 540 S.W.2d 723 (Tex. Crim. App. 1976)). The majority essentially opined that such right merely ensures reasonably effective assistance, rather than errorless counsel whose performance is judged by hindsight.

56. 679 S.W.2d at 509.

57. *Id.* (citing *Weathersby v. State*, 627 S.W.2d 729 (Tex. Crim. App. 1982), and *Cude v. State*, 588 S.W.2d 895 (Tex. Crim. App. 1979)). Also decided during the Survey period were *Carr v. State*, 694 S.W.2d 123 (Tex. App.—Houston [14th Dist.] 1985, no pet.) and *Vertz v. State*, 686 S.W.2d 696 (Tex. App.—Corpus Christi 1985, no pet.) (rejecting ineffective assistance of counsel claims). Compare *San Roman v. State*, 681 S.W.2d 872 (Tex. App.—El Paso 1984, pet. ref'd.) (reversing for ineffective assistance of counsel).

58. 679 S.W.2d at 509.

59. *Id.* The court of appeals had previously found that the defendant's trial was not fair and his counsel was ineffective for failing to object to introduction of oral statements made by the defendant to police, evidence of extraneous matters, and hearsay. Accordingly, the court reversed the defendant's twin convictions for murder and voluntary manslaughter. *Id.* at 504-



In *Ex parte Owens*<sup>60</sup> the defendant's ineffectiveness claim was based on his dual assertion that he was misadvised as to whether he should go to the judge or jury on punishment, and that his counsel failed to discover that an alleged prior felony conviction used for enhancement was void. The defendant presented two issues by habeas corpus application. First, the defendant asserted that one of the two prior felony convictions alleged for enhancement was void due to a fundamentally defective indictment. Second, he asserted that his trial counsel's ineffective assistance denied him an opportunity to have punishment assessed by the jury. In a previous decision<sup>61</sup> the court of criminal appeals agreed with his first contention, but remanded to the trial court for an evidentiary hearing on the second contention. Subsequent to this hearing, the case came again before the court of criminal appeals for final disposition.

The court apparently did not question that the defendant's attorney advised the defendant to go to the trial judge for punishment. The defendant claimed that he had accepted this advice based on his counsel's assurance that, because of the automatic life sentence then carried by proof of two prior felony convictions, it would be pointless to go to the jury. The defendant further alleged that he would have gone to the jury had his counsel properly investigated and discovered that the prior felony conviction was void. The defendant's trial counsel testified, however, that he would have given the same advice without the enhancement allegations, because he based such advice on the nature of the offense (sexual abuse of a child), his past experience with juries in such cases, and his belief that a judge would be more likely to exercise leniency.<sup>62</sup>

Without referring to any authority, a majority of the court of criminal appeals found that the facts did not support the defendant's claim of ineffective assistance of counsel.<sup>63</sup> The defendant's allegation that his counsel failed to discover that one of the two prior felony convictions was void was virtually uncontested on appeal. The dissent pointed out in its opinion<sup>64</sup> that the court of criminal appeals held virtually the same error to constitute ineffective assistance in a previous decision.<sup>65</sup> Apparently the *Owens* majority was unpersuaded by this isolated error by the defendant's counsel.<sup>66</sup>

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05. See also *Ingham v. State*, 654 S.W.2d 516 (Tex. App.—Corpus Christi 1983, *rev'd*, 679 S.W.2d 503 (Tex. Crim. App. 1984)). The court of criminal appeals found that only the failure to object to the extraneous matters was an error by the defendant's trial counsel. 679 S.W.2d at 508. Just as the majority dismissed these mistakes as not being ineffective assistance, it also concluded that admission of the two extraneous matters did not result in an unfair trial. 679 S.W.2d at 509.

60. 679 S.W.2d 518 (Tex. Crim. App. 1984) (en banc).

61. The previous decision of the court of criminal appeals was not published.

62. *Id.* at 519.

63. *Id.* at 520.

64. *Id.* (Teague, J., dissenting).

65. See *Ex parte Scott*, 581 S.W.2d 181 (Tex. Crim. App. 1979) (court held that counsel's failure to discover that the first of two prior convictions alleged for enhancement was not final when the defendant committed the second was ineffective assistance of counsel).

66. As Judge Teague's dissent also suggested, this result was rather surprising at the time, since TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974), then required automatic life imprisonment upon proof of two prior felony convictions. As such, defense counsel's admitted belief

In *May v. State*<sup>67</sup> the defendant alleged that the trial judge's refusal to submit the issue of probation to the jury was due to his counsel's erroneous failure to have him swear to his motion for probation prior to its submission to the trial court.<sup>68</sup> Placing the blame solely on the defendant's counsel, the court of appeals held that failure by the attorney to have the defendant's motion verified in and of itself constituted ineffective assistance of counsel, and reversed the defendant's conviction and three-year sentence for aggravated assault with a deadly weapon.<sup>69</sup> The court of criminal appeals, however, shifted its focus to the actions of the trial judge. The court concluded that the failure of the trial judge to permit the defendant to swear to his motion for probation, when asked to do so by defense counsel at a time when such action was still within the judge's discretion, constituted an abuse of discretion that deprived the defendant of effective representation.<sup>70</sup>

Thus, although a majority of the court of criminal appeals agreed with the result reached by the court of appeals, the two courts clearly differed as to who was responsible for denying the defendant effective assistance of counsel. Moreover, the majority did not expressly adopt the court of appeals' suggestion that an isolated error can constitute ineffective assistance of counsel. On the contrary, the majority, focusing on the abuse of the trial court's discretion, appears to have based its holding on a combination of circumstances. Those circumstances included counsel's failure to have the defendant swear to his motion for probation when filing it, the fact that this omission was not a matter of trial strategy, the trial judge's failure to permit the same to be done at a time when it was within his discretion to do so, and the subsequent refusal by the trial judge to charge the jury on the issue of probation, all of which were revealed after a brief review of what the totality of the circumstances showed in the case.<sup>71</sup> The majority acknowledged that review in such cases must be based on the facts of the individual case before the reviewing court.<sup>72</sup>

Two points concerning the majority's opinion bear repeating. First, the

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that the trial judge could have been more lenient than the jury was obviously erroneous. The majority noted that the defense counsel did object to the prior felony conviction; however, the counsel did not mention his reasons for doing so.

67. No. 113-84 (Tex. Crim. App., Dec. 5, 1984) (not yet reported).

68. The defendant asserted on original submission to the Austin court of appeals that the trial court failed to order a mistrial sua sponte once it became evident that he was being denied effective assistance of counsel due to the omitted verification. *May v. State*, 660 S.W.2d 888, 889 (Tex. App.—Austin 1983, pet. granted).

69. "Normally an isolated instance of alleged ineffectiveness is not sufficient to sustain a claim of ineffective assistance of counsel. [Citations omitted]. However, the action of trial counsel in the instant case . . . was an omission which can be attributed to nothing but the neglect of counsel, and which totally precluded the jury from considering probation." *Id.* at 890. The court of appeals also analogized the facts before it to those in *Ex parte Scott*, 581 S.W.2d 181 (Tex. Crim. App. 1979). A reference to *Scott* appears in most of the cases discussed to this point.

70. No. 113-84, slip op. at 4-5 (quoting *Brown v. State*, 475 S.W.2d 938, 956 (Tex. Crim. App. 1971)).

71. No. 113-84, slip op. at 5.

72. *Id.* (citing *Ex parte Scott*, 581 S.W.2d at 181). The court did not mention *Strickland* in its opinion.

majority clearly stated that it based its determination of ineffective assistance on the actions of the trial judge, rather than on an omission by the defendant's counsel. Second, it is far from clear after reading the majority's opinion whether it meant for its decision to be viewed as holding that an isolated incident can constitute ineffective assistance of counsel. The court of criminal appeals' subsequent opinion in *Jackson v. State* clarified that the court had meant to hold so.<sup>73</sup>

In *Jackson* the court found ineffective assistance of counsel based upon trial counsel's advice concerning the defendant's election to seek punishment from the jury upon retrial of a prior conviction. In the prior trial the defendant had received a fifteen-year sentence, the minimum possible punishment under the relevant habitual offender's statute.<sup>74</sup> On retrial counsel advised the defendant to go to the jury for punishment, despite the fact that under *North Carolina v. Pearce*<sup>75</sup> the minimum sentence that the new jury could have imposed was the maximum that the trial court could have ordered absent subsequent identifiable conduct.<sup>76</sup> This single piece of bad legal advice was sufficient for the court of appeals and the court of criminal appeals to find that the defendant had received ineffective assistance of counsel requiring the reversal of his conviction.<sup>77</sup>

Writing for the majority, Judge Miller explained that a criminal defendant faces only three personal decisions during the course of a trial: what plea he will enter, whether to submit the case to the judge or a jury, and whether to exercise his right to remain silent. When an accused raises an ineffectiveness claim alleging that he was given bad advice on one or more of these matters, the relevant factors for consideration are "(1) whether advice was given which would promote an understanding of the law in relation to the facts, (2) whether the advice was reasonably competent, and (3) whether the advice permits an informed and conscious choice."<sup>78</sup> Judge Miller concluded that counsel's failure to advise the defendant of the prophylactic protections of *Pearce* if he went to the trial judge, and the wide open punishment discretion if he went to the jury, did not promote an understanding of the law in relation to the facts, nor did it permit an informed and conscious choice.<sup>79</sup>

In a footnote Judge Miller seemed to suggest that, irrespective of whether there was subsequent identifiable conduct sufficient to permit the trial judge greater discretion in assessing punishment (i.e., to remove the presumption of *Pearce*), the mere failure to explain the potential implications of *Pearce* was sufficient to constitute ineffective assistance of counsel.<sup>80</sup> Judge Miller noted the court of appeals' finding that there was no objective information

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73. No. 115-84 (Tex. Crim. App., July 24, 1985) (not yet reported).

74. See TEX. PENAL CODE ANN. § 12.42(c) (Vernon 1974).

75. 395 U.S. 711, 714 (1969).

76. See *Jackson v. State*, 662 S.W.2d 74, 76 (Tex. App.—San Antonio 1983), *aff'd*, No. 115-84 (Tex. Crim. App., July 24, 1985) (not yet reported).

77. *Id.* See also *Jackson*, slip op. at 2-3.

78. *Id.*, slip op. at 9.

79. *Id.*, slip op. at 10-11.

80. *Id.*, slip op. at 11 n.4.

with regard to identifiable conduct of the accused between the two trials and that, as a result, the trial judge would have been required to give the minimum sentence of fifteen years. Judge Miller concluded, citing *Strickland*, that there was more than a reasonable probability that the proceedings would have resulted differently but for counsel's advice.<sup>81</sup>

Implicit in Judge Miller's discussion of *Strickland* was the belief that prejudice alone is sufficient to require reversal and that actual review of counsel's performance is not necessarily required in order to find prejudice.<sup>82</sup> Judge Miller further observed that the court's previous decision in *May v. State* recognized that some isolated omissions are capable of rendering the proceedings unreliable.<sup>83</sup> Whether *May* actually set the stage for reversal due to a single error is debatable,<sup>84</sup> but the message in *Jackson* is clear—an isolated instance of error by trial counsel "so severe in its consequences that it permeates the entirety of his representation" can constitute ineffective assistance of counsel.<sup>85</sup> Thus, the court appears to emphasize the fundamental fairness of the proceedings as a whole, rather than the totality of counsel's representation.<sup>86</sup>

In *Hanzelka v. State*<sup>87</sup> the court of appeals likewise held that a single error constituted ineffective assistance of counsel. In *Hanzelka* the court determined whether trial counsel's failure to inform the defendant of a plea bargain offer constituted ineffective assistance of counsel if the resulting punishment was substantially greater than that contemplated by the plea bargain offer.<sup>88</sup> Treating the issue before it as one of first impression, the court of appeals noted several pertinent provisions of the Texas State Bar Code of Professional Responsibility<sup>89</sup> and briefly reviewed decisions from other states holding that such failures deny an accused effective assistance of

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81. *Id.*, slip op. at 11-12.

82. *Id.*, slip op. at 13-14 n.6.

83. *Id.*, slip op. at 12-13.

84. Judge Miller's use and footnote review of the court's previous decision in *May* leaves a somewhat different impression of the case's meaning than does an initial reading of *May* itself. Judge Miller's recollection of *May* seems to imply that the court based its holding therein solely on counsel's single error of omission. *Id.*, slip op. at 13 n.6.

85. *Id.*

86. Does this mean that reasonably effective assistance of counsel may nevertheless be deemed ineffective if the overall proceedings are in some other way unfair? The stated reason for the court's decision in *May* suggests that the answer is yes. If so, then perhaps something more than simply reasonably effective assistance is required. It has been said that, before *Strickland*, counsel needed only to show up in court sober, but that after *Strickland*, counsel now need only show up in court. While that may be the case in some jurisdictions, it clearly is not the present situation in Texas according to the cases reviewed.

87. 682 S.W.2d 385 (Tex. App.—Austin 1984, no pet.).

88. Following a jury trial, the trial court assessed punishment at one year's confinement in the county jail. *Id.* at 386. In return for the defendant entering a plea of no contest or guilty to a charge of misdemeanor assault, the state had offered to "recommend ten days in jail, probated for twelve months; \$250 fine or 80 hours community service work; and restitution to the complainant of \$366.82." *Id.* Counsel did not inform the defendant of the plea bargain offer. *Id.*

89. The court of appeals did so after noting the supreme court's directive in *Strickland* suggesting that such standards are guides to determining whether counsel's assistance was reasonable. *Id.*

counsel.<sup>90</sup> The court of appeals reversed the conviction after concluding that the failure by counsel to inform the defendant of the plea bargain prejudiced the defendant because under the terms of the plea bargain the defendant would not have had to serve any time in jail.<sup>91</sup>

Finally, with regard to the issue of whether a single error can result in ineffective assistance, the court of appeals in *Snow v. State*<sup>92</sup> considered the defendant's contention that his right to be considered for probation was waived when his attorney failed to request a jury instruction on that issue at the punishment phase of the trial. The jury convicted the defendant of aggravated robbery and assessed punishment at ten years imprisonment. Although the defendant applied for and presented evidence entitling him to consideration for probation, the trial court did not instruct the jury on the issue of probation. Instead, the court instructed the jury to assess a term of imprisonment for five years to life. Counsel did not object to this instruction, nor did he request an instruction on the availability of probation as an optional punishment.<sup>93</sup> Defendant's counsel apparently believed that the jury could not consider probation due to defendant's conviction for aggravated robbery.<sup>94</sup>

The court of appeals determined that the right to probation is valuable, and that the issue of probation should have been submitted to the jury.<sup>95</sup> After quoting heavily from *Strickland* and *Jackson*, the court of appeals found that but for counsel's error the jury's verdict would have been different.<sup>96</sup> The court further concluded that a reasonable possibility existed that an instruction on the issue of probation would have altered the punishment assessed by forcefully directing the jury's attention to the lowest punishment allowed by law, and thereby influencing the jury to consider seriously a sentence lower than that actually assessed.<sup>97</sup> After noting that defense counsel had in fact argued that his client be sent to prison despite his eligibility for probation, the court of appeals reversed the defendant's conviction.<sup>98</sup> Thus,

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90. *Id.* at 387.

91. *Id.*

92. 697 S.W.2d 663 (Tex. App.—Houston [1st Dist.] 1985, no pet.).

93. *Id.* at 664.

94. *Id.* at 665. The court of appeals explained counsel's misconception of the law: Counsel apparently misunderstood Art. 42.12, sec. 3(f) of the Code of Criminal Procedure, which prohibits a judge from granting probation to persons found guilty of aggravated robbery. This statute does not limit the jury's power to make a binding recommendation of probation for a defendant convicted of aggravated robbery. Art. 42.12 sec. 3(a). . . . The jury assessed a penalty of ten years. Consequently, it could have recommended probation of that punishment. Art. 42.12, sec. 3(a).

*Id.*

95. *Id.* at 666-67.

96. *Id.* at 667.

97. *Id.* at 668. The court of appeals interpreted the prejudice component of *Strickland* as calling for reversal if there was a reasonable probability that the error simply altered the outcome of the proceedings, rather than as imposing a requirement, under the facts before it, of showing that but for counsel's error probation would have been granted.

98. *Id.*

once again, a single isolated error was held to constitute ineffective assistance of counsel.

Also during the current Survey period, the court of criminal appeals addressed the issue of ineffective assistance of trial-level counsel from a purely procedural point of view. In *Hill v. State*<sup>99</sup> the defendant urged that the trial court should have held a hearing on the issue of defense counsel's effectiveness when the defendant, following the state's case-in-chief, inquired generally as to the status of a number of previously filed pro se motions, two of which essentially asked for replacement of his appointed counsel. In a unanimous decision, the court stated that a defendant must make the trial court aware of his dissatisfaction with counsel, state the grounds for his dissatisfaction, and substantiate his claim.<sup>100</sup> The court concluded that error was not present due to the defendant's failure to request a hearing on either of his motions or the matter of his dissatisfaction with defense counsel.<sup>101</sup>

Similarly, in *Wilson v. State*<sup>102</sup> the court of appeals held that the defendant failed to develop the record in regard to his contention that trial counsel's failure to locate and subpoena a key witness for the defense constituted ineffective assistance of counsel, since the defendant did not show that the witness was available.<sup>103</sup> The court further noted that if the alleged errors of trial counsel are primarily ones of omission, the proper vehicle for complaint is a collateral attack, which permits the defendant to develop facts concerning the alleged ineffectiveness of counsel.<sup>104</sup>

In *Lewis v. State*<sup>105</sup> the defendant claimed that his counsel's withdrawal of his motion for probation after the defendant testified that he had previously been convicted of forgery and granted probation constituted ineffective assistance of counsel. The appellant argued that if counsel had properly investigated the matter he would have discovered that the prior probation was premised on a fundamentally defective indictment.<sup>106</sup> The court of appeals held that the defendant had introduced no evidence to support this claim, and affirmed the defendant's conviction. It did so, however, only after stating that the narrow issue before the court was whether the trial court could conduct a hearing to supplement the record after the appellate court had already denied such a hearing. Declining to find that the trial court could conduct such a hearing, the court further explained that rather than denying the defendant the right to assert his claim, the court was merely requiring him properly to assert his claim by way of a collateral attack.<sup>107</sup>

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99. 686 S.W.2d 184 (Tex. Crim. App. 1985) (en banc).

100. *Id.* at 187 (citing *Malcolm, v. State*, 628 S.W.2d 790 (Tex. Crim. App. 1982); *King v. State*, 511 S.W.2d 32 (Tex. Crim. App. 1974); and *Stovall v. State*, 480 S.W.2d 223 (Tex. Crim. App. 1972)).

101. *Id.*

102. 688 S.W.2d 212 (Tex. App.—Corpus Christi 1985, no pet.).

103. *Id.* at 214 (citing *Hunnicut v. State*, 531 S.W.2d 618 (Tex. Crim. App. 1976)).

104. *Id.* (citing *Berrera v. State*, 664 S.W.2d 372 (Tex. App.—Corpus Christi 1983, no pet.)).

105. 686 S.W.2d 243 (Tex. App.—Houston [14th Dist.] 1985, pet. granted).

106. *Id.* at 245.

107. *Id.* at 247.

*E. Ineffective Assistance of Counsel on Appeal*

The United States Supreme Court decided in *Evitts v. Lucey*<sup>108</sup> that the due process right to appellate-level counsel also comprehended the sixth amendment right to effective assistance of counsel.<sup>109</sup> In *Ex parte Edwards*<sup>110</sup> the court of criminal appeals, without discussing the basis for such right, concluded that the defendant was denied effective assistance of counsel on appeal. In *Edwards* the defendant brought the issue of ineffective assistance of counsel on appeal before the court by way of a post-conviction application for writ of habeas corpus, seeking relief in the form of an out-of-time appeal. Counsel had represented the defendant during the initial proceedings in which the court had granted probation in nine cases following the defendant's pleas of guilty. Counsel continued to represent the defendant as retained counsel during the subsequent revocation proceedings in which the court revoked probation in each of the nine cases. At the conclusion of the revocation proceedings, counsel gave notice of appeal and indicated to the trial court that he would handle any appeals in the nine cases. Subsequent to the revocation of probation in the nine cases, the defendant escaped. Shortly thereafter, the court notified defendant's counsel that the record on appeal was complete. Counsel did not obtain the record, nor did he file a brief in the case. At no time did counsel ever offer to withdraw or notify the court that he was not the defendant's lawyer on appeal.<sup>111</sup>

At the hearing on the application for writ of habeas corpus, counsel testified that he did not obtain the record or file a brief because he had not been retained or paid any money, and because he believed that the defendant's escape had terminated the appeal process. The defendant's boyfriend, who had paid counsel for his prior representation of the defendant, testified that he had also paid counsel to represent the defendant on appeal. The defendant testified that she unsuccessfully attempted several times to contact counsel concerning her appeal, and that, disregarding her escape, she at no time wanted to give up her right to appeal from the revocation proceedings. The trial court took judicial notice that notice of appeal had been given and of counsel's retention on appeal.<sup>112</sup>

After noting that article 44.09<sup>113</sup> ordinarily governs the disposition of cases in which the defendant escapes pending appeal, the court held that its provisions were not applicable in this case because the state had not moved

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108. See *supra* note 2.

109. See *supra* notes 2-19 and accompanying text.

110. 688 S.W.2d 566 (Tex. Crim. App. 1985) (en banc).

111. *Id.* at 566-567. The Dallas court of appeals recently noted that by giving notice of appeal at the conclusion of a trial, trial-level counsel voluntarily becomes the attorney of record on appeal. See *Shead v. State*, 697 S.W.2d 784, 785 n.2 (Tex. App.—Dallas 1985, no pet.) (citing *Robinson v. State*, 661 S.W.2d 279, 283 (Tex. App.—Corpus Christi 1983, no pet.)).

112. 688 S.W.2d at 567. The trial court, in its findings of fact and conclusions of law, found that counsel's lack of representation on appeal was due to non-payment of fees rather than to neglect, that the defendant's escape demonstrated her desire to abandon available legal processes, and that the defendant had abandoned and waived her right to effective assistance of appellate-level counsel. *Id.*

113. TEX. CODE CRIM. PROC. ANN. art. 44.09 (Vernon Supp. 1986).

to dismiss the appeal following the defendant's escape.<sup>114</sup> The court further determined that the defendant's escape did not relieve counsel of his duty to represent her on appeal.<sup>115</sup> Moreover, regardless of whether the defendant had fully compensated her attorney for past or future services, the court of appeals felt that the defendant's attorney, as retained counsel, could not frustrate the defendant's rights by simply bowing out without any notice to her or to the court.<sup>116</sup> Concluding that counsel had denied the defendant effective assistance on appeal, the court granted the defendant's request for an out-of-time appeal and ordered the case returned to the point at which notice of appeal was given.<sup>117</sup>

In *Norsworthy v. State*<sup>118</sup> when the appellant's brief was not timely filed, the court of appeals ordered the appellant's court-appointed counsel to file a brief and a motion for an extension of time within ten days of the court's order. Counsel filed only the motion and asked for more than the ten days already given. The court granted his request for additional time with the express provision that no further extensions would be granted. On the day before expiration of the requested deadline, counsel filed a second motion to extend time relying only on the pressures of other business. Finding that counsel had not shown good cause, the court of appeals denied the motion, abated the appeal, and remanded the case for such action as was necessary to protect the appellant's right to effective representation on appeal.<sup>119</sup> The court explained its decision by noting that a court-appointed counsel's role as an advocate requires him to prepare and file a brief on behalf of his indigent client.<sup>120</sup> The court offered no other basis for the right to effective assistance of appellate-level counsel.

#### F. Ineffective Assistance of Counsel Due to Conflict

In *Lerma v. State*<sup>121</sup> a panel of the court of criminal appeals generally reviewed the pertinent decisions of the United States Supreme Court concerning conflicts of interest. In *Holloway v. Arkansas*<sup>122</sup> the United States Supreme Court held that when a defendant raises the possibility of conflicting interests between himself and his co-defendants, the court has an affirmative duty to assure that it does not deprive the co-defendants of their right to effective representation. Whenever a trial court improperly requires joint representation over a timely objection, reversal is automatic.<sup>123</sup> In *Cuyler v.*

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114. 688 S.W.2d at 567.

115. *Id.* at 568.

116. *Id.*

117. *Id.*

118. 682 S.W.2d 428 (Tex. App.—Houston [1st Dist.] 1984, no pet.).

119. *Id.* at 428-429.

120. *Id.* at 429 (citing *Anders v. California*, 386 U.S. 738 (1967); *Currie v. State*, 516 S.W.2d 684 (Tex. Crim. App. 1974) and *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969)).

121. 679 S.W.2d 488 (Tex. Crim. App. 1984) (opinion on state's motion for rehearing).

122. 435 U.S. 475, 484 (1978).

123. *Id.*



*Sullivan*<sup>124</sup> the Court held that it would not apply *Holloway*'s presumption of harm absent a trial objection by a co-defendant. A co-defendant who has not raised an objection at trial must show that an actual conflict of interest adversely affected his counsel's performance in order to establish a violation of the sixth amendment.<sup>125</sup>

Guadalupe and Salustrio Lerma had appealed from their convictions as co-defendants for involuntary manslaughter. Although Guadalupe had objected to a conflict of interest, Salustrio never raised that issue. Nevertheless, the panel determined that Salustrio could rely on the presumption of harm raised by his brother's objection, and reversed the convictions of both brothers.<sup>126</sup>

On rehearing the court of criminal appeals, after first noting that the panel had correctly stated the applicable law,<sup>127</sup> overruled the state's motion for rehearing as to Guadalupe, but found that the panel's opinion with regard to Salustrio directly contradicted the panel's reliance on *Holloway* and *Cuyler*.<sup>128</sup> Sitting en banc, the court placed the burden of showing the conflict directly upon the defendant involved, and stated that a co-defendant who has not personally objected to his counsel's multiple representation cannot rely on his co-defendant's objection to preserve error. Salustrio's conviction was therefore affirmed.<sup>129</sup> Having not personally objected to a potential conflict of interest, Salustrio could not rely on the presumption of harm, recognized in *Holloway*, which would have ordinarily required automatic reversal if joint representation continued following a timely objection.

In *Foster v. State*<sup>130</sup> one of two co-defendants asserted that counsel was ineffective for failing to move for a severance once counsel determined that a conflict of interest existed. Again relying on *Cuyler*, the court of criminal appeals stated that a defendant must demonstrate that an actual conflict of interest adversely affected his counsel's performance if he did not raise the alleged conflict by objection at trial. Mere assertion of the conflict of interest would not suffice to show ineffective assistance of counsel.<sup>131</sup> Finding that the co-defendant had failed to show an actual conflict, the court affirmed the judgment of the court of appeals upholding his conviction.<sup>132</sup>

Subsequently, the court of criminal appeals reviewed *Holloway*, *Sullivan*, and *Lerma* at length in *Calloway v. State*.<sup>133</sup> From its review, the court

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124. 446 U.S. 335, 347 (1980).

125. *Id.* at 348.

126. 679 S.W.2d at 493-494.

127. *Id.* at 494.

128. *Id.* at 497.

129. *Id.* at 498.

130. 693 S.W.2d 412 (Tex. Crim. App. 1985) (en banc).

131. *Id.* at 413.

132. *Id.* at 414.

133. 699 S.W.2d 824 (Tex. Crim. App. 1985) (en banc). In *Calloway* the trial court did not hold a hearing on counsel's alleged conflict of interest even though the same was raised prior to trial in a letter from counsel to the court, counsel later moved to withdraw for other reasons, and counsel again raised a conflict allegation in making a bill on his motion. The trial court did, however, suggest that any conflict regarding counsel's representation of his client's co-defendant in another trial could be remedied by his withdrawal as the attorney in the latter's

concluded that joint representation of the co-defendants did not by itself constitute ineffective assistance of counsel.<sup>134</sup> Instead, even if a defendant has made a timely objection, a court must judge each case on the basis of its individual facts.<sup>135</sup> Moreover, the court's opinion suggests that neither *Holloway* nor *Lerma* mean that the mere mention of a conflict of interest without advancing any valid basis for such claim is alone sufficient to entitle a defendant to automatic reversal with harm presumed, even though the trial court may have failed to make additional inquiry or to conduct a hearing on the unsupported claim.<sup>136</sup>

## II. GUILTY PLEAS

The only case decided during this Survey period by the United States Supreme Court which dealt with the plea bargaining process was *United States v. Benchimol*.<sup>137</sup> The issue in that case was how forcefully and clearly the government must urge its recommendation of sentence to the trial court when its recommendation is a part of the plea bargain. The defendant had pled guilty to mail fraud in 1976. At the sentencing hearing the defense counsel discovered that the pre-sentence report incorrectly stated that the government would stand silent. Defense counsel informed the trial court of this error and of the fact that the government had agreed to recommend probation with restitution. The assistant United States attorney averred to the accuracy of the representation, but did not elaborate. The trial court disregarded the recommendation and sentenced the defendant to six years of treatment under the Youth Correction Act.<sup>138</sup> After being released on parole, the defendant returned to federal custody because of a parole violation. He then filed a motion<sup>139</sup> to withdraw his guilty plea, or in the alternative to have his sentence vacated and to be resentenced to time already served, on the ground that the government's failure to state its recommendation clearly and to express the justification for its recommended sentence constituted a breach of its duty under the plea bargain agreement.

The Ninth Circuit, relying on the general rule announced in *Santobello v. New York*,<sup>140</sup> remanded the case for resentencing before a different district

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case. *Id.* at 828. The court of appeals applied *Holloway's* presumption of harm and reversed the defendant's conviction due to the trial court's failure to meet its affirmative duty to hold a hearing. *Id.* at 826. See also *Calloway v. State*, 700 S.W.2d 3, 5 (Tex. App.—Beaumont 1984) (citing *Lerma v. State*, 679 S.W.2d 488 (Tex. Crim. App. 1982)). The court of criminal appeals reversed the court of appeals after determining that a valid basis was never advanced in support of the alleged potential conflict of interest. 699 S.W.2d at 831.

134. *Id.* at 829.

135. *Id.* at 830.

136. *Id.* at 831.

137. 105 S. Ct. 2103, 85 L. Ed. 2d 462 (1985).

138. 18 U.S.C.A. § 5010(b) (West 1985).

139. This motion was filed pursuant to FED. R. CRIM. P. 32(d) and 28 U.S.C. § 2255 (1982).

140. 404 U.S. 257 (1971). The court of appeals relied on the language in *Santobello* that when a guilty plea "rests in any significant degree on a promise or agreement of a prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 257.

judge.<sup>141</sup> The court of appeals held that because the government's agreement to recommend probation had induced the plea, the government had a duty to state its recommendation clearly and to express the justification for the recommendation to the sentencing judge. The court of appeals reasoned that the "less-than-enthusiastic support for leniency" demonstrated by the "perfunctory statement of the recommendation" could have left the sentencing judge with the impression that the government was unconvinced that the recommendation was appropriate or even that the government tacitly disfavored the recommendation.<sup>142</sup>

The Supreme Court in a brief, per curiam opinion reflecting the opinion of six of the justices,<sup>143</sup> reversed the judgment of the court of appeals. The Court held that under Federal Rule of Criminal Procedure 11(e), the government may agree to recommend a particular sentence, or agree not to oppose a defendant's request, with the understanding that such a recommendation or request will not bind the sentencing court. While the government may specifically pledge itself to make a particular recommendation in an "enthusiastic" manner or to explain the reasoning behind such a particular recommendation, the Court disagreed with the court of appeals' assessment that such undertakings must be implied from a bare agreement to recommend a sentence. The court of appeals had improperly implied as a matter of law a term of the plea bargain on which the parties themselves had not agreed.<sup>144</sup>

During the Survey period, Texas courts issued several opinions dealing with the enforcement of plea bargains under the rationale of *Santobello v. New York*.<sup>145</sup> Two of these cases dealt with plea bargain agreements that included terms providing for the deletion from the trial court's judgment of a finding that the defendant used or exhibited a deadly weapon in the course of committing the offense charged.<sup>146</sup> The inclusion of such a finding is critical because its entry on the judgment requires the defendant to serve one-third of the calendar time of his sentence before he is eligible for parole.<sup>147</sup>

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141. 738 F.2d 1001 (9th Cir. 1984).

142. *Id.* at 1002. The Ninth Circuit relied on *United States v. Grandinetti*, 564 F.2d 723 (5th Cir. 1977) and *United States v. Brown*, 500 F.2d 375 (4th Cir. 1974) in support of this holding. In both of these cases the assistant United States attorneys making the bargained for sentencing recommendations had expressed problems with the recommendations, and in effect argued against the recommendations.

143. Justice Stevens concurred solely on the basis that under the relevant rule and statute, the error, if any, was "not serious enough to support a collateral attack." Justices Brennan and Marshall dissented to a decision not based on full briefing or oral arguments. 105 S. Ct. at 2106, 85 L. Ed. 2d at 467 (Brennan, J., dissenting).

144. 105 S. Ct. at 2105, 85 L. Ed. 2d at 466-67.

145. *See supra* note 140.

146. *See Ex parte Garcia*, 682 S.W.2d 581 (Tex. Crim. App. 1985) (en banc); *Ex parte Hopson*, 688 S.W.2d 545 (Tex. Crim. App. 1985) (en banc).

147. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(b) (Vernon 1979) provided that when the prisoner was serving a sentence for the offenses listed under § 3f(a)(1) of article 42.12 or under a judgment that contains an affirmative finding of use of a deadly weapon pursuant to § 3f(a)(2), he would not be eligible for parole until the "actual calendar time served, without consideration of good conduct time" equals the lesser of one-third of the maximum sentence or

In *Ex parte Garcia*<sup>148</sup> the state charged the petitioner with aggravated robbery involving the use and exhibition of a deadly weapon, but permitted him to plead guilty in the trial court to the lesser included offense of robbery. The stipulated evidence did not demonstrate the petitioner's use or exhibition of a deadly weapon and the judicial confession simply recited his guilt. The pre-sentence report did not include any evidence suggesting that either the petitioner or his accomplice had used a deadly weapon during the commission of the offense. The trial court refused to recommend relief on the defendant's post-conviction writ of habeas corpus. The court of criminal appeals granted relief based upon the allegations contained in the affidavit of the petitioner's trial counsel that the prosecutor had informed counsel that the trier of fact would make the findings from a stipulation of evidence, that the stipulation contained no reference to use of a deadly weapon, and that no finding regarding the use of a deadly weapon was made from the bench. This affidavit also alleged that at the time the petitioner had agreed to accept the plea bargain his counsel had advised him that no finding of a deadly weapon would be made. The court held that the petitioner was entitled to specific performance of a plea bargain agreement under *Santobello* and ordered the deadly weapon finding deleted from the judgment.<sup>149</sup>

In *Ex parte Hopson*<sup>150</sup> the court reached a similar result, reformation of the judgment to delete the deadly weapon finding, in a case in which the plea bargain agreement showed that the petitioner charged with escape with a deadly weapon enhanced by a prior felony conviction was permitted to plead guilty to the lesser offense of escape<sup>151</sup> enhanced to a first degree felony. The judgment and sentence, however, both recited that the petitioner was guilty of the offense of "escape with a deadly weapon (enhanced)."<sup>152</sup> Such wording amounted to an affirmative finding of use of a deadly weapon and therefore violated the plea bargain agreement.<sup>153</sup>

*Swanson v. State*<sup>154</sup> presented a different species of the enforcement of a plea bargain problem to the court of appeals. In *Swanson* the district attor-

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20 calendar years, but "in no event shall he be eligible for release on parole in less than two calendar years."

Section 15(b) was transferred to article 42.18, § 8(b) of the Code of Criminal Procedure by the amendments to the Code enacted in 1985 and that section now refers to article 42.12, § 3g(a)(1) and (2), § 3f having been renumbered by bills enacted in the 1985 legislative session. The deadly weapon finding is also significant because § 3g (formerly 3f) of article 42.12 provides that the provisions of §§ 3 and 3c of article 42.12, authorizing the assessment of probation by the trial court, are inapplicable if such a finding is made.

