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Trial and Appellate Criminal Procedure

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TRIAL AND APPELLATE CRIMINAL PROCEDURE

by

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DURING the survey period, important developments occurred in the field of trial and appellate criminal procedure. Among the more significant developments were state and federal decisions affecting the punishment stage of Texas criminal trials. The first part of this Article discusses three main areas: recent decisions that define the scope of evidence admissible at the punishment stage; recent decisions that address procedural and substantive questions concerning the special punishment issue of use or exhibition of a deadly weapon; and recent decisions that, while affirming the facial validity of the Texas death penalty statute, raise substantial questions about the constitutionality of the death penalty as the courts have applied it in Texas.

During the survey period, Texas courts also commented on important constitutional issues. Specifically, the courts further explicated several important state and federal constitutional decisions from past years. In the aftermath of decisions declaring unconstitutional a statutorily authorized parole law jury instruction and a statute authorizing the admission of out-of-court videotaped statements of child sexual assault victims, the Texas courts faced a welter of cases addressing such problems as the retroactivity of the prior cases, whether error based upon the statutes could be harmless, and whether a lack of a timely objection would result in a waiver of the claim.

The second part of this Article addresses the cases decided in the wake of these prior decisions of the Texas Court of Criminal Appeals. It also discusses the procedures devised by Texas courts in implementing a landmark United States Supreme Court decision establishing new standards to prevent racial discrimination in the selection of juries. Issues of procedural default, retroactivity, and harmless error raised in these cases have prompted reconsideration of the availability of, and procedural requirements for, habeas corpus, which this Article addresses in the final section.

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I. RECENT DECISIONS CONCERNING PUNISHMENT AND THE DEATH SENTENCE

A. Evidence Admissible at the Punishment Stage of Trial

On June 21, 1989, the Texas Court of Criminal Appeals decided four cases concerning a confusing and uncertain area of law: the evidence admissible at the punishment phase of the Texas system of bifurcated trials.[1] The confused state of the law is curious in light of the fact that the primary statute regulating the evidence admissible at punishment[2] has been virtually unaltered for over twenty years. Although frequently litigated, the meaning of the key term "character" in the statute was an issue of first impression[3] before the highest court in criminal law matters. In addition, conflicting authority existed concerning the admissibility of unadjudicated specific acts of the defendant.

Although a number of cases had stated the general rule that courts cannot admit either unadjudicated specific acts or the details of adjudicated offenses at the punishment phase of a non-capital prosecution,[4] some courts had recognized an ill-defined exception when a defendant's specific acts were relevant to an application for probation or mitigation of punishment.[5] In *Murphy v. State*[6] the defendant took the stand and testified in response to only three questions that were designed to establish Murphy's eligibility for a grant of probation from the jury. Murphy testified that he was the person

1. Hedicke v. State, 779 S.W.2d 837 (Tex. Crim. App. 1989) (en banc); Drew v. State, 777 S.W.2d 74 (Tex. Crim. App. 1989) (en banc); Murphy v. State, 777 S.W.2d 44 (Tex. Crim. App. 1988) (*opinion on reh'g*, en banc, June 21, 1989); King v. State, 773 S.W.2d 302 (Tex. Crim. App. 1989) (en banc).

2. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1990). The statute provides that either the prosecution or the defense may offer evidence "as to . . . the prior criminal record of the defendant, his general reputation and his character." *Id.* § 3(a).

3. *Hedicke*, 779 S.W.2d at 839. The *Hedicke* opinion recognized that litigants had raised the question of the meaning of character evidence in earlier cases before the court of criminal appeals, but that the court skirted direct examination of the issue. *Id.* at 839 n.6.

4. *See* Ramey v. State, 575 S.W.2d 535, 537 (Tex. Crim. App. 1978); Sherman v. State, 537 S.W.2d 262, 264 (Tex. Crim. App. 1976); Lege v. State, 501 S.W.2d 880, 882 (Tex. Crim. App. 1973); Mullins v. State, 492 S.W.2d 277, 279 (Tex. Crim. App. 1973). Texas has traditionally recognized two exceptions to the general rule. First, courts allow the introduction of a felony conviction (or a conviction for a misdemeanor involving moral turpitude) to attack the character for truth and veracity of an accused who has testified on his own behalf. *See* Ochoa v. State, 481 S.W.2d 847, 850 (Tex. Crim. App. 1972). Second, specific conduct can form the basis for questions testing the knowledge of a reputation witness on cross-examination. *See* Rutledge v. State, 749 S.W.2d 50, 53-54 (Tex. Crim. App. 1988). The prohibition against evidence concerning specific defendant misconduct at the punishment stage of trial does not apply to capital cases where almost anything connected to the defendant and the crime committed is both relevant and admissible. In Motley v. State, 773 S.W.2d 283, 294 (Tex. Crim. App. 1989) the court denied a capital defendant's claim that, because such evidence would have been inadmissible in a non-capital trial, the court denied him equal protection of the laws. *Accord* Hogue v. State, 711 S.W.2d 9, 29 (Tex. Crim. App. 1986), *cert. denied*, 479 U.S. 922 (1986); Nethery v. State, 692 S.W.2d 686, 707 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1110 (1985); Morin v. State, 682 S.W.2d 265, 269 (Tex. Crim. App. 1983); Williams v. State, 622 S.W.2d 116, 120 (Tex. Crim. App. 1981).

5. The apparent source of this exception is Allaben v. State, 418 S.W.2d 517, 519 (Tex. Crim. App. 1967).

6. 777 S.W.2d 44 (Tex. Crim. App. 1988).

who had been found guilty by the jury; that he had not been convicted of a felony offense before; and that he had never been placed on felony probation. The State expressed its intention of calling five witnesses to testify to unadjudicated offenses that Murphy allegedly committed. The trial court overruled the defense's objection to the proposed testimony.[7] The court found the testimony relevant "as to whether . . . defendant is a proper person to have on the street on probation, or should in fact, be in the penitentiary . . . ."[8] As a result, the court permitted the prosecution to introduce evidence of five prior unadjudicated offenses committed within six months of the offense at trial.[9] The jury did not recommend probation, but instead, assessed life imprisonment.[10]

The court of appeals reversed, reading the "relevant to probation" cases narrowly as allowing proof of unadjudicated acts only when the defense had created a false impression as to the defendant's suitability for probation so that the evidence was necessary for a fair determination of defense testimony.[11] Because Murphy's carefully limited testimony had not created a false impression as to his suitability for probation, the trial court erred in allowing the State's evidence of the five unadjudicated acts.[12] On appeal to the Texas Court of Criminal Appeals, the State cited numerous cases that interpreted the relevant to probation exception more broadly, supporting the State's argument that the mere filing of an application for probation made unadjudicated offense testimony admissible.[13]

The court of criminal appeals resolved the conflicting authority by disapproving the cases cited by the State and affirming the decision of the court of appeals.[14] Thus, regardless of whether an application for probation has been filed, neither the defense nor the State may introduce evidence of specific

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7. *Id.* at 56.

8. *Id.*

9. The State introduced evidence that Murphy stole a purse, drove while intoxicated by sniffing paint, fled officers in a three-county chase, and committed an assault by near strangulation, followed within an hour by an arrest for public intoxication from sniffing paint. The State initially presented no evidence at the punishment stage of Murphy's trial, choosing to rest after urging reconsideration of the evidence adduced at the guilt/innocence phase of trial. Only after the defendant's limited testimony did the State introduce the extraneous offenses under the theory that they were relevant to the application for probation. *Id.*

10. *Id.*

11. Murphy v. State, 700 S.W.2d 747 (Tex. App.—Dallas 1985), *aff'd*, 777 S.W.2d 44 (Tex. Crim. App. 1988).

12. 777 S.W.2d at 67-68.

13. *See* Cleveland v. State, 502 S.W.2d 24, 25 (Tex. Crim. App. 1973) (following defendant's testimony that he had never been convicted of a felony, that the military had honorably discharged him, and that he enjoyed a good work record and family life, the court permitted the State to elicit, on cross-examination, that defendant had once purchased marijuana, even though the State declined to prosecute him for the offense). *See also* Holmes v. State, 502 S.W.2d 728, 729 (Tex. Crim. App. 1973) (in considering issue of probation, court allowed prosecutor to elicit testimony from defendant concerning defendant's possible addiction to controlled substances); McCrea v. State, 494 S.W.2d 821, 825 (Tex. Crim. App. 1973) (in connection with motion for probation, court permitted prosecutor to elicit testimony from defendant concerning defendant's prior hospitalization for drug addiction); Basaldua v. State, 481 S.W.2d 851, 854 (Tex. Crim. App. 1972) (during punishment proceedings admissible evidence not limited to that of prior criminal record, reputation, and character).