148. 682 S.W.2d 581 (Tex. Crim. App. 1985).

149. *Id.* at 582-83.

150. 688 S.W.2d 545 (Tex. Crim. App. 1985) (en banc).

151. TEX. PENAL CODE ANN. § 38.07 (Vernon 1974) provides for a single offense of escape with punishment varying depending upon the defendant's status at the time of the escape and the circumstances surrounding the escape.

152. 688 S.W.2d at 547.

153. *Id.* at 548. The holding that such recitation was the equivalent of a specific notation of the use of a deadly weapon is somewhat questionable in light of the court's subsequent holding in *Flores v. State*, 690 S.W.2d 281, 283 (Tex. Crim. App. 1985), which suggests that a specific notation on the judgment is required to be affixed to the judgment.

154. 692 S.W.2d 548 (Tex. App.—Houston [14th Dist.] 1985, no pet.).

ney's office and the Drug Enforcement Administration (DEA) signed a plea bargain agreement obligating the district attorney to dismiss the burglary indictment then pending against the defendant, if the defendant could provide information to the DEA leading to the arrest and indictment of four unspecified individuals for controlled substance violations. The plea agreement also specified that the state would recommend the seven-year sentence for partial performance of the defendant's portion of this agreement. The state recommended seven years even though the defendant failed fully to perform even the partial compliance portion of the plea bargain agreement. The defendant appealed claiming that his full compliance with the conditions prerequisite to the dismissal of the indictment had been frustrated because the DEA failed to follow through on information he had provided to it, and that therefore he was entitled to a dismissal of the indictment. The court of appeals disagreed, treating the plea bargain agreement as a contract and holding that because the defendant failed to prove that he had performed his end of the bargain, he had failed to substantiate his claim that the DEA prevented his performance.<sup>155</sup>

Several cases decided during the Survey period concerned the problems created when the accused enters a guilty plea pursuant to a plea bargain containing terms that are unenforceable by Texas state courts. *Ex parte Huerta*,<sup>156</sup> *Ex parte Chandler*<sup>157</sup> and *Ex parte Slaughter*<sup>158</sup> were all cases in which the state induced the accused to enter into plea bargains by promising that his penitentiary time would run concurrently with federal sentences or his federal parole time. Since decisions on whether federal sentences will run concurrently with state sentences and what course of action will be taken when a federal parolee is convicted of a new offense are matters exclusively within the province of the United States Parole Commission,<sup>159</sup> the court of criminal appeals, citing its earlier opinion in *Ex parte Burton*,<sup>160</sup> found that the plea bargains were unenforceable.<sup>161</sup> *Ex parte Young* presented a similar situation.<sup>162</sup> The defendant entered into a plea bargain that provided that his ten-year Texas sentence would run concurrently with his Colorado sentences. Colorado authorities subsequently informed both the defendant and the Texas Department of Corrections that the Colorado sentences would not run concurrently with the Texas sentences. The majority of the court of criminal appeals<sup>163</sup> held in *Young* as it did in *Huerta*, *Chandler* and *Slaugh-*

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155. *Id.* at 550.

156. 692 S.W.2d 681 (Tex. Crim. App. 1985) (en banc).

157. 684 S.W.2d 700 (Tex. Crim. App. 1985) (en banc).

158. 689 S.W.2d 464 (Tex. Crim. App. 1985) (en banc).

159. *Moody v. Doggett*, 429 U.S. 78, 81 (1976).

160. 623 S.W.2d 418 (Tex. Crim. App. 1981) (en banc).

161. *Huerta*, 692 S.W.2d at 685; *Slaughter*, 689 S.W.2d at 465-66; *Chandler*, 684 S.W.2d at 701.

162. 684 S.W.2d 704 (Tex. Crim. App. 1985) (en banc).

163. Presiding Judge Onion, joined by three other judges, would have distinguished the cases from *Burton v. State*, by holding that while in *Burton* the defendant was told he would receive credit upon his federal sentence while in state custody, in *Huerta*, *Young*, *Chandler*, and *Slaughter*, the Texas court was permitting the state sentences to run concurrently with the federal and Colorado sentences rather than ordering the foreign sentences to run concurrently

ter that the plea bargain in question was unenforceable, since the Texas courts could not control sentences obtained in other jurisdictions. Because Texas courts could not specifically enforce the terms of the plea bargain, the petitioners could withdraw his plea of guilt.

In his dissent in *Huerta* Presiding Judge Onion recommended that in situations in which the state tells the defendant that his Texas sentence will run concurrently with sentences imposed by other jurisdictions, the defendant should be admonished that the Texas trial court has no control over the federal or other state sentence and that running the Texas sentence concurrently with the sentences from other jurisdictions does not necessarily mean that the other court's sentence will run concurrently with the Texas sentence.<sup>164</sup>

Several months later in *Ex parte Davenport*,<sup>165</sup> the court considered a situation in which the petitioner entered into a plea bargain. The state told him that his Texas conviction would run concurrently with a sentence on a conviction obtained in New Mexico. The defense attorney, however, informed the petitioner prior to the entry of his plea that the probation authorities in New Mexico had advised the attorney that they would not make deals. In addition, prior to accepting his plea the trial court had admonished the petitioner that it would permit the Texas sentences to run concurrently with the New Mexico sentences but that it had no control over what New Mexico would choose to do.<sup>166</sup> The *Davenport* court held that because of the admonishments received by the petitioner no plea bargain was shown and the petitioner was therefore not entitled to relief.<sup>167</sup>

In *Ex parte Pruitt*<sup>168</sup> the petitioner entered a plea of guilty to aggravated robbery, a first degree felony, accepting a twenty-five year sentence in exchange for an agreement that the court would not enter an affirmative finding of use or exhibition of a deadly weapon on the judgment. This portion of the agreement sought to avoid the one-third calendar flat time parole eligibility requirement of article 42.12.<sup>169</sup> Because of the nature of the offense, however, the one-third requirement was not avoided, since the requirement applies when either a conviction for aggravated robbery or an affirmative finding of a deadly weapon occurs. Unlike the situation in *Garcia and Hopson*, reformation of the judgment to reflect a conviction for the lesser offense of robbery was not an available remedy since robbery was only a second degree felony and therefore the twenty-five year sentence imposed would have exceeded the maximum twenty year punishment available for that of-

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with the Texas sentences. See dissenting opinions of Onion, J., in *Huerta*, 692 S.W.2d at 683-86, *Young*, 684 S.W.2d at 705-08, and *Chandler*, 684 S.W.2d at 701-03. The majority of the court rejected this distinction as sophistry. 692 S.W.2d at 682 n.1.

164. 692 S.W.2d at 685-86 (Onion, J., dissenting).

165. 688 S.W.2d 875 (Tex. Crim. App. 1985) (en banc).

166. *Id.* at 876.

167. *Id.*

168. 689 S.W.2d 905 (Tex. Crim. App. 1985) (en banc).

169. See *supra* note 147. Aggravated robbery is one of the offenses listed in § 3f(a)(1) of article 42.12.

fense.<sup>170</sup> The plea bargain, therefore, included a term which could not be performed and the petitioner was allowed to withdraw his plea of guilt.

In *Ex parte Young*,<sup>171</sup> a 1983 case, the court of criminal appeals held that a defendant's guilty plea is involuntary if the defendant is grossly misinformed about his parole eligibility date by his attorney and the defendant relies upon that information to the extent that it induces him to plead guilty or nolo contendere.<sup>172</sup> In one case decided during the Survey period, *Ex parte Carillo*,<sup>173</sup> the court held that *Ex parte Young* was inapplicable because unlike the situation in *Young*, in *Carillo* the defense attorney's inaccurate advice concerning parole eligibility was not made part of the plea bargain and was not sanctioned by the trial court.<sup>174</sup> Instead, the trial court admonished the defendant that it was unlikely that he would receive parole any time within the foreseeable future.<sup>175</sup> In addition, the two trial courts that conducted the hearings in *Carillo's* habeas corpus applications both found that *Carillo's* pleas were prompted by other inducements that were expressly made part of his plea bargain agreements.<sup>176</sup>

In *Ex parte Evans*<sup>177</sup> the trial court found that *Evans* had been given erroneous advice as to his parole eligibility and that he had relied upon this advice and was thereby induced to enter his plea of guilty.<sup>178</sup> The court of criminal appeals reviewed cases dealing with involuntary pleas resulting from conditional pleas, plea bargains which were broken or not kept, and plea bargains resulting from erroneous advice from an attorney and/or the trial court.<sup>179</sup> The court of criminal appeals concluded that because neither the trial court nor the prosecutor overtly sanctioned the erroneous advice on parole eligibility, and because the advice was not made a part of the plea bargain, this was not a case of a broken or impossible plea bargain.<sup>180</sup> *Evans* was therefore not entitled to relief on those grounds, and the issue presented for resolution was whether the applicant's plea was involuntary simply because his attorney had relayed erroneous parole eligibility advice to him upon which he had relied when deciding to plea guilty.<sup>181</sup> Noting that the United States circuit courts of appeal were divided on this issue,<sup>182</sup> the court concluded that because the attainment of parole is speculative at best, erroneous advice on the subject of parole eligibility will not render a plea involuntary if such advice is not a part of a plea bargain agreement. The court

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170. 689 S.W.2d at 906 n.2.

171. 644 S.W.2d 3 (Tex. Crim. App. 1983) (en banc).

172. *Id.* at 5.

173. 687 S.W.2d 320 (Tex. Crim. App. 1985) (en banc).

174. *Id.* at 323.

175. *Id.* at 324.

176. *Id.* In exchange for his guilty pleas the court dismissed additional charges against *Carillo* and set the sentences in all three cases in which he entered a plea of guilty to run concurrently.

177. 690 S.W.2d 274 (Tex. Crim. App. 1985) (en banc).

178. *Id.* at 275.

179. *Id.* at 276-77.

180. *Id.* at 277.

181. *Id.* at 278.

182. *Id.* at 278 n.4.

overruled *Ex parte Young* to the extent that it had created a per se rule that a misunderstanding by the defendant regarding his parole eligibility will automatically render his plea of guilty involuntary.<sup>183</sup>

During the Survey period, the court of criminal appeals delivered three opinions dealing with the voluntariness of guilty pleas in light of the court's prior holdings in *Ex parte Crisp*<sup>184</sup> and *Ex parte Smith*.<sup>185</sup> In 1981 the legislature enacted House Bill 730,<sup>186</sup> which purported to amend certain provisions of the Controlled Substances Act.<sup>187</sup> These amendments substantially increased the penalty range for many species of offenses prescribed by the Controlled Substances Act. In *Ex parte Crisp*, however, the court of criminal appeals affirmed a court of appeals' decision<sup>188</sup> that House Bill 730 was passed in an unconstitutional manner due to defective notice provisions in the caption of the bill.<sup>189</sup> During the period between the effective date of House Bill 730 and the return of the decisions holding that the bill had been passed in an unconstitutional manner, many defendants had entered guilty pleas to offenses to which the higher punishments created by the bill had attached.

The court's holding in *Ex parte Crisp* returned the range of punishments for Controlled Substances Act offenses purportedly increased by the amendments authorized by House Bill 730 to the punishment ranges mandated by the pre-amendment version of the Act. The court, therefore, reversed those cases in which the defendants had received sentences higher than those permitted under the pre-amendment version of the Controlled Substances Act.<sup>190</sup> A more difficult question was what would become of convictions obtained in the hiatus between the effective date of the House Bill 730 amendments and the issuance of the court's opinion in *Ex parte Crisp* in which the sentences actually imposed were valid under either the old or the new versions of the Controlled Substances Act.

In *Ex parte Smith* the court of criminal appeals reversed a conviction for delivery of less than five pounds but more than four ounces of marijuana, in which the petitioner had received an eight year sentence pursuant to a plea bargain. Under the amendments to the relevant provision<sup>191</sup> of the Con-

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183. *Id.* at 279.

184. 661 S.W.2d 944, *reh'g denied*, 661 S.W.2d 956 (Tex. Crim. App. 1983) (en banc).

185. 678 S.W.2d 78 (Tex. Crim. App. 1984) (en banc).

186. Tex. H.B. 730, 67th Leg. (1981) (effective September 1, 1981) [hereinafter cited as House Bill 730].

187. TEX. REV. CIV. STAT. ANN. art. 4476-15 (Vernon Supp. 1982) [hereinafter cited as the Controlled Substances Act].

188. *Crisp v. State*, 643 S.W.2d 487 (Tex. App.—Austin 1982), *aff'd*, 661 S.W.2d 944 (Tex. Crim. App. 1983). Significant for present purposes is the delivery of the court of appeals' opinion on November 24, 1982, well after the effective date of the amendments effectuated by House Bill 730.

189. TEX. CONST. art. III, § 35 requires that a bill's caption be specific enough to give a reasonable reader fair notice of the subject and contents of the bill.

190. *Hernandez v. State*, 669 S.W.2d 734, 735-36 (Tex. Crim. App. 1984); *see also* *Uribe v. State*, 688 S.W.2d 534, 539 (Tex. Crim. App. 1985) (improper range of punishment submitted to the jury).

191. Sec. 3.05(b)(1) of the Controlled Substances Act.



trolled Substances Act effectuated by House Bill 730, this offense was punishable as a second degree felony (not less than two years nor more than twenty years imprisonment, and a possible fine not to exceed \$10,000).<sup>192</sup> Under the pre-amendment version of the Controlled Substances Act, however, this offense was punishable as a third degree felony (not less than two years nor more than ten years imprisonment, and a possible fine not to exceed \$5,000).<sup>193</sup> Prior to entering his plea of guilty petitioner Smith had been admonished by the trial court as to the punishment range for a second degree felony. While the eight-year sentence bargained for was within the punishment range for either a second degree felony or a third degree felony, Smith successfully argued that he was harmed by the improper admonishment because he would not have agreed to the eight year sentence if he had known that the maximum penalty for the offense with which he was charged was ten years rather than twenty years.

In *Hurwitz v. State*<sup>194</sup> the state charged the defendant with possession of marijuana in a two count indictment. The defendant pled guilty to count two of this indictment pursuant to a plea bargain. The second count had charged the defendant with possession of fifty pounds or less but more than five pounds of marijuana, a second degree felony under the ill-fated amendment to the Controlled Substances Act.<sup>195</sup> Under the Act as originally adopted,<sup>196</sup> possession of any amount of marijuana over four ounces was a third degree felony. As in *Smith*, the trial court had admonished Hurwitz that the offense to which he was pleading guilty was punishable as a second degree felony rather than as a third degree felony.<sup>197</sup> Unlike *Smith*, however, prior to the entry of his plea of guilty, Hurwitz filed a motion to quash the indictment, based upon the court of appeals' opinion in *Crisp*. At a hearing on this motion, it became clear to both of the parties and the trial court that the proper punishment range for the offense charged would depend upon whether the court of appeals' decision in *Crisp* withstood review in the court of criminal appeals. The parties agreed to proceed only on the second count of the indictment and the state agreed to recommend a punishment of two years, the minimum sentence for either a second or third degree felony, in exchange for Hurwitz' plea of guilty.

In this context the court of appeals held that the improper admonishment as to the maximum punishment of twenty years did not render Hurwitz' plea unknowing because he was aware that he had bargained for the minimum punishment available under either version of the Controlled Substances Act. The court of appeals reasoned that although the unsettled state of the law may have made his decision concerning his plea more difficult, it was the status of a law, and not the trial court's admonishment, which produced this

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192. TEX. PENAL CODE ANN. § 12.33 (Vernon 1974) (second degree felony punishment).

193. TEX. PENAL CODE ANN. § 12.34 (Vernon 1974) (third degree felony punishment).

194. 673 S.W.2d 347 (Tex. App.—Austin 1984), *aff'd*, 700 S.W.2d 919 (Tex. Crim. App. 1985).

195. See § 4.051(b)(4) of the 1981 version of the Controlled Substances Act.

196. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.051(b)(4) (Vernon 1976).

197. 673 S.W.2d at 350.

difficulty. The admonishment was thus sufficient to advise Hurwitz of the consequences of his plea and was not harmful.<sup>198</sup>

The court of criminal appeals affirmed, the majority of the court following the approach utilized by the court of appeals. Two concurring opinions, joined by a total of four judges, urged that the court's earlier decision in *Smith* was not entirely correct in that an admonishment as to the range of punishment that correctly states the range of punishment at the time it is given is a proper admonishment and therefore the issue of substantial compliance<sup>199</sup> is not presented by such a case. Judge Clinton's concurring opinion emphasized that: (1) given the substantial evidence against Hurwitz, the only logical reason for his appeal was to contest the trial court's ruling on his motion to suppress the evidence, and (2) Hurwitz' true claim on appeal was not that the admonishment had rendered his plea involuntary, but that because the statute under which he was convicted had been found to be unconstitutional, his guilty plea was *ipso facto* involuntary.<sup>200</sup>

*Fuentes v. State*<sup>201</sup> was decided by the court of criminal appeals a week after it had returned its opinion in *Hurwitz*. The defendant in *Fuentes* was initially charged with possession of more than 400 grams of cocaine with the intent to deliver, a crime punishable under the House Bill 730 version of the Controlled Substances Act by from fifteen to ninety-nine years confinement and a fine not to exceed \$250,000.<sup>202</sup> The State elected to proceed against the defendant for possession of more than twenty-eight grams, but less than 200 grams, a crime that under both the prior version of the Controlled Substances Act and the amended version was punishable as a first degree felony.<sup>203</sup> The defendant entered a plea of *nolo contendere* pursuant to a plea bargain and received a seven-year sentence. On appeal the defendant maintained that the threat of the fifteen-year minimum punishment on the original charge had induced his acceptance of a plea bargain for seven years.

The court of appeals rejected this contention without discussion.<sup>204</sup> The court of criminal appeals, in upholding this portion of the court of appeals' decision, ruled that the reduction of the charge was not a part of the plea bargain agreement<sup>205</sup> and at the time the defendant entered his plea of *nolo contendere*, he knew that he would receive a seven year sentence. Because

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198. *Id.* at 351.

199. See TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (Vernon Pam. Supp. 1985).

200. 700 S.W.2d at 921-23 (Clinton, J., concurring).

201. 688 S.W.2d 542, (Tex. Crim. App. 1985), *aff'g in part and rev'g in part*, 681 S.W.2d 91 (Tex. App.—Houston [14th Dist.] 1984).

202. Controlled Substances Act, *supra* note 187, § 4.03(a) and (d)(3).

203. Under the amended version of the statute, the fine available was not to exceed \$50,000 (as opposed to \$10,000 under the pre-amendment version of the statute). The defendant was admonished on the range of punishment with the \$50,000 limit. The court of criminal appeals found this error to be without significance, however, due to the defendant's decision to plead *nolo contendere* because no fine was assessed. 688 S.W.2d at 544 n.1.

204. 681 S.W.2d at 93.

205. With all due respect to the court, this statement is somewhat disingenuous as it ignores the reality of the state of the law then in existence. Before a seven year sentence could have been recommended, the charge had to be reduced, since the minimum punishment for the offense originally charged was fifteen years.

possession with intent to deliver any amount of cocaine was punishable as a first degree felony under the pre-amendment version of the Controlled Substances Act, the defendant faced first degree felony punishment under either statute. The court's subsequent holding in *Crisp*, therefore, did not render the defendant's plea involuntary.

In *Ex parte Gibauitch*<sup>206</sup> the petitioner was charged with delivery of more than 400 grams of cocaine. By agreement with the state, he was allowed to plead guilty to possession of that amount of cocaine. There was no agreement on the issue of punishment. Appellant was admonished as to the then accurate range of punishment, confinement for not less than ten years or more than 99 years, or life, and a possible fine not to exceed \$100,000. In light of *Ex parte Crisp*, however, the second degree felony range of punishment set by prior law for such an offense proscribed the true limits of the defendant's criminal liability. Following a pre-sentence investigation, the trial court set punishment at sixteen years, a punishment within the range of punishment for possession of 400 grams of cocaine under either version of the Controlled Substances Act. At the habeas corpus hearing the petitioner offered no testimony concerning abandoned trial strategy, but simply testified that he would not have entered a plea of guilty had he known the actual range of punishment was from two to twenty years.<sup>207</sup> The court, in a per curiam opinion, reviewed the prior opinions in *Hurwitz* and *Smith*, and noted that although the Court was in dispute<sup>208</sup> as to whether an admonishment that accurately stated the range of penalties permitted by House Bill 730 was improper, all members of the court agreed that such an admonishment constituted substantial compliance with article 26.13.<sup>209</sup> The Court concluded that petitioner Gibauitch had no plea bargain regarding punishment, and therefore his ability to evaluate a plea bargain was not an issue.<sup>210</sup> Furthermore, the fact that petitioner had entered a plea of guilty without a plea bargain as to punishment made his assertion that had he known the true range of punishment for the offense charged he would have elected to have the case tried before the jury even more unlikely.<sup>211</sup> Finally, because the petitioner's attorney had filed a motion to quash the indictment based on the unconstitutionality of the statute and had delayed disposition of the case in the hope that the statute would be declared unconstitutional, the petitioner was forced to admit at the habeas corpus hearing that at the time of his plea he was aware that the state of the law was changing or was about to change.<sup>212</sup> The application for writ of habeas corpus was therefore denied, although the case was remanded for resentencing.<sup>213</sup>

One of the most far-reaching cases decided by the court of criminal ap-

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206. 688 S.W.2d 868 (Tex. Crim. App. 1985) (en banc).

207. *Id.* at 870.

208. *Id.* Here, the opinion made specific reference to Judge Clinton's concurring opinion in *Hurwitz*. See *supra* text at note 200.

209. *Id.* at 872.

210. *Id.*

211. *Id.* at 872-73.

212. *Id.* at 872.

213. As a basis for its decision to remand, the court concluded that the amendment's pen-

peals during the Survey period was *Morgan v. State*,<sup>214</sup> wherein the court radically altered the effect that a guilty plea entered pursuant to a plea bargain agreement will have on the right to appeal any pre-trial rulings of the trial court on the defendant's motion to suppress evidence. Traditionally, a guilty plea that a defendant knowingly and intelligently entered constituted a waiver of all non-jurisdictional defects.<sup>215</sup> In addition, prior to the adoption of the present Code of Criminal Procedure in 1965, there was no statutory authorization for presenting a pre-trial motion to suppress and a denial of such motion was not error.<sup>216</sup> Article 28.01 of the present Code of Criminal Procedure, however, authorized pre-trial hearings on a number of issues including motions to suppress evidence.<sup>217</sup>

A criminal defendant who only wished to challenge the trial court's ruling on his motion to suppress the evidence against him, generally on the ground that the evidence was improperly seized and therefore subject to the prophylactic effects of the exclusionary rule, was left in a quandry. If the accused entered a plea of guilty or nolo contendere, then the preservation of any error based on the pre-trial suppression ruling was deemed waived. Even if a plea of not guilty was entered, if there was evidence (generally a judicial confession) independent of the tainted evidence which had been the object of a motion to suppress, then such independent evidence would preclude appellate review of any pre-trial suppression ruling.<sup>218</sup>

This set of procedural rules and circumstances resulted in a large percentage of appeals involving guilty pleas. In response to this problem, the legislature amended article 44.02 of the Code of Criminal Procedure<sup>219</sup> to permit

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alty range "exerted on the [trial] court's discretion distinct pressure toward a higher punishment, that is, toward the maximum provided by the pre-amendment act." *Id.* at 873.

Judge Clinton's concurring opinion stated that based on the rationale of *Brady v. United States*, 397 U.S. 742, 757 (1970), there was no constitutional requirement that a guilty plea be declared involuntary simply because the maximum penalty for the offense in question was held inapplicable in subsequent judicial decisions. *Id.* at 874.

214. 688 S.W.2d 504 (Tex. Crim. App. 1985) (en banc).

215. For a discussion of this general rule, see the dissenting opinion of Presiding Judge Onion in *Morgan*, 688 S.W.2d at 511.

216. *Id.* at 511-12.

217. TEX. CODE CRIM. PROC. ANN. art. 28.01(6) (Vernon 1979). The purpose of this article was to permit the trial court to resolve non-fact issues prior to the selection and swearing of the jury. See TEX. CODE CRIM. PROC. ANN. art. 28.01 comment (Vernon 1979).

The hearings permitted by article 28.01 are discretionary, and with regard to suppression claims, the accused has retained the right to object to evidence at the time it is offered at trial even though no pre-trial motion to suppress had been filed. *Rojas v. State*, 530 S.W.2d 298, 301 (Tex. Crim. App. 1975); *Writt v. State*, 541 S.W.2d 424, 425 (Tex. Crim. App. 1976).

218. See the excellent discussion in Presiding Judge Onion's dissenting opinion in *Morgan*, 688 S.W.2d at 513.

219. TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979) now provides:

A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial. This article in no way affects appeals pursuant to Article 44.17 of this chapter.

a defendant who pleads guilty or nolo contendere pursuant to a plea bargain to appeal the pre-trial rulings of the trial court.<sup>220</sup> Subsequent case law, however, still made it difficult for an accused to preserve his pre-trial suppression issues for appellate review even when he subsequently pled guilty or nolo contendere pursuant to a plea bargain. In *Ferguson v. State*<sup>221</sup> the court held that an erroneous ruling on a pre-trial motion to suppress would not constitute reversible error if the tainted evidence was not introduced at trial and the guilty plea was supported by other, independent evidence, such as a judicial confession. Subsequently in *Haney v. State*<sup>222</sup> the court held that even when the illegally seized evidence was introduced at trial, if the conviction was also supported by a judicial confession, those defendants who were otherwise factually within the scope of article 44.02 could not successfully challenge the trial court's ruling on their pre-trial motion to suppress.<sup>223</sup>

Prior to *Morgan*, therefore, a defendant who pled guilty pursuant to a plea bargain agreement could not preserve his pre-trial suppression claim unless he agreed to stipulate to the testimony of the State's witnesses and did not enter a judicial confession.<sup>224</sup> The only other available avenue of relief was a new trial following a withdrawal of the plea of guilty. Those defendants who were specifically informed during admonishments that they could appeal the pre-trial suppression motion were granted such relief on the theory that the erroneous advice rendered the guilty plea involuntary, since the terms of the agreement were unforceable in light of *Haney*.<sup>225</sup> In *Morgan v. State*, the majority of the court of criminal appeals, over Presiding Judge Onion's spirited and lengthy dissent,<sup>226</sup> overruled both *Haney* and *Ferguson* to the extent that those cases held that a judicial confession would bar appellate review of a pre-trial suppression motion if the accused subsequently pled guilty pursuant to a plea bargain agreement.

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The 1977 amendment to this article added all of the language following "prescribed."

220. The amendment did not alter the appellate procedures for those defendants who did not plead guilty or nolo contendere pursuant to a plea bargain or who pled not guilty. Again, Presiding Judge Onion's dissent in *Morgan* is instructive. 688 S.W.2d at 515.

221. 571 S.W.2d 908, 909-10 (Tex. Crim. App. 1978).

222. 588 S.W.2d 913 (Tex. Crim. App. 1979).

223. *Id.* at 915.

224. See *Brown v. State*, 617 S.W.2d 196, 199-200 (Tex. Crim. App. 1981); *Galitz v. State*, 617 S.W.2d 949, 955-56 (Tex. Crim. App. 1981) (en banc).

225. See, e.g., *Mooney v. State*, 615 S.W.2d 776, 777-78 (Tex. Crim. App. 1981) (plea induced by erroneous understanding that matters raised by motion to suppress were appealable).

226. The thrust of Presiding Judge Onion's objections seems to be: 1) that the intent of the 1977 amendment to article 44.02 was not to allow expedited appeals of pre-trial suppression motions, but simply to remove the plea itself as a waiver of the pre-trial motion to suppress, 688 S.W.2d at 516 (Onion, P.J., dissenting); 2) a concern that trial courts might be reluctant to accept negotiated guilty pleas when there are overruled pre-trial motions that can be appealed, *id.* at 523; 3) concerns as to whether the rule in *Morgan* will result in any net judicial economy, *id.*; and 4) the fact that there is now one rule for pleas of not guilty and a different rule for guilty pleas under article 44.02. *Id.* The answer to this last concern may be that under pre-*Morgan* law there were two sets of rules for those seeking to appeal the trial court's ruling on pre-trial suppression motions after pleading guilty pursuant to a plea bargain: one rule for those entering into a judicial confession and another for those stipulating to the state's evidence.

In the penultimate paragraph of his dissent, Presiding Judge Onion asks: What if, in addition to the judicial confession, the State introduces other evidence independent of the "tainted" evidence involved in the pre-trial motion which in and of itself is sufficient to support the conviction based on the guilty plea, then is *Ferguson* alive and well to that extent? May the appellate court then affirm the conviction without the necessity of passing on the pre-trial ruling?<sup>227</sup>

Although the answer to these questions awaits further refinement of the holding in *Morgan*, the hypothetical facts upon which the questions are premised rarely occur. In almost all drug cases for example, suppression of the evidence seized will eliminate any real chance to prosecute the accused. In cases involving admissibility of instrumentalities or fruits of the crime, it is unlikely that an adverse ruling on a defendant's motion to suppress would have provided the impetus for a guilty plea in the first place.

With regard to those cases falling outside of the operation of article 44.02 of the Code of Criminal Procedure, the court of criminal appeals' decisions following *Morgan* make it clear that a valid guilty plea still waives all non-jurisdictional defects.<sup>228</sup>

### III. PROCEDURAL ASPECTS OF THE RIGHT TO A JURY TRIAL

#### A. Waiver of the Right to Trial by Jury

As during the previous Survey period, problems created by incomplete compliance with the requirements of article 1.13<sup>229</sup> of the Texas Code of Criminal Procedure<sup>230</sup> continued to plague the courts.<sup>231</sup> In *State ex rel. Bryan v. McDonald*<sup>232</sup> the State entered into a written plea agreement with the defendant and her attorney. The State agreed to recommend a sentence of six years and to dismiss several other cases then pending against the defendant in exchange for the defendant's guilty plea. When the court called the case to trial several months later, the defendant's attorney immediately announced that the defendant agreed to the trial court's newly proposed

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227. *Id.* at 524.

228. In *King v. State*, 656 S.W.2d 617 (Tex. App.—Fort Worth 1983), *rev'd*, 687 S.W.2d 762 (Tex. Crim. App. 1985) (en banc), the court held that a plea of guilty before a jury and without a plea bargain waived a pre-trial challenge to an indictment that was based on inadequate notice. 656 S.W.2d at 620-21. The court of appeals had granted an out-of-time appeal and reversed the conviction on the defective indictment ground. *Id.* at 673. The court of criminal appeals, in reversing the court of appeals, held that the case was not controlled by article 44.02 because the plea of guilty was made without a plea bargain agreement and was made before a jury. 687 S.W.2d at 765. The rule of *Helms v. State*, 484 S.W.2d 925, 927 (Tex. Crim. App. 1972) (a valid plea of guilty waives all non-jurisdictional defects) therefore applied. Likewise, when the defendant was erroneously told by the trial court that he could appeal a pre-trial suppression claim at the time he entered a non-negotiated plea of guilty or *nolo contendere*, relief is still available on the theory that the false representations regarding the appealability of the trial court's ruling on the suppression motion rendered the plea conditional and therefore not knowing or voluntary. See *Christal v. State*, 692 S.W.2d 656, 658 (Tex. Crim. App. 1981), (rehearing 1985).

229. TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon 1979) (hereinafter "Article 1.13").

230. TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon 1979 & Supp. 1986).

231. See *1985 Annual Survey*, at 509.

232. 681 S.W.2d 65 (Tex. Crim. App. 1984).

promise to consider shock probation as part of her plea. Upon being admonished, the defendant waived her right to a trial by jury.

The State noted that it had not previously been aware of the shock probation component of the bargain and refused to consent to the defendant's waiver. The trial court, noting that this would be a good test case, questioned the State's right to a jury trial, consented to the defendant's waiver of a right to trial by jury, and proceeded to judgment without the State's consent.<sup>233</sup> After accepting the defendant's plea, the trial court assessed punishment and pronounced sentence at six years confinement. The court entered written judgment and sentence immediately thereafter. Later that day, the judgment and sentence were filed with the clerk.

The State subsequently filed its original petition for mandamus, requesting that the court of criminal appeals direct the trial court to vacate its judgment and sentence and to set the case for a jury trial. The State alleged that the trial court lacked authority to proceed to a non-jury trial without first securing a waiver in compliance with article 1.13. The court of criminal appeals agreed with the State that the State's consent ordinarily conditions and limits a defendant's right to a non-jury trial.<sup>234</sup> After determining that the State's consent was not jurisdictional, however, the court concluded that neither the plea hearing nor the judgment was void.<sup>235</sup> Despite the trial court's erroneous decision to proceed without the State's consent, the trial court lacked jurisdiction to vacate its judgment or to order a new trial; therefore, mandamus could not issue to compel the trial court to do that which it had no authority to do.<sup>236</sup> The court accordingly denied the relief sought by the State.<sup>237</sup>

Addressing the issue of incomplete compliance with the provisions of article 1.13, the court of criminal appeals held in another case that different rules apply on collateral attacks than apply on direct appeals.<sup>238</sup> In *Ex parte Aaron*,<sup>239</sup> pursuant to a plea agreement, the defendant pleaded guilty to the felony offense of burglary of a building and was thereafter sentenced to eight years imprisonment. In a pro se post-conviction application for writ of habeas corpus, the defendant argued, inter alia, that his guilty plea was

233. *Id.* at 66. Although the State declined to offer the written plea agreement, the court admitted it as a "Court's Exhibit". *Id.*

234. *Id.* at 66-67. In *State ex rel. Turner v. McDonald*, 676 S.W.2d 371 (Tex. Crim. App. 1984), decided during the previous Survey period and cited by the *Bryan* court, the court held that the right of an accused to a non-jury trial is a statutory right that is not absolute, but that is subject to the procedural conditions provided in art. 1.13, including the consent of the state. *Id.* at 373. For a further discussion of *Turner*, see Keck, 1985 *Annual Survey*, at 510.

235. 681 S.W.2d at 67.

236. *Id.* The court apparently concluded that this reasoning was indirectly supported by its previous decision in *Garcia v. Dial*, 596 S.W.2d 524 (Tex. Crim. App. 1980). In *Garcia*, a panel of the court held that when the trial court reinstated a case erroneously dismissed on speedy trial grounds, the defendant was entitled to a writ of mandamus directing dismissal of the reinstatement since the trial court's original dismissal removed the case from its jurisdiction. *Id.* at 528-30.

237. 681 S.W.2d at 67.

238. *Ex parte Aaron*, 691 S.W.2d 680, 684 (Tex. Crim. App. 1985).

239. *Id.*

invalid due to the State's failure to sign the consent form for his waiver of a jury trial, as required by article 1.13. The court of criminal appeals denied the relief sought.<sup>240</sup> The court initially observed that, irrespective of a prosecutor's post-conviction affidavit reflecting his intent to sign the waiver form in compliance with article 1.13 when the record on direct appeal reflects his failure to sign such a waiver agreement, the conviction will be reversed.<sup>241</sup> The court qualified this rule, however, as not applicable in collateral attacks.<sup>242</sup> The court chose instead to rely on its previous decision in *Ex parte Collier*,<sup>243</sup> wherein the court held that a conviction will not be set aside "based merely upon the missing signature of the district attorney when it was obvious that the State did indeed consent to the jury waiver."<sup>244</sup>

Since only the district attorney's signature was missing from the written form, the court stated that the evidence at the evidentiary hearing showed that the defendant and his attorney went to trial with the understanding that the district attorney's office had consented to waiver of trial by jury.<sup>245</sup> The court overruled the defendant's contention and denied the relief sought,<sup>246</sup> concluding that the record sufficiently demonstrated the State's intent to consent to the jury waiver. Concurring, Judge Clinton would have held that such complaints, even if factually supported, are not cognizable by post-conviction writ of habeas corpus, since mere absence of procedural compliance does not make restraint under the judgment of conviction illegal.<sup>247</sup>

In *Wilson v. State*<sup>248</sup> the court of criminal appeals determined whether a jury waiver is revoked upon withdrawal of a plea of guilty or nolo contendere. The defendant initially appeared before a magistrate, waived arraignment and his right to a jury trial, and entered a plea of nolo contendere. After the magistrate found the defendant guilty, the case was passed twice due to delay in preparation of a presentence report and for the assessment of punishment by the district judge. The defendant finally appeared before the district judge and waived his right to a speedy trial. At that time, the district judge noted that the pre-sentence report reflected that the defendant had denied that he committed the offense. The defendant acknowledged the truth of the report. The district judge then told the defendant that he would accept only an unqualified plea and that the defendant's alternative was to withdraw his plea and have the case set for a jury trial.<sup>249</sup>

Several weeks later the defendant again appeared before the same district

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240. *Id.* Judge Clinton concurred and filed an opinion in which Judges Davis, McCormick, Campbell and White joined. *Id.* at 684-85. Judge Teague dissented without opinion. *Id.* at 684. Presiding Judge Onion concurred in part and dissented in part, filing an opinion. *Id.* at 685-88. All members of the court essentially agreed with the results reached by the majority regarding the specific complaint discussed herein.