14. Murphy v. State, 777 S.W.2d 44, 68 (Tex. Crim. App. 1988).

good or bad acts of a defendant. In addition, a trial court is required to sustain an objection to such evidence. *Murphy*, however, creates a strategic decision for the opponent of such improper evidence. By objecting, the opponent may prevent the introduction of the improper specific act evidence, but, by foregoing an objection, the opponent is allowed to introduce otherwise impermissible specific act evidence in rebuttal. Thus, both sides can impliedly consent to expand the evidence at the punishment phase to include specific unadjudicated conduct of the defendant even though the *Murphy* court found such evidence improper under the punishment evidence statute.[15] The original proponent of specific act evidence assumes more than the risk that an objection to the evidence will be sustained. Because the opponent may decide instead to accept the implicit invitation to expand the usual rules of admissibility and engage in a good act/bad act contest, the original proponent puts the choice in the hands of the opponent.

Drew v. State,[16] decided the same day as *Murphy*, underscored the advisability of carefully considering becoming the original proponent of specific act evidence. In *Drew* the State was the original proponent of specific, unadjudicated conduct evidence. At the punishment phase of Drew's trial for indecency with a child, the State presented the testimony of a nine-year old boy whom the defendant had allegedly sexually assaulted. Because the extraneous offense was unadjudicated, the trial court erred by failing to sustain the defense's objection. By being the original proponent of the evidence, the State had, as the *Murphy* opinion put it, "in effect consented to admission of specific acts of conduct . . . ."[17] *Drew* also held that the defendant who preserves error for review by objecting does not waive error by then present-

15. *Id.* at 67-68. The Court noted an exception to the inadmissibility of character evidence rule for evidence relevant to specific fact issues created by the legislature. Examples provided by *Murphy* include:

> [T]he State must prove that the accused has been previously convicted in order to enhance range of punishment under V.T.C.A. Penal Code, § 12.42. Where the jury's verdict does not already constitute an affirmative finding of use or exhibition of a deadly weapon . . . that fact must also be proven at the punishment phase for the State to reap the benefit of Article 42.12, § 3g(a)(2) or Article 42.18, § 8(b), V.A.C.C.P. To obtain a recommendation of probation from a jury, an accused must plead and prove he has never before been convicted of a felony offense. Article 42.12, § 3a(a), V.A.C.C.P. The issue whether one accused of aggravated kidnapping released his victim alive and in a safe place may be submitted at the punishment phase, the burden apparently falling upon the accused, since "proof of such release only mitigates punishment" under V.T.C.A. Penal Code, § 20.04(b). Robinson v. State, 739 S.W.2d 795, 797 (Tex. Crim. App. 1987).

Id. at 62-63 n.10.

16. 777 S.W.2d 74 (Tex. Crim. App. 1989).

17. *Id.* at 76 (citing Murphy v. State, 777 S.W.2d 44 (Tex. Crim. App. 1988)). In *Drew* the defense presented the opinion testimony of a psychologist that the defendant would be susceptible to treatment in a particular program for sex offenders and that the defendant would be capable of meeting the requirements of probation. *Id.* at 75. While the court held this testimony admissible to rebut the State's unadjudicated offense evidence, which was improperly introduced over the defendant's objection, the *Drew* court observed that if the defendant had offered the psychologist's testimony in the first instance, it would have opened the door to the very evidence that caused the reversal of the conviction. *Id.* at 76.

ing specific act rebuttal evidence.[18]

Dicta in *Drew*, and the holding in another case decided the same day, *King v. State*,[19] illustrate the perils of being first for the defense. Unlike Murphy, who had carefully limited his testimony to establishing eligibility for probation, King, in addition to testifying that he had no prior felony convictions, testified that he had never been convicted of a misdemeanor that was punishable by jail sentence, and that he would not violate any laws in the future.[20] The court sustained King's objection to the State's attempt to elicit testimony that two days after the sale of cocaine for which King was tried and convicted, King had been involved in the delivery of methamphetamine.[21] The court, however, allowed the State to present this same evidence after King's testimony.[22] King's claims of past and future good conduct sufficed to allow the State to introduce evidence of specific misconduct.[23]

Hedicke v. State,[24] decided the same day as *Murphy*, also addressed the admissibility of specific conduct testimony. The bulk of the opinion, however, concerned another punishment evidence issue: the admissibility of opinion testimony. In *Hedicke* the defendant objected to the trial court's refusal to allow defense witnesses to testify to specific instances of defendant's good conduct and to give their opinions of defendant's character. Consistent with *Murphy*, the court of criminal appeals affirmed the trial court's action in forbidding the specific conduct testimony, but the court of criminal appeals also held that the trial court erred in forbidding the opinion testimony.[25]

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18. *Id.* In a case like *Drew*, the defense may receive a double benefit: the ability to introduce specific act evidence that would not be admissible in the first instance (at least if the State objects) and the ability to appeal the erroneous overruling of the defendant's objection. The defendant's rebuttal may influence the jury to impose a lesser sentence, if the jury is more influenced by it than by the unadjudicated bad act evidence originally tendered by the State. But, if the jury imposes a sentence that the defendant dislikes, the error of the trial court will result in appellate reversal (absent a harmless error finding). Because of the limitations upon State appeal, the converse situation is not as advantageous. If the defendant originally offers specific unadjudicated act evidence and the court erroneously denies the prosecution's objection, the State may introduce like kind rebuttal evidence. An appeal by the State, however, is not possible. Not surprisingly, the *Drew* opinion cautioned that, "[b]ecause ordinarily it proceeds first with whatever punishment evidence it has, the State would be wise to save for rebuttal any specific misconduct it may wish to present." *Id.*

19. 773 S.W.2d 302 (Tex. Crim. App. 1989).

20. *Id.* at 303.

21. *Id.*

22. *Id.*

23. *Id.* Even though the defendant's testimony did not refer to specific conduct, the court allowed the State to proceed with evidence in rebuttal that the court had already held to violate the prohibition against specific unadjudicated misconduct evidence. *Id.*

24. 779 S.W.2d 837 (Tex. Crim. App. 1989).

25. *Id.* at 842. In reaching this holding, the court was required to construe the meaning of the term character evidence, as used in article 37.07 § 3(a) of the Texas Code of Criminal Procedure, the punishment evidence statute. This statute allows for the introduction of the defendant's prior record of adjudicated criminal offenses, reputation and character testimony. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1990). Despite the presence of the term character in the statute for over twenty years, the court of criminal appeals had never previously defined the term. The most plausible explanation for this neglect stems from the linguistic confusion that this term historically has engendered. The *Hedicke* court stated

The *Hedicke* opinion acknowledged that, prior to the adoption of the 1965 Code of Criminal Procedure, the general rule provided that reputation testimony constituted the only permissible method of proving character and that both opinion testimony and evidence of specific instances of conduct were inadmissible.[26] While as *Murphy* demonstrated, the prohibition against specific conduct testimony remains, *Hedicke* held that the 1965 Code made both opinion and reputation evidence admissible.[27] The court noted that the prohibition against opinion testimony was adopted from civil law and derived from the policy concern that the prejudicial effect of opinion testimony would outweigh the relevance value of opinion testimony with regard to the determination of guilt or innocence.[28] The 1965 Code, however, created a bifurcated trial system. By separating the question of guilt/innocence from the question of the appropriate punishment, courts could admit evidence at the second stage of trial that could not be allowed at the first.[29] Furthermore, because the drafters of the 1965 Code made both reputation *and* character evidence admissible at punishment, they must have had something beyond reputation evidence in mind. Despite the unfortunate and redundant use of the term character, the legislature obviously intended to make opinion testimony admissible at punishment.[30]

Although the quartet of cases of June 21, 1989, helped to clarify issues that had been the source of confusion for years, the issues require further legislative and/or judicial explication. For example, although *Hedicke* resolved doubt about the admissibility of opinion testimony, uncertainties still remain as to what types of opinions are admissible. Is the witness limited to an opinion of defendant's capacity for truth and veracity, or his peaceful and law-abiding nature, or are other opinions allowed? In *Drew* the defense elicited the testimony of an expert as to the defendant's suitability for probation. This testimony was held to be properly allowed by the trial court only because the court had improperly allowed the State to introduce evidence of an unadjudicated offense over the defendant's objection.[31] But may a defendant properly introduce such evidence in the first instance, or should the court

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that the proper view of the term character includes both reputation and opinion evidence. 779 S.W.2d at 840. The term, however, has been used synonymously with one of these more specific methods of proof. To appreciate the depth of the confusion, the reader must realize that courts have used the term character to mean reputation in contradistinction to opinion; but, at other times, the exact opposite has been the case. Furthermore, during some periods of legal history, courts have admitted both reputation and opinion testimony but, at other times, courts have allowed only reputation evidence. *See Hedicke*, 779 S.W.2d at 840-41.