241. *Id.* at 683 (citing *Lawrence v. State*, 626 S.W.2d 56 (Tex. Crim. App. 1981)).

242. *Id.* (citing *Boyd v. State*, 660 S.W.2d 820 (Tex. Crim. App. 1983)).

243. 614 S.W.2d 429 (Tex. Crim. App. 1981).

244. 691 S.W.2d at 683 (quoting *Collier*, 614 S.W.2d at 434).

245. *Id.*

246. *Id.* at 684.

247. *Id.* at 685 (Clinton, J., concurring).

248. 698 S.W.2d 145 (Tex. Crim. App. 1985).

249. *Id.* at 145-46.



judge and with permission of the court withdrew his plea of nolo contendere and pleaded not guilty. Arguing that his change of plea rendered his jury waiver void, the defendant demanded a jury trial and objected to proceeding otherwise. The district judge overruled the objection, tried the defendant without a jury, and found him guilty.<sup>250</sup> Relying on *Parker v. State*<sup>251</sup> and *Fairfield v. State*,<sup>252</sup> the court of appeals held that the defendant's prior jury waiver was revoked by his change of plea.<sup>253</sup>

The court of criminal appeals disagreed with the lower court's reliance on *Parker* and *Fairfield*. Although *Parker* suggested that permitting withdrawal of a guilty plea is the equivalent of granting a new trial, the court of criminal appeals characterized that suggestion as dictum unsupported by citation of authority.<sup>254</sup> The court rejected such reasoning as misleading. With regard to *Fairfield*, the court of criminal appeals eventually dismissed it as inapposite.<sup>255</sup> The court of criminal appeals affirmed the reversal because it believed that the district judge intended to return the defendant to the status he enjoyed before his plea of nolo contendere, including the right to have a jury trial.<sup>256</sup>

In *McGraw v. State*<sup>257</sup> the court of appeals followed the court of criminal appeals' recent holding in *Brezeale v. State*.<sup>258</sup> In *McGraw* the defendant argued for reversal of his conviction because the record was void of any written waiver of a jury trial by the defendant and written consent and approval of the same by the State. Noting that the judgment before it recited that the defendant signed his waiver in open court with the signed consent and approval of both the court and the State and finding nothing to the contrary, the court of appeals determined that *Brezeale* foreclosed the defendant's argument.<sup>259</sup> The court deemed the recitations in the trial court's judgment binding and creating a presumption of regularity which, absent an affirmative showing to the contrary, established a jury waiver in accordance with the provisions of article 1.13.<sup>260</sup>

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250. *Id.* at 146.

251. 626 S.W.2d 738 (Tex. Crim. App. 1981).

252. 610 S.W.2d 771 (Tex. Crim. App. 1981).

253. 698 S.W.2d at 146. See *Wilson v. State*, 669 S.W.2d 792 (Tex. App. — Dallas 1984).

254. 698 S.W.2d at 146.

255. 698 S.W.2d at 146-47. "When a defendant pleads guilty before a jury and, during the trial, changes his plea to not guilty, the trial proceeds before the same jury. The same thing happens if the original plea is not guilty, and is changed later to guilty." *Id.* at 147.

256. *Id.* at 147.

257. 690 S.W.2d 69 (Tex. App.—Dallas 1985, no pet.).

258. 683 S.W.2d 446 (Tex. Crim. App. 1985). "In that opinion the court of criminal appeals held that, in the absence of direct proof of their falsity, recitations in the court's judgment are binding and create a presumption of regularity." *McGraw*, 690 S.W.2d at 70. Compare TEX. CODE CRIM. PROC. ANN. art. 44.24(a) (Vernon Supp. 1986) which in part provides: "The courts of appeals and the Court of Criminal Appeals shall presume . . . that the jury was properly impaneled and sworn . . . unless such matters were made an issue in the court below, or it otherwise affirmatively appears to the contrary from the record." Although mentioned by neither the *Brezeale* court nor the court of criminal appeals in *McGraw*, the latter court's application of the holding by the former would appear to create a corollary of the presumption created by art. 44.24(a).

259. *McGraw*, 690 S.W.2d at 70.

260. *Id.* at 70.

### B. *Shuffling the Jury Panel*

Texas is apparently the only state that gives the parties in a criminal proceeding the right<sup>261</sup> to call for a shuffle or redrawing of the names of the members of the jury panel from which the jurors hearing their case will be selected.<sup>262</sup> With this right comes a number of equally unique problems, not the least of which is determining whether a motion to shuffle has been timely urged. Clearly, invocation of the right to shuffle the names of the members of the jury panel after the beginning of the voir dire examination of the prospective jurors is untimely.<sup>263</sup> However, the question of precisely when examination begins for purposes of cutting off the right to demand a jury shuffle is hotly disputed.<sup>264</sup>

Prior to the current Survey period the court of criminal appeals sought to answer this question in its opinion delivered in *Yanez v. State*.<sup>265</sup> The court held with regard to motions to shuffle that voir dire examination may not begin until after the trial judge has selected the jury panel and those persons have been seated in the courtroom.<sup>266</sup> Thus, a motion urged immediately thereafter is timely made, and if urged by counsel for the accused, a denial of the same constitutes automatic reversible error.<sup>267</sup> The court found reversible error when the trial judge denied the defendant's motion to have the names of the prospective jurors shuffled, even though the motion was made after the trial judge had already sworn and qualified the jurors and had shuffled their names without a request to do so.<sup>268</sup> Accordingly, in *Wilkerson v. State*<sup>269</sup> and *Sewell v. State*,<sup>270</sup> both decided by the court of criminal appeals during the current Survey period, the court recognized that an accused is entitled to a shuffle if timely requested under *Yanez*, regardless of whether the panel was seated following the trial judge's sua sponte shuffle.<sup>271</sup>

In *Beir v. State*<sup>272</sup> the court of appeals, however, held that when an accused prematurely exercises his right to have the panel shuffled after it is

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261. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon 1966) (hereinafter referred to as "Article 35.11").

262. *Yanez v. State*, 677 S.W.2d 62, 68 (Tex. Crim. App. 1984).

263. *Id.* at 65 (citing *Latham v. State*, 656 S.W.2d 478, 479 (Tex. Crim. App. 1983)).

264. *Id.* at 65-67.

265. 677 S.W.2d 62, 69.

266. *Id.* Judge Clinton, concurring in the results reached by the majority, would have held that voir dire examination does not begin until the State is permitted to address the prospective jurors. *Id.* at 71 (Clinton, J., concurring).

267. *Id.* at 69.

268. *Id.*

269. 681 S.W.2d 29 (Tex. Crim. App. 1984).

270. 696 S.W.2d 559 (Tex. Crim. App. 1985).

271. *Wilkerson*, 681 S.W.2d at 30, and *Sewell*, 696 S.W.2d at 560. In *Sewell*, on original submission, the court held that "the trial judge was justified in ordering a mistrial due to 'manifest necessity' after he had erroneously overruled the appellant's motion to shuffle . . ." *Id.* On motion for rehearing, the appellant argued that the doctrine of manifest necessity did not apply because his motion to shuffle was untimely. *Id.* The court denied the appellant's motion for rehearing after finding that his motion to shuffle was timely under *Yanez*. *Id.* at 561.

272. 681 S.W.2d 124 (Tex. App.—Houston [14th Dist.] 1984), *rev'd on other grounds*, 687 S.W.2d 2 (Tex. Crim. App. 1986).

seated by making his motion prior to seating of the panel, and the trial judge insists on shuffling the panel prior to its being seated, the failure of the accused to thereafter reurge his motion preserved nothing for review.<sup>273</sup> In *Williams v. State*<sup>274</sup> the defendant, however, did not move to shuffle the panel until after it had been seated for approximately forty minutes. During this time the trial judge explained general principles of law and courtroom procedure, and the panel members had indicated by their silence in response to the judge's questioning that they could consider the full range of punishment. After recognizing the rule in *Yanez*, the court of appeals noted the suggestion in *Alexander v. State*<sup>275</sup> that a court should not permit an accused to determine whether to request a shuffle based upon information already elicited on voir dire and held that the defendant's motion was not timely.<sup>276</sup>

In *Hatfield v. State*<sup>277</sup> the defendant's sole ground of error on appeal was that the presence of only twelve jurors on the panel rendered his motion to shuffle moot. The defendant had received a shuffle prior to voir dire in accordance with the provisions of article 35.11. The defendant was convicted upon his plea of guilty. Prior to commencement of punishment, the defendant objected to the court's denial of information concerning the background of the potential jurors; however, he did not raise the issue at trial. The court of appeals accordingly held that it did not have to consider the ground urged on appeal.<sup>278</sup> Nevertheless, the court of appeals continued to review the issue raised and observed that the defendant had not cited any authority in support of his argument.<sup>279</sup> The court of appeals further noted that, pursuant to article 33.09<sup>280</sup> of the Code of Criminal Procedure, Rules 231 and 235 pertaining to civil cases apply in criminal cases when challenges deplete the number of potential jurors below that necessary to complete a full jury.<sup>281</sup> The court of appeals concluded that neither rule applied because the parties had made no challenges for cause and because after both sides had exercised their complement of three peremptory challenges the number of jurors remaining filled a complete jury. The court, therefore, overruled the defend-

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273. *Id.* at 128.

274. 690 S.W.2d 656 (Tex. App.—Dallas 1985, pet. granted).

275. 523 S.W.2d 720, 721 (Tex. Crim. App. 1975).

276. 690 S.W.2d at 660.

277. No. 05-84-8-CR (Tex. App.—Dallas, March 21, 1985) (reporter service at April 24, 1985).

278. *Id.*, slip op. at 3 (citing *Euziere v. State*, 648 S.W.2d 700 (Tex. Crim. App. 1983)).

279. *Id.*, slip op. at 3.

280. TEX. CODE CRIM. PROC. ANN. art. 33.09 (Vernon 1966) provides in pertinent part that: "Jury panels . . . shall be selected and summoned . . . in the same manner as the selection of panels for the trial of civil cases except as otherwise provided in this Code."

281. As explained by the court of appeals:

TEX. R. CIV. P. 231 provides that if challenges for cause reduce the number of jurors to less than 12, at that time "the court shall order other jurors to be drawn . . . and their names written upon the list instead of those set aside for cause." If peremptory challenges result in an incomplete jury, TEX. R. CIV. P. 235 requires that the court "direct other jurors to be drawn or summoned to complete the jury."

*Hatfield*, slip op. at 4-5.

ant's ground of error.<sup>282</sup>

### C. Jury Selection in Capital Cases: *Witherspoon* Revisited

The United States Supreme Court again examined the proper procedure for selection of jurors in capital cases in *Wainwright v. Witt*.<sup>283</sup> In *Wainwright* the Court clarified its previous decision in *Witherspoon v. Illinois*<sup>284</sup> and thereby dispensed with that decision's dual reference to automatic decision making and unmistakable clarity.<sup>285</sup> The Court thus reaffirmed the standard enunciated in *Adams v. Texas*<sup>286</sup> as the proper standard to be employed in determining whether a prospective juror is subject to exclusion for cause due to his beliefs regarding capital punishment.<sup>287</sup> Thus, the appropriate inquiry is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."<sup>288</sup>

### D. Jury Selection in General: *Voir Dire*

With regard to excusing prospective jurors, the courts were called on several times during the Survey period to consider whether objections both at trial and on appeal were sufficient to preserve and present error for review. In *Willard v. State*<sup>289</sup> the court of appeals held that an objection "to the cause" failed to preserve for review the question whether the trial court's *sua sponte* dismissal of a prospective juror constituted error. The court reasoned that the vague and imprecise objection was capable of two different and dissimilar interpretations so as to prevent the objection on appeal from comportsing with that raised at trial.<sup>290</sup> Similarly, in *Duff-Smith v. State*,<sup>291</sup> the court of criminal appeals held that defense counsel's remark during voir dire, "I don't think that's sufficient for challenge," did not constitute a proper objection.<sup>292</sup> With respect to the defendant's ground of error concerning another venireman in that case, the court also held that litigation of a pre-trial motion generally objecting to certain types of exclusions for cause cannot overcome waiver due to lack of an objection to the improper exclu-

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282. *Id.*, slip op. at 5.

283. 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

284. 391 U.S. 510 (1968).

285. *Witt*, 105 S. Ct. at 852, 83 L. Ed. 2d at 851-852. In *Witherspoon*, the Court had indicated that prospective jurors may be excluded for cause if they make it unmistakably clear that they would automatically vote against capital punishment without regard to the evidence or that their beliefs concerning capital punishment "would prevent them from making an impartial decision as to the defendant's *guilt*." (Emphasis in original). *Witherspoon*, 391 U.S. at 522-23, n.21.

286. 448 U.S. 38 (1980).

287. *Witt*, 105 S. Ct. at 851, 83 L. Ed. 2d at 851.

288. 105 S. Ct. at 852, 83 L. Ed. 2d at 851-52. The opinion also addressed the problem of the equivocating juror by recognizing that even exhaustive questioning will not always reveal the venireman's prejudice. 105 S. Ct. at 852, 83 L. Ed. 2d at 852. In such situations the judgment of the trial judge must be given deference. 105 S. Ct. at 853, 83 L. Ed. 2d at 852-53.

289. 682 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1984, pet. granted).

290. *Id.* at 690-91.

291. 685 S.W.2d 26 (Tex. Crim. App. 1985) (en banc).

292. *Id.* at 36-38.

sion of venireman.<sup>293</sup>

The defendant in *Barney v. State*<sup>294</sup> alleged that the trial court erred in continuing his trial with the original twelve jurors after juror Payne indicated on the second day of trial that personal problems prevented her from continuing as a fair and impartial juror.<sup>295</sup> Following examination of juror Payne before the bench by both the State and the defense, defense counsel stated that she did not believe the juror was disabled from sitting on a jury, but nevertheless moved for a mistrial. After the trial court denied the motion, defense counsel took exception to denial of her motion, but did not object to the court's finding that Payne was not disabled from sitting as a juror. Defense counsel further refused the State's offer to replace Payne with one of the two alternates.

The court of criminal appeals overruled the first ground of error wherein the defendant asserted that the trial court should have granted his mistrial motion.<sup>296</sup> The court based its decision on the language of article 36.29,<sup>297</sup> which may have entitled the defendant to replace Payne with an alternate juror, but did not entitle him to the more disruptive relief of a mistrial.<sup>298</sup> The court overruled defendant's second ground of error that the trial court should have replaced Payne with an alternate juror.<sup>299</sup> The court based its ruling on defense counsel's refusal at trial to agree with the State's offer to replace Payne. The court also held that counsel's failure to object to the trial court's determination that Payne was not disabled from sitting on a jury constituted waiver.<sup>300</sup>

Two other cases decided in this area during the survey period by the court of criminal appeals concerned punishment as a proper subject for voir dire examination. In *Campbell v. State*<sup>301</sup> the court held that the question, "Would you consider retribution or rehabilitation to be the primary concern of punishment?" was proper; therefore, the trial court abused its discretion in sustaining the State's objection to the question.<sup>302</sup> In *Barrow v. State*,<sup>303</sup> a

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293. *Id.* at 36.

294. 698 S.W.2d 114 (Tex. Crim. App. 1975).

295. Juror Payne was the fifth juror selected during the second week of voir dire in the capital murder case. Voir dire examination ended one month later after the selection of twelve jurors and two alternates. Trial commenced two days later, and prior to commencement of the second day of trial, Juror Payne sought to be excused due to a personal problem. *Id.* at 121-22.

296. *Id.* at 122.

297. TEX. CODE CRIM. PROC. ANN. art. 36.29(b) (Vernon Supp. 1986).

298. 698 S.W.2d at 122.

299. *Id.*

300. *Id.* Defendant also complained that he was improperly denied a challenge for cause to venire-member Matura and thereby forced to exercise a peremptory strike. *Id.* However, because defense counsel failed to allege at trial a reason why Matura should be struck for cause, or to state grounds for his challenge in his brief on appeal, the same was held to present nothing for review. *Id.* at 123 (citing *Garcia v. State*, 626 S.W.2d 46, 56 (Tex. Crim. App. 1981)). The court of criminal appeals, in the interest of justice, nevertheless proceeded to review the defendant's complaints concerning Matura and rejected the same for want of merit. *Id.* at 123-24.

301. 685 S.W.2d 23 (Tex. Crim. App. 1985).

302. *Id.* at 25.

303. 688 S.W.2d 860 (Tex. Crim. App. 1985).

capital murder case, a venireman stated that she could not consider the sentence of five years probation for a person convicted of the lesser included offense of murder. The court of criminal appeals held that the juror's reservations demonstrated an inability to consider the full range of punishment.<sup>304</sup> The court accordingly reversed the conviction due to the trial court's erroneous refusal to exclude the juror for cause, and because the defendant was forced to exercise a peremptory challenge in order to make up for the court's ruling, allowing another objectionable juror to sit on the panel.<sup>305</sup>

Considering the length of time necessary to conduct voir dire examination, in *Ratliff v. State*<sup>306</sup> the court of criminal appeals attempted to harmonize the right of counsel to question veniremembers and the right of the trial court to control the voir dire and impose reasonable restrictions on voir dire examination. In determining whether an unreasonable time limitation was placed on an accused's voir dire examination, the court held that each case must be examined on its own facts and evaluated on the basis of three factors: (1) whether the accused's voir dire revealed an attempt to unnecessarily prolong the examination of prospective jurors; (2) whether the unasked questions set out in his bill of exceptions were proper questions, rather than irrelevant, immaterial or unnecessarily repetitious inquiries; and (3) whether the time limitation resulted in the seating of jurors whom the accused was not permitted to question.<sup>307</sup>

Finally, in *Pheffer v. State*<sup>308</sup> the court of appeals was faced with harmonizing and giving effect to section 12.03(c)<sup>309</sup> of the Penal Code and articles 35.16(a)(2)<sup>310</sup> and 35.19<sup>311</sup> of the Texas Code of Criminal Procedure. The

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304. *Id.* at 863.

305. *Id.*

306. 690 S.W.2d 597 (Tex. Crim. App. 1985).

307. *Id.* at 599-600 (citing *Thomas v. State*, 658 S.W.2d 175 (Tex. Crim. App. 1983); *Clark v. State*, 608 S.W.2d 667 (Tex. Crim. App. 1980); *De La Rosa v. State*, 414 S.W.2d 668 (Tex. Crim. App. 1967)). Earlier during the Survey period, in *Santos v. State*, 681 S.W.2d 208 (Tex. App.—Houston [1st Dist.] 1984, no pet.), the court of appeals discussed *De La Rosa*, *Clark* and *Thomas*, and held that a one hour time limit on the defendant's voir dire was not an abuse of discretion when, among other things, counsel did not file a bill of exceptions showing the questions he would have asked if allowed additional time. *Id.* at 209-10. In *Ratliff*, 690 S.W.2d at 600, the trial court originally placed a one-hour time limit on the accused's voir dire, but eventually extended that by twenty-one minutes for examination, and fifteen minutes for a closing statement. In addition, counsel perfected a bill of exceptions showing fifteen questions he had wanted to ask, one of which pertained to whether the venire members would vote not guilty if the State proved a different element of the offense than they alleged. The time permitted in *Ratliff* was found to be unreasonable under the facts of the case, and the accused's conviction was reversed. *Id.* at 601.

308. 683 S.W.2d 64 (Tex. App.—Amarillo 1984, pet. ref'd).

309. TEX. PENAL CODE ANN. § 12.03(c) (Vernon 1974) provides:

(c) Conviction of a Class C misdemeanor does not impose any legal disability or disadvantage.

310. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(2) (Vernon Supp. 1986) provides:

(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on a jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

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court of appeals found a conflict between the two statutes as to a convicted misdemeanant's qualifications to serve on a jury.<sup>312</sup> Invoking section 3.06 of the Code Construction Act<sup>313</sup> the court held that the most reasonable construction of the statutes in question provides that although conviction of a Class C misdemeanor does not deprive an individual of basic rights of citizenship, conviction of a Class C misdemeanor theft absolutely precludes the right to serve as a juror.<sup>314</sup> The court of appeals held that once the trial court discovered that an impaneled juror was absolutely disqualified due to a previous Class C misdemeanor theft conviction, it had no alternative except to declare a mistrial despite the defendant's objection.<sup>315</sup> The court held that a second prosecution did not expose the defendant to double jeopardy.<sup>316</sup>

#### IV. DISTRICT COURT MAGISTRATES

In 1981 the legislature enacted article 1918c,<sup>317</sup> authorizing the use of magistrates in the criminal district courts of Dallas County. During the Survey period, state appellate courts issued several opinions upholding the constitutional validity of the use of magistrates. While at present these cases concern only those attorneys practicing in Dallas and Jefferson<sup>318</sup> counties, the experience with magistrates under the present statute is best regarded as an experiment, which if successful, may expand to other counties.<sup>319</sup>

In *Kelly v. State*<sup>320</sup> the court of appeals held that article 1918c did not violate that section of the Texas Constitution prohibiting local or special laws.<sup>321</sup> Relying upon prior case law upholding the creation of district, county and justice courts for specifically named counties and the modifica-

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2. That he has been convicted of theft or any felony . . . .

311. TEX. CODE CRIM. PROC. ANN. art. 35.19 (Vernon Supp. 1986) provides: "No juror shall be impaneled when it appears that he is subject to the second, third or fourth cause of challenge in Article 35.16, though both parties may consent." *Id.*

312. 683 S.W.2d at 66.

313. TEX. PENAL CODE ANN. § 1.05(b) (Vernon Supp. 1986).

314. 683 S.W.2d at 66.

315. *Id.*

316. *Id.* at 67.

317. TEX. REV. CIV. STAT. ANN. art. 1918c (Vernon Pam. Supp. 1985) (now at TEX. GOV. CODE ANN. §§ 54.301—54.313 (Vernon Pam. 1986)). This article provided for the appointment of district court magistrates by the judges of those Dallas County district courts that give preference to criminal cases and the criminal district courts of Dallas County. TEX. GOV. CODE ANN. § 54.301 (Vernon Pam. 1986).

318. TEX. REV. CIV. STAT. ANN. art. 1918e, §§ 6-9 (Vernon Pam. Supp. 1985) provided for the appointment of TEX. CODE CRIM. PROC. ANN. art. 2.09 (Vernon Supp. 1986) magistrates to serve as masters in the district and county courts at law that give preference to criminal cases in Jefferson County. The powers and responsibilities of such Jefferson County masters are similar to those of the Dallas County district court magistrates. Article 1918e is now found at TEX. GOV. CODE ANN. §§ 54.202-54.205 (Vernon Pam. 1986).

319. TEX. REV. CIV. STAT. ANN. arts. 1918b and 1918d (Vernon Pam. Supp. 1985) provided for the use of masters in certain types of domestic relations cases. Article 1918b is now found at TEX. GOV. CODE ANN. §§ 54.001-54.014 (Vernon Pam. 1986). Article 1918d is now found at TEX. GOV. CODE ANN. §§ 54.101-54.112 (Vernon Pam. 1986).

320. 686 S.W.2d 742 (Tex. App.—Austin 1985, pet. granted).

321. TEX. CONST. art. III, § 56.

tion of jurisdiction among the various courts of specific counties, the court held that the magistrate's act was a proper exercise of legislative authority to create courts and organize those courts as it deems necessary.<sup>322</sup>

In *Jones v. State*<sup>323</sup> the court of appeals refused to reach another type of constitutional attack on article 1918c. The court held that that constitutional issue was not reached because the magistrate had lacked authority under the statute to preside over the probation revocation hearing referred to him.<sup>324</sup> Accordingly, the court reversed and remanded.<sup>325</sup>

Two cases ultimately decided by the court of criminal appeals during the Survey period further defined the authority of an article 1918c magistrate to accept a negotiated plea of guilty.<sup>326</sup> In *Ex parte Howard*<sup>327</sup> the applicant had entered into a plea bargain and received deferred probation on his burglary charge. While on probation, the applicant was accused of committing aggravated robbery. Pursuant to his second plea bargain, the applicant pled guilty to the robbery charge and true to the State's motion to revoke his unadjudicated probation. Under the plea agreement, the State was to make no recommendation on punishment, but the resulting sentences were to run concurrently. A magistrate then took the applicant's pleas and judicial confession and proposed a judgment that the trial court adopted. In his habeas corpus application Howard insisted that the magistrate's action amounted to presiding over a trial on the merits.

On direct appeal,<sup>328</sup> the court of appeals disagreed with Howard's contention, holding that the magistrate's action was authorized since under the plea bargain agreement no disputed factual issues requiring judicial investigation existed.<sup>329</sup> The district court judge determined the issue of appropriate sentence.<sup>330</sup>

The court of criminal appeals denied relief on Howard's writ application<sup>331</sup> on basically the same grounds as the court of appeals.<sup>332</sup> The court

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322. 686 S.W.2d at 743. The court relied upon TEX. CONST. art. V, § 1, which authorizes the legislature to "establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof . . . See also *Kelley v. State*, 676 S.W.2d 104, 107 (Tex. Crim. App. 1984) (appointment of magistrates not equal to creation of courts).

323. 666 S.W.2d 360 (Tex. App.—Dallas 1984, pet. granted).

324. *Id.* at 361. The court reasoned that a probation revocation hearing was part of a trial on the merits since the proceeding investigated the truth of factual allegations and had as its goal the same purpose as a trial—"to correctly and *finally* determine disputed issues among litigants." *Id.* (emphasis original). The district judge may not refer to a magistrate a criminal case in which the magistrate presides over the trial on the merits. *Id.*

325. 666 S.W.2d at 361.

326. Article 1918c, § 4(a) authorizes the referral to magistrates of criminal cases for proceedings involving, *inter alia*, negotiated pleas of guilty before the court (now found at TEX. GOV. CODE ANN. §§ 54.306-54.307 (Vernon Pam. 1986)).

327. 685 S.W.2d 672 (Tex. Crim. App. 1985).

328. 667 S.W.2d 265 (Tex. App.—Dallas 1984).

329. *Id.* at 267.

330. *Id.*

331. Howard presumably sought relief in the court of criminal appeals by way of post-conviction writ pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977 & Supp. 1985) instead of by way of petition for discretionary review in order to also obtain review of the adjudication of his revoked probation on his conviction for burglary. Revocations of deferred adjudicated probation are not reviewable on direct appeal. See *Williams v. State*, 592



held first that the magistrate had taken the same actions as required in acceptance of a negotiated plea.<sup>333</sup> Second, and perhaps more importantly, the court held that a hearing to proceed to adjudication is one of the other matters contemplated by article 1918c for referral to the magistrate.<sup>334</sup> Notice that this brings into question the court of appeals' holding in *Jones* that a magistrate lacks statutory authority to preside over a regular probation revocation hearing.

In *Scott v. State*<sup>335</sup> the court considered the question of what constitutes a negotiated plea. The magistrate had received the defendant's plea of guilty and accepted his judicial confession pursuant to an open plea of guilty. The parties did not agree on punishment and the magistrate made no findings as to punishment. The district court judge resolved the punishment issue following the preparation of a pre-sentence report.<sup>336</sup> The court of appeals held that the magistrate had not presided over a negotiated plea within the meaning of article 1918c because the parties had not exchanged legal consideration and that such consideration was required before the plea could be considered negotiated within the terms of the statute.<sup>337</sup> The court reasoned that without such consideration the word, "negotiated," would "have no meaning in the context of the statute."<sup>338</sup> The court of criminal appeals found no basis for the court of appeals' holding, noting that no general requirement exists that all plea bargains contain an agreement as to punishment.<sup>339</sup> The court held that use of the phrase, "negotiated pleas of guilty," in Art. 1918c, did not require that plea bargained cases referred to the magistrates specify punishment.<sup>340</sup>

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S.W.2d 931 (Tex. Crim. App. 1979) (court of criminal appeals holding that the trial court's decision was one of absolute discretion and not reviewable).

332. 685 S.W.2d at 674.

333. *Id.*

334. *Id.*

335. 668 S.W.2d 430, 431 (Tex. App.—Dallas 1984), *rev'd*, 690 S.W.2d 256 (1985).

336. See the facts set forth in the court of criminal appeals' opinion. 690 S.W.2d at 257.

337. 668 S.W.2d at 431.

338. *Id.* The court of appeals rejected the State's contention that the State's refusal to exercise its right to a jury trial pursuant to TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon 1977) constituted consideration.

339. 690 S.W.2d at 258. The court relied upon its prior holdings in *Ex parte Williams*, 637 S.W.2d 943 (Tex. Crim. App. 1982), *cert. denied*, 462 U.S. 1108 (1983) (holding that judgment and sentence were valid although probation was not indicated in the judgment); and *Bass v. State*, 576 S.W.2d 400 (Tex. Crim. App. 1979) (holding that an agreement not to make a recommendation of punishment does not foreclose the state from arguing punishment in response to defendant's request for probation).

340. 690 S.W.2d at 258. The court noted that under art. 1918c (now at TEX. GOV. CODE ANN. § 54.306 (Vernon Pam. 1986)), the referring district judge must "approve the recommendations and supervise the magistrates in the performance of their duties." 690 S.W.2d at 258.

Judge Clinton's concurring opinion took pains to distinguish negotiated pleas of guilty under Article 1918c, § 4(a)(1) (now TEX. GOV. CODE ANN. § 54.316 (Vernon Pam. 1986)) from plea bargain agreements within the meaning of TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979). Therefore, "whatever other considerations are exchanged in an agreement that leads to a 'negotiated plea,' if the parties do not mutually agree on specific terms of punishment to be recommended by the prosecutor there is no 'plea bargain agreement' within the contemplation of Article 44.02." 690 S.W.2d at 259-60.

## V. RECUSAL OF THE TRIAL COURT JUDGE

During the Survey period the court of criminal appeals returned its opinion in *State ex rel. Milsap v. Lozano*<sup>341</sup> a case concerned with the substantive and procedural aspects of motions to recuse a trial court judge based on claims of prejudice and incompetence. The particular circumstances of the case, which are unusual to the point of being bizarre,<sup>342</sup> are too complicated to set forth in detail in an article of this nature. A rough outline of the events leading to the State's successful application for writ of mandamus in *Milsap*, however, is necessary to an understanding of this case.

The defendant in a DWI trial was tried in Bexar County Court at Law No. 4, before Judge Miller. The first trial ended in a mistrial and the case was reset for a new trial. Following the resetting of the case defense counsel filed a motion for recusal in Judge Miller's court.<sup>343</sup> When Judge Miller declined to recuse himself, defense counsel then filed a motion to recuse or disqualify Judge Miller in the Bexar County County Court at Law No. 6,<sup>344</sup> Judge Lozano, presiding. Although Judge Lozano ordered that all proceedings in Judge Miller's court be suspended until he could hear this defense motion, Judge Miller proceeded to trial and the defendant was convicted. Thereafter Judge Lozano heard defendant's motion to disqualify or recuse Judge Miller and granted the recusal motion.<sup>345</sup> The State then filed an original application for a writ of mandamus in the court of criminal appeals.

After a lengthy, historical discussion of the development of the common law, constitutional, and statutory grounds for the disqualification and recusal of a trial court judge, the court of criminal appeals granted the application. The court of criminal appeals held that under Rule 18a of the Rules of Civil Procedure,<sup>346</sup> which the court was not certain even applied in criminal cases,<sup>347</sup> a motion for recusal should first be filed with the judge who is the object of the motion. If that judge declines to recuse himself, then he should forward the motion and the accompanying paperwork to the presid-

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341. 692 S.W.2d 470 (Tex. Crim. App. 1985).

342. Presiding Judge Onion noted the unusual nature of the facts of the case. *Id.* at 472.

343. Judge Miller's neglect of duty in the first trial, insubstantial grounding in basic tenets of the law and a "complaint pending before the State Judicial Conduct Commission as a result of Judge Miller's handling of the first trial" constituted grounds for the recusal motion. *Id.* This recusal motion asked for Judge Miller to request that the presiding judge in Bexar County assign the recusal motion to another Bexar County county court at law judge for his determination. *Id.*

344. The discussion in the text omits reference to several other interesting events including a separate hearing on a recusal motion filed by the State in a third Bexar County county court at law that resulted in Judge Miller being held qualified to hear the case against the defendant, the granting and subsequent withdrawal of a temporary restraining order against Judge Miller by the Court of Appeals for the Fourth Supreme Judicial District, and the forfeiture of the defendant's bond by Judge Miller and the defendant's subsequent release pursuant to a writ of habeas corpus obtained from a Bexar County district court. *Id.* at 473-74.

345. The evidence in support of the motion for recusal that was introduced at this hearing provided little support for the allegations contained in the motion. *Id.* at 474.

346. TEX. R. CIV. P. 18a.

347. 692 S.W.2d at 481. Presiding Judge Onion noted that even if Rule 18a did apply, the defendant's failure to comply with the notice provisions of the rule eliminated any basis for complaint on appeal. *Id.*

ing judge of the administrative judicial district so that the administrative judge may hear the motion or assign another judge. Judge Lozano had no statutory authority to assume jurisdictional authority over the case once it had been assigned to Judge Miller's court.<sup>348</sup>

## VI. PROCEDURAL ASPECTS OF TRIAL

No survey article on the subject of criminal procedure can hope to discuss all the rulings of the relevant courts with regard to questions of evidentiary rulings and other trial procedures. This section, however, does briefly discuss the major rulings of the relevant courts during the Survey period with regard to the admissibility of evidence and impeachment which directly implicated constitutional issues or specific evidentiary rules contained in the Texas Code of Criminal Procedure.

### A. Impeachment of Witnesses

In *United States v. Abel*<sup>349</sup> a unanimous Supreme Court speaking through Justice Rehnquist held that testimony regarding the membership of the defendant and a defense witness in a prison gang, offered to impeach the defense witness for bias, was properly admissible under the federal rules of evidence.<sup>350</sup> The case is of interest not only for its specific holding but also because the Court saw fit to uphold the admission of such evidence based in part upon the common law of evidence existing prior to the adoption of the federal rules. Respondent Abel had been charged with robbing a savings and loan institution.<sup>351</sup> Other co-defendants had pled guilty but Abel chose to stand trial. After one of the co-defendants, Ehle, had testified against Abel, implicating him in the robbery, the defense called an associate of both men named Mills. Mills had not participated in the robbery but claimed that prior to Abel's trial, Ehle had told him that Ehle intended to implicate Abel falsely in order to obtain favorable treatment from the government. The court allowed the government to recall Ehle and establish through his testimony that Abel and Mills were both members of a secret prison society<sup>352</sup> that had a creed requiring its members to lie, cheat, steal and kill to protect each other and to deny the existence of the organization.<sup>353</sup>

A divided panel of the Ninth Circuit Court of Appeals had reversed the convictions on direct appeal.<sup>354</sup> The majority of the court of appeals had held that because Abel had not testified in his own behalf, the testimony regarding membership of Abel and Mills in the organization was not offered

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348. *Id.* at 482.

349. 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).

350. *Id.* at 467.

351. 18 U.S.C. §§ 2113(a), (d) (1982).