26. 779 S.W.2d at 842.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* The decision to allow opinion testimony at punishment also mirrors the treatment accorded to this issue under rules 404(c) and 405(a) of the Texas Rules of Criminal Evidence, which were not yet in effect at the time of Hedicke's trial. The new code, like *Hedicke*, treats character evidence as a generic term that litigants may prove by various methods, including reputation and opinion testimony. Rule 405(a) makes both reputation and opinion testimony admissible "[i]n all cases in which evidence of character . . . is admissible . . . ." TEX. R. CRIM. EVID. 405(a).

31. *Drew*, 777 S.W.2d at 75-76.

sustain a State objection?[32]

Although article 37.07 Section 3(a) of the Texas Code of Criminal Procedure has been the exclusive legislative pronouncement concerning the evidence admissible at the punishment phase of a non-capital trial, its provisions do not exhaustively determine what evidence is allowed.[33] *Murphy* held that interpretations of *Allaben v. State*,[34] providing that merely applying for probation expanded the evidence admissible to include specific conduct of the defendant, were erroneous.[35] *Murphy*, however, acknowledged that *Allaben* correctly held that "evidence of the circumstances of the offender . . . such as his family background, religious affiliation, education, employment history and the like, are appropriate considerations in assessment of punishment."[36] The permissible contours of this "circumstances of the offender" evidence, and whether the evidence is equally available to the defense and prosecution remain unclear.[37]

Just prior to the quartet of decisions from June 21, 1989, the legislature passed a new statute during the 1989 session that comprehensively reorganized the structure of the post-conviction administration of criminal justice in Texas.[38] One small part of this large piece of legislation referred to the evidence admissible at the punishment stage of a criminal trial. The new statute simply declares that all evidence relevant to sentencing is admissible.[39] The breadth of this language evinces a legislative intent to allow the courts to grapple with this difficult issue. Although, arguably, this broad language sweeps away all previous caselaw interpreting the former version of article 37.07 Section 3(a), it is unlikely that the courts will ignore the few guideposts the court of criminal appeals established in deciding what evidence should be admissible at punishment. Legislative and judicial recalcitrance in defining the proper limits of punishment evidence probably stems from the amorphous nature of sentencing decisions. Unlike the guilt/innocence phase of the trial where a charging instrument, alleging a violation of a particular statute with defined elements, frames the issues to be

32. The State might argue, for example, that the question of the defendant's suitability for probation invades the province of the jury or constitutes improper ultimate issue testimony. Also, the State may assert that expert testimony is unnecessary because the determination is within the jury's expertise.

33. Murphy v. State, 777 S.W.2d 44, 64 (Tex. Crim. App. 1988).

34. 418 S.W.2d 517 (Tex. Crim. App. 1967).

35. *Murphy*, 777 S.W.2d at 64.

36. *Id.*

37. Can the State introduce evidence of the defendant's lack of employment or religious affiliation? Can the State introduce opinion testimony to show that it considers the defendant a poor risk for probation? Some case law suggests that the prosecution may not introduce such evidence in the first instance, but, just as with evidence of the defendant's specific unadjudicated misconduct, may do so only in rebuttal. Although *Murphy, Drew*, and *King* clarified the rebuttal-only approach for specific misconduct evidence, the scope and original admissibility of circumstances of the offender evidence remains uncertain. For example, is evidence that the defendant's employer fired him from his job on a particular date impermissible specific misconduct evidence or permissible circumstances of the offender evidence? Can the State introduce this fact in the first instance or only in rebuttal?

38. Act of June 15, 1989, ch. 786 § 404 (989 Vernon Tex. Sess. Law Serv. 3471, 3492); *see* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1990).

39. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1990).

determined, nothing so defines the issues relevant to the question of the appropriate disposition of the convicted defendant. An indeterminate sentencing system, such as in Texas, has been held to require the widest possible information about the offense and the offender in order to individualize an appropriate disposition.[40] Such an approach is more easily accomplished when the judge determines the sentence based upon a comprehensive presentence investigation report developed by a probation officer. In Texas cases where the defendant does not elect to have the jury sentence him, the judge makes use of a presentence investigation report, which is not subject to the rules of evidence, to provide a wide range of information about the convicted defendant.[41] In the federal system and in most states, for non-capital cases the judge sentences the defendant based upon the information developed by a presentence report.[42] But in Texas the defendant in any criminal case can elect the jury to sentence.[43] Yet, the legislature has never authorized the use of presentence investigation reports by the jury; rather, the information necessary to make an informed sentencing decision must be developed in a formal hearing.[44] If Texas courts are to continue this unusual method of determining sentences, either the legislature or the courts must clarify the scope of the evidence that may be properly considered and other issues relating to the punishment phase that have been consistently avoided should be confronted.

B. Deadly Weapon Finding

One of the most important issues in Texas sentencing law is whether a defendant's judgment of conviction contains a deadly weapon finding. If a defendant's judgment of conviction contains a deadly weapon finding, the trial judge cannot grant him regular adult probation and such an inmate must serve a prison sentence at least until his parole eligibility date, without having that date reduced by goodtime.[45] In contrast, inmates not burdened with a deadly weapon finding have their minimum parole eligibility date advanced based upon the amount of good-time earned in custody.[46] With the large awards of good-time granted in Texas, this distinction can have a dramatic effect on the length of confinement.[47]

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40. *See* Williams v. New York, 337 U.S. 241, 250 (1949).

41. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4 (Vernon 1981).

42. Only six states currently allow active jury participation in the sentencing process in non-capital felony convictions. *See* ARK. CODE ANN. § 5-4-103 (1987); KY. REV. STAT. ANN. § 532.055 (Michie Supp. 1988); MO. ANN. STAT. § 557.036 (Vernon Supp. 1990); OKLA. STAT. ANN. tit. 22, § 926 (West 1986); TENN. CODE ANN. § 40-20-104 (1982); TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon 1981). *See also* Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 124 (1985) (commenting on the current expansion of jury power).

43. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon Supp. 1990).

44. Murphy v. State, 777 S.W.2d 44, 64 n.11 (Tex. Crim. App. 1988).

45. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1)-(2) (Vernon Supp. 1990); *id.* art. 42.18, § 8(b)(1).

46. *Id.* § 8(a)-(b).

47. For example, a convicted defendant who receives a 60 year sentence, but whose judgment of conviction contains a deadly weapon finding, making him ineligible to have his parole

The 1987 decision in *Ex parte Patterson*[48] saved a number of inmates from the consequences of a deadly weapon finding. *Patterson* held that an accused is entitled to notice that the use of a deadly weapon will be a contested issue at the punishment phase of trial.[49] The *Patterson* court made it clear that the best way to provide notice is explicitly to allege the use of a deadly weapon in the indictment or to allege the use of a weapon that is, per se, deadly.[50] "Firearms", "rifles" and "handguns" are deadly weapons per se.[51] The bare allegation of the use of one of these devices suffices to provide notice that the use of a deadly weapon may be a fact issue at the punishment stage of trial. By contrast, "knives" and "guns" are not, per se, deadly weapons.[52]

Although *Patterson* indicated that the preferred method of providing notice was to put an explicit or implicit allegation of deadly weapon use or exhibition in the indictment, the court acknowledged the possibility that notice could be provided to the defense in some form other than the indictment prior to the punishment stage of trial.[53] *Patterson*, however, held that unless the State provided notice to the defendant in some form, the State could not