352. During cross-examination by the prosecutor, Mills had denied any knowledge of the gang called the "Aryan Brotherhood". In an attempt to avoid undue prejudice to the defendant, the district court ordered that the name of the gang not be used before the jury and also offered to give the jury a limiting instruction. 105 S. Ct. at 467, 83 L. Ed. 2d at 455.

353. 105 S. Ct. at 467, 83 L. Ed. 2d at 454-55.

354. 707 F.2d 1013 (9th Cir. 1983).

to impeach the defendant and served only to prejudice him by association.<sup>355</sup> To the extent that Mills' membership impeached Mills, it did so only by virtue of showing the tenets of the organization to which he belonged included the advocacy of perjury, without demonstrating that Mills had personally accepted these tenets as his own.<sup>356</sup>

Justice Rehnquist's discussion of the legal principles involved begins with the recognition that the Federal Rules of Evidence concerned with impeachment<sup>357</sup> do not by their terms permit impeachment for bias. A review of the federal rules defining relevant evidence and impeachment, the advisory committee notes to the federal rules,<sup>358</sup> and the fact that the bias of a witness had been a proper basis of impeachment under the common law of evidence<sup>359</sup> led Justice Rehnquist to conclude that it was unlikely that the drafters of the federal rules of evidence intended to eliminate the use of cross-examination for establishing bias.<sup>360</sup>

Justice Rehnquist concluded that the mutual membership of Abel and Mills in the Aryan Brotherhood demonstrated the bias of Mills since it supported the inference that Mills slanted or perhaps fabricated his testimony to favor the defendant.<sup>361</sup> Although mere membership in an organization with subversive or illegal goals would not be sufficient to prove a defendant's guilt, membership may reasonably imply subscription to the tenets of the organization.<sup>362</sup> The Court held that the trial court did not abuse its discretion by permitting the jury to hear testimony describing the gang and its tenets over defendant's objection that the court should have only admitted evidence that Abel and Mills knew each other and had belonged to the same organization.<sup>363</sup> The Court left open the question of whether Mills' membership in the gang constituted a specific instance of his misconduct resulting in inadmissible extrinsic evidence.<sup>364</sup>

The court of criminal appeals returned two opinions dealing with the sub-

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355. *Id.* at 1016-1017.

356. *Id.* Here the court relied upon the Supreme Court's prior opinions in *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) and *Scales v. United States*, 367 U.S. 203, 219-224 (1959), cases in which the Court held that mere membership in a particular organization which espoused illegal aims and engaged in illegal conduct would not support a conviction under the Smith Act and state syndicalism laws when it was not shown that the defendant had personally adopted that organization's tenets.

357. 105 S. Ct. at 467, 83 L. Ed. 2d at 455 (referring to FED. R. EVID. 608, 609 and 610).

358. FED. R. EVID. 401, 402, 607, 608, 610.

359. 105 S. Ct. at 468, 83 L. Ed. 2d at 456. Bias in the common law of evidence referred to the relationship between the party and a witness that might lead the witness to slant his testimony in favor of or against a party due to the witness' self-interest or like, dislike or fear of a party. 105 S. Ct. at 467, 83 L. Ed. 2d at 457.

360. *Id.*

361. *Id.*

362. 105 S. Ct. at 470, 83 L. Ed. 2d at 458.

363. *Id.* Here the *type* of organization "bore directly not only on the *fact* of bias but also on the *source* and strength of Mills' bias." *Id.* (emphasis original). By way of contrast, if the prosecution had shown common membership in an organization unrelated to the subject matter of the litigation, such as the Book of the Month Club, the mutual membership might have not been relevant. *Id.*

364. 105 S. Ct. at 471, 83 L. Ed. 2d at 460.

ject of impeachment that deserve brief attention here. In *Madden v. State*<sup>365</sup> the court held that the trial court's refusal to determine the voluntariness of an extra-judicial statement by the defendant, offered for purposes of impeachment, was reversible error.<sup>366</sup> Use of an involuntary extra-judicial statement in a criminal trial for any purpose, including impeachment, constitutes a denial of due process regardless of the strength of the other evidence against the accused. The issue of the voluntariness of the defendant's statement thus obligated the trial court to hold an evidentiary hearing.<sup>367</sup>

The court of criminal appeals had previously held it improper to impeach a witness by proof of a prior juvenile record,<sup>368</sup> except when the impeachment demonstrates the witness' bias, motive or prejudice to assist the party for whom he is testifying.<sup>369</sup> Cross-examination of a State's witness concerning charges pending against him constitutes one circumstance in which the courts generally permit cross-examination to establish motive or bias.<sup>370</sup>

In *Carmona v. State*<sup>371</sup> five juvenile witnesses testified against the defendant, incriminating him in the aggravated kidnapping charged in the indictment. One witness, Joe Garcia, although too young at the time of the aggravated kidnapping to be prosecuted for that offense,<sup>372</sup> had subsequently committed a burglary and at the time of Carmona's trial had juvenile court charges pending against him in connection with that subsequent offense. The trial court, however, refused to permit the defendant to impeach Garcia with the pending burglary charge.<sup>373</sup>

The court of criminal appeals, although agreeing that the court of appeals had utilized an improper analysis to resolve the issue, upheld the court's

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365. 691 S.W.2d 688 (Tex. Crim. App. 1985).

366. *Id.* at 691. Sections 5 and 6 of TEX. CRIM. PROC. CODE ANN. art. 38.22 (Vernon (1979), in effect at the time of the defendant's trial in 1979, authorized the impeachment of an accused with his voluntary extra-judicial statement. *Id.* Section 6 requires that the trial court, however, was obligated to conduct an independent finding (in the absence of the jury) as to the voluntariness of the statement in every case where a question is raised as to the voluntariness of a statement of the accused. 691 S.W.2d at 690.

The court recognized that a statement of the accused obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) might be used for the limited purpose of impeachment. *See Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). The court had also held that such statements were admissible for impeachment only if they were voluntary. *See Mincey v. Arizona*, 437 U.S. 385, 397-398 (1978).

367. 691 S.W.2d at 690.

368. *Barecky v. State*, 639 S.W.2d 943, 944 (Tex. Crim. App. 1982).

369. *Harris v. State*, 642 S.W.2d 471, 476 (Tex. Crim. App. 1982) (citing *Davis v. Alaska*, 415 U.S. 308, 310 (1974)); *Alford v. United States*, 282 U.S. 687, 688 (1931).

370. Cross-examination on pending charges is permissible in such circumstances despite the dictates of TEX. CRIM. PROC. CODE ANN. art. 38.29 (Vernon 1979) which provides that witnesses may be impeached only with proof of a final conviction. *See Parker v. State*, 657 S.W.2d 137, 139-140 (Tex. Crim. App. 1983).

371. 670 S.W.2d 695 (Tex. App.—Texarkana 1984), *aff'd*, 698 S.W.2d 100 (Tex. Crim. App. 1985).

372. Garcia was thirteen years old at the time of the kidnapping. 670 S.W.2d at 697. *See TEX. PENAL CODE ANN.* § 8.07 (Vernon 1973) (providing that with certain inapplicable exceptions, no person may be prosecuted for an offense committed when he was younger than fifteen years of age).

373. 698 S.W.2d at 105.

affirmance of the conviction.<sup>374</sup> The court of criminal appeals held that *Davis v. Alaska*<sup>375</sup> did not establish a per se rule "mandating reversal of a conviction in every case wherein a trial court has limited or prevented cross-examination into the area of unadjudicated juvenile offenses."<sup>376</sup> Rather, said the court, *Davis* stands only for the proposition that "no criminal defendant may be denied an *effective* cross-examination of the witnesses against him."<sup>377</sup> Four defense attorneys thoroughly cross-examined Garcia for well over a day and a half. The testimony before the jury established that Garcia had been offered and received a great deal of leniency from the State. Other testimony established a vivid portrayal of "the life of a juvenile miscreant."<sup>378</sup> The court concluded that Garcia had been thoroughly and effectively cross-examined and his general bias and prejudice as a witness had been made "patently obvious" to the jury.<sup>379</sup> Accordingly, the exclusion of evidence concerning the pending juvenile burglary charge was not reversible error.<sup>380</sup>

### B. Evidentiary Rulings

The proper application of the confrontation clause arose in several recent cases concerning the improper admission of evidence offered by the prosecution. In *Tennessee v. Street*<sup>381</sup> Chief Justice Burger articulated the unanimous view of the eight participating justices that the introduction of an accomplice's confession, offered for the non-hearsay purpose of rebutting the defendant's testimony that his own confession constituted a coerced copy of the accomplice's statement, did not implicate the defendant's rights under the confrontation clause of the sixth amendment.<sup>382</sup> A recitation of the facts of the case is necessary to an understanding of the Court's narrow holding.

The defendant and several others, including one Peele, had burglarized

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374. *Id.* at 121. The court of appeals reasoned that because the juvenile burglary charge against Garcia was dismissed after Carmona's trial, the confrontation clause concerns addressed in *Davis v. Alaska*, 415 U.S. 308 (1974), were not implicated. 670 S.W.2d at 698. The court of criminal appeals noted that the dismissal of the charge after Carmona's trial "further buttresses the inference that the charge was kept pending as an incentive for Garcia to testify in the State's behalf . . ." against Carmona. 698 S.W.2d at 102.

375. *See Davis*, 415 U.S. 308 (1974).

376. *Id.* at 319-20.

377. 698 S.W.2d at 103-04. Judge Clinton's dissent took issue with this analysis, urging that in *Davis* the Supreme Court had rejected the Alaska Supreme Court's conclusion that sixth amendment confrontation rights were satisfied when the accused had an adequate opportunity to cross-examine the witnesses against him on the issue of bias or motive. 698 S.W.2d at 106-107 (quoting *Davis*, 415 U.S. at 314-315). Judge Clinton concluded that the mere substitution of effective cross-examination for adequate cross-examination of a witness with a juvenile record would not conform to the requirements set out by the court in *Davis*. 698 S.W.2d at 107.

378. This evidence was substantial and included testimony concerning Garcia's prior acts of shoplifting and marijuana cultivation, prior abuse of drugs and alcohol, and the witness' open admission of having committed perjury before a Travis County Grand Jury, an offense from which Garcia was not immune from prosecution. *Id.* at 104.

379. *Id.*

380. *Id.* at 105.

381. 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985).

382. *Id.* at 2078, 85 L. Ed. 2d at 433.

the home of the elderly murder victim. When the victim returned home unexpectedly and confronted the burglars, a struggle ensued. Ultimately, the burglars took the victim outside and hung him from a tree. Approximately two weeks after the murder, the defendant made a written confession to the local sheriff in the presence of several state officers, an assistant attorney general and a juvenile judge. The next day, the defendant recanted his earlier confession.

At trial, the defendant presented an alibi defense and claimed that the written confession had been extracted by the sheriff by means of coercion and threats. The defendant testified that the sheriff had read Peele's written confession to him a number of times and told him to say the same thing contained in that confession. According to the defendant whenever he made a statement differing from Peele's confession, the sheriff would accuse him of lying and would then read Peele's statement. The defendant would then say "that's right."<sup>383</sup>

The court permitted the State to recall the sheriff and through his sponsorship offered Peele's written confession, not to prove the truth of the matters contained therein, but for the purpose of refuting the defendant's allegation that his statement was derived from Peele's confession. The parties made no attempt to call Peele as a witness or to exact portions of the Peele confession which implicated the defendant. The judge instructed the jury to consider Peele's confession for rebuttal purposes only.<sup>384</sup>

The Tennessee Court of Criminal Appeals reversed the conviction. Relying upon *Bruton v. United States*<sup>385</sup> the Tennessee court held that the trial court had violated the defendant's sixth amendment rights.<sup>386</sup> The court rejected the interlocking confessions doctrine<sup>387</sup> analysis advanced by the state.<sup>388</sup> The respective confessions of the defendant and Peele both placed primary responsibility for the murder on the other; therefore, the confessions were not interlocking.<sup>389</sup>

In reversing the Tennessee court, the Supreme Court noted that the use of the confession of a non-testifying co-defendant would not have been admissible as substantive evidence of guilt.<sup>390</sup> Peele's confession, however, was not admitted for that purpose.<sup>391</sup> Peele's confession was not hearsay because it was admitted solely to rebut the defendant's version of how his statement

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383. *Street*, 674 S.W.2d 741, 744 (Tenn. Crim. App. 1984).

384. *Id.*

385. 391 U.S. 123 (1968).

386. 674 S.W.2d at 747.

387. *Parker v. Randolph*, 442 U.S. 62 (1979).

388. 674 S.W.2d at 746.

389. *Id.* The Tennessee court of criminal appeals also advanced the theory that the interlocking confessions doctrine applied only when the jointly tried co-defendants have confessed and their confessions are similar in material aspects. *Id.* Even if the doctrine was applicable to severed trials, when the confession of a non-testifying co-defendant exposed the defendant on trial to increased risk of conviction or punishment, the interlocking confession exception would be inapplicable. *Id.* at 742-43.

390. 105 S. Ct. at 2081, 85 L. Ed. 2d at 430; see *Ohio v. Roberts*, 448 U.S. 56 (1980); *Dutton v. Evans*, 400 U.S. 74 (1970).

391. 105 S. Ct. 2081, 85 L. Ed. 2d at 430.

was obtained. The court held that *Bruton* was distinguishable.<sup>392</sup> The Court recognized that as in *Bruton* the jury could have misused Peele's confession if the jury had been asked to consider Peele's statement as evidence of the defendant's participation in the murder.<sup>393</sup> The jury was pointedly instructed by the trial court not to consider the statement for its truthfulness.<sup>394</sup> The Court found it could rely on the crucial assumption that the jurors followed the instructions given to them by the trial court.<sup>395</sup>

The Court emphasized that in the case before it there were no alternatives that would have maintained the trial court's truth seeking function and at the same time prevented improper use of the evidence.<sup>396</sup> Editing Peele's confession would have impaired the jury's evaluation of the defendant's testimony that his confession was a coerced imitation of Peele's and editing might have harmed the defendant by creating artificial differences between the two confessions.<sup>397</sup> The Court noted that calling Peele to testify as a witness would not have permitted the State to refute the defendant's claim that his confession was coerced and cross-examination of Peele by defense counsel would not have defeated the State's limited purpose in introducing Peele's confession.<sup>398</sup>

Confrontation clause considerations played a central role in a series of decisions by several Texas courts of appeals that focused on the validity of article 38.071 of the Code of Criminal Procedure.<sup>399</sup> Enacted in 1983, article 38.071 authorizes the admission of live or video taped testimony of a child witness under the age of twelve when the child is the complaining witness in the prosecution for a sexual offense defined by chapter 21 of the Penal Code<sup>400</sup> or for the offense of sexual performance of a child.<sup>401</sup> Article 38.071 contemplates several related, but different types of video taped evidence. Section 2 of article 38.071 authorizes the admission of a pre-trial interview of the child-victim made when no attorney for either party is present. Under this section, both the child and the person interviewing the child must be available to testify and be cross-examined at trial. Under section 3, during the trial, attorneys may examine the child outside the courtroom while the testimony is simultaneously shown in the courtroom. Section 4 provides that a video tape of an interview conducted prior to trial under circumstances similar to those outlined in section 3 may be played before the jury. Under both sections 3 and 4 the defendant is allowed to see and hear the testimony of the child but the court must ensure that the child cannot

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392. *Id.*

393. *Id.*

394. 105 S. Ct. at 2081, 85 L. Ed. 2d at 430.

395. 105 S. Ct. at 2082, 85 L. Ed. 2d at 431.

396. 105 S. Ct. at 2082, 85 L. Ed. 2d at 432.

397. *Id.*

398. *Id.*

399. TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1986).

400. See TEX. PENAL CODE ANN. §§ 22.011, 22.021 (Vernon Supp. 1986) (containing the sexual offenses formerly proscribed in Chapter 21).

401. TEX. PENAL CODE ANN. § 43.25 (Vernon Supp. 1986). Sexual performance of a child constitutes an obscenity offense. *Id.*



hear or see the defendant.<sup>402</sup> If the court utilizes either of the types of interviews authorized by sections 3 and 4, pursuant to section 5, the child may not be required to testify at the proceeding for which the testimony was taken.<sup>403</sup>

The protections of the confrontation clause compete against the public policy advantages inherent in permitting the use of video taped testimony.<sup>404</sup> The confrontation of witnesses: 1) ensures the witness will give his statement under oath; 2) forces the witness to submit to cross-examination; and 3) permits the jury to observe the demeanor of the witness, aiding the jury in assessing his credibility.<sup>405</sup>

The courts have never read the confrontation clause literally because such an approach would negate the operation of virtually every established hearsay exception.<sup>406</sup> In *Powell v. State*<sup>407</sup> the Dallas court of appeals held that the introduction of video taped testimony of the child-victim introduced pursuant to article 38.071, section 4, violated both the sixth amendment and the confrontation clause protections contained in the Texas Constitution.<sup>408</sup> In holding this portion of the statute unconstitutional the court found that the right to a face-to-face confrontation at trial is an essential component of an accused's confrontation rights.<sup>409</sup> The court found itself unable to agree with the holding of a New Jersey appellate court that had approved the ad-

402. Under § 2 of article 38.071 the defendant is not specifically excluded from the interview. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon Supp. 1986). Another question unanswered by the express language of the statute is whether the trial judge is to be present when the child is examined.

403. *Id.* §§ 3-4.

404. For an interesting and informative overview of the area of video tape testimony of child victims of sexual abuse crimes and the legislatively crafted exceptions to the general hearsay rule prohibitions against the admission of out-of-court statements by such witnesses see Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985).

There are various problems associated with child-witnesses generally which the procedures authorized by art. 38.071 may alleviate. For example, children are easily confused by cross-examination and may recant their earlier testimony on direct examination and the child witness may be more intimidated than an adult witness by the trappings of the courtroom and the presence of a large number of strange adults. It is especially difficult for children to discuss matters involving sexual assaults on their person because their general embarrassment about sexual matters and the feeling that they are somehow responsible for the attack and have done something wrong. In addition, the defendants in such cases are likely to be relatives of the child or family friends, and the child would be reluctant to exculpate. *Id.* at 807-08.

The trauma of having to testify about the sexual assault in court may itself be damaging to the child-victim's psychological health. By permitting the child to testify on video tape prior to trial the child can put the incident behind him or her once and for all. See Libai, *The Protection of the Child Victim of a Sexual Abuse Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 984 (1969).

405. See *California v. Green*, 399 U.S. 149, 158 (1970) (comparing purposes of the confrontation clause with alleged dangers of admitting out-of-court statements).

406. *Ohio v. Roberts*, 448 U.S. 56 (1980). For an analysis of the relationship between the confrontation clause and the admissibility of hearsay statements in criminal prosecutions see Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979).

407. 694 S.W.2d 416, 421 (Tex. App.—Dallas 1985, pet. granted).

408. TEX. CONST. art. I, § 10.

409. The court relied on the Supreme Court's holdings in *Dowdell v. United States*, 221 U.S. 325 (1911) and *Kirby v. United States*, 174 U.S. 47 (1899) and implications from *Davis v. Alaska*, 415 U.S. 308, 315 (1974). *Id.* at 419. In addition, the opinion cited the preference for

mission of video taped testimony of a child-witness in a sexual abuse case.<sup>410</sup>

The majority of the courts of appeals that faced the issue of the constitutional validity of this section during the Survey period upheld section 2 of the statute against confrontation clause attacks because the child-witness must be available to testify, according to the statute.<sup>411</sup> The Dallas court of appeals, however, in *Long v. State*,<sup>412</sup> held that section 2 of article 38.071 violated the defendant's right to confrontation.<sup>413</sup>

The ultimate constitutional questions surrounding article 38.071 must await final resolution in the court of criminal appeals or beyond. In those cases where article 38.071 video taped testimony is used, practitioners should be aware that when such testimony is used, it is subject to pre-trial discovery.<sup>414</sup>

## VII. THE TRIAL COURT'S CHARGE TO THE JURY

In *Francis v. Franklin*<sup>415</sup> a bare majority of the United States Supreme Court, speaking through Justice Brennan, affirmed the court of appeals' decision<sup>416</sup> reversing a Georgia death penalty conviction. The appeals court reversed on the ground that the charge to the jury concerning the presumption of intent arising from the acts of the accused<sup>417</sup> improperly shifted the

face-to-face confrontation expressed by the Court in *Ohio v. Roberts*, 444 U.S. 56, 63 (1980). *Id.*

410. *Id.* at 420. In *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984), the court approved a video tape testimony format that was fashioned by a trial judge operating without benefit of enabling statute.

411. *Alexander v. State*, 692 S.W.2d 563, 566-67 (Tex. App.—Eastland 1985, pet. granted); *Tolbert v. State*, 697 S.W.2d 795 (Tex. App.—Houston [1st Dist.] 1985, no pet.); *Newman v. State*, 700 S.W.2d 307, 312 (Tex. App.—Houston [1st Dist.] 1985, no pet.); *Jolly v. State*, 681 S.W.2d 689, 695 (Tex. App.—Houston [14th Dist.] 1984, pet. granted).

In *Jolly* the court held that the phrase "before the proceeding begins" as used in 38.071, § 2 means before the trial begins, rejecting the Appellant's claim that the proceedings against him began when the complaint against him was filed. 681 S.W.2d at 696-697. However, in *Lawson v. State*, 697 S.W.2d 799 (Tex. App.—Houston [1st Dist.] 1985, no pet.), the court refused to follow this holding. *Id.* at 801-03.

In *Jolly*, the court also held that the trial court did not exceed the scope of its discretion by admitting the video tape without first having a hearing as to the child-witness' competency, since the trial court previewed the tape itself and could make a competency determination based on the testimony of the child-witness during the taped interview. 681 S.W.2d at 695.

In both *Jolly* and *Tolbert*, the courts of appeals held that an indictment's failure to allege the fact that the child-victim was under twelve years of age did not prevent the admission of an otherwise admissible video tape interview. 681 S.W.2d at 696; 697 S.W.2d at 797.

412. 694 S.W.2d 185 (Tex. App.—Dallas 1985, pet. granted).

413. *Id.* at 191.

414. *Reynolds v. Dickens*, 685 S.W.2d 479 (Tex. App.—Fort Worth 1985, no pet.). The court held that the video taped interview was an object or tangible thing within the meaning of TEX. CRIM. PROC. CODE ANN. art. 39.14 (Vernon 1983). 685 S.W.2d at 483. The defendant was entitled not just to have defense counsel view the tape prior to trial, as provided by art. 38.071, § 2(7), but to have a copy of the tape made so the defendant's experts could examine it prior to trial. 685 S.W.2d at 483-84.

415. 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

416. 720 F.2d 1206 (11th Cir. 1983), *reh'g denied*, 723 F.2d 770 (1984).

417. The challenged portion of the instructions to the jury provided:

The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of

burden of proof from the State to the accused on an element of the crime charged.<sup>418</sup> This violated the due process protections recognized in *Sandstrom v. Montana*.<sup>419</sup> Justice Brennan termed the issue before the Court in *Franklin* almost identical to the issue presented in *Sandstrom*.<sup>420</sup> The additional instruction submitted to the jury in *Franklin* to the effect that the presumption of intent may be rebutted did not make the improper instructions regarding the mandatory presumption less constitutionally infirm.<sup>421</sup> The Court again left open the question of whether an erroneous charge that shifts the burden of persuasion to the defendant on an essential element of the offense can ever be harmless error,<sup>422</sup> by deferring to the court of appeals' determination<sup>423</sup> that the *Sandstrom* error in the case before it could not be deemed harmless error.<sup>424</sup>

Several Texas cases decided during the Survey period dealt with the problem of jury instructions that contained or that were alleged to contain presumptions that violated the rule enunciated in *Sandstrom v. Montana*. In *Shockley v. State*<sup>425</sup> the court of appeals held that the submission of an instruction advising that breaking and entering at nighttime raises the presumption of an intent to commit theft constituted reversible error in the prosecution for the offense of burglary.<sup>426</sup> The presumption<sup>427</sup> of an intent to steal from such facts, the court held, is merely a device used to determine the

sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

105 S. Ct. at 1969-70, 85 L. Ed. 2d at 351-52.

The court of appeals concluded that this language constituted a mandatory rebuttable presumption, prohibited by *Sandstrom*, since

a reasonable juror could conclude that on finding the basic facts (sound mind and discretion) he must find the ultimate fact (intent for the natural consequences of an act to occur) unless the defendant has proven the contrary by an undefined quantum of proof which may be more than 'some' evidence.

720 F.2d at 1210. Relying on its earlier analysis of the Georgia murder statutes in *Lamb v. Jernigan*, 683 F.2d 1332, 1337 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 1276, 75 L. Ed. 2d 496 (1983), the court of appeals also concluded that an intent to kill and the lack of provocation or justification were both essential elements of malice murder under the Georgia statute. The intent instruction given in *Franklin*, therefore, related to an essential element of the offense. 720 F.2d at 1210.

418. *Id.* at 1209.

419. 442 U.S. 510 (1979).

420. 105 S. Ct. at 1971, 85 L. Ed. 2d at 353. Later in his opinion, Justice Brennan states that the words used in the *Franklin* instruction have the same meaning as the language condemned in *Sandstrom*. 105 S. Ct. at 1972, 85 L. Ed. 2d at 354.

421. *Id.* While the presumption was not an irrebuttable or conclusive presumption, relieving the state of its burden of proof by removing the presumed element entirely from the case if the state proves the predicate facts, mandatory rebuttable presumptions, while less onerous for the defendant, are no less unconstitutional. 105 S. Ct. at 1972, 85 L. Ed. 2d at 355 (citing *Sandstrom*, 442 U.S. at 524 and *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975)).

422. 105 S. Ct. at 1977, 85 L. Ed. 2d at 360. See *Connecticut v. Johnson*, 460 U.S. 73, 97 n.5 (1983) (Powell, J., dissenting).

423. 720 F.2d at 1212.

424. 105 S. Ct. at 1977, 85 L. Ed. 2d at 360-61.

425. 695 S.W.2d 754 (Tex. App.—Dallas 1985, pet. pending).

426. *Id.* at 755.

427. The court of appeals noted that in *Hardesty v. State*, 656 S.W.2d 73, 76 (Tex. Crim. App. 1983), the court of criminal appeals had stated that the presumption of intent to commit theft from such facts is not a true presumption but merely a permissible inference that allows

sufficiency of the evidence, rather than an element of the State's case.<sup>428</sup>

The court reached a different result in *Scherlie v. State*<sup>429</sup> when the accused attacked the constitutional validity of the submission of an instruction that tracked the definition of intoxicated now found in the driving while intoxicated statute.<sup>430</sup> The court rejected the defendant's contention that the submission of such an instruction constituted the impermissible use of a mandatory presumption.<sup>431</sup> The *Scherlie* court relied upon the recent holding of the Fort Worth Court of Appeals in *Forte v. State*,<sup>432</sup> a case in which the constitutional validity of the new definition of "intoxicated" was challenged.<sup>433</sup> The *Forte* court concluded that the statutory definition of intoxication found in the present DWI statute did not violate the rule of *Sandstrom* because, rather than creating a presumption of intoxication, "the statute defines in precise terms the conduct proscribed."<sup>434</sup>

Another Texas case concerned with the proper role of presumptions in jury charges was *Castillo v. State*.<sup>435</sup> The court held that in a murder prosecution, a defendant who testifies that he did not intentionally shoot the victim is entitled to have the court instruct the jury on the lesser included offense of aggravated assault.<sup>436</sup> The court did not rely upon constitutional grounds in reaching this conclusion, but rather upon the court of criminal appeals' earlier opinion in *Harrell v. State*<sup>437</sup> wherein the court had held that a statutory presumption of an intent to kill arising from the use of a deadly weapon no longer exists.<sup>438</sup>

the fact finder to draw the existence of such intent from the circumstances of a nighttime entry but does not obligate such a finding. 695 S.W.2d at 756.

428. 695 S.W.2d at 756. The court of appeals quoted from dicta contained in the court of criminal appeals' opinion in *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985). The court of appeals also specifically recognized the *Sandstrom* problem inherent in such an instruction. *Id.* at 757, n.1.

429. 689 S.W.2d 294 (Tex. App.—Houston [1st Dist.] 1985, pet. granted).

430. TEX. REV. CIV. STAT. ANN. art. 6701/-1 (Vernon Supp. 1986).

Under prior law, Section 3(a) TEX. REV. CIV. STAT. ANN. art. 6701/-5 (Vernon 1977) (the so called implied consent statute), provided that in a criminal trial involving "acts alleged to have been committed by any person while driving . . . a motor vehicle while under the influence of intoxicating liquor," in which evidence established that there was "0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor." *Id.* at § 3. This presumption was rebuttable, pursuant to TEX. PENAL CODE ANN. § 2.05 (Vernon 1974). *Slagle v. State*, 570 S.W.2d 916, 919 (Tex. Crim. App. 1978).

431. 689 S.W.2d at 296.

432. 686 S.W.2d 744 (Tex. App.—Fort Worth 1985), *aff'd in part, rev'd in part*, 707 S.W.2d 89 (1986) The court of criminal appeals held in *Forte* that the present DWI statute does not create an irrebuttable presumption. 707 S.W.2d at 94.

433. 689 S.W.2d at 296.

434. 686 S.W.2d at 747. In reaching this conclusion, the court relied on the many decisions of our sister states upholding the validity of similar statutes.

435. 686 S.W.2d 377 (Tex. App.—San Antonio 1985, no pet.).

436. *Id.* at 378.

437. 659 S.W.2d 825 (Tex. Crim. App. 1983).

438. In *Harrell*, the court held that while such a presumption was created by TEX. PENAL CODE art. 45 (1925), that the present Penal Code contains no similar provision. 659 S.W.2d at 827. The defendant in *Harrell* testified that he did not shoot to kill, but intended only to hit the deceased in the arm. Thus, he was not entitled to an instruction on aggravated assault as a

In *Almanza v. State*<sup>439</sup> an overwhelming majority<sup>440</sup> of the court of criminal appeals delivered the most far reaching decision in the area of Texas criminal procedure in the last several years. The majority opinion authored by Judge Clinton eliminates the automatic reversal rule in cases when fundamental error is contained in the application portion of the trial court's charge to the jury.<sup>441</sup> The court substituted a two-pronged test for analyzing error contained in a trial court's charge to the jury.<sup>442</sup> Under this analysis if

lesser included offense of murder, since this conduct, when it resulted in the death of the victim, constituted murder pursuant to TEX. PENAL CODE ANN. § 1902(a)(2) (Vernon 1974).

439. 645 S.W.2d 885 (Tex. App.—Fort Worth 1983), *rev'd*, 686 S.W.2d 157 (Tex. Crim. App. 1985), *conviction aff'd on remand*, 696 S.W.2d 282 (1985).

440. Despite the fact that the opinion was generally recognized as a clear break with past precedent, illustrated by the fact that on original submission the majority of the court would have voted to affirm the court of appeals' original decision, on rehearing only Judge Teague dissented. 686 S.W.2d at 178-80. Presiding Judge Onion filed an opinion that concurred in part and dissented in part. *Id.* at 174-78.

441. *Id.* at 174. Prior to *Almanza*, recent opinions of the court of criminal appeals had held that improper language contained in the application portion of the trial court's instructions to the jury could constitute grounds for reversing a conviction even though the error was not objected to at trial.

In *Cumbie v. State*, 578 S.W.2d 732, 733-35 (Tex. Crim. App. 1979), the court of criminal appeals gave examples of the four types of fundamentally defective expansive charges that the court had previously identified:

[1]) [a]n omission from the court's charge of an allegation in the indictment which is required to be proved has long been held to be fundamental error.

[Here the court cited as one example the failure to require the jury to find that stolen property was received from "some party to the grand jurors unknown." *Moore v. State*, 84 Tex. Crim. 256, 206 S.W. 683, 683 (1918);

...

[2]) [a] charge to the jury [that] substitutes a theory of the offense completely different from the theory alleged in the indictment;

...

[3]) [a] charge to the jury [that] authorizes conviction on the theory alleged in the indictment and on one or more theories not alleged in the indictment; [and]

...

[4]) [a] charge [that] authorizes conviction for conduct which is not an offense, as well as for conduct which is an offense.

*Id.*

In *Almanza* itself, the analysis of the charge was made more difficult by the fact that *Almanza's* criminal responsibility, as submitted by the charge, rested upon his responsibility as a party pursuant to TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974). See *Almanza*, 696 S.W.2d at 286-87 (containing copy of the relevant instructions). However, reduced to its essence, the problem presented was that in the application portion of the charge, which authorized a conviction for aggravated rape, the aggravating element of the offense (threat of death to be imminently inflicted), contained in TEX. PENAL CODE ANN. § 21.02 (Vernon 1974), was joined to the standard allegation for the offense of rape (force and threats), pursuant to TEX. PENAL CODE ANN. § 21.03 (Vernon 1974), by the disjunctive "or." The charge, therefore, permitted conviction for aggravated rape without requiring the jury to find that the aggravating element had been committed by either *Almanza* or his accomplice. The court of appeals reversed, 645 S.W.2d 886, citing *Messenger v. State*, 638 S.W.2d 883 (Tex. Crim. App. 1982), a case which was concerned not with aggravated rape but aggravated sexual abuse pursuant to TEX. PENAL CODE ANN. § 21.05 (Vernon 1974). The interplay between the offenses of aggravated sexual abuse and sexual abuse pursuant to TEX. PENAL CODE ANN. § 21.04 (Vernon 1974), was identical to the relationship between aggravated rape and rape under the pre-1983 amendment version of the Penal Code. In 1983 §§ 21.02-21.05 of the Penal Code were repealed and conduct formerly prescribed by those sections of the Penal Code is now proscribed by TEX. PENAL CODE ANN. §§ 22.011, 22.021 (Vernon Supp. 1986).

442. 686 S.W.2d at 171.

the error in the charge complained of on appeal is ordinary reversible error, that is, error properly preserved by an objection at trial,<sup>443</sup> then reversal of the conviction is required if the error does some harm to the rights of the accused.<sup>444</sup> If, however, counsel made no objection to the charge at trial that comports to the ground brought forward on appeal,<sup>445</sup> requiring the accused to claim that the error was fundamental, then he will obtain a reversal only if the error is so egregious and harmful that he has been deprived of a fair trial.<sup>446</sup>

After a lengthy and circumspect review of the development of the present version of article 36.19 of the Texas Code of Criminal Procedure,<sup>447</sup> the majority opinion announced the above stated analysis of appeals grounded on errors contained in the trial court's charge to the jury.<sup>448</sup> Part II of the opinion then turned to a discussion of the test's application.<sup>449</sup> The proper application of the new test for fundamental error involves first, a recognition that a charge authorizing a conviction will not necessarily be fundamentally

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443. TEX. CODE CRIM. PROC. ANN. arts. 36.14, 36.15 (Vernon Supp. 1986) (permitting the defendant to object to the trial court's proposed charge to the jury by either objecting to the trial court's charge or by tendering requested instructions supplementing those contained in the trial court's charge).

444. 686 S.W.2d at 171. See TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981) (providing the second prong of the test to be applied to errors in the charge not objected to at trial).

445. The "ground brought forward on appeal" language is supplied by the Survey author. Presumably, the *Almanza* opinion did not alter the rule that requires any objection at trial to comport to the complaint on appeal in order to preserve error (assuming the error is not so fundamental that no objection at all is required).

446. 686 S.W.2d at 171.

447. *Id.* at 161-71. Judge Clinton recognized at the outset "the simple fact that no conceivable theory can reconcile the cases written on the subject over the last 130 years." *Id.* at 161.

While on its surface the majority's historical justification for the rule announced in *Almanza* seems perfectly plausible, Presiding Judge Onion was less than convinced, stating that the majority's construction of Article 36.19 is a product of its "own reading of the statutory and decisional law, by removing commas in earlier opinions and reinterpreting them, and by selected excerpts from other cases." *Id.* at 174 (Onion, P.J., concurring and dissenting).

This analysis of Judge Clinton's opinion seems unduly harsh, yet there does remain the question of how it is that the new interpretation of art. 36.19 has only recently revealed itself despite the fact that it has been 20 years since the present Code of Criminal Procedure was adopted.

For his part, Presiding Judge Onion admitted that art. 36.19 is subject to numerous and conflicting interpretations. *Id.* at 175. However, the Presiding Judge placed the blame for the increased number of fundamental error per se reversals upon the court's partial abandonment of the practice of reading the trial court's charge as a whole and instead treating the application paragraph of the charge as if one and only one paragraph applies the law to the facts. *Id.* at 177. In addition, Presiding Judge Onion cited sloppiness on the part of trial court judges in preparing their charges to the jury. *Id.* at 177-78.

The presiding judge also questioned the wisdom of remanding the case to the court of appeals since the court of appeals would be applying a new rule without the guidance of the court of criminal appeals. *Id.* at 178.

Perhaps in response to this latter criticism, the week after *Almanza* was returned the court of criminal appeals applied the *Almanza* doctrine rather than remanding the case to the court of appeals. See *Kucha v. State*, 686 S.W.2d 154 (Tex. Crim. App. 1985); *Mosley v. State*, 686 S.W.2d 180 (Tex. Crim. App. 1985); *Bonfanti v. State*, 686 S.W.2d 149 (Tex. Crim. App. 1985).

448. 686 S.W.2d at 172.

449. *Id.*

erroneous simply because it authorizes a conviction of the offense charged on different theories of that offense than were alleged in the indictment.<sup>450</sup> Second, the reviewing court must conduct an evidentiary review of the record in the case. This review should not be limited to an examination of the charge's deviation from the allegations contained in the indictment, but should also include a review of the state of the evidence, the State's theory of the case, and the arguments of counsel based on the charge.<sup>451</sup> The reviewing court should reverse the conviction only when this evidentiary review demonstrates actual harm to the accused.<sup>452</sup>

The opinion also overruled *Cumbie v. State*,<sup>453</sup> to the extent that it held that any error in the charge mandates automatic reversal.<sup>454</sup> The opinion noted that the court of appeals had reversed the case based on the court of criminal appeals' prior holding in *Messenger v. State*,<sup>455</sup> a decision following the automatic reversal doctrine set out in *Cumbie*, and remanded the case to the court of appeals to allow it to determine whether the error was so egregiously harmful as to require reversal.<sup>456</sup>

Judge Teague dissenting in *Lang v. State*<sup>457</sup> stated that the *Almanza* egregious harm standard regarding error in the trial court's charge that was not objected to at trial constituted a test that all convicted persons were doomed to fail on appeal.<sup>458</sup> Decisions of the courts of appeals as well as at least one opinion of the court of criminal appeals, however, suggest that Judge Teague's concerns might be overstated. In *Boone v. State*<sup>459</sup> the court of criminal appeals found that the trial court's charge on the issue of the pre-

450. *Id.* at 173.

Thus while it is clear that due process would be violated *per se* by convicting a person for murder when he had been indicted for a totally different offense such as robbery, it is faulty reasoning to cite such a proposition as authority for finding 'fundamental' charge error of the genre created by *Robinson*.

*Id.* (referring to *Robinson v. State*, 553 S.W.2d 371 (Tex. Crim. App. 1977)). Judge Clinton cites *Robinson* as the beginning of the "modern trend of the Court first to label certain errors [in the jury charge] 'fundamental' then automatically reverse convictions without regard to the nature and harm of the error in the case. . . ." *Id.* at 172-73. The erroneous premise in *Robinson*, was that alternative theories of criminal liability that are found "within the same penal proscription can never overlap in substance and must be treated . . . as if they are wholly different offenses containing different elements." *Id.* at 173.

451. *Id.* at 173-74.

452. *Id.* (quoting the court of appeals' prior opinion in *Davis v. State*, 28 Tex. Ct. App. 542, 13 S.W. 994, 995 (1890), *writ of error dismissed*, 139 U.S. 651 (1891)).

453. 578 S.W.2d 732 (Tex. Crim. App. 1979).

454. 686 S.W.2d at 174.

455. 638 S.W.2d at 883.

456. On remand, the court of appeals concluded that the error was not egregious under the facts of the case. The court held that the error was not harmless, reserving the right to reexamine the courts' use of the disjunctive "or" upon differing facts. 695 S.W.2d at 286.

457. 691 S.W.2d 692 (Tex. Crim. App. 1985).

458. *Id.* at 695 (Teague, J., dissenting). (Judge Teague labeling the *Almanza* test the "no pass, penitentiary rule"). *Id.* Judge Teague, ever the master of the colorful phrase, was led by his objections to the *Almanza* test to refer to that opinion as "the monster child, '*Almanza* the terrible,'" in his concurring opinion in *Kucha v. State*, 686 S.W.2d 154, 156 (Tex. Crim. App. 1985). See also *Lawrence v. State*, 700 S.W.2d 208, 214 (Tex. Crim. App. 1985) (*Almanza* "is so full of evil that it should be expressly overruled before it gives birth to too many more illegitimate children.") *Id.* (Teague, J., dissenting and concurring).

459. 689 S.W.2d 467 (Tex. Crim. App. 1985).

sumption of intoxication, given in a trial for the offense of driving while intoxicated, was worded in such a way as possibly to confuse the jury on the issue of burden of proof.<sup>460</sup> Such an error clearly met the requisite harm under *Almanza*'s standard of review for error that the trial court held objectionable.<sup>461</sup> In *Ruiz v. State*<sup>462</sup> the Austin court of appeals held that the omission of the requirement that the State's proof negate the existence of sudden passion<sup>463</sup> from the application portion of the trial court's charge on murder constituted fundamental reversible error under the *Almanza* test.<sup>464</sup>

In several cases in which convictions had been ordered reversed on *Cum-bie*-type error grounds by the court of appeals the convictions were ordered affirmed by the court of criminal appeals<sup>465</sup> or remanded to the court of

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460. *Id.* at 469. Similar defects had been found in *Eckman v. State*, 600 S.W.2d 937 (Tex. Crim. App. 1980) and *Ginther v. State*, 605 S.W.2d 610 (Tex. Crim. App. 1980).

461. 689 S.W.2d at 469.

462. 691 S.W.2d 90, 93 (Tex. App.—Austin 1985, pet. granted).

463. This type of error was first identified in a series of court of criminal appeals' cases decided prior to *Almanza*. *E.g.*, *Cobarrubio v. State*, 675 S.W.2d 749 (Tex. Crim. App. 1983). In *Moore v. State*, 694 S.W.2d 528 (Tex. Crim. App. 1985) the court of criminal appeals held that *Cobarrubio*-type error was not fundamental error where there was no evidence raising the sudden passion element of voluntary manslaughter. *Id.* at 531. While under the proper facts such an error might have been considered fundamental prior to *Almanza*, see *Cano v. State*, 681 S.W.2d 291 (Tex. App.—San Antonio 1984, pet. ref'd) and *Goff v. State*, 681 S.W.2d 619 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd), in which the court applied the *Almanza* analysis looking to the arguments of counsel, the state of the evidence, and the charge as a whole. *Id.* at 530-31.

The Austin court of appeals reached a similar result in *Huffman v. State*, 691 S.W.2d 726 (Tex. App.—Austin 1985, pet. granted), when it found the record contained no evidence that the defendant was acting under the influence of sudden passion. *Id.* at 731.

In *Lawrence v. State*, 700 S.W.2d 208 (Tex. Crim. App. 1985) the court also discussed the issue of whether *Cobarrubio* error constituted fundamental error consistent with the holding in *Almanza*, noting that "prior to our holding in *Almanza* this Court had not had the opportunity to determine if *Cobarrubio* error was fundamental under our State law." *Id.* at 211. The majority undertook "the responsibility" of resolving the issue, rather than remanding the case to the court of appeals. *Id.* at 211-12 n.5. Observing that under *Almanza*, each case involving a claim of error in the jury charge requires a case-by-case analysis where the assigned error was not objected to at trial, the majority undertook an examination of the evidence in the case. The majority concluded that voluntary manslaughter was an incidental theory of defense under the facts. *Id.* at 211. Therefore, the unobjected to *Cobarrubio* error did not deny the accused a fair trial. *Id.* at 212-13. Judges Teague and Clinton filed dissenting opinions. *Id.* at 213-19.

464. 691 S.W.2d at 94.

465. *Bonfanti v. State*, 686 S.W.2d 149 (Tex. Crim. App. 1985) (holding that indictment alleging the sole aggravating element of aggravated rape as a threat to cause death or serious bodily injury, but the charge authorizing conviction on that theory as well as aggravation by causing serious bodily injury not fundamental error under *Almanza*).

In both *Watson v. State*, 693 S.W.2d 938 (Tex. Crim. App. 1985) and *DeGarmo v. State*, 691 S.W.2d 657 (Tex. Crim. App. 1985) the trial court's charge had expanded the scope of the accused's criminal liability by authorizing a conviction (or punishment) based on acts of another or conduct committed against someone other than the complainant. In *Watson* the defendant was charged with burglary. The proof at trial was insufficient to support his conviction based on only his own conduct. However, the trial court charged the jury (over *Watson*'s objection) that they could convict him if they found he committed the offense of burglary alone or in conjunction with other parties. In *Savant v. State*, 544 S.W.2d 408, 409 (Tex. Crim. App. 1976), the court had held that such an application of the law of principles under similar facts was erroneous because it permitted the jury to find the accused guilty regardless of whether he alone committed the offense. In *Watson*, the court of appeals had relied on *Savant* and its progeny to reverse. 660 S.W.2d 882 (Tex. App.—Ft. Worth 1983). In



appeals for reconsideration<sup>466</sup> in light of *Almanza*. Several court of appeals' opinions decided after the return of *Almanza* relied upon the new approach in rejecting *Cumbe*-type error found in the trial court's charge as grounds for reversal of the conviction.<sup>467</sup>

Furthermore, cases involving claims of error in jury charges that were not those types of error identified in *Cumbe* felt the impact of *Almanza*.<sup>468</sup> In *Cane v. State*<sup>469</sup> the court of criminal appeals relied upon *Almanza*, holding that the defendant's failure to object to the trial court's proposed charge on the objectives of the Penal Code<sup>470</sup> on the ground that the proposed charge contained an incomplete statement of those objectives, required the defendant to show actual harm from the submission of the incomplete instruction.<sup>471</sup> In *Shannon v. State*<sup>472</sup> the court of criminal appeals reversed the court of appeals and ordered the case remanded to that court for reconsideration in light of *Almanza*. The court of appeals in *Shannon* had reluctantly reversed<sup>473</sup> the conviction relying upon the court of criminal appeals' prior

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light of the first prong of *Almanza*, the court of appeals held that the *Savant* rationale no longer applied in such situations. 660 S.W.2d at 884.

In *DeGarmo*, a capital punishment case, the first special issue that tracked the language of TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (Vernon Supp. 1986) asked the jury if the defendant caused the death of the deceased "with the reasonable expectation that the death of the deceased or another would result . . ." 691 S.W.2d at 663 (emphasis original). The court rejected DeGarmo's *Cumbe* error claim relying upon both *Almanza* and the fact that the charge in question first required the jury to find that the defendant had intended to kill the deceased. *Id.* at 663-64.

466. *Lang v. State*, 642 S.W.2d 68 (Tex. App.—Dallas 1982), *remanded*, 691 S.W.2d 692 (1985), *opinion on remand*, 698 S.W.2d 223 (1985).

467. *Rowden v. State*, 696 S.W.2d 490, 491-92 (Tex. App.—El Paso 1985, no pet.); *Cevallos v. State*, 699 S.W.2d 334, 336-337 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd).

468. 578 S.W.2d 732.

469. 698 S.W.2d 138 (Tex. Crim. App. 1985).

470. TEX. PENAL CODE ANN. § 1.02 (Vernon 1974).

In *Hart v. State*, 634 S.W.2d 714 (Tex. Crim. App. 1982), the court had held that the refusal of the defendant's request to include a charge on the objectives of the Penal Code was not reversible error. In *Cane* the court of appeals had construed the holding of *Hart* and dicta in earlier cases, as prohibiting the submission of a charge on the objectives of the Penal Code. 698 S.W.2d 366 (Tex. App.—Beaumont 1984). On this point, the court of criminal appeals disagreed, holding that submission of a charge pursuant to Section 1.02 of the Penal Code was discretionary with the trial court. 698 S.W.2d at 140.

471. *Id.* at 141. The court recognized that while a complete charge on the objectives of the Penal Code is discretionary, the given charge omitted several of the stated objectives of the Penal Code thereby constituting an erroneous charge. *Id.* at 140. Properly, the court should have charged on all the objectives and not just part of them. *Id.* (quoting the court of appeals' opinion in *Wilson v. State*, 680 S.W.2d 539, 542 (Tex. App.—Beaumont 1984, no pet.)).

At this point in the analysis, the court invoked the fundamental error rule of *Almanza*. 698 S.W.2d at 141. The court noted that at trial *Cane* had objected only to charges relating to § 1.02 of the Penal Code. *Id.* at 140. There was no objection at trial that notified the court that the charge submitted was inaccurate. No fundamental error was committed because the omission of the last three subsections did not result in egregious harm to the defendant. *Id.* at 140-41.

472. 698 S.W.2d 153, 154 (Tex. Crim. App. 1985).

473. 683 S.W.2d 819, 822 (Tex. App.—Texarkana 1984). The court of appeals noted that in its opinion the charge of the trial court in instructing the jury correctly applied the law to the facts of the case. *Id.* at 820. Nevertheless, the court found *Antunez v. State*, 647 S.W.2d 649 (Tex. Crim. App. 1983) controlling. 683 S.W.2d at 820.

opinion in *Antunez v. State*.<sup>474</sup> In *Antunez*, a pre-*Almanza* opinion, a bare majority of the court of criminal appeals reversed the conviction holding that the wording of the trial court's charge failed properly to apply the law regarding the lesser included offense of robbery to the facts of the case.<sup>475</sup>

In *Boyette v. State*<sup>476</sup> the court of criminal appeals held that under *Almanza*'s first prong, the instructions given to the jury with regard to lesser included offenses did not deprive the defendant of a fair and impartial trial because the charge explicitly instructed the jurors that if they had a reasonable doubt about the defendant's guilt of the greater charge they should acquit the defendant of the greater offense and consider whether the appellant was guilty of the lesser offenses.<sup>477</sup> The court indicated that in the post-*Almanza* era, it would continue to follow the rule that an accused may not complain of error contained in a requested charge that he submitted and that was then included in the jury instructions by the trial court.<sup>478</sup>

In *Mosley v. State*<sup>479</sup> the court of criminal appeals held that under *Almanza*, the failure of the trial court's charge to include a definition of a statutorily defined term<sup>480</sup> used elsewhere in the charge, did not constitute fundamental error. The failure to include a definition of a statutorily defined term, however, may still constitute reversible error if counsel objects to this omission at trial.<sup>481</sup>

Note also that two post-*Almanza* cases that were not concerned with any jury charge issue relied upon the definition of fundamental error found in *Almanza*. Grounded on *Almanza* the court of appeals in *Hoobler v. State*<sup>482</sup>

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474. 683 S.W.2d at 821.

475. In *Antunez*, the five judge majority had relied upon the court's earlier holding in *Williams v. State*, 622 S.W.2d 578 (Tex. Crim. App. 1981). 647 S.W.2d at 649. Presiding Judge Onion, speaking for the dissenters, filed a lengthy opinion. *Id.* at 651-53. Judge Onion deplored the practice of piecemeal consideration of the charge when determining questions of fundamental error.

476. 692 S.W.2d 512 (Tex. Crim. App. 1985).

477. *Id.* at 516. The charge given told the jurors that if they had a reasonable doubt as to the defendant's guilt of the greater offense they should then determine whether the defendant was guilty of the lesser included offense. *Id.* at 515. The court of criminal appeals found that while the charge given was not a model charge, the charge properly informed the jurors to consider whether the defendant was guilty of the lesser included charges. *Id.* at 516. The fact that this charge did not specifically use the word "acquit" with reference to the greater offense did not mean that the charge as a whole was defective. *Id.* The court noted that the defendant was convicted of one of the lesser included offenses, thus indicating that the jurors adequately understood the charge. *Id.*

478. *Id.* at 515. The court cited *Guitierrez v. State*, 659 S.W.2d 423 (Tex. Crim. App. 1983). The *Boyette* court, however, did not decide the case on *Guitierrez* grounds because the record on did not clearly indicate the origin of the charges submitted. *Id.*

479. 686 S.W.2d 180, 182 (Tex. Crim. App. 1985).

480. The term in the issue was "bodily injury" as defined by TEX. PENAL CODE ANN. § 1.07(a)(7) (Vernon 1974), and an element of the offense of aggravated robbery charged in the indictment. 686 S.W.2d at 182. The court noted that the evidence at trial clearly established the defendant's guilt and that the arguments of counsel indicated that there was no controversy surrounding the meaning of the term "bodily injury." *Id.*

481. *Arline v. State*, 690 S.W.2d 20 (Tex. App.—Beaumont 1984) remanded to court of appeals, 686 S.W.2d 157 (Tex. Crim. App. 1985), *on remand*, 702 S.W.2d 755 (1986, pet. pending).

482. 695 S.W.2d 785 (Tex. App.—Houston [1st Dist.] 1983, no pet.).

held that the fact that the district attorney had failed to sign the waiver of jury trial form was not fundamental error.<sup>483</sup> Likewise, in *McClain v. State*<sup>484</sup> the court of appeals concluded that the failure of the trial court to sign the written stipulation of evidence form did not constitute fundamental error.<sup>485</sup>

Apart from *Almanza* and its progeny the courts delivered several other opinions dealing with the issue of improper jury charges during the Survey period. Three cases dealt with the rule against the trial court commenting on the weight of the evidence in its charge to the jury.<sup>486</sup> In *Chambers v. State*<sup>487</sup> the court of criminal appeals relied upon this rule in holding that the trial court properly overruled the defendant's requested instruction that testimony presented by way of a deposition<sup>488</sup> introduced at trial was legally admissible evidence that may be considered as if presented at trial.<sup>489</sup> In *Canady v. State*<sup>490</sup> the court of appeals held that the portion of the trial court's charge that instructed the jury on the law regarding uncorroborated testimony of a sexual assault victim<sup>491</sup> did not constitute an improper comment on the weight of the evidence.<sup>492</sup> In *Russell v. State*<sup>493</sup> the court of appeals held that the rule against commenting on the weight of evidence was violated by an instruction that informed the jury that it was not bound by the testimony of qualified expert witnesses but could give such testimony the weight that it was entitled to when assessing its weight in relation to the

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483. *Id.* at 787. The waiver of jury form contained in the appellate record was not signed by the State's attorney. It was not disputed that the prosecution had in fact waived its right to a jury trial. *Id.* at 786. However, TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon 1977) requires that the State's attorney must approve the waiver of a jury trial and indicate his approval by written statement filed with papers of the cause prior to entry of the defendant's plea. The *Hoobler* court noted that *Lawrence v. State*, 626 S.W.2d 56 (Tex. Crim. App. 1981) provided grounds for reversal. 695 S.W.2d at 786. The court also concluded, however, that an application of the *Almanza* fundamental error test grounded on article 1.13 required an affirmation of the conviction. 695 S.W.2d at 786. The court recognized that *Almanza* pertained to jury charge error but held that the egregious error test should be applied to determine whether there was substantial compliance with statutory requirements, and whether there was actual harm to the accused. *Id.*

484. 697 S.W.2d 807, 809 (Tex. App.—Houston [1st Dist.] 1985, pet. granted).

485. TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon 1977) requires the trial court's written approval of the appearance of witnesses and any consent to stipulate evidence. See *Ellard v. State*, 650 S.W.2d 840 (Tex. Crim. App. 1983). This requirement obtains only when the trial is without a jury. See *Compton v. State*, 607 S.W.2d 246, 251-52 (Tex. Crim. App. 1980) (opinion on rehearing).

In *McClain*, the court relied upon its prior ruling in *Hoobler*, 695 S.W.2d 785, in holding that where the stipulation form itself was not signed by the trial court, but the court's written approval was noted on the docket sheet, there was no fundamental error. 697 S.W.2d at 809.

486. *Hawkins v. State*, 656 S.W.2d 70 (Tex. Crim. App. 1983); TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1986).

487. 700 S.W.2d 597, 599 (Tex. Crim. App. 1985).

488. See TEX. CODE CRIM. PROC. ANN. art. 39.02 (Vernon 1979) (permitting the use of depositions in criminal cases under certain circumstances).

489. 700 S.W.2d at 599.

490. 690 S.W.2d 620, 623 (Tex. App.—Dallas 1985, no pet.).

491. See TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1986).

492. 690 S.W.2d at 623.

493. 694 S.W.2d 207 (Tex. App.—Houston [1st Dist.] 1985, pet. granted).

other evidence offered.<sup>494</sup>

### VIII. PROSECUTORIAL ARGUMENT

Claims that prosecuting attorneys exceeded the bounds of proper jury argument form the basis of many appeals of criminal convictions. During the Survey period several courts returned decisions concerning the limits on prosecutorial argument and how appeals involving arguments that are alleged to have exceeded those bounds are to be evaluated by the reviewing court. In *United States v. Young*<sup>495</sup> the United States Supreme Court took the rare step of giving plenary consideration to a case involving the standards of prosecutorial conduct relevant to jury argument. The government sought certiorari to determine whether a prosecutor may express his personal opinion of the guilt of the accused after counsel for the defendant has asserted during his argument that the prosecutors did not believe that the defendant was guilty.<sup>496</sup> The Supreme Court unanimously agreed that defense counsel may not make such an argument. The proper response for the prosecutor was not to make an improper profession of his personal beliefs during his final argument, but rather to request a limiting instruction from the trial court to cure the error engendered by the defense attorney's remarks.<sup>497</sup> The issue that divided the Court was whether under the facts of the case, the prosecutor's remarks constituted plain error, permitting the de-

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494. *Id.* at 209-10. The court relied upon several prior cases decided by the court of criminal appeals that held that the trial court did not err in refusing to give such a charge since the charge, if given, would have constituted a comment on the weight to be given to the testimony. *Id.* at 109. See *Florio v. State*, 532 S.W.2d 614 (Tex. Crim. App. 1976). The court of appeals concluded that the same principles may be utilized by the defendant if applicable. *Id.* at 210.

495. 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

496. The defendant had been charged with a variety of crimes for allegedly selling an oil company fuel oil that had been falsely certified as sweet crude oil. Although the defendant's company had entered a plea of *nolo contendere* to all of the charges against it, Young himself elected to stand trial. He was ultimately convicted on some of the charges and acquitted on others. During arguments to the jury, defense counsel had attacked the conduct of the prosecutors as unethical, stated that there was "no one in the courtroom," including the prosecutors, who thought his client intended to defraud the oil company, and suggested that his client had been "the only one in this whole affair that has acted with honor and integrity." *Id.* at 1041, 84 L. Ed. 2d at 5-6. The attorneys for the government did not object to this argument. During the government's closing argument, however, the prosecutor stated that, since he was asked his personal opinion, he felt that Young did intend to defraud the oil company, and that he did not personally believe that the accused had acted honorably. The prosecutor also suggested that the jurors would not be doing their job if they found that the defendant's conduct could be characterized as an example of honor and integrity. Defense counsel did not object to these arguments and the trial court took no corrective action on its own initiative. *Id.* at 1041-42, 84 L. Ed. 2d at 6.

497. The majority opinion stated that the "kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded." *Id.* at 1043, 84 L. Ed. 2d at 8. The majority categorized the situation as "but one example of an all too common occurrence in criminal trials—the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action." *Id.* at 1044, 84 L. Ed. 2d at 9. Recognizing that its suggestions were made with the advantage of hindsight, the majority suggested that the better remedy would have been for the district judge to deal promptly with the improper argument of the defense counsel, thus blunting the need for the prosecutor to respond. *Id.* at 1045, 84 L. Ed. 2d at 11. In his dissent, Justice Brennan expressed full agreement with all of these conclusions. *Id.* at 1051, 84 L. Ed. 2d at 17-18.

defendant to raise a complaint on appeal based upon the prosecutor's improper expression of personal opinion, even though the defendant did not preserve the issue by objection to the argument at trial.<sup>498</sup> In the course of deciding this issue, the justices had an occasion to apply the rule of invited error in the context of improper prosecutorial argument. Complicating the Court's task was the fact that the court of appeals reached the conclusion that the prosecutor's arguments assigned as error constituted plain error with absolutely no supporting analysis.<sup>499</sup>

A bare majority of the Court, speaking through the Chief Justice, held that the prosecutor's remarks went well beyond what was required to "right the scale of justice" following the defense counsel's unwarranted remarks about the integrity of the prosecutors and the prosecutor's beliefs about the guilt of his client.<sup>500</sup> The majority noted, however, that the issue presented was not whether the prosecutor's remarks were appropriate, but whether they constituted plain error.<sup>501</sup> An unwarranted extension of the plain error rule, said the majority, risks skewing the rule's careful balancing of the need to encourage all trial participants to seek a fair trial the first time around against the Court's insistence on the prompt redress of any obvious injustice.<sup>502</sup> The Court held that a proper analysis of the problem by the court of appeals should have included an application of the rule of invited response or invited reply.<sup>503</sup> Under this doctrine the reviewing court must assess the probable effect of the prosecutor's response on the ability of the jury fairly to judge the evidence by considering the conduct of the defense counsel as well as the nature of the prosecutor's response.<sup>504</sup> In addition the court must consider the entire record when evaluating a plain error claim founded on improper prosecutorial argument.<sup>505</sup>

In applying this analytical framework to the facts of the case, the majority concluded that the jury could not have misunderstood the nature of the prosecutor's response.<sup>506</sup> In addition, the overwhelming evidence of guilt

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498. Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

499. 736 F.2d 565 (10th Cir. 1983) (per curiam). The court stated that it was "beyond cavil that such statements constitute prosecutorial misconduct." *Id.* at 570. In holding that the comments of the prosecutor rose to the level of plain error, the 10th Circuit's opinion summarily categorized the complained of remarks as "sufficiently egregious as to constitute plain error" without further elaboration. *Id.*

500. 105 S. Ct. at 1046, 84 L. Ed. 2d at 12.

501. *Id.* at 1042, 1046, 84 L. Ed. 2d at 7, 12.

502. *Id.* at 1047, 84 L. Ed. 2d at 12-13. "Reviewing courts are not to use the plain error doctrine to consider trial court error not meriting appellate review absent timely objection—a practice we have criticized as 'extravagant protection.'" *Id.* at 1047, 84 L. Ed. 2d at 13 (footnote and citations omitted).

503. *Id.* at 1044, 84 L. Ed. 2d at 10.

504. *Id.* at 1045, 84 L. Ed. 2d at 11.

505. 105 S. Ct. at 1047, 84 L. Ed. 2d at 13.

506. Prosecutorial expression of personal opinions of guilt pose two dangers. First, such remarks imply that there is evidence of guilt, in addition to that introduced before the jury, which was known to the prosecutor, thus jeopardizing the accused's right to be tried solely on the basis of evidence presented to the jury. In addition, the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government rather

eliminated any concern by the Court that the prosecutor's remarks unfairly exploited the prestige of the government or in any other way prejudiced the defendant.<sup>507</sup> Concluding that there was no plain error and that the challenged argument did not seriously affect the fairness of the trial, the majority reversed the judgment of the court of appeals, which had ordered a new trial.

In his dissent, in which two other justices joined, Justice Brennan conceded that the court of appeals had failed to apply the plain error rule to the facts of the case, but had instead merely concluded that the challenged remarks spoke for themselves and thus constituted plain error.<sup>508</sup> Justice Brennan would have ordered the case remanded to the lower court "for a proper plain-error inquiry."<sup>509</sup> The dissent then stated that the majority's invited error analysis was critically flawed.<sup>510</sup> Although conceding that the prosecutor's initial comments might have fallen "within the bounds of restrained reply,"<sup>511</sup> the dissent found that the other remarks of the prosecutor, when viewed cumulatively, so clearly violated the legal profession's disciplinary rules that the remarks warranted "stern and unqualified judicial condemnation."<sup>512</sup> One of the major abuses inherent in the invited error doctrine, according to Justice Brennan, is that the Court applied the doctrine as a "rule of unclean hands" rather than as a "limited corrective."<sup>513</sup> The Court's application of the doctrine resulted in the Court minimizing the seriousness of virtually unchecked prosecutorial appeals that far exceeded a fair response to the defense counsel's arguments.<sup>514</sup>

Justice Brennan also disagreed with the majority's decision to have the Supreme Court determine the plain error question itself rather than to remand the case to the court of appeals for further consideration.<sup>515</sup> He emphasized that because review of plain error and harmless error issues requires a detailed analysis of the trial record, it is not possible for the Supreme Court to make an even-handed review of the lower courts' resolutions of "fact-bound questions of possible prejudicial error."<sup>516</sup> The institutional role of the Court, said Justice Brennan, should be limited to deciding important questions of federal law and supervising the lower federal courts by insuring the uniformity and clarity of legal doctrines.<sup>517</sup>

Justice Stephens would have simply affirmed the court of appeals' judg-

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than its own view of the evidence. *Berger v. United States*, 295 U.S. 78, 88-89 (1935). See 105 S. Ct. at 1048, 84 L. Ed. 2d at 14. The majority concluded that in the instant case the "jury surely understood the comment for what it was—a defense of his decision and integrity—in bringing criminal charges on the basis of the very evidence the jury had heard during the trial." 105 S. Ct. at 1048, 84 L. Ed. 2d at 14.

507. *Id.*

508. *Id.* at 1050, 84 L. Ed. 2d at 16 (Brennan, J., concurring in part and dissenting in part).

509. *Id.*

510. *Id.* at 1051, 84 L. Ed. 2d at 18.

511. *Id.* at 1052, 84 L. Ed. 2d at 20.

512. *Id.*

513. *Id.* at 1053, 84 L. Ed. 2d at 21.

514. *Id.*

515. *Id.* at 1056, 84 L. Ed. 2d at 24.

516. *Id.*

517. *Id.*

ment rather than remanding the case to it. He noted that all of the justices conceded that the remarks of the prosecutor assigned as error were obviously prejudicial and that the only dispute was the degree of prejudice. This issue was resolved by the court of appeals, which was familiar with the differences between harmless and plain error.<sup>518</sup>

In *Dickinson v. State*<sup>519</sup> the court of criminal appeals held that the prosecutor violated the defendant's right to remain silent when he argued to the jury that the defendant, who had not testified in court, had exhibited no remorse and had failed to show any pity for his victim or shame.<sup>520</sup> The court reasoned that this argument was an indirect comment on the accused's failure to testify, not a proper expression of the defendant's courtroom demeanor.<sup>521</sup> The court relied upon its earlier opinion in *Thomas v. State*<sup>522</sup> in holding that contriteness is a state of mind and a matter known only to the defendant unless it was revealed to others by him.

In *Jones v. State*<sup>523</sup> the court reiterated its earlier holding that a prosecutorial invocation of a defendant's lack of remorse may be cured by an instruction to disregard the remark.<sup>524</sup> The prosecutorial argument assigned as error was made at the punishment phase of the trial. While the defendant had stood silent at the punishment phase, he had testified at the guilt/innocence phase of the trial. The court therefore concluded that the prosecutor intended for his statement to reflect upon the appellant's testimony during the guilt/innocence portion of the trial.<sup>525</sup> The court did not consider the remark to be a comment on the accused's failure to testify at the punishment phase of the trial.<sup>526</sup>

## IX. VERDICTS

### A. *Inconsistent Verdicts*

For over fifty years courts have not permitted a criminal defendant convicted by a jury on one count to attack that conviction on the ground that it is inconsistent with the jury's verdict of acquittal on another count.<sup>527</sup> During the current Survey period the United States Supreme Court refused to carve out an exception to this long standing rule for those cases in which the jury acquits a defendant of a predicate felony, but convicts on the compound felony. In *United States v. Powell*<sup>528</sup> a unanimous Court concluded that in-

518. *Id.* at 1057-58, 84 L. Ed. 2d at 25-27 (Stevens, J., dissenting).

519. 685 S.W.2d 320 (Tex. Crim. App. 1984) (en banc).

520. *Id.* at 321, 324-25.

521. *Id.* at 324.

522. 638 S.W.2d 481, 484 (Tex. Crim. App. 1982) (en banc).

523. 693 S.W.2d 406 (Tex. Crim. App. 1985) (en banc).

524. *Id.* at 408-09.

525. *Id.* at 408.

526. *Id.*

527. See *Dunn v. United States*, 284 U.S. 390 (1932).

528. 105 S. Ct. 471, 83 L. Ed. 2d 461 (1985). This case presented the issue of whether a defendant who was acquitted of the predicate felonies of conspiracy to possess cocaine and possession of cocaine was entitled to vacation of a conviction for the compound felony of facilitating commission of the narcotics offenses by use of a telephone. 21 U.S.C. § 843(b)

consistent jury verdicts in a criminal case are not reviewable. In so doing, the Court expressly rejected the defendant's argument that an acquittal on the predicate offense necessitates a finding of insufficient evidence on the compound offense.<sup>529</sup> The Court felt that this argument necessarily assumes that the acquittal on the predicate offense was in fact proper. The government could similarly claim that the conviction on the compound offense was the jury's true verdict. The Court concluded that both views are equally erroneous since the only provable truth in such cases is that the verdicts are inconsistent.<sup>530</sup>

The Court cited three factors in support of its decision to insulate jury verdicts from review on the ground that they are inconsistent: (1) the government's inability to invoke review to determine if the defendant benefited from an erroneous acquittal; (2) the judiciary's general reluctance to conduct speculative inquiry into the inner workings of the jury's deliberation; and (3) the possibility that inconsistent verdicts may be the result of an erroneous exercise of lenity by the jury.<sup>531</sup> Upon review of the case at bar, the Court refused to vacate the defendant's conviction despite having recognized that the verdicts before it could not rationally be reconciled. The Court further explained that since the defendant was given the benefit of an acquittal on the counts on which she was acquitted, it was neither irrational nor illogical to require her to accept the burden of her conviction on the counts on which she was convicted.<sup>532</sup> This was clearly a decision based in equity that gave both the jury and the government the benefit of all doubt.

### *B. Verdict Forms*

In *Berghan v. State*<sup>533</sup> the verdict form attached to the trial court's charge included alternatives for the jury to find the defendant guilty of murder or a number of lesser included offenses, but did not include a form for finding him not guilty. The omission was apparently the result of a clerical error

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(1982) provides in part: "It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter." See 105 S. Ct. at 474 n.3, 83 L. Ed.2d at 465 n.3.

529. The Court was careful to note that independent review of the sufficiency of the evidence is the only safeguard necessary to protect criminal defendants against jury irrationality. The Court distinguished sufficiency of the evidence from the problems caused by inconsistent verdicts by pointing out that review of the former involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt independent of the jury's determination that evidence on another count was insufficient. *Id.* at 478, 83 L. Ed. 2d at 470.

530. *Id.* at 478-79, 83 L. Ed. 2d at 470-71. The Court refused to accept as a possible solution to the problems caused by inconsistent jury verdicts an instruction to the jury that it must find the defendant guilty of the predicate offense before it can convict on the compound offense. *Id.* at 478, 83 L. Ed. 2d at 471.

531. *Id.* at 477, 479, 83 L. Ed. 2d at 469, 471. The Court qualified its opinion by noting that it was not "intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilty on the other." *Id.* at 479 n.8, 83 L. Ed. 2d at 471 n.8 (citation omitted).

532. *Id.* at 479, 83 L. Ed. 2d at 471.

533. 683 S.W.2d 697 (Tex. Crim. App. 1984) (opinion on appellant's motion for rehearing) (en banc).



and was not objected to by defense counsel. The court of appeals determined that the omission was fundamental error requiring reversal since it amounted to an instruction by the trial court to find the defendant guilty.<sup>534</sup> On original submission, the court of criminal appeals concluded that no reversible error was shown and reversed the judgment of the court of appeals.<sup>535</sup>

On subsequent review, the court of criminal appeals denied the defendant's motion for rehearing.<sup>536</sup> In so doing, the court reaffirmed its reliance on *Bolden v. State*<sup>537</sup> in its original opinion, wherein *Bolden* was described as having held that when there was no objection at trial to an alleged error in the verdict form, the error is not preserved for review.<sup>538</sup> On both original submission and subsequent review, the court omitted discussion of fundamental error, the reason given in support of the court of appeals' decision to reverse. On subsequent review, this prompted Judge Clinton to dissent, both because the majority did not review the decision of the court of appeals, and because he felt *Bolden* was inapposite, since it held only that fundamental error was not presented by the circumstances involved in that case.<sup>539</sup>

Subsequently, the court of appeals that had originally reversed the conviction in *Berghan* was again faced with a similar situation. In *Kahm v. State*<sup>540</sup> the defendant was charged by two separate indictments. Both indictments included one count of attempted capital murder and one count of aggravated assault with a deadly weapon. The defendant pleaded not guilty to the greater offense and guilty to the lesser offense in each case before the jury. The court accepted the pleas, and trial was held on the greater offenses. The court instructed the jury to find the defendant guilty of the lesser offenses if it found him not guilty of the greater offenses. The court's charge did not, however, include a not guilty verdict form as to the greater offense of attempted capital murder. The jury found the defendant guilty on both counts of attempted capital murder.<sup>541</sup>

The defendant argued on appeal that the jury would have had to create its own verdict form in order to have found him not guilty of attempted capital murder. The court of appeals began its inquiry by noting that the absence of an objection at trial required it to determine whether the omitted verdict form constituted fundamental error. Before making this inquiry, however, the court concluded that the court's charge was sufficient to advise the jury that if they determined the defendant was not guilty of the greater offenses, or if they had a reasonable doubt thereof, they were to sign the second form finding him guilty of the lesser offenses. Having done so, the court went on

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534. *Berghan v. State*, 660 S.W.2d 877 (Tex. App.—Fort Worth 1983), *rev'd*, 683 S.W.2d 697 (Tex. Crim. App. 1984).

535. 683 S.W.2d at 699.

536. *Id.* at 701.

537. 489 S.W.2d 300, 302 (Tex. Crim. App. 1973).

538. 683 S.W.2d at 698.

539. *Id.* at 702 (Clinton, J., dissenting).

540. 689 S.W.2d 324 (Tex. App.—Fort Worth 1985, *pet. ref'd*).

541. *Id.* at 325-26.

to suggest that if there was error in omitting the not guilty verdict form, it was not fundamental error.<sup>542</sup>

Apparently undaunted by the *Berghan* court's omission of any discussion concerning fundamental error, the court of appeals characterized *Berghan* as having held that omission of a not guilty verdict form does not constitute fundamental error. Believing the absence of a guilty plea to a lesser offense in *Berghan* to be the more extreme case, the court determined that the situation before it was likewise not fundamental error.<sup>543</sup> The court concluded that if there was error it was not so egregious as to deny the defendant a fair and impartial trial and therefore did not constitute fundamental error.<sup>544</sup> The defendant's convictions were thus affirmed.<sup>545</sup>

## X. PUNISHMENT AND SENTENCING

### A. Affirmative Finding that a Deadly Weapon was Used or Exhibited

As previously discussed, an affirmative finding by the trier of fact that a deadly weapon was used or exhibited in the course of committing the offense charged is a critical factor affecting eligibility for probation and service of sentence.<sup>546</sup> A number of cases decided during the survey period clarified, if not substantially altered, the procedural aspects of such findings, perhaps making this one of the more significant areas surveyed. In *Polk v. State*<sup>547</sup> the term "affirmative finding" as it appears in article 42.12<sup>548</sup> was held to require that the trier of fact make an express determination that a deadly weapon or firearm was exhibited or used in the commission of the offense.<sup>549</sup> The court of criminal appeals further delineated the only ways in which an affirmative finding may be made when the jury is the trier of fact: 1) the jury returns a verdict of guilty as charged in the indictment and the indictment specifically alleges the use or exhibition of a deadly weapon or firearm;<sup>550</sup> 2) the jury returns a verdict of guilty as charged in the indictment and the indictment, rather than using the nomenclature deadly weapon or firearm, specifically alleges the use or exhibition of a weapon that is per se a deadly weapon or firearm;<sup>551</sup> or 3) the jury answers affirmatively a special issue

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542. *Id.* at 326.

543. *Id.* (citing *Berghan v. State*, 683 S.W.2d 697 (Tex. Crim. App. 1984)). By way of further explanation, the court wrote: "In essence, the directed verdict of guilty form on the lesser included offenses constituted a 'not guilty' form for the greater offense." *Id.* Note that an acquittal on the greater offense can be "inferred" from a conviction on a lesser included offense. See *Tomlin v. State*, 155 Tex. Crim. 207, 233 S.W.2d 303 (1950). See generally TEX. CODE CRIM. PROC. ANN. art. 37.08 (Vernon 1981).

544. 689 S.W.2d at 325.

545. *Id.* at 328.

546. See *supra* note 147 and accompanying text.

547. 693 S.W.2d 391 (Tex. Crim. App. 1985) (en banc).

548. See *supra* note 147.

549. 693 S.W.2d at 393. See also *id.* at 393 n.1.

550. *Id.* at 394.

551. *Id.* The court held that pistols, firearms, 30-30 caliber rifles, and handguns are per se deadly weapons. See *id.* and cases cited therein. In *Boyette v. State*, 692 S.W.2d 512 (Tex. Crim. App. 1985) the court held that a "gun" was not a deadly weapon per se and reformed by deletion the trial court's entry that an affirmative finding was made. *Id.* at 517. In *Slaton v.*

regarding the defendant's use or exhibition of a deadly weapon or firearm.<sup>552</sup> When the jury is the trier of fact the trial court may not enter that the jury made an affirmative finding on the deadly weapon issue except in one of the above three situations.<sup>553</sup> If the trial court enters an affirmative finding when the jury was the trier of fact and none of the above events occurred, the proper remedy is to reform the judgment by deleting the improper finding.<sup>554</sup> In conclusion, the court overruled all cases that suggest that a review of the facts can permit an implication that an affirmative finding was made by the jury.<sup>555</sup>

The *Polk* court expressly noted that "[n]ot before us today is the question of how culpability under the theory of parties comes into play in this area."<sup>556</sup> The court then proceeded to address this issue in *Travelstead v. State*,<sup>557</sup> decided the same day as *Polk*. Upon examination of the relevant provisions of Article 42.12, the court concluded "that the phrase 'the defendant used or exhibited a deadly weapon,' implies that the defendant, himself, use or exhibit a deadly weapon . . ."<sup>558</sup> Thus, when the defendant is a party to the offense charged the trier of fact must specifically find that the accused himself used or exhibited the deadly weapon.<sup>559</sup>

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State, 685 S.W.2d 773 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd), the court of appeals held that a person's hands were not per se deadly weapons. *Id.* at 775-76.

552. 693 S.W.2d at 394. The court indicated that the better practice would be to submit the special issue at the punishment phase of trial. *Id.* at 694 n.3. Responding to Judge Clinton's concurring opinion in which he suggested that notice requirements dictate that special issue submissions be supported by a formal pleading in the indictment, the majority noted a number of considerations for use in examining the issue of notice should it be properly presented in a future case. *Id.* at 396 n.4. More recently, in *Fann v. State*, 702 S.W.2d 602 (Tex. Crim. App. 1985), after reforming the judgment before it in accordance with *Polk*, the court again side-stepped the issue of notice. *Id.* at 603-04. However, the court in *Fann* subsequently granted the State's motion for rehearing, reversed its original holding that the trial court did not have authority to enter an affirmative finding after determining that the trial court did have such authority since it was the trier-of-fact at the punishment phase, and affirmed the judgment of the trial court. This time there was no mention whatsoever of the issue of notice. See *Fann v. State*, 702 S.W.2d at 604-05 (Tex. Crim. App. 1986).

553. *Id.* at 396. Accord *Ex parte Castaneda*, 697 S.W.2d 617, 618 (Tex. Crim. App. 1985) (en banc); *Lara v. State*, 693 S.W.2d 403, 404 (Tex. Crim. App. 1985) (en banc).

554. 693 S.W.2d at 396. See also *Adams v. State*, 685 S.W.2d 661, 671 (Tex. Crim. App. 1985) (en banc) (reaching similar results prior to the court's holding in *Polk*).

555. 693 S.W.2d at 396. The court was careful to note that its holding was not meant to hamper appellate review of the sufficiency of the evidence to support proper findings proper findings. *Id.* at 396 n.5.

556. *Id.* at 394 n.2.

557. 693 S.W.2d 400 (Tex. Crim. App. 1985) (en banc).

558. *Id.* at 402.

559. *Id.* Although the court ordered the judgment of the trial court reformed by deletion of the affirmative finding that the defendant used or exhibited a deadly weapon, it is not entirely clear whether it did so due to a failure to comply with the rule enunciated therein or because, under the directional guidelines set forth in *Polk*, the trial court was not the proper trier of fact. The jury assessed punishment although there was no special submission, the weapon used was not a deadly weapon per se, and the indictment did not use the nomenclature deadly weapon or firearm.

### B. *Crisp* Fallout Regarding the Punishment Assessed

As was true with respect to voluntariness of guilty pleas,<sup>560</sup> the backlash following *Ex parte Crisp*<sup>561</sup> similarly invaded the arena of punishment and sentencing when the punishment assessed took into account the unconstitutional amendment to the Controlled Substances Act. Four cases decided during the survey period by the court of criminal appeals presented an equal number of points worthy of note.<sup>562</sup> First, the court made clear that the original Controlled Substances Act was left intact by *Crisp* as if the unconstitutional amendment had never been enacted.<sup>563</sup> Second, the verdict on punishment is void ab initio when the punishment assessed includes a fine not provided for under the old act.<sup>564</sup> Third, when the punishment assessed by the trial court takes into account the higher punishments created by the constitutionally infirm amendment, the proper remedy is to remand the case for reassessment of punishment within the range provided for under the old act, rather than to order a new trial on the merits.<sup>565</sup> Finally, if the punishment provided for under the unconstitutional act was considered for any reason, the case must be remanded for reassessment in accordance with the range provided for in the old act.<sup>566</sup>

### C. Evidence

In *Maynard v. State*<sup>567</sup> the court of criminal appeals delineated a harmless error test to be applied in cases in which the admission of extraneous offense evidence has been determined improper.<sup>568</sup> According to the court, the

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560. See *supra* notes 184-213 and accompanying text.

561. 661 S.W.2d 956 (Tex. Crim. App. 1983).

562. These points are not discussed in the order that they were addressed in the court's decisions.

563. See *Ex parte Carpio*, 684 S.W.2d 708, 709 (Tex. Crim. App. 1985) (en banc).

564. See *Moya v. State*, 681 S.W.2d 41, 42 (Tex. Crim. App. 1984) (en banc).

565. See *Ex parte Wahl*, 693 S.W.2d 942, 944 (Tex. Crim. App. 1985) (en banc). Cf. *Ex parte Gibauitch*, 688 S.W.2d 868 (Tex. Crim. App. 1985) (en banc) (per curiam) (discussed *supra* notes 206-213 and accompanying text); *Ex parte Carpio*, 684 S.W.2d at 708.

566. In *Carpio* the court concluded that the defendant was entitled to reassessment of punishment because the punishment assessed exceeded the maximum punishment available under the old act. 684 S.W.2d at 709. In *Wahl* the case was not remanded because the punishment exceeded the constitutional range of punishment, which it in fact did not do, but because the trial court considered the unconstitutional range of punishment in assessing punishment. 693 S.W.2d at 944. In *Gibauitch* although the trial court had recognized that the amendment had been challenged and purposefully assessed punishment within the ranges provided for by both the pre- and post-amendment act, the court of criminal appeals nevertheless concluded that the lower court's consideration of the higher range of punishment under the unconstitutional amendment undeniably exerted an improper influence on the trial judge's decision by exerting on his "discretion a distinct pressure toward . . . the maximum [punishment] provided by the pre-amendment act." 688 S.W.2d at 873.

567. 685 S.W.2d 60 (Tex. Crim. App. 1985).

568. In determining that evidence of the defendant's possession of a switchblade and marijuana was improperly admitted evidence of extraneous offenses (the evidence had apparently been admitted during the guilt/innocence hearing), the court held that an accused does not waive his objection to extraneous offense evidence when he "subsequently testifies to the same facts to which he had earlier objected." *Id.* at 66. The court also held that "to qualify as 'res gestae', the evidence of extraneous offenses must be so closely interwoven with the offense on trial that it shows the context in which the offense occurred." *Id.* at 67. The court implicitly

proper inquiry in such cases is whether when viewing the record in its entirety there is a reasonable probability that the evidence complained of might have contributed to either the conviction *or* the eventual assessment of punishment.<sup>569</sup> Thus, even if the erroneously admitted extraneous evidence is determined not to have contributed to an accused's conviction, it is nevertheless necessary to inquire further as to the probable effect of the improper evidence on the punishment assessed.

In *Scott v. State*<sup>570</sup> a two member majority<sup>571</sup> of the court of appeals seriously questioned the state's right to introduce, after a plea of guilty, extraneous offense evidence ordinarily admissible at the guilt or innocence phase of trial. The court reluctantly recognized the court of criminal appeals' holding in *York v. State*<sup>572</sup> that a guilty plea does not restrict the state's right to introduce evidence that would have been admissible under a plea of not guilty,<sup>573</sup> and concluded that it was compelled to affirm because it was bound by the court of criminal appeals' decision.<sup>574</sup>

In *Saunders v. State*<sup>575</sup> another two member majority<sup>576</sup> of the same court of appeals reversed a murder conviction for the exclusion of testimony at the punishment phase purportedly offered by the defendant in mitigation of punishment. The defendant testified that prior to killing the deceased, the deceased told him that if he had a gun he should use it, and then stood up and grabbed his arm, whereupon the defendant pulled back and the gun dis-

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defined closely interwoven to mean that such evidence was either inseparable from the accused's arrest or related to proof of the offense charged. *Id.*

569. *Id.* at 67-68.

570. 699 S.W.2d 314 (Tex. App.—Dallas 1985, pet. filed).

571. Justice Akin joined in the opinion authored by Justice Devany. *Id.* Justice Guillot concurred without opinion. *Id.* at 316 (Guillot, J., concurring).

572. 566 S.W.2d 936, 938 (Tex. Crim. App. 1978).

573. *Id.*, see 699 S.W.2d at 315. Implicit in Justice Devany's opinion is the dual suggestion that extraneous offense evidence relevant to the issue of guilt is by its very relevance not pertinent to the issue of punishment and article 37.07 limits introduction of evidence at the punishment phase to proof of final convictions only. The court of criminal appeals' opinion in *Hoffert v. State*, 623 S.W.2d 141 (Tex. Crim. App. 1983), cited by Justice Devany in another context, makes clear that extraneous offense evidence relevant to the context of the offense committed (thereby circumstantially proving guilt) is equally relevant to punishment since events do not occur in a vacuum, and because the jury is entitled to know all of the circumstances surrounding commission of the offense charged so that it may intelligently assess punishment. *Id.* at 145. As for Article 37.07, the final conviction requirement contained therein appears limited to proof of the defendant's prior criminal record, and does not apply to all evidence sought to be introduced at the punishment phase of trial. See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3a (Vernon Supp. 1986). Finally, although not clearly expressed in the court's opinion, the evidence complained of in *Scott* was offered to prove that the offense charged was committed as part of a continuous course of conduct, as had been alleged in the indictment. Thus, such evidence was clearly *res gestae* under the definition applied in *Maynard*. See *Maynard*, 685 S.W.2d at 66.

574. 699 S.W.2d at 316.

575. 687 S.W.2d 60 (Tex. App.—Dallas 1985, pet. ref'd.).

576. Justice Stephens joined in the opinion written by Justice Vance. *Id.* at 62. Justice Guillot dissented in a separate opinion primarily on the basis that he believed the only reasonable interpretation of the proffered testimony was that the defendant was trying to exonerate himself by raising the defense of accident. *Id.* at 65 (Guillot, J., dissenting) (citing *Nixon v. State*, 572 S.W.2d 699 (Tex. Crim. App. 1978)). See also *White v. State*, 444 S.W.2d 921 (Tex. Crim. App. 1969) (holding that testimony given by defendant at the penalty stage was later properly excluded when it was not connected with proof of defendant's character).

charged. The trial court sustained the state's objection that the defendant was offering proof as to defensive matters, and instructed the jury to disregard.<sup>577</sup> The majority concluded, however, that the excluded testimony was offered to show absence of malice.<sup>578</sup> The majority reasoned that the defendant's testimony was offered as evidence of surrounding circumstances and was properly admissible in mitigation of punishment under section 19.06.<sup>579</sup> Holding that the testimony was therefore improperly excluded, the majority concluded that because the defendant received a 30 year sentence out of a possible 99 years or life, it was precluded from finding that the error was harmless.<sup>580</sup>

As to proof of prior convictions at the punishment phase, in *Little v. State*<sup>581</sup> the court of criminal appeals held that a pen packet that did not include fingerprints was insufficient to show that the defendant was the person previously convicted of the offense referred to in the pen packet. The court also rejected the state's argument that the photographs contained in the pen packet were sufficient to prove that the defendant was the same person previously convicted.<sup>582</sup> In *Carey v. State*<sup>583</sup> the court of appeals reached a similar result after finding *Little* directly on point.<sup>584</sup>

As a result of recent legislation, the court of criminal appeals' decisions in *Turner v. McDonald*<sup>585</sup> and *Jackson v. State*<sup>586</sup> have been rendered virtually meaningless for present purposes. The opinions in *Turner* and *Jackson* reveal disagreement between many members of the judiciary as to the preparation and use of pre-sentence investigation reports. The opinions and

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577. 687 S.W.2d at 62.

578. *Id.* at 63-64. *But cf.* *Sowell v. State*, 503 S.W.2d 793, 795 (Tex. Crim. App. 1974) (defining malice as any state of mind "in which a killing takes place without any cause which will in law justify, excuse or extenuate the act.").

579. 687 S.W.2d at 64. The *Saunders* majority also relied on *Allaben v. State*, 418 S.W.2d 517, 519 (Tex. Crim. App. 1967), wherein TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3a (Vernon Supp. 1986) was judicially enlarged to include any legally admissible evidence that might mitigate punishment as evidence admissible in the punishment hearing. 687 S.W.2d at 62-63. Perhaps the labels defensive and mitigatory should be eliminated and replaced by the requirement that evidence simply be relevant so as to avoid the problem in cases such as *Saunders* in which the testimony in question is, at least arguably, both defensive and mitigatory.

580. 687 S.W.2d at 64. This author believes that the majority did not intend to say that harmless error is to be determined by a quantitative comparison of the punishment received with the range of punishment potentially available. Although not expressed in the court's opinion, the majority must have reasoned that there was at least some possibility that the erroneous exclusion of evidence contributed to the punishment assessed. *Compare* *Maynard v. State*, 685 S.W.2d 60 (Tex. Crim. App. 1985) (en banc) (holding that a harmless error test should be applied in cases in which the admission of extraneous offense evidence has been held improper).

581. No. 301-83 (Tex. Crim. App., Sept. 19, 1984) (not yet reported).

582. *Id.*, slip op. at 6.

583. 677 S.W.2d 821 (Tex. App.—Fort Worth 1984, no pet.).

584. *Id.* at 826.

585. 676 S.W.2d 375 (Tex. Crim. App. 1984) (en banc). *Turner* was followed in the court of appeals' opinion in *Orellana v. State*, 686 S.W.2d 703, 705 (Tex. App.—Corpus Christi 1985, *aff'd*, 706 S.W.2d 660 (1986) (pet. granted on other grounds). *Turner* and *Orellana*, however, appear to have been legislatively overruled by the latest enactment of TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4 (Vernon Supp. 1986). *See* Act of June 11, 1985, ch. 427, § 4, 1985 Tex. Sess. Law Serv. 2895, 2958 (Vernon).

586. 680 S.W.2d 809 (Tex. Crim. App. 1984) (en banc).

amendments to the statutes discussed in these two cases also reflect the legislature's attempts to overcome these disagreements, as well as a certain degree of dissatisfaction with the courts' opinions in this area.<sup>587</sup>

The last case to be discussed with regard to evidence is the opinion of a panel of the court of criminal appeals rendered on motion for rehearing in *Wagner v. State*.<sup>588</sup> Prior to the court's decision in *Wagner*, the rule regarding reputation witnesses was that their testimony could be based on specific acts of misconduct committed by the defendants as long as their testimony was not based solely on the offense that was being tried.<sup>589</sup> In *Wagner*, however, Judge Clinton retreated from the court's previous holdings by observing that the facts<sup>590</sup> before it provided the "perfect example of the reason that knowledge of specific acts alone as a basis for reputation testimony violates the rationale for admitting such testimony in the first place."<sup>591</sup>

Obviously relying on the court of appeals' discussion of reputation testimony in *Moore v. State*,<sup>592</sup> Judge Clinton further suggested that reputation testimony must be based on a "synthesis of observation and discussion in the community . . . indicative of the climate of opinion in the community [rather than on] a single unproven allegation made by an obviously biased third party."<sup>593</sup> Nevertheless, rather than reverse due to the perfect example of the latter in the case before the court, Judge Clinton dismissed the same as harmless error, despite the fact that the defendant's punishment was assessed at 85 years confinement in the penitentiary.<sup>594</sup> Whether or not a majority of the court agrees with Judge Clinton's opinion in either respect is presently unclear.<sup>595</sup>

587. See Act of June 11, 1985, ch. 427, § 4(b), 1985 Tex. Sess. Law Serv. 2895, 2958 (Vernon); and *Jackson*, 680 S.W.2d at 812 n.3.

588. 687 S.W.2d 303, 309 (Tex. Crim. App. 1984) (opinion on appellant's motion for rehearing).

589. See *Jackson v. State*, 628 S.W.2d 446, 449-50 (Tex. Crim. App. 1982); *Stephens v. State*, 522 S.W.2d 924, 927 (Tex. Crim. App. 1975).

590. A single reputation witness, a police officer, had gained his knowledge of the defendant's reputation through discussion of the same with a single, biased third party victim of a terroristic threat by the defendant. 687 S.W.2d at 312. The offense on trial and the terroristic threat were the "product of the tumultuous relationship" between the defendant, the third party victim, and one Willie Etta Smith (daughter of the deceased in the case on trial, the defendant's former fiance, and subsequently the third party victim's wife). *Id.* at 312-13.

591. *Id.* at 313.

592. 663 S.W.2d 497, 500 (Tex. App.—Dallas 1983, no pet.). See also *Wagner*, 687 S.W.2d at 313.

593. 687 S.W.2d at 314.

594. *Id.* Judge Teague dissented due to Judge Clinton's failure to apply what he felt was the appropriate harmless error test (i.e., whether there is not a reasonable probability that the error contributed to the punishment assessed.) *Id.* at 315 (Teague, J., dissenting). Compare *Maynard*, 685 S.W.2d at 62 (defining harmless error test).

595. On original submission to a three judge panel of the court, in an opinion authored by Judge W.C. Davis and joined by Presiding Judge Onion, the majority did not find any error in the fact that the reputation testimony was based on a specific bad act. *Wagner*, 687 S.W.2d at 308-309. Their opinion in this respect is consistent with past decisions of the court of criminal appeals. See *supra* note 590 and accompanying text. Judge Teague dissented in a separate opinion. 687 S.W.2d at 309 (Teague, J., dissenting). On denial of the defendant's motion for rehearing by a four judge panel of the court, Judge Clinton wrote the majority opinion. *Id.* at 309. Presiding Judge Onion and Judges McCormick and Campbell joined in the result. Although the motion for rehearing was apparently not heard before Judge Teague, he never-

*D. Enhancement*

In *Disheroon v. State*<sup>596</sup> the indictment against the defendant initially alleged two prior felony convictions for enhancement purposes, one for burglary and the other for swindling by worthless check. The defendant apparently moved to quash the worthless check conviction on the ground that it was void for having been enhanced by two uncounseled misdemeanor convictions. At the hearing on the defendant's motion to quash, the defendant testified that when he entered guilty pleas in the misdemeanor convictions he was not represented by counsel nor was he aware that he had a right to an attorney, that he did not affirmatively waive his right to an attorney, and that he was indigent. On cross-examination, the state elicited testimony that the district attorney believed demonstrated that the defendant was not indigent at the time of his misdemeanor convictions. The trial court ruled the felony conviction admissible, noting that the judgment therein was regular on its face and recited that the defendant had appeared with counsel. The records concerning the underlying enhancing misdemeanors were not made available to the trial court. Prior to punishment, the state elected to drop both the burglary and worthless check convictions as enhancement paragraphs, and instead introduced both convictions at the punishment hearing as evidence of the defendant's prior criminal record.

On appeal the defendant continued to complain that the worthless check conviction was void because he was not represented by counsel when he pleaded guilty to the two misdemeanor convictions used to enhance the offense charged therein to a felony. The defendant thus argued that the trial court erroneously admitted the improperly enhanced worthless check conviction at the punishment hearing in the case on appeal. The defendant also contended that the doctrine of collateral estoppel should have barred the trial court from permitting the state to relitigate the validity of the worthless check conviction in the hearing held on his motion to quash. In support of this contention the defendant relied on a bill of exception that appeared in the record of the case on appeal, wherein he had advised the trial court that the worthless check conviction had been previously ruled inadmissible at an earlier trial of yet another offense.

The court of criminal appeals initially observed that because an accused's right to counsel in a misdemeanor conviction was not widely recognized at the time of the defendant's worthless check conviction, the defendant was not precluded from raising the issue argued on appeal.<sup>597</sup> The court was quick to note, however, that his right to raise the issue carried with it "the burden to prove that with respect to the enhancing misdemeanors (1) he was indigent, (2) he was without counsel and (3) he did not voluntarily waive the right to counsel."<sup>598</sup> Moreover, the court was of the opinion that under its

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theless submitted a dissenting opinion. *Id.* at 314 *but cf.* *Nethery v. State*, 692 S.W.2d 686, 707 (Tex. Crim. App. 1985) (cited in *Wagner* in dicta).

596. 687 S.W.2d 332 (Tex. Crim. App. 1985) (en banc).

597. *Id.* at 334.

598. *Id.* (citations omitted).



prior rulings the defendant could not meet this burden absent proof of independent evidence other than his own testimony.<sup>599</sup> Accordingly, the court held that the defendant's testimony at the hearing on the motion to quash was insufficient to show indigency, lack of counsel, and lack of waiver, and thus overruled his first contention.<sup>600</sup> With respect to the defendant's second contention, the court held that the bill of exception alone did not preserve error, and because he had not objected at trial to the introduction of the worthless check conviction on the basis of collateral estoppel, nothing was presented for review.<sup>601</sup>

### E. Number of Convictions on Multiple Count Indictments

A series of cases decided by the court of criminal appeals during the current Survey period considered the ramifications and consequences of multiple count prosecutions in terms of punishment and sentencing. In *Drake v. State*<sup>602</sup> a plurality<sup>603</sup> of the court held that two convictions for attempted capital murder arising from a single indictment containing multiple counts and arising from separate transactions and resulting in separate punishments violated article 21.24 of the Code of Criminal Procedure.<sup>604</sup> The indictment would therefore have been quashable upon a proper motion.<sup>605</sup> Although the plurality recognized that in the case before it the trial court had erroneously permitted multiple, non-property convictions to be had on a single indictment, it concluded that such error was not fundamental and was therefore waived by the absence of a motion to quash.<sup>606</sup>

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599. *Id.* (citing *Maddox v. State*, 591 S.W.2d 898 (Tex. Crim. App. 1979), *cert. denied*, 447 U.S. 909 (1980)). In support of its holding, the court included the following language from *Maddox*: "we adhere to our consistent holdings that bald assertions by an accused that he was without counsel in his prior convictions are insufficient to overcome the presumption of regularity of the records that were before the trial court . . ." *Id.* at 903. As Judge Teague implicitly suggests in his concurring opinion, this presumption of regularity would appear to have been inapplicable under the facts before the court of criminal appeals since the records of the underlying enhancing misdemeanors were not made available to the trial court. 687 S.W.2d at 335 (Teague, J., concurring).

600. *Id.* at 334.

601. *Id.* at 335.

602. 686 S.W.2d 935 (Tex. Crim. App. 1985) (en banc).

603. Judge Clinton wrote the plurality opinion for the en banc court. *Id.* at 936. Judges Campbell and Thomas G. Davis concurred in the result without opinion. *Id.* at 945. Presiding Judge Onion and Judge Miller dissented without opinion. *Id.* Judge Teague dissented for the reasons stated in his concurring opinion in *Ex parte Siller*, 686 S.W.2d 617 (Tex. Crim. App. 1985) (Teague, J., concurring) (delivered the same day as *Drake*).

604. See TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon Supp. 1986), which provides for the joinder of Title 7 offenses only. See *infra* note 640.

605. 686 S.W.2d at 944. The plurality earlier observed that *Vannerson v. State*, 408 S.W.2d 228 (Tex. Crim. App. 1966) was incorrect insofar as it held that the 1965 revision of the Code of Criminal Procedure did not invalidate charges containing two or more extraneous offenses. 686 S.W.2d at 942. The *Drake* court concluded that it could not hold that a pleader may allege in separate counts of a single indictment two or more offenses arising out of the same incident, act, or transaction. *Id.* at 944. This part of the plurality's opinion would appear to be dicta, since the case before it involved offenses arising out of different criminal transactions, rather than arising out of the same incident, act, or transaction.

606. *Id.* at 944-45. The plurality also suggested that the former "carving doctrine" that was abolished by *McWilliams v. State*, 634 S.W.2d 815 (Tex. Crim. App. 1980) is inapplicable to the rules concerning joinder of offenses. 686 S.W.2d at 945 n.2 and accompanying text. See

In *Ex parte Siller*,<sup>607</sup> decided the same day as *Drake*, a virtually unanimous court cited *Drake* and recognized that "it is settled law in this State that regardless of an allegation in a charging instrument the consequences of a general verdict of guilt . . . is but one conviction and punishment".<sup>608</sup> The majority thus rejected the state's contention that the legislature, by adding section 1(c) and section 2(c) to article 37.07 in 1973, intended to authorize single indictment multiple convictions of offenses generally (i.e., both Title 7 and non-property offenses).<sup>609</sup> Accordingly, the majority ultimately held that the habeas corpus applicant in the case before it was entitled to relief and reformed the judgment against him to reflect only one conviction and punishment.<sup>610</sup>

Subsequently, in *McIntire v. State*<sup>611</sup> a majority of the court relied upon both *Drake* and *Siller* in support of its holding that the trial court was without authority to permit the jury to return multiple convictions on two offenses alleged in separate counts of a single indictment because those offenses arose from a single transaction.<sup>612</sup> Of particular importance is the *McIntire* court's express declaration of the principle that was little more than implied in *Drake* and *Siller*: an objection is required to preserve error for appeal when a multiple count indictment alleges separate offenses arising out of different transactions, but is not required when the offenses arise out of the same criminal transaction.<sup>613</sup>

#### F. Reformation of Sentence on Appeal

In *Ex parte Spaulding*<sup>614</sup> the court of criminal appeals held that the governor lacked authority to remit or commute a portion of a void sentence, despite his exclusive jurisdiction to grant commutations.<sup>615</sup> Thus, when a jury verdict assessing a fine in addition to enhanced jail time was void from its inception,<sup>616</sup> the fact that the governor had remitted applicant's fine and

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also *Ex parte Siller*, 686 S.W.2d at 619 (examining carving doctrine in juxtaposition with the common law rules of joinder of offenses and concluding their independence).

607. 686 S.W.2d 617 (Tex. Crim. App. 1985) (en banc). In *Siller* the applicant for habeas corpus relief was charged in a single indictment with two non-property offenses arising from the same transaction, tried by a jury, convicted of both offenses, and sentenced to serve concurrent punishments for both offenses.

608. 686 S.W.2d at 618.

609. *Id.* at 619-620. From its review of legislative history, the majority concluded that "all the affirmative evidence is that § 1(c) and § 2(c) were added to Article 37.07 to effectuate the provisions for 'multiple prosecutions' of offenses against property constituting a criminal episode within the meaning of § 3.01." *Id.* at 620.

610. 686 S.W.2d at 620. Because the judgment indicated that the jury had first found the applicant guilty of the aggravated rape offense, it was reformed to read that the applicant was guilty of that offense only, and his punishment and sentence for the indecency offense were vacated and set aside. *Id.*

611. 698 S.W.2d 652 (Tex. Crim. App. 1985) (en banc).

612. *Id.* at 655-56.

613. *Id.* at 655 n.2 and accompanying text.

614. 687 S.W.2d 741 (Tex. Crim. App. 1985) (en banc).

615. *Id.* at 743.

616. The indictment alleged two prior felony convictions for purposes of enhancement. The trial judge instructed the jury that it could assess a fine as well as confinement. The court found the fine assessed to be void ab initio based on its previous decision in *Bogany v. State*,

deleted the offending portion of the jury's verdict did not render moot the defendant's complaint that the verdict was void as unauthorized by law.<sup>617</sup> The judgment of conviction was therefore vacated and a new trial ordered.<sup>618</sup>

Subsequently, in *Ex parte Johnson*<sup>619</sup> the court of criminal appeals recognized that a new trial was ordered in *Spaulding* because there was no other way to cure the infirmity since, at the time, a court was permitted only to reform the judgment so as to reflect properly the true verdict of the jury.<sup>620</sup> The *Johnson* court further noted that since *Spaulding* was decided the legislature had enacted a new law that gave the courts greater authority to reform judgments and thereby provided an alternative way to cure such infirmities.<sup>621</sup> Therefore, under circumstances similar to those in *Spaulding*, the *Johnson* court was able to reform the jury's verdict by deleting an unauthorized fine improperly assessed by the jury.<sup>622</sup> A majority of the court later reaffirmed its decision in *Johnson* when it similarly reformed the judgment and sentence before it in *Ex parte Youngblood*<sup>623</sup> by again deleting a fine improperly assessed by the jury.<sup>624</sup>

Finally, in *Ex parte Hernandez*<sup>625</sup> another of the *Crisp*-fallout cases,<sup>626</sup> the court addressed the somewhat different situation in which the trial judge's verdict on punishment was not authorized by law and was therefore void at its inception. The court determined that it was without authority to reform the defendant's sentence and held that the proper procedure in such cases is to remand for resentencing.<sup>627</sup> The court remanded the case for a new punishment hearing only, because the punishment was assessed by the trial judge, rather than a jury.<sup>628</sup>

661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc) wherein it held that TEX. PENAL CODE ANN. § 12.42 (Vernon 1974) does not authorize a fine in addition to the enhancement of punishment. 687 S.W.2d at 742-43.

617. *Id.* at 743-744. "Even the Governor, with his constitutional powers, may not breathe new life into a 'dead' judgment." *Id.* at 744.

618. *Id.*

619. 697 S.W.2d 605 (Tex. Crim. App. 1985) (en banc).

620. *Id.* at 607.

621. *Id.*

622. *Id.* at 608. The majority's application of the new amendment, and Presiding Judge Onion's dissent raise a question concerning retroactivity that is seemingly left unanswered by the majority. *See id.* at 607-08; *id.* at 609-612 (Onion, J., dissenting).

623. 698 S.W.2d 671 (Tex. Crim. App. 1985) (en banc).

624. *Id.* at 672.

625. 698 S.W.2d 670 (Tex. Crim. App. 1985) (en banc) (per curiam).

626. *See supra* notes 184-213 and 560-566 and accompanying text.

627. 698 S.W.2d at 671. Inasmuch as *Hernandez* was decided only one week after *Johnson*, it is interesting to note the *Hernandez* court's reliance on *Spaulding* in support of its suggestion that the proper procedure in such cases is to remand for new sentencing. The holding raises several inconsistencies: first, *Spaulding* involved assessment of punishment by a jury and was therefore inapposite; second, *Johnson* indicated that *Spaulding* no longer stated the proper procedure to be followed in jury cases; third, *Johnson* was reaffirmed in *Youngblood* on the same day *Hernandez* was decided; and fourth, *Hernandez* was completely devoid of the many vigorous dissenting opinions that accompanied *Spaulding*, *Johnson* and *Youngblood*. The per curiam opinion in *Hernandez* was unanimous save for the non-participation of Judge Tom G. Davis.

628. By its own terms, the reformation provided in article 37.10(b) applies only to unau-

## G. Miscellaneous

In *McCullough v. State*<sup>629</sup> the court of criminal appeals unanimously reaffirmed its decision in *Miller v. State*.<sup>630</sup> The court held that the presumption of vindictiveness established by the United States Supreme Court in *North Carolina v. Pearce*,<sup>631</sup> when a greater sentence is imposed following retrial, is applicable when a jury assessed punishment at the first trial and a judge assessed punishment upon retrial.<sup>632</sup> With respect to jail time credit<sup>633</sup> a seven member majority of the court of criminal appeals held in *Ex parte Green*<sup>634</sup> that when a juvenile is confined in a juvenile detention center for conduct that would constitute a penal offense if committed by an adult, the time served may be credited to any sentence he subsequently receives in a court of criminal jurisdiction to which his case has been transferred.<sup>635</sup> In *Williams v. State*<sup>636</sup> a majority of the court observed that the better practice with respect to cumulation orders is to track the statutory language set out in article 42.08.<sup>637</sup> Nevertheless, the court held that a cumulation order that used the words "stacked on" was sufficient to direct the Texas Department of Corrections that the defendant was to be confined pursuant to the sentence in question only after the judgments and sentences in the preceding convictions therein referred to cease to operate.<sup>638</sup>

In *Garza v. State*<sup>639</sup> a virtually unanimous court held that the applicability of the provisions relating to multiple prosecutions in chapter 3 of the Penal

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thorized assessment of punishment by a jury. Aside from this, is there any logical reason for the rule to be different when an unauthorized punishment is assessed by the trial court? Insofar as the circumstances in *Hernandez* are concerned, perhaps the answer is yes since the entire punishment assessed was unauthorized due to the holding in *Crisp*, rather than just the fine as was the case in *Johnson*. Future discussion of this area, as well as the matters raised in the various dissents in the jury verdict cases, seems inevitable.

629. No. 351-83 (Tex. Crim. App., Dec. 5, 1984) (opinion on state's motion for rehearing) (not yet reported).

630. 472 S.W.2d 269 (Tex. Crim. App. 1971).

631. 395 U.S. 711 (1969).

632. *McCullough*, slip op. at 4-5. The court noted that five justices had concurred in *Wasman v. United States*, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984), "stating in substance that the *Pearce* presumption is not simply concerned with actual vindictiveness, but is also intended to protect against the reasonable apprehension of vindictiveness that can deter a defendant from seeking a new trial." *McCullough*, slip op. at 3 n.2. See also *id.*, slip op. at 2 n.1. Both *Pearce* and the court of appeals' opinion in *McCullough* were discussed last Survey period. See 1985 *Annual Survey*, *supra* note 50, at 516-517.

633. See generally TEX. CODE CRIM. PROC. ANN. art. 42.03, § 2a (Vernon Supp. 1986) (providing requirements for jail time credit).

634. 688 S.W.2d 555 (Tex. Crim. App. 1985) (en banc).

635. *Id.* at 556-57. At one point the court observed: "That juvenile detention is not considered punishment is of no moment; adult confinement prior to trial is not for punishment either." *Id.* at 556. Holding that the defendant was entitled to flat time credit, the court noted that his eligibility for good time credit under TEX. CODE CRIM. PROC. ANN. art. 42.03, § 4 (Vernon 1979), was neither raised nor considered. 688 S.W.2d at 557 n.3.

636. 675 S.W.2d 754 (Tex. Crim. App. 1984) (opinion on state's motion for rehearing) (en banc).

637. *Id.* at 760. See TEX. CODE CRIM. PROC. ANN. art. 42.08 (Vernon 1979).

638. 675 S.W.2d at 763.

639. 687 S.W.2d 325 (Tex. Crim. App. 1985) (en banc). Judge Campbell did not participate.

Code<sup>640</sup> is limited to the property-related offenses of title 7 of the Code. The court therefore held that it was not improper for the trial court to order non-property offenses to be made cumulative on each other and on top of title 7 offenses even though all the offenses had been consolidated under Section 3.02.<sup>641</sup>

*Ex parte Smith*<sup>642</sup> involved circumstances almost too bizarre for description or classification. In *Smith* the defendant was convicted in a case that had been previously considered for punishment in another case and thereafter dismissed pursuant to section 12.45 of the Penal Code,<sup>643</sup> only to have been later reinstated after the trial court subsequently vacated the judgment of conviction in the other case in which the conviction on appeal had been considered for punishment purposes. The court of criminal appeals began by noting that the trial court was without jurisdiction to vacate the judgment of conviction in the other case.<sup>644</sup> With regard to reinstatement of the case at bar, the court further implied that if the trial court had validly dismissed that case, then it could not thereafter consider the dismissal ineffective and reinstate the case.<sup>645</sup> The court concluded that the defect<sup>646</sup> that prompted the trial court to vacate the judgment of dismissal in the other case in which the case in question had been considered for punishment purposes, was not one that rendered the proceedings therein void so as to deprive the trial court of jurisdiction. Thus the trial court was without authority to recon-

640. TEX. PENAL CODE ANN. § 3.01 (Vernon 1974) defines criminal episode to mean the repeated commission of Title 7 offenses (Offenses Against Property). TEX. PENAL CODE ANN. § 3.02(a) (Vernon 1974) provides for the consolidation and joinder of "all offenses arising out of the same criminal episode." TEX. PENAL CODE ANN. § 3.03 (Vernon 1974) provides that the accused's sentences for multiple offenses "arising out of the same criminal episode prosecuted in a single criminal action . . . shall run concurrently."

641. 687 S.W.2d at 329-30. In other words, where non-property and property offenses have been joined in a single prosecution, the sentences on the property offenses would run concurrently, and the sentences in the non-property offenses could then be stacked on the property offense sentences, as well as on each other. Of course, separate indictments are probably required with respect to the non-property offenses if the separate convictions thereon are to remain valid. See *supra* notes 602-613 and accompanying text.

642. 690 S.W.2d 601 (Tex. Crim. App. 1985) (en banc) (per curiam).

643. TEX. PENAL CODE ANN. § 12.45 (Vernon 1974 and Supp. 1986) ("§ 12.45") provides:

(a) An individual 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 which he stands adjudged guilty.

.....

(c) If a court lawfully takes into account an admitted offense, prosecution is barred for that offense.

644. 690 S.W.2d at 603 (citing TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977) and *Ex parte Friday*, 545 S.W.2d 182 (Tex. Crim. App. 1977)).

645. *Id.* (citing *Garcia v. Dowell*, 596 S.W.2d 524 (Tex. Crim. App. 1980)). See also *Haley v. Lewis*, 604 S.W.2d 194 (Tex. Crim. App. 1980) (en banc) (holding indictment validly dismissed when oral dismissal was accompanied by entry in docket and minutes).

646. Insufficient evidence to support the conviction in the other case (due to the fact that the judicial confession introduced therein was actually a judicial confession to the offense charged in the case dismissed pursuant to § 12.45) apparently prompted the trial court to vacate the judgment of conviction in the other case and reinstate the § 12.45 dismissal. *Smith*, 609 S.W.2d at 603.

sider the section 12.45 dismissal and reinstate the case under consideration by the court of criminal appeals.<sup>647</sup> The conviction in the latter case was therefore set aside and further prosecution presumably barred by operation of section 12.45.<sup>648</sup>

Finally, although verdict forms in general have already been discussed,<sup>649</sup> verdict forms at the punishment phase of trial present a unique problem that deserves mention in the current context. *McCloud v. State*<sup>650</sup> involved a verdict form that gave the jury only three options: probated confinement and a fine, confinement and a fine, or confinement. The defendant objected to the verdict form at trial and requested that the jury be given the option to probate both the confinement and the fine. The court of appeals agreed that it was error for the trial court to refuse this request since the requested punishment option is authorized by the Code of Criminal Procedure.<sup>651</sup> Because there is no such authority to probate a fine when confinement has been assessed rather than probated, the court found the error to be harmless since the jury had rejected probation of confinement in favor of assessing four years imprisonment.<sup>652</sup>

## XI. MOTIONS FOR NEW TRIAL

### A. Procedural Aspects

The court of criminal appeals decided several cases during the survey period dealing with the procedural mechanics of filing motions for new trial. In the first of these cases, *Dugard v. State*,<sup>653</sup> the court upheld the trial court's determination that the motion for new trial before the trial court, which was based on the jury's misconduct in discussing the laws of parole, was insufficient.<sup>654</sup> The court noted that the motion did not have an affidavit<sup>655</sup> of any juror attached to it and was not verified.<sup>656</sup> Although the ap-

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647. The § 12.45 dismissal was valid, thereby stripping the trial court of the authority to later reinstate it, since the case in which it was considered for punishment purposes was not void ab initio. Compare *Ex parte Chisena*, 623 S.W.2d 354 (Tex. Crim. App. 1981) (en banc) (on which case the trial court's reliance was held to be misplaced in *Smith*). 690 S.W.2d at 603.

648. *Id.*

649. See *supra* notes 527-545 and accompanying text.

650. 692 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1985, no pet.).

651. *Id.* at 581 (citing TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3a (Vernon Supp. 1985)).

652. *Id.* at 582.

653. 688 S.W.2d 524 (Tex. Crim. App. 1985).

654. The trial court had ruled that the motion was untimely filed, that is, filed after the 30-day time limit set forth in TEX. CODE CRIM. PROC. ANN. art. 40.05(a) (Vernon Supp. 1986). 688 S.W.2d at 527. This ruling was not correct because the motion was filed on the 31st day after sentencing; the 30th day had been a Sunday, thus extending the time to Monday. *Id.* at 529.

655. 688 S.W.2d at 529. The policy of requiring that an affidavit of a juror (or other person in position to know the facts) be attached to a motion for new trial alleging jury misconduct is to discourage "fishing expeditions" into supposed jury misconduct. *Id.*

656. *Id.* Failure to grant a mistrial is not error where the motion for new trial was not verified or supported by a juror's affidavit. *Bearden v. State*, 648 S.W.2d 688, 690 (Tex. Crim. App. 1983).

pellant's subsequently filed motion for a new trial hearing did have a juror's affidavit attached to it, this motion was filed more than thirty days after sentencing and was, therefore, filed too late to constitute an amendment to the motion for new trial.<sup>657</sup> In addition, the juror's affidavit failed to allege facts which, if true, would have entitled the defendant to relief.<sup>658</sup> A final problem was that the defendant failed to bring the motion for new trial to the attention of the trial court within ten days of the filing of the motion.<sup>659</sup> In short, *Dugard* provides any practitioner contemplating filing a motion for a new trial with a virtual checklist of the procedural pitfalls to be avoided when pursuing this form of relief.

In *Trout v. State*<sup>660</sup> the court of criminal appeals reaffirmed its prior holdings that the grounds for a motion for new trial must be clearly set forth in the motion for a new trial itself. The court of appeals had held that additional grounds for the new trial, which were contained in the juror's affidavit attached to the motion for new trial but not alleged in the motion for new trial itself, provided the State and the trial court with reasonable notice that these additional grounds for new trial would be urged at a new hearing on a motion for new trial.<sup>661</sup> Accordingly, the court of appeals held that the trial court erred in failing to grant a new trial when evidence admitted at the hearing on the motion for new trial substantiated the additional grounds for a new trial contained in the juror's affidavit. The court of criminal appeals, noting that the Code of Criminal Procedure no longer specifically requires that a motion for new trial set forth the grounds upon which a new trial is sought,<sup>662</sup> nevertheless concluded that the court of appeals' holding permit-

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657. 688 S.W.2d at 529, citing the provisions of TEX. CODE CRIM. PROC. ANN. art. 40.05(b) (Vernon Supp. 1986). The statutory methods set forth in Article 40.05 do not provide for any amendment of the motion for new trial after the time limit of 30 days after the date of sentencing has expired.

658. 688 S.W.2d at 531. The affidavit failed to allege facts which demonstrated jury misconduct under the test established in *Munroe v. State*, 637 S.W.2d 475 (Tex. Crim. App. 1982). The court of appeals had held that while the affidavit failed to allege facts which would have established grounds for a new trial under *Munroe*, the defendant was entitled to a hearing on his motion for new trial since at that hearing additional evidence or affidavits supporting the granting of a new trial might be introduced. The court of criminal appeals rejected this analysis, relying upon its prior holding in *Slanker v. State*, 505 S.W.2d 274 (Tex. Crim. App. 1974) and noting that the affidavit attached to the motion for a hearing was "vague, indefinite, and did not reflect probable cause for conducting a hearing on the motion for new trial." *Id.* The court also noted that *Munroe* had been overruled by *Sneed v. State*, 670 S.W.2d 262 (Tex. Crim. App. 1984), which re-imposed a more stringent standard for reversible error in cases of jury misconduct involving discussions of the laws of parole. Since the affidavit was insufficient under *Munroe*, it followed that it would also be insufficient under the *Sneed* standard. 688 S.W.2d at 531.

659. TEX. CODE CRIM. PROC. ANN. art. 40.05(d) (Vernon Supp. 1986).

660. 702 S.W.2d 618 (Tex. Crim. App., 1985).

661. Cause No. 05-81-00400-CR (Tex. App.—Dallas, December 28, 1983) (unpublished opinion).

662. TEX. CODE CRIM. PROC. ANN. art. 756 (1925) required that "[a]ll motions for new trial shall set forth distinctly in writing the grounds upon which the new trial is asked," and this provision had been strictly construed by the court of criminal appeals. *E.g.*, *Harvey v. State*, 150 Tex. Cr. R. 332, 201 S.W.2d 42, 45 (1947). The requirement of art. 756 was deleted from Chapter 40 of the 1965 Code of Criminal Procedure. The effect of this change in the statute had not been considered by any prior opinion of the Texas appellate courts and formed the basis for the court of appeals' conclusion that the pleading rules had been relaxed in this

ting affidavits supporting a new trial to provide the sole statement of the grounds for the new trial would "annihilate" the motion for new trial and reduce the motion itself to a "mere formalism."<sup>663</sup>

In *McIntire v. State*<sup>664</sup> the court of criminal appeals considered the question of how specific a juror's affidavit supporting a motion for new trial must be in order for the accused to be entitled to a hearing on a motion for new trial based on a claim of jury misconduct. Before addressing this issue the court stated that the court of appeals<sup>665</sup> had correctly held that the trial court erred in refusing to consider the motion for new trial because it had been filed after the defendant had filed a pro se notice of appeal.<sup>666</sup>

The court then determined that the court of appeals had erred by holding "[i]n essence . . . that an affidavit attached to a motion for new trial must establish a prima facie case for at least one cognizable ground for new trial before a hearing on the motion is required," noting that "this Court has never articulated such a requirement."<sup>667</sup> Rather, the court said an affidavit in support of a motion for new trial is sufficient if it demonstrates "that reasonable grounds for believing that" jury misconduct constituting grounds for a new trial occurred.<sup>668</sup> The court expressly disavowed the language of *Dugard v. State*,<sup>669</sup> which had suggested that the affidavit must establish probable cause to believe the conduct warranting a new trial had occurred. The court ordered the case remanded to the trial court for a hearing on the motion for new trial.

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regard. The court of criminal appeals disagreed with this analysis stating: "even if it is clear that the Legislature intended to allow for more general pleading in the motions for new trial it is not clear that supporting affidavits are now to take the place of the motion itself." 702 S.W.2d. at 620-21.

663. *Id.* at 620. Judges Clinton and Teague dissented. *Id.* at 620-21.

664. 698 S.W.2d 652 (Tex. Crim. App. 1985).

665. 662 S.W.2d 65 (Tex. App.—Corpus Christi 1983).

666. Prior to the filing of a timely filed motion for new trial by defense counsel, *McIntire* had filed a pro se notice of appeal. 698 S.W.2d at 656. The court concluded that the notice of appeal divested the trial court of jurisdiction to entertain the motion for new trial. In *Ex parte Drewery*, 677 S.W.2d 533 (Tex. Crim. App. 1984), a case decided subsequent to the proceedings at trial and the return of the court of appeals' opinion in *McIntire*, the court of criminal appeals had held that notice of appeal filed prior to an otherwise timely motion for new trial will *not* deprive the trial court of jurisdiction to rule on the motion for new trial. 698 S.W.2d at 657.

667. 698 S.W.2d at 657-58. The trial court had also refused to conduct a hearing on the motion for new trial because it "presented nothing for hearing." 662 S.W.2d at 68. The motion for a new trial alleged three grounds for a new trial which called for the testimony of fact witnesses (i.e., jury misconduct in both discussing the law of parole and in agreeing to a quotient verdict and that a juror had conferred with a witness during an adjournment) and the affidavits of three different jurors supported each of the grounds alleged in the motion. The supporting affidavits set forth some of the facts surrounding the events constituting each instance of the alleged misconduct. However, the court of appeals concluded that the defendant had no absolute right to have a hearing on his motion, since each of the grounds "presented were determinable from the record itself and the juror's affidavit." 662 S.W.2d at 69.

668. 698 S.W.2d at 658. The "purpose of the affidavit requirement is to limit the parameters of the hearing that is sought." *Id.* However, the court had never held "that before a hearing is necessitated the affidavits must reflect every component legally required to establish a claim of jury misconduct." *Id.*

669. *Id.* at 658 n.12. See *supra* note 653. Language in that opinion, 688 S.W.2d at 531, had suggested a "probable cause" standard was appropriate. See *supra* note 658.



Subsequently, McIntire filed a motion for rehearing in the court for criminal appeals, urging that the passage of more than three years since the hearing was initially denied by the trial court had deprived him of his right to a free, fair, and full presentation of evidence in support of that motion. Accordingly, McIntire claimed he was now entitled not merely to a belated hearing on his motion for new trial but to a new trial itself.<sup>670</sup> The court of criminal appeals recognized that the delay in holding the hearing on the motion for new trial might have resulted in prejudice to the defendant due to missing witnesses and the inability of jurors who could be found to recall the events in question. However, the court refused to indulge in a "presumption of prejudice" and, therefore, remanded the case to the trial court for a preliminary hearing "to determine the feasibility of . . . holding a hearing wherein Appellant may obtain a free, fair and full presentation of evidence in support of his motion for a new trial." At this hearing the accused was to bear the burden of establishing (by a preponderance of the evidence) that such a presentation was not feasible.<sup>671</sup>

In *Cannon v. State*<sup>672</sup> the court held that where a new trial has been granted on the ground that the defendant's confession was inadmissible,<sup>673</sup> this determination does not bar relitigation of that issue in a second trial under the law of the case doctrine. That doctrine is limited to decisions of courts of superior jurisdiction, and courts are not bound by courts of equal jurisdiction.<sup>674</sup> In addition, pursuant to article 44.08,<sup>675</sup> the effect of an order granting a new trial is to put the cause in the same position in which it was before any trial had taken place.<sup>676</sup>

### B. Particular Grounds for a New Trial

Several cases decided in the survey period concerned denials of motions for new trials based on the jury's receipt of "other evidence" not involving a

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670. 698 S.W.2d at 661 (opinion on motion for rehearing).

671. *Id.* at 662. While Presiding Judge Onion was opposed to much of the analysis found in the majority's opinion in *McIntire*, thus accounting for his rather lengthy dissent, 698 S.W.2d 662-70, he was particularly critical of the decision to remand to the trial court for a feasibility hearing, which he called dangerous new legal precedent. *Id.* at 662. Because the majority opinion allowed the defendant to appeal an adverse feasibility decision by the trial court to the court of appeals, Presiding Judge Onion called this new procedure judicial nonsense which would prolong the delay and finality of judgment. *Id.* He also condemned the present unordered procedure which permits giving notice of appeal (and commencement of the preparation of the appellate record) while a motion for new trial is simultaneously pending. *Id.* at 664.

672. 691 S.W.2d 664 (Tex. Crim. App. 1985).

673. *Id.* at 679. The trial court may grant a new trial without stating its reasons. TEX. CODE CRIM. PROC. ANN. art. 40.07 (Vernon 1979). Here, the defendant was given an opportunity at his second trial to examine the trial judge who had granted the motion for new trial as to the reasons for doing so, but the defendant "declined the opportunity." The court of criminal appeals presumed that the motion for new trial was granted because the first trial court judge had considered the defendant's confession to be inadmissible.

674. 691 S.W.2d at 679-80. The court had reached a similar conclusion in *Shook v. State*, 156 Tex. Crim. R. 515, 244 S.W.2d 220 (1951) (opinion on rehearing).

675. See *supra* note 671.

676. 698 S.W.2d at 680.

discussion of the parole laws.<sup>677</sup> The test for evaluating such claims was stated in *Garza v. State*.<sup>678</sup> In *Bishop v. State*<sup>679</sup> the court of appeals ordered the conviction reversed holding that the trial court should have granted a new trial after the foreman of the jury that was deliberating on the issue of punishment in an involuntary manslaughter trial provided "other evidence" in the form of an expression of her past experiences.<sup>680</sup> One juror testified that this information caused her to change her vote from probation to confinement.<sup>681</sup> In *Deary v. State*<sup>682</sup> the court of appeals held that the jury received detrimental "other evidence" in a theft case during deliberations when one juror explained to another his understanding of the value of the merchandise stolen.<sup>683</sup>

In *Roe v. State*<sup>684</sup> the court held that the jury received "other evidence" in a DWI trial when it was shown that the jurors had discussed the reason why there had been no evidence offered as to the results of a breath test to determine the defendant's blood alcohol level. As a result of this discussion, the jurors concluded that the defendant had refused to take a breath test because he believed he was intoxicated.<sup>685</sup> Since the trial court had not permitted any testimony relevant to the defendant's refusal to submit to the breath test to go before the jury, the jurors' discussion constituted "other evidence."<sup>686</sup>

In *Keady v. State*<sup>687</sup> the court of criminal appeals was confronted with an appeal from a denial of a motion for new trial based on claims that the jury had received "other evidence" and had also discussed the operation of the

677. TEX. CODE CRIM. PROC. ANN. art. 40.03(7) (Vernon 1979) authorizes granting a new trial when it is shown, *inter alia*, that the jury "has received other evidence; or where a juror has conversed with any person with regard to the case . . . ." As was discussed in the 1985 *Annual Survey*, *supra* note 50, at 520-21, claims of jury misconduct involving a discussion of the laws of parole have been analyzed under both subsections (7) and (8) of Article 40.03.

678. 630 S.W.2d 272, 274 (Tex. Crim. App. 1982). In order to mandate a new trial for receipt of "other evidence" by the jury it must be shown that (1) "other testimony" was actually received by the jury, and (2) that such evidence was "detrimental" to the appellant.

679. 695 S.W.2d 359 (Tex. App.—Amarillo 1985, no pet.).

680. One juror had asked, "If you give him probation and this happened—occurred again, how could you ever live with yourself?" The foreman then stated, "Don't think it can't happen to you. It happened to me twice." *Id.* at 361. This apparently was a reference to the foreman's own experience, which had included two traffic accidents involving intoxicated drivers. *Id.*

681. In this connection the court held that the testifying juror's statements that two other jurors had also changed their votes was properly excluded from the harm analysis since, without any showing of the basis of the testifying juror's knowledge, her statement was "pure conjecture" as to the other jurors' states of mind. *Id.* at 361 n.1.

682. 681 S.W.2d 784 (Tex. App.—Houston [14th Dist.] 1984, no pet.).

683. At issue was the value of certain stereo equipment taken by the defendant. During deliberations one juror expressed confusion over the type of equipment which had been taken and its value. Another juror related his experiences in shopping for component stereo equipment and stated that he felt that it was reasonable to believe that the tape player taken by the defendant had a value over the amount required to establish third degree felony theft. The court held that this testimony was "received" in that it was more than just a "passing comment." *Id.* at 787. The harm caused by the juror's remark was not cured by a later discussion of the testimony of the witnesses regarding the value of the property. *Id.* at 787-88.

684. 691 S.W.2d 731 (Tex. App.—Beaumont 1985, no pet.).

685. *Id.* at 732-33.

686. *Id.* at 733.

687. 687 S.W.2d 757 (Tex. Crim. App. 1985).

parole laws. With regard to the other evidence point, the court held that the trial court did not abuse its discretion in overruling the motion for new trial based upon one juror's remark that the defendant could not be retried if the jury failed to reach a verdict on the issue of punishment and a mistrial resulted due to a hung jury. The court stated that no abuse of discretion was shown because, based on the testimony of different jurors, it was apparent that the remark concerning the effect of a hung jury was "open to differing interpretations."<sup>688</sup> With regard to the discussion of the laws of parole, the court applied the *Sneed v. State* analysis in reaching its conclusion that the trial court had correctly rejected this ground for a new trial.<sup>689</sup>

Several cases decided during the survey period dealt exclusively with jurors' discussions of the laws of parole during their deliberations on punishment. In *Monroe v. State*<sup>690</sup> the court of criminal appeals upheld the court of appeals' holding affirming<sup>691</sup> a conviction in which the trial court had refused the defendant's motion for new trial based on the jurors' discussion of the laws of parole. The majority applied the "five-prong test" for evaluating this type of jury misconduct, which was set forth in *Sneed v. State*.<sup>692</sup> Judge Clinton filed a thoughtful dissenting opinion discussing the problems involved in fashioning a set of rules governing this form of jury misconduct.<sup>693</sup> In *Perry v. State*<sup>694</sup> the court of appeals held that the fact that during their deliberations the jurors had sent out a note to the judge asking why, if the defendant had been assessed a one-year sentence in August, he was not incarcerated in November when the offense was committed, did not constitute proof that the jury's discussion of the parole laws constituted grounds for a new trial under *Sneed*.<sup>695</sup>

Although most practitioners are by now aware of the most recent legislative efforts in this area, it should be noted that article 37.07 of the Code of Criminal Procedure now requires specific jury instructions in felony cases. These statutorily mandated instructions provide the jurors with guidance

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688. *Id.* at 760.

689. *Id.* at 759-60.

690. 689 S.W.2d 450 (Tex. Crim. App. 1985).

691. 644 S.W.2d 540 (Tex. App.—Dallas 1978). The court of appeals had held that the then applicable rule of *Munroe v. State*, 637 S.W.2d 475 (Tex. Crim. App. 1982), was not applicable because the brief mention of the parole laws did not constitute a "discussion" of the parole laws. *Id.* at 545.

692. 670 S.W.2d 262 (Tex. Crim. App. 1984). The *Monroe* court held that the record demonstrated that no juror had professed to know the parole laws and that each time the parole laws were mentioned, the jurors were admonished by the foreman not to consider the parole laws. 689 S.W.2d at 452.

693. 689 S.W.2d at 452-59. Judges Miller and Teague joined in this dissent.

694. 689 S.W.2d 256 (Tex. App.—Waco 1985, no pet.).

695. *Id.* at 258. At the hearing on a motion for new trial the foreman testified that during the jury's deliberations on punishment, a juror had wondered out loud how the accused could have been out of jail on November 14, 1983, when he had been sentenced to serve one year in jail on August 11, 1983, on a misdemeanor DWI conviction. However, the foreman also stated that the jury had followed the trial court's instructions prohibiting consideration of the operation of the parole laws and had imposed a five year sentence in the felony DWI case before them because it believed that the accused could benefit from alcoholic rehabilitation programs available in the Texas Department of Corrections. *Id.* at 257-58.

concerning the parole laws.<sup>696</sup> Whether this "solution" to this species of jury misconduct will produce its own set of problems remains to be seen.

## XII. PROBATION/PAROLE

In *Black v. Romano*<sup>697</sup> the United States Supreme Court held that due process did not require a trial court or probation board revoking a defendant's probation to indicate on the record that it had considered the alternatives to incarceration before revoking probation.<sup>698</sup> Speaking for a unanimous Court,<sup>699</sup> Justice O'Connor held that the Eighth Circuit<sup>700</sup> had erred in expanding the procedural requirements of due process that the Court had recognized in earlier cases dealing with probation revocation proceedings.<sup>701</sup> Although stressing that it was desirable for the fact finder to consider the possible alternatives to imprisonment before revoking probation,<sup>702</sup> Justice O'Connor found that "a general requirement that the fact finder elaborate upon the reasons for a course not taken would unduly burden the probation revocation proceeding without significantly advancing the interest of the probationer."<sup>703</sup> The Court also rejected claims that Romano's substantive due process rights were violated by the revocation of his probation because the new offense he had committed was unrelated to the original offense.<sup>704</sup>

The due process considerations at issue in *Romano* were also implicated in three habeas corpus cases decided during the Survey period by the court of criminal appeals. In *Ex parte Glenn*,<sup>705</sup> *Ex parte Johnson*,<sup>706</sup> and *Ex parte Maceyra*<sup>707</sup> inmates challenged the constitutional validity<sup>708</sup> of the Board of

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696. See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (Vernon Supp. 1986).

697. 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985).

698. *Id.* at 2259, 85 L. Ed. 2d at 644.

699. Justice Powell did not participate. Justice Marshall filed a concurring opinion in which Justice Brennan joined.

700. See *Romano v. Black*, 735 F.2d 319 (8th Cir. 1984).

701. In *Morrissey v. Brewer*, 408 U.S. 471, 484-89 (1972) the Court had held that due process requires that certain procedural and substantive safeguards must be followed in parole revocation proceedings. In *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1972) the Court held that such safeguards are also applicable to probation revocation proceedings.

In *Romano* the Court summarized the due process requirements established in *Gagnon* and *Morrissey*: the probationer is entitled to written notice of the claimed violations of his probation, disclosure of the evidence against him, an opportunity to be heard and present evidence in his own behalf, the assistance of counsel, a neutral hearing body, and a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation. 105 S. Ct. at 2258, 85 L. Ed. 2d at 642-43. When discretion to continue probation is given to the fact finder, the probationer must also be given the opportunity to demonstrate that there was a justifiable excuse for any violations of the conditions of probation or that revocation is not the appropriate disposition. *Id.*, 85 L. Ed. 2d at 642-43.

702. *Id.* at 2259, 85 L. Ed. 2d at 643.

703. *Id.* at 2259, 85 L. Ed. 2d at 644.

704. *Id.* at 2260, 85 L. Ed. 2d at 645-46.

705. 690 S.W.2d 578 (Tex. Crim. App. 1985) (en banc).

706. 690 S.W.2d 585 (Tex. Crim. App. 1985) (en banc).

707. 690 S.W.2d 572 (Tex. Crim. App. 1985) (en banc).

708. The attacks were based on the due process protections established in *Morrissey*. See *supra* note 701.

Pardon and Parole's automatic revocation rule,<sup>709</sup> pursuant to which those parolees who committed and were convicted of felony offenses while on parole had their parole revoked without benefit of a hearing.<sup>710</sup> Although the court clearly recognized the constitutional issue involved, it resolved the question of the validity of the rule in favor of the parolees on statutory grounds.<sup>711</sup>

During the Survey period Texas courts continued to construe provisions of the Code of Criminal Procedure that authorize deferred adjudication probation.<sup>712</sup> In *Rodriguez v. State*<sup>713</sup> the court of appeals held that this form of probation was no different from regular probation imposed following a finding of guilt for purposes of the liability of a surety on an appearance bond.<sup>714</sup> In both situations the surety's liability is discharged when the principal on the bond appears in court at the trial of his case and the term of probation commences.<sup>715</sup>

In *Maxwell v. State*<sup>716</sup> the court of criminal appeals upheld the court of appeals' determination that an accused is not entitled to ten days to prepare for the hearing on the State's motion to proceed to adjudication.<sup>717</sup> Maxwell argued that his appointed attorney should have been granted ten days to prepare for the hearing, the same length of time granted to appointed attorneys to prepare for a regular trial.<sup>718</sup> Again, no distinction was made between unadjudicated and regular probation.<sup>719</sup>

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709. Section 145.41(b)(5) of the Rules of the Texas Board of Pardons and Paroles effectively provided for revocation of parole without a hearing in some circumstances. 690 S.W.2d at 580. These circumstances included situations in which a felony conviction was the basis of the parole revocation proceedings. See Tex. Bd. of Pardons & Paroles, 37 TEX. ADMIN. CODE § 145.41(b)(5) (Hart Apr. 1, 1985) (Revocation of Administrative Release).

710. While section 145.41(b)(5) did provide for review and disposition by a panel of the parole board, the parolee was not allowed to present any evidence or even appear at this hearing.

711. The court concluded that because TEX. CODE CRIM. PROC. ANN. art. 42.12, § 22 (Vernon Supp. 1985) provides that a parolee is entitled to a hearing on an accusation of violation of parole, the Board of Pardons and Paroles exceeded its statutory authority by enacting rules that "abrogate the statutorily granted right to a hearing." *Maceyra*, 690 S.W.2d at 575. See also *Glenn*, 690 S.W.2d at 585; *Johnson*, 690 S.W.2d at 587. The court also recognized that a parolee who had been convicted of a subsequent felony offense was not entitled to the on-site hearing otherwise mandated by *Morrissey*. *Glenn*, 690 S.W.2d at 581 (citing *Moody v. Daggett*, 429 U.S. 78 (1976)).

712. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3d (Vernon Supp. 1986).

713. 680 S.W.2d 585 (Tex. App.—Corpus Christi 1984, no pet.).

714. *Id.* at 587. At issue was whether the hearing held on the state's motion to proceed to final adjudication was a subsequent proceeding for purposes of TEX. CODE CRIM. PROC. ANN. art. 17.09 (Vernon 1977).

715. The court noted that under Article 42.12, § 3d, an accused can be put on deferred adjudication probation for up to ten years. 680 S.W.2d at 587. Holding a surety liable for such an extended period of time on a misdemeanor bond would "discourage the bail process . . . and would require much more of the surety than the law requires." *Id.*

716. 691 S.W.2d 696 (Tex. Crim. App. 1985).

717. *Id.* at 697.

718. *Id.*

719. In reaching its holding that ten days preparation time was not required, the court relied on its earlier ruling in *Hill v. State*, 480 S.W.2d 200 (Tex. Crim. App. 1971), in which the court held that the indigent accused is not entitled to ten days to prepare for a regular probation revocation. *Id.* at 204.

Generally, the defendant is not entitled to appeal from a trial court's decision to proceed to an adjudication of guilt when the State has moved to "revoke" unadjudicated probation.<sup>720</sup> One court of appeals has issued a general order that prohibits its clerk from accepting filings of such appeals except when the accused has moved for an adjudication of guilt or when the accused has obtained leave of the appellate court to file such an appeal.<sup>721</sup> The accused may, however, appeal a trial court's decision to proceed to adjudication when the trial court lacked jurisdiction<sup>722</sup> and he is entitled to have an appeal bond set by the trial court if an appeal is entertained by the appellate court.<sup>723</sup> Finally, in *Panelli v. State*<sup>724</sup> the court of appeals held that an order granting deferred adjudication is not a final conviction that will support the revocation of regular probation granted in another case.<sup>725</sup>

Closely related to deferred adjudication is the conditional discharge disposition authorized by Section 4.12 of the Controlled Substances Act.<sup>726</sup> In *Jacolos v. Moss*<sup>727</sup> the court of appeals held that mandamus would lie to test the legality of conditions of probation assessed under this procedure.<sup>728</sup> Since the conditions imposed by the trial court were found to be within the trial court's discretion in such matters, however, the application for a writ of mandamus was denied.<sup>729</sup>

### XIII. PROCEDURAL ASPECTS OF APPEAL

#### A. Preservation of Error for Appellate Review

In *Luce v. United States*<sup>730</sup> a unanimous Supreme Court<sup>731</sup> held that a defendant who does not testify in a federal criminal trial may not appeal the

720. See *Contreres v. State*, 645 S.W.2d 298, 298 (Tex. Crim. App. 1983) (en banc).

721. See *Seals v. State*, 691 S.W.2d 30, 31-32 (Tex. App.—Beaumont 1985, no pet.).

722. See *Roberson v. State*, 688 S.W.2d 657 (Tex. App.—Eastland 1985, no pet.). In this case the court held that the trial court lacked jurisdiction to revoke the appellant's unadjudicated probation because although the state's motion to revoke probation and adjudicate the appellant's guilt and a *capias* thereon were filed prior to the expiration of the probationary period, the revocation hearing itself occurred after the expiration of the probationary period. *Id.* at 658. Since the state was unable to demonstrate that its attempts to arrest the appellant on the *capias* amounted to due diligence, the trial court lacked jurisdiction over the case when the appellant was arrested three months after the expiration of the probationary period. *Id.* The court also held that the appellant had properly preserved his challenge to the trial court's jurisdiction by filing a motion to quash. *Id.* at 659.

723. *Valles v. State*, 689 S.W.2d 501, 503 (Tex. App.—El Paso 1985, pet. ref'd). In this case the appellant sought to attack the validity of his plea, not the trial court's decision to proceed to adjudication.

724. 685 S.W.2d 400 (Tex. App.—San Antonio 1985), *aff'd*, — S.W.2d —, No. 148-85 (Tex. Crim. App. May 14, 1986) (not yet reported) (pet. granted on other grounds).

725. *Id.* at 402.

726. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.12 (Vernon 1976 & Supp. 1986) provides that first time offenders, with certain exceptions, may be placed on unadjudicated probation "on such reasonable conditions" as the trial court may require.

727. 682 S.W.2d 364 (Tex. App.—Dallas 1984, no pet.).

728. *Id.* at 365.

729. *Id.* at 366.

730. 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984).

731. Justice Stevens did not participate. Justice Brennan, joined by Justice Marshall, filed a concurring opinion. *Id.* at 464, 83 L. Ed. 2d at 449 (Brennan, J., concurring).

trial court's denial of the defendant's motion in limine<sup>732</sup> to forbid the use of his prior convictions for purposes of impeachment pursuant to Rule 609(a).<sup>733</sup> This ruling affirmed the Sixth Circuit's holding below.<sup>734</sup> The Supreme Court granted certiorari, however, to resolve a conflict among the circuits on the appealability issue.<sup>735</sup>

Speaking through the Chief Justice, the Court held that, unlike the situation in which the defendant testifies at trial and is then impeached with his prior convictions, a motion in limine seeks to prevent such impeachment prior to the time the defendant testifies and therefore presents a different situation for the reviewing court.<sup>736</sup> First, any harm flowing from the district court's in limine ruling permitting impeachment by prior conviction is speculative, because there is no way to determine whether the defendant would have testified before the jury in the same manner he claimed he would in his motion in limine.<sup>737</sup> In addition, if the defendant had testified at trial, the trial court might well have changed its earlier ruling and not permitted the impeachment.<sup>738</sup> If the accused presents a motion in limine to prohibit impeachment and then does not testify, the reviewing court is unable to make the balancing test required by Rule 609(a)(1) within the bounds of a known factual context.<sup>739</sup>

Second, in the motion in limine situation, the court has no way of knowing whether the prosecution would actually have sought to impeach the accused with his prior conviction.<sup>740</sup> Third, the court has no way of ascertaining on appeal whether the trial court's adverse decision on the accused's motion in limine actually resulted in the accused deciding not to testify.<sup>741</sup> Finally, even if the aforementioned difficulties could be sur-

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732. The Court noted that in limine rulings are not explicitly authorized by the Federal Rules of Evidence but "the practice has developed pursuant to the district court's inherent authority to manage the course of trials." *Id.* at 463 n.4, 83 L. Ed. 2d at 447 n.4.

The Court also noted that while in limine has been defined to mean preliminarily, the Court used the term "in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Id.* at 463 n.2, 83 L. Ed. 2d at 447 n.2.

733. *Id.* at 464, 83 L. Ed. 2d at 448. See FED. R. EVID. 609a (controlling previous conviction evidence).

734. *United States v. Luce*, 713 F.2d 1236 (6th Cir. 1983).

735. 105 S. Ct. at 463, 83 L. Ed. 2d at 447. See also 713 F.2d at 1238-39 (Sixth Circuit's discussion of other circuits).

736. The Court noted that when the accused does testify and is then impeached with a prior conviction, the district court's decision to admit the impeaching evidence is reviewable on appeal along with any other claims of error. 105 S. Ct. at 463, 83 L. Ed. 2d at 447. Such claims are reviewed under an abuse of discretion standard. See *United States v. Williams*, 587 F.2d 1, 1-2 (6th Cir. 1978).

737. 105 S. Ct. at 463, 83 L. Ed. 2d at 447.

738. *Id.*, 83 L. Ed. 2d at 448.

739. *Id.*

740. *Id.* The Court noted that a prosecutor with a strong case and other available means to impeach the defendant might elect not to use an arguably inadmissible prior conviction for purposes of impeachment. *Id.*

741. The Court observed that an accused's decision to testify seldom turns on the resolution of any one factor. *Id.* at 463-64, 83 L. Ed. 2d at 448. A reviewing court therefore cannot assume that an adverse ruling on a motion in limine to prohibit impeachment by use of a prior conviction motivated a defendant's decision not to testify. *Id.*

mounted, a reviewing court would still face the issue of harmless error. If in limine rulings under Rule 609(a) were appealable, the Court reasoned, "almost any error would result in the windfall of automatic reversal; the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying."<sup>742</sup> Because of these policy considerations, the Court concluded that in order to raise and preserve for review a claim of improper impeachment with a prior conviction, a defendant must testify at trial.<sup>743</sup>

Two court of criminal appeals cases decided during the Survey period reiterated prior holdings that motions in limine are not sufficient to preserve error in a Texas criminal trial. In *Maynard v. State*<sup>744</sup> the court held that the defendant's motion in limine to exclude weapons and contraband found in his car on the ground that admission of these items would constitute proof of extraneous offenses did not preserve any error involved in the admission of the items for appellate review.<sup>745</sup> The defendant's objection to the admission of the items at the time they were offered into evidence, however, was sufficient to preserve error.<sup>746</sup> In holding that admission of the items seized constituted reversible error, the *Maynard* court also held that although the defendant subsequently testified at trial concerning the contents of his automobile, because the defendant offered this testimony to meet and explain the improperly admitted exhibits, the defendant's testimony did not waive his earlier objection to the exhibits.<sup>747</sup>

In *Warren v. State*<sup>748</sup> the court of criminal appeals held that error resulting from the trial court's failure to read to the jury the enhancement allegations contained in the indictment and to call upon the defendant to enter a plea to this portion of the indictment could be preserved by means of a motion for mistrial, motion for new trial, bill of exception, or motion to arrest judgment.<sup>749</sup> All that is required for the defendant to preserve such an error for appellate review is that he make an issue of the failure to read the indict-

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742. *Id.* at 464, 83 L. Ed. 2d at 448.

743. *Id.* Justice Brennan's concurring opinion pointed out that the policy considerations supporting this ruling in the context of a claim that the impeaching evidence was not admissible under Rule 609a might well be absent when the "determinative question turns on legal and not factual considerations" (i.e., an "in limine ruling concerning the constitutionality of admitting immunized testimony for impeachment purposes"). *Id.* at 464, 83 L. Ed. 2d at 449 (Brennan, J., concurring). In the latter situation "a requirement that the defendant actually testify at trial to preserve the admissibility issue for appeal might not necessarily be appropriate." *Id.*

744. 685 S.W.2d 60 (Tex. Crim. App. 1985) (en banc).

745. *Id.* at 64. See also *Gonzales v. State*, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985) (reversing court of appeals' holding that motion in limine was sufficient to preserve objection to prior arrest evidence).

746. *Id.* at 65 (citing provisions of TEX. CODE CRIM. PROC. ANN. art. 40.09(6)(d)(3) (Vernon Supp. 1986)).

747. *Id.* at 65-66. Generally, when the defendant offers the same evidence to which he earlier objected, he is not in a position to complain on appeal of the earlier admission of the evidence under the doctrine of curative admissibility. A corollary to this doctrine is that the harmful effect of improperly admitted evidence is not cured when the defendant testifies to "meet, destroy or explain it by the introduction of rebutting evidence." *Id.* at 65. See *Thomas v. State*, 572 S.W.2d 507 (Tex. Crim. App. 1978).

748. 693 S.W.2d 414 (Tex. Crim. App. 1985).

749. *Id.* at 416.



ment in the trial court.<sup>750</sup> The court emphasized, however, that a motion for new trial is the proper method to preserve such a claim.<sup>751</sup>

Another case decided by the court of criminal appeals, *Currie v. State*,<sup>752</sup> provides an excellent example of the wrong way to utilize both formal and informal bills of exception. In *Currie* the accused sought to bolster his self-defense claim by introducing evidence that the deceased was the aggressor in the incident. The evidence in issue included police records of the deceased's prior arrests for several assaultive offenses and the police report filed by a police officer who had investigated an earlier assault committed on the defendant by the deceased. Since the defendant had not established that self-defense was an issue in the case at the time both of these documents were offered into evidence at trial,<sup>753</sup> the trial court ruled that the exhibits were not admissible at that stage of the trial. These rulings were correct at the time they were made.<sup>754</sup> After the defendant raised the issue of self-defense through the testimony of other witnesses, he did not re-offer the exhibits. Rather, after sentencing the defendant sought to perfect a formal bill of exception with regard to the arrest records.<sup>755</sup> Since this bill was not acted on by the trial court, the court of criminal appeals deemed the trial court to have approved it without qualification. The court of criminal appeals held that the formal bill failed to preserve any error for review, however, because the record did not reflect that the reports were ever offered at trial after the admissibility of this type of evidence had been established, and because the formal bill itself stated that if the sponsoring witness had been permitted to testify, the records would then have been offered.<sup>756</sup>

With regard to the police report involving the prior assault on the defendant, the defendant attempted to preserve error by way of an informal bill of exception. Although the report in question was attached to the formal bill of exception, which was not utilized properly, and the report was numbered as an exhibit and identified by the sponsoring witness, the record did not reflect that the report was ever offered for purposes of the informal bill of exception or otherwise. The defendant therefore failed to preserve any error that resulted from the exclusion of the police report.<sup>757</sup>

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750. *Id.* TEX. CODE CRIM. PROC. ANN. art. 44.24(a) (Vernon Supp. 1986) states that it is presumed on appeal that the defendant was arraigned and pleaded to the indictment or information "unless such matters were made an issue in the court below" or it affirmatively appears in the record that this was not done.

751. 693 S.W.2d at 416.

752. 692 S.W.2d 95 (Tex. Crim. App. 1985) (en banc). The conviction had been ordered reversed by the court of appeals in an unpublished opinion. No. 2-81-119-CR (Tex. App.—Fort Worth, May 2, 1984).

753. Under the rule of *Dempsey v. State*, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954), when the defense in a murder case produces testimony establishing that the defendant acted in self-defense, evidence of acts of violence or misconduct by the deceased are then admissible to demonstrate that the deceased was the aggressor in the incident.

754. 692 S.W.2d at 97-98.

755. See TEX. CODE CRIM. PROC. ANN. art. 40.09 (6)(a) (Vernon Supp. 1986) (discussing bills of exception).

756. 692 S.W.2d at 97-98.

757. *Id.* at 98.

*B. The Record on Appeal*

The issue of an appellant's right to a transcription of the court reporter's notes of the trial was addressed in several cases decided during the Survey period. Ordinarily, an appellant is entitled to such a transcription. If for some reason the trial court cannot provide such a transcription, the appellant is entitled to a new trial.<sup>758</sup> In *Young v. State*,<sup>759</sup> however, the court of appeals found an exception to this rule based upon the unique facts of the case. A portion of the court reporter's notes of the defendant's trial had been destroyed in a courthouse fire, thus making preparation of the complete transcription impossible. Since the trial court and the defendant agreed as to what occurred at the trial during the period not covered by the transcription, the court of appeals refused to reverse the conviction on the ground that a small part of the record happened to be missing through no fault of either party.<sup>760</sup>

Two cases during the Survey period dealt with the problem of who pays for a court reporter's transcription of the statement of facts. In *Abdnor v. State*<sup>761</sup> the court of appeals held that if an appellant who had filed an affidavit of indigency failed to testify concerning his indigency, the trial court could properly refuse to provide the appellant with a copy of the transcript at the county's expense.<sup>762</sup> The fact that the probate court appointed a guardian for the appellant did not automatically establish the appellant's incompetency as a witness for purposes of establishing his indigency, and therefore the appellant's status as a ward did not excuse his failure to testify at the hearing on the issue of indigency.<sup>763</sup> The court of appeals also held that the testimony of other witnesses as to the appellant's lack of income did not establish a lack of other assets, and therefore the appellant failed to establish his status as an indigent.<sup>764</sup> In *Dunn v. State*<sup>765</sup> the court of appeals rejected the claim of a non-indigent appellant that because he had been successful on appeal<sup>766</sup> he was entitled to have the court reporter's transcript paid for by the state or by the county in which the prosecution was brought.<sup>767</sup>

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758. See *Gamble v. State*, 590 S.W.2d 507 (Tex. Crim. App. 1979).

759. 691 S.W.2d 757 (Tex. App.—Texarkana 1985, no pet.).

760. *Id.* at 759.

761. 687 S.W.2d 14 (Tex. App.—Dallas 1984, no pet.). This is not the first time the issue of this appellant's status as an indigent had been litigated. See *Abdnor v. Ovard*, 635 S.W.2d 864 (Tex. App.—Dallas 1982), *aff'd*, 653 S.W.2d 793 (Tex. Crim. App. 1983). Interestingly, in that case the court of criminal appeals expressly disapproved the court of appeals' determination that the "appellant is required to testify, rather than call witnesses in his behalf," at an indigency hearing. 653 S.W.2d at 794 n.2.

762. See TEX. CODE CRIM. PROC. ANN. art. 40.09(5) (Vernon 1979), then in effect, which provided that the transcripts of those appellants determined to be indigent are to be paid for out of the general fund of the county in which the offense was alleged to have been committed.

763. 687 S.W.2d at 16-17.

764. *Id.* at 16.

765. 683 S.W.2d 729 (Tex. App.—Amarillo 1984, no pet.).

766. The appellant was found guilty on four counts of theft. On appeal the court of appeals dismissed three of the counts and reversed and remanded the conviction on a fourth count. *Dunn v. State*, 646 S.W.2d 576 (Tex. App.—Amarillo 1983, no pet.).

767. The appellant relied on TEX. CODE CRIM. PROC. ANN. art. 1016 (Vernon 1979),

The proper method for supplementation of the appellate record on appeal was the subject of two cases decided during the Survey period. In *Durrough v. State*<sup>768</sup> the court of criminal appeals held that the court of appeals erred in failing to consider two exhibits that had been introduced at trial but had not been included in the appellate record.<sup>769</sup> The court of appeals concluded that the statutory procedures for supplementation of the record had not been complied with in the trial court and that counsel for the appellant could not supplement the record on appeal simply by tendering the omitted exhibits to the court of appeals.<sup>770</sup> The court of criminal appeals held that because the items omitted from the record were exhibits, which are required to be made part of the record whether designated or not, the court of appeals should have considered the exhibits despite the fact that the appellant had not physically forwarded the exhibits to the court of appeals along with the record.<sup>771</sup> In *Labarge v. State*<sup>772</sup> the court of appeals held that if the trial judge who had heard the case had left office without filing findings of fact that a confession was voluntarily given,<sup>773</sup> the successor of the trial judge could make such findings and such findings could then be made part of the appellate record by supplementation.<sup>774</sup> In *Shead v. State*<sup>775</sup> the court of appeals held that the twenty-day time limit<sup>776</sup> to file the designation of items to be included in the appellate record cannot be extended.<sup>777</sup> The appellant therefore was not entitled to an extension of the time for the court reporter to prepare a statement of facts since the defendant had not made a timely designation of the record.<sup>778</sup>

### C. Notice of Appeal

Under previous holdings of the court of criminal appeals, notice of ap-

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which provides for the retaxing of costs improperly taxed against a defendant. 683 S.W.2d at 730. The court of appeals held that this statute had nothing to do with the costs of a transcription of the statement of facts, which must be paid for by the appellant. *Id.*

768. 693 S.W.2d 404 (Tex. Crim. App. 1985) (en banc).

769. *Id.* at 405.

770. 672 S.W.2d 860, 864 n.1 (Tex. App.—Corpus Christi 1984). The appellant had filed a motion to supplement the record by including the omitted exhibits. The motion was granted by the court of appeals. The missing exhibits were not, however, forwarded to the court of appeals by the trial court as required by TEX. CODE CRIM. PROC. ANN. art. 40.09, § 7 (Vernon Supp. 1984).

771. 693 S.W.2d at 405 TEX. CODE CRIM. PROC. ANN. art. 40.09, § 1 (Vernon Supp. 1986) requires that the clerk of the trial court make and prepare an appellate record including copies of all exhibits on file, whether these items are designated to be included in the record or not.

772. 681 S.W.2d 261 (Tex. App.—San Antonio 1984, no pet.).

773. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (Vernon 1979).

774. 681 S.W.2d at 263.

775. 697 S.W.2d 784 (Tex. App.—Dallas 1985, no pet.) (per curiam).

776. TEX. CODE CRIM. PROC. ANN. art. 40.09, § 2 (Vernon Supp. 1986) requires the appellant to file his designation of the appellate record within twenty days after giving notice of appeal. The state's designation of the record must be filed within thirty days of the appellant's notice of appeal.

777. 697 S.W.2d at 785.

778. *Id.* at 785-86. The court relied upon *Hernandez v. State*, 670 S.W.2d 686, 688 (Tex. App.—Amarillo 1984, no pet.).

peal<sup>779</sup> given before the disposition of a motion for new trial was deemed premature, and therefore ineffective.<sup>780</sup> In *Ex parte Drewery*<sup>781</sup> the court left open the question of whether such a premature notice of appeal would be effective in light of the adoption of the Texas Rules of Post-Trial and Appellate Procedure, which arguably make the civil rule concerning premature notice of appeal effective in criminal cases.<sup>782</sup> During the Survey period several courts of appeals delivered opinions dealing with this issue.<sup>783</sup> The mixed results in these cases suggest that the issue must ultimately be decided by the court of criminal appeals.

In *Williams v. State*<sup>784</sup> the trial court improperly<sup>785</sup> gave the defendant a probated sentence on his 1981 aggravated robbery conviction. Three years later the trial court set aside that portion of the judgment in which probation was granted after realizing that the defendant was not eligible for probation. When the trial court overruled the defendant's motion for a new trial, the defendant gave notice of appeal. The court of appeals held that notice of appeal was not timely filed and dismissed the appeal for want of jurisdiction with the suggestion that the defendant seek relief by way of post-conviction writ of habeas corpus or motion for an out-of-time appeal.<sup>786</sup> In *Hall v. State*<sup>787</sup> the court of criminal appeals held that when a notice of appeal is filed while the motion for new trial is pending and is then withdrawn prior to resolution of the motion for new trial, the defendant is not precluded from filing a second notice of appeal following an adverse ruling by the trial court on his motion for new trial.<sup>788</sup>

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779. TEX. CODE CRIM. PROC. ANN. art. 44.08(b) (Vernon Supp. 1986) requires that when a motion for new trial is filed, notice of appeal must be given "within fifteen days after overruling of the motion or amended motion for new trial." Subsection (a) of article 44.08 makes notice of appeal "a condition of perfecting an appeal to the Court of Appeals."

780. See *Gordon v. State*, 627 S.W.2d 708, 709 (Tex. Crim. App. 1982).

781. 677 S.W.2d 533 (Tex. Crim. App. 1984).

782. *Id.* at 536. Judge Miller, concurring in *Drewery*, noted that two courts of appeals had held that in light of the 1981 adoption of TEX. R. CRIM. APP. P. 211, TEX. R. CIV. P. 306(c) may now apply in criminal cases. 677 S.W.2d at 537 (citing *Johnson v. State*, 649 S.W.2d 153 (Tex. App.—Austin 1983, no pet.) and *Mayfield v. State*, 627 S.W.2d 474 (Tex. App.—Corpus Christi 1981, no pet.)). Rule 306(c) operates to make prematurely filed notices of appeal "deemed to have been filed on the date of but subsequent to . . . the date of the overruling of the motion for new trial, if such motion is filed. TEX. R. CIV. P. 306(c).

783. The following decisions have now held that a notice of appeal given while a motion for new trial is pending is timely filed: *Panelli v. State*, 685 S.W.2d 400, 402 (Tex. App.—San Antonio 1985, *aff'd*, — S.W.2d — No. 148-85 (Tex. Crim. App., May 14, 1985) (not yet reported); *Sweeten v. State*, 686 S.W.2d 680, 683 (Tex. App.—Corpus Christi 1985, no pet.); *Lee v. State*, 699 S.W.2d 312, 313 (Tex. App.—Dallas 1985, pet. ref'd, untimely filed).

Cases holding that such a notice of appeal should still be considered premature and therefore ineffective include: *Davis v. State*, 688 S.W.2d 702, 703 (Tex. App.—Eastland 1985, pet. granted); *Penhanker v. State*, 689 S.W.2d 233, 234 (Tex. App.—Houston [1st Dist.] 1985, pet. granted) (appeal dismissed without prejudice to filing motion for reinstatement for good cause pursuant to article 44.08(e)).

784. 692 S.W.2d 545 (Tex. App.—Houston [14th Dist.] 1985, no pet.).

785. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3f(a)(1)(D) (Vernon Supp. 1985) made probation unavailable for defendants convicted of aggravated robbery.

786. 692 S.W.2d at 546. Appellant followed this suggestion and received relief. *Ex parte Williams*, 704 S.W.2d 773 (Tex. Crim. App. 1986).

787. 698 S.W.2d 150 (Tex. Crim. App. 1985).

788. *Id.* at 152.

#### D. *Test of Sufficiency of Evidence on Appeal*

In a series of cases involving the question of sufficiency of evidence regarding the affirmative defense of insanity, the court of criminal appeals found it necessary to state again that the courts of appeals do not have the authority to review the sufficiency of evidence in a criminal case by the great weight and preponderance standard utilized by those courts in civil cases. Rather, when reviewing the evidence in a criminal case, the courts of appeals must use the due process standard for reviewing the sufficiency of evidence that was recognized in *Jackson v. Virginia*.<sup>789</sup> In *Combs v. State*,<sup>790</sup> a 1982 case, the court of criminal appeals reversed the court of appeals after that court had found the evidence was insufficient to establish the cause of death and had remanded the case for a new trial.<sup>791</sup> In reversing the court of appeals, the court of criminal appeals took pains to point out that it had never had the authority to unfind facts or pass upon the weight and preponderance of the evidence<sup>792</sup> and in a footnote observed that the court of appeals also lacked such authority when reviewing criminal convictions.<sup>793</sup> At issue was the question of whether the provision of the Texas Constitution that had been interpreted as giving the courts of civil appeals the authority to determine questions of sufficiency of evidence in civil cases by the great weight and preponderance of the evidence standard and making factual determinations by the courts of appeals dispositive also granted the courts of appeal such authority when reviewing criminal cases.<sup>794</sup> In *Combs* the court of criminal appeals held that the courts of appeals did not have the authority to apply this standard of review in criminal cases and that the court of criminal appeals had "jurisdiction to review the sufficiency of the evidence [applying the *Jackson* standard] to support a conviction even though that question has been addressed by the Court of Appeals."<sup>795</sup>

The decision in *Combs* was subsequently followed in two court of appeals<sup>796</sup> opinions, although not without criticism by at least one court of appeals chief justice.<sup>797</sup> This criticism prompted a per curiam reply by the

789. 443 U.S. 307 (1979). See also *Wilson v. State*, 654 S.W.2d 465, 471 (Tex. Crim. App. 1983) (discussing the *Jackson* standard).

790. 643 S.W.2d 709 (Tex. Crim. App. 1982).

791. See *Combs v. State*, 631 S.W.2d 534 (Tex. App.—Houston [1st Dist.] 1982).

792. 643 S.W.2d at 716.

793. *Id.* at 716 n.1.

794. TEX. CONST. art. V, § 6 provides that the decisions of the courts of appeals "shall be conclusive on all questions of fact brought before them on appeal or error." After reviewing the relevant case law, the *Combs* court concluded that "[i]t is thus clear that the phrase 'questions of fact' is, in the context of Art. 5, Sec. 6, a legal term of art signifying 'questions of weight and preponderance of the evidence.'" 643 S.W.2d at 715.

795. 643 S.W.2d at 717.

796. See *Arvay v. State*, 646 S.W.2d 320, 321-22 (Tex. App.—Dallas 1983, *pet. ref'd*); *Minor v. State*, 653 S.W.2d 349 (Tex. App.—San Antonio), *pet. ref'd*, 657 S.W.2d 811 (Tex. Crim. App. 1983) (*en banc*) (*per curiam*).

797. See the concurring opinion of Chief Justice Cadena in *Minor*, 653 S.W.2d at 351-54. The Chief Justice called the court of criminal appeals' holding in *Combs* "a clear misinterpretation of Tex. Const. art. V § 6 (amended 1980, effective September 1, 1981) . . . the constitutional provision defining the jurisdiction of the Court of Appeals." *Id.* at 351. The Chief Justice concluded that the court of criminal appeals' holding had created "a justifiable concern

court of criminal appeals in *Minor v. State*<sup>798</sup> in which the court reiterated its prior holding in *Combs*<sup>799</sup> while at the same time conceding that the question of the court of appeals' conclusive authority over the sufficiency of evidence in a criminal case was not raised by the facts of the case before it.<sup>800</sup>

Various courts of appeals, however, either did not get or chose not to acknowledge the message sent by the court of criminal appeals in *Combs* and *Minor*. In *Schuessler v. State*,<sup>801</sup> decided before the delivery of the court of criminal appeals' opinion in *Minor*, the El Paso court of appeals flatly asserted its conclusive authority over questions of fact existing on appeal, finding the authority for ultimate jurisdiction over questions that involve the factual sufficiency of the evidence, in Article V, Section 6 of the state constitution and the constitutional portion of Article 44.25 of the Code of Criminal Procedure.<sup>802</sup> Its jurisdiction thus established, the court of appeals then applied the great weight and preponderance standard of proof to overrule the jury's implicit rejection of the insanity defense, reversed the conviction, and remanded the case to the trial court for a new trial.<sup>803</sup>

On the heels of the court of appeals' opinion in *Schuessler v. State* came the San Antonio court of appeals' opinion in *Van Guilder v. State*.<sup>804</sup> In *Van Guilder*, the court reversed the conviction on the ground that the defendant had established her insanity defense as a matter of law,<sup>805</sup> and rendered a judgment of acquittal by reason of insanity.<sup>806</sup> Although the court did not rely on the great weight and preponderance of the evidence standard, it went

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that the grant of jurisdiction to the Court of Appeals contained in § 6 may be subject to restriction." *Id.* at 354.

798. 657 S.W.2d 811 (Tex. Crim. App. 1983).

799. *Id.* at 812 n.5.

800. *Id.* at 812. The court of criminal appeals pointed out that the 1980 amendment of TEX. CONST. art. V, § 6, which referred to the jurisdiction of the courts of appeals, retained the "ubiquitous qualifying phrase 'under such restrictions and regulations as may be prescribed by law.'" 657 S.W.2d at 812. The court then pointed to the language of TEX. REV. CIV. STAT. ANN. art. 1820 (Vernon 1964) (now found at TEX. GOV'T CODE ANN. § 22.225(a) (Vernon Pam. 1986)) which was amended in 1981 to read: "The judgments of the Courts of Appeals in civil cases shall be conclusive in all cases on the facts of the case." 657 S.W.2d at 811-12 (emphasis original with opinion). The court noted that the language "in civil cases" was also inserted in TEX. REV. CIV. STAT. ANN. art. 1821 (Vernon 1964) (now found at TEX. GOV'T CODE ANN. § 22.225(b) (Vernon Pam. 1986)). 657 S.W.2d at 812 n.3. From this set of developments the court of criminal appeals concluded that the legislature "undertook to ensure that the proviso in § 6 [of Article V] is not applicable in criminal actions and cases." *Id.* at 812.

801. 647 S.W.2d 742 (Tex. App.—El Paso 1983).

802. *Id.* at 748. TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon Supp. 1986) provides that "[t]he courts of appeal or the Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts."

803. 647 S.W.2d at 748.

804. 674 S.W.2d 915 (Tex. App.—San Antonio 1984).

805. The evidence of insanity was so compelling (and the state's rebuttal evidence so non-existent) that the jury found the defendant not guilty by reason of insanity on the four other indictments, each of which charged attempted murder, but inexplicably convicted the defendant of the offense of murder. *Id.* at 916. The court of appeals recognized that the inconsistency of the verdicts did not require reversal of the murder conviction, but noted that the result in the other cases was proof of the overwhelming nature of the evidence supporting a finding of insanity. *Id.* at 919.

806. *Id.* at 920.

out of its way to acknowledge that it had jurisdiction over great weight and preponderance fact issues.<sup>807</sup> Next, in *Baker v. State*<sup>808</sup> a Houston Court of Appeals applied the great weight and preponderance of the evidence standard to an insanity defense and ordered the conviction reversed and the cause remanded for a new trial.<sup>809</sup>

The first of these three cases decided by the court of criminal appeals on petition for discretionary review was *Van Guilder v. State*.<sup>810</sup> In its opinion affirming the court of appeals' disposition of the case, the court of criminal appeals reaffirmed its earlier holdings that the *Jackson v. Virginia* standard of review was the only appropriate standard for reviewing the sufficiency of evidence in criminal cases, and stated that courts of appeals must apply this standard in reviewing criminal cases.<sup>811</sup> The court then noted that the confusion in the court of appeals' decision apparently stemmed from the use by the defendant of the affirmative defense of insanity.<sup>812</sup> If the defense raises an affirmative defense, the state does not retain the burden of proof beyond a reasonable doubt. Rather, the accused bears the burden of persuasion by the preponderance of the evidence. This does not mean that the accused is not entitled to a review of the sufficiency of the evidence as to the insanity (or other affirmative) defense,<sup>813</sup> but when the appellate court undertakes such a review it must apply a modified *Jackson* test.<sup>814</sup> The court of appeals must review the evidence on the affirmative defense in the light that is most favorable to the implicit finding by the jury with respect to such affirmative defense and then determine, by examining all the evidence concerning the affirmative defense, if any rational trier of fact could have found that the defendant failed to prove his defense by a preponderance of the evidence.<sup>815</sup> Such an approach, the court was careful to note, does "not involve the appellate court in any fact finding function" and "there must be no reweighing or reclassifying of the evidence by the appellate court."<sup>816</sup> When this test was applied to the evidence in *Van Guilder*, the court concluded it was clear that no rational trier of fact could have found that the defendant failed to prove her insanity defense by a preponderance of the evidence. The court of appeals' reversal of the conviction was therefore affirmed.<sup>817</sup>

Subsequently, the court of criminal appeals ordered the *Baker* case remanded to the court of appeals for application of the standard of review set

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807. *Id.*

808. 682 S.W.2d 701 (Tex. App.—Houston [1st Dist.] 1984).

809. *Id.* at 709. The court overruled the defendant's claim that there was no evidence rebutting the defendant's defensive evidence on the issue of insanity. *Id.*

810. No. 899-84 (Tex. Crim. App., Nov. 6, 1985) (not yet reported).

811. Under this standard the reviewing court examines all of the evidence in the light most favorable to the jury's verdict, limiting its inquiry to the issue of whether "any rational trier of fact could have found the defendant guilty beyond a reasonable doubt" and "resolving all conflicts and reasonable inferences in favor of the verdict." *Id.*, slip op. at 2-3.

812. *Id.*, slip op. at 4. See TEX. PENAL CODE ANN. § 2.04(d) (Vernon 1974).

813. *Id.*, slip op. at 5-6.

814. *Id.*, slip op. at 6.

815. *Id.*

816. *Id.*

817. *Id.*, slip op. at 11.

out in *Van Guilder*.<sup>818</sup> On petition for discretionary review, the court of appeals' holding in *Schuessler* was reformed by the court of criminal appeals to reflect an acquittal and affirmed as reformed, since the court of criminal appeals agreed that the state had utterly failed to produce any evidence rebutting the defensive testimony that had established the insanity of the defendant.<sup>819</sup>

In an unrelated case, *Richardson v. State*,<sup>820</sup> the majority of the court of criminal appeals held that in a prosecution for solicitation of a felony an accomplice witness's testimony must be corroborated as to both the solicitation itself and the solicitor's intent that the felony solicited actually be carried out.<sup>821</sup> The majority rejected, however, the defendant's claim that the phrase "strongly corroborative", as used in the solicitation statute,<sup>822</sup> required a test of the sufficiency of the corroboration of the accomplice witness more stringent than the test applied under the general statute<sup>823</sup> dealing with corroboration of accomplice witness testimony.<sup>824</sup>

#### E. Petition for Discretionary Review

In *Jacolos v. Moss*<sup>825</sup> the court of criminal appeals held that it could not entertain a petition for discretionary review to examine the correctness of the court of appeals' resolution of an application for writ of mandamus or prohibition.<sup>826</sup> Rather, as in civil cases, the proper procedural vehicle for seeking review of a court of appeals exercise of its power to issue extraordinary writs is by way of an original application for writ of mandamus filed in the court of criminal appeals.<sup>827</sup> In *Dickens v. Palmer*<sup>828</sup> the court of criminal appeals held that the clerk of the court of appeals had no authority to refuse to accept a petition for discretionary review that sought to challenge the court of appeals' exercise of its mandamus authority.<sup>829</sup> The court of criminal appeals reasoned that it was its prerogative to assess the issue of whether it

818. *Baker v. State*, No. 135-85 (Tex. Crim. App., Jan. 15, 1986) (not yet reported), slip op. at 3.

819. *Schuessler v. State*, No. 289-83 (Tex. Crim. App., Feb. 5, 1986) (not yet reported), slip op. at 7.

820. 700 S.W.2d 591 (Tex. Crim. App. 1985).

821. 700 S.W.2d at 594.

822. See TEX. PENAL CODE ANN. § 15.03(b) (Vernon 1974).

823. See TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979).

824. 700 S.W.2d at 594. The policy consideration motivating the adoption of § 15.03(b) according to the majority, "does not indicate a different standard" for evaluating the corroboration of accomplice witness testimony, but "only re-emphasizes the need for some additional safeguard." *Id.* The additional safeguard that the court notes is that the corroboration must go to both the solicitation and the solicitor's intent. *Id.* The dissent argued that the legislature meant to apply a different standard when it used the phrase "strongly corroborated." *Id.* at 595-96 (Clinton, J., dissenting).

825. 692 S.W.2d 724 (Tex. Crim. App. 1985) (en banc).

826. *Id.* at 726.

827. *Id.* at 725-26. The court recognized that in *Abdnor v. Ovard*, 653 S.W.2d 793 (Tex. Crim. App. 1983), it had reviewed a denial of mandamus by way of a petition for discretionary review without determining jurisdiction. 692 S.W.2d at 726 n.5. This however was an aberration without precedential value. *Id.*

828. 697 S.W.2d 418 (Tex. Crim. App. 1985).

829. *Id.* at 420.



had jurisdiction over a petition for discretionary review. The filing of the petition and the forwarding of it to the court of criminal appeals was a ministerial duty to be performed by the clerk of the court of appeals.<sup>830</sup>

Two other cases bear mention only because the court of criminal appeals saw fit to publish per curiam opinions in those cases, thus suggesting that both opinions address problems which frequently occur. In *Pumphrey v. State*<sup>831</sup> the court refused a petition for discretionary review because both the first and second drafts of the petition failed to comply with the requirements of criminal appellate procedure Rule 304(d).<sup>832</sup> In *Shannon v. State*<sup>833</sup> the court repeated its earlier admonitions<sup>834</sup> that its summary refusals of petitions for discretionary review do not lend any additional authority to the underlying opinions of the court of appeals.<sup>835</sup>

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830. *Id.* at 419-20.

831. 689 S.W.2d 466 (Tex. Crim. App. 1985).

832. *Id.* at 467.

833. 693 S.W.2d 390 (Tex. Crim. App. 1985).

834. *See Sheffield v. State*, 650 S.W.2d 813, 814 (Tex. Crim. App. 1983).

835. 693 S.W.2d at 391.