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eligibility date advanced by the award of good-time, will serve 15 years in custody before becoming eligible for parole. An inmate, however, whose parole eligibility date was accelerated by the good-time rate earned by every inmate upon arrival at the Division of Corrections (20 days of good-time for each 30 days served) would become eligible for parole after nine years. If the convicted defendant becomes a trusty, a status achieved by nine out of every ten inmates, he can earn an extra ten days per month of goodtime, and he can achieve parole eligibility in seven and a half years for the same maximum sentence of 60 years. If an inmate earns the additional reductions of up to 15 days per month for completion of educational and vocational programs, he can reduce the date of parole eligibility to under four years for a 60 year sentence. As of September 1, 1987, courts applied a new disadvantage to those inmates whose judgments of convictions contained a deadly weapon finding. Inmates convicted prior to this date do not receive a reduction in the minimum parole eligibility date. They were, however, awarded good-time for the purpose of determining a mandatory release date, a date at which parole-type release must be granted, which is determined by subtracting good-time from the total sentence. Inmates convicted after the effective date of the legislative amendment to article 42.18 of the code of criminal procedure, however, not only lose the benefit of subtracting good-time from the minimum parole eligibility date, but also no longer have a mandatory release date. As a result, an inmate whose judgment contains a deadly weapon finding will now serve his full sentence in prison unless the court grants discretionary parole. Discretionary parole can only be granted after the minimum term before parole eligibility, one-fourth of the total sentence or 15 years, whichever is less, is served in full without a reduction for good-time. *See* Schmolesky, *Time Changes: Growing Complexity in Texas Sentencing Law*, 30 S. TEX. L. REV. 283, 286-90 (1989).

48. 740 S.W.2d 766 (Tex. Crim. App. 1987).

49. *Id.* at 775.

50. *Id.* at 776.

51. *See* DeAnda v. State, 769 S.W.2d 522, 524 (Tex. Crim. App. 1989); *Ex parte* Kirkland, 768 S.W.2d 304, 305 (Tex. Crim. App. 1989); *Ex parte* Carrasco, 750 S.W.2d 222, 225 (Tex. Crim. App. 1988).

52. *See Ex parte* Patterson, 740 S.W.2d at 767; Polk v. State, 693 S.W.2d 391, 393 (Tex. Crim. App. 1985). An indictment alleging the use of a weapon that is not, however, per se deadly may still provide notice to the defendant that the use or exhibition of a deadly weapon will be an issue at the punishment stage of trial by an explicit allegation, such as: "The defendant caused serious bodily injury by stabbing the complainant with a knife, a deadly weapon." *See Ex parte Patterson*, 740 S.W.2d at 776.

53. *See* Leberta v. State, 770 S.W.2d 828, 832 (Tex. App.—Ft. Worth 1988, *pet. ref'd*) (oral notice during plea bargaining sufficient notice); Kirkpatrick v. State, 747 S.W.2d 521, 523 (Tex. App.—Ft. Worth 1988, pet. ref'd) (oral notice sufficient).

attempt to obtain a deadly weapon finding in the judgment.[54]

In two opinions issued on the same day, the court of criminal appeals undermined the importance of *Patterson* without overruling it. In *Ex parte Beck*[55] the defendant's murder indictment alleged that Beck murdered the complainant by shooting him with a gun.[56] Following Beck's conviction, the court submitted a special issue to the jury at the punishment stage concerning Beck's use or exhibition of a deadly weapon in the commission of the offense. Based upon the jury's affirmative finding, the trial judge entered a deadly weapon finding in the judgment.[57] A gun is not a deadly weapon, per se, and the State provided no other written notice to the defendant prior to the punishment stage. The court of criminal appeals ruled, however, that the indictment sufficed to satisfy the notice requirement of *Ex parte Patterson*.[58] The court reasoned that any allegation in an indictment that alleges that death was caused by a named weapon or instrument necessarily includes an allegation that the named weapon or instrument was a deadly weapon.[59]

The court of criminal appeals reached a similar result in *Gilbert v. State*,[60] a case involving injury but not death. Gilbert's indictment alleged that he had intentionally caused serious bodily injury to a child fourteen years of age or younger by putting the complainant into hot liquid.[61] Although hot liquid does not constitute a deadly weapon per se, and although the defendant received no other notice that the deadly weapon issue would be raised at the punishment phase, the court held that the indictment provided adequate notice to the defendant because it alleged that Gilbert had caused serious bodily injury.[62] This language necessarily included an allegation that the hot liquid in this case was a deadly weapon because in the manner of its use the water was capable of causing serious bodily injury, since it did cause serious bodily injury.[63]

The importance of *Beck* and *Gilbert* in reducing the impact of the notice requirement of *Ex parte Patterson* was demonstrated by several cases during the survey period that were originally reversed under *Ex parte Patterson*, but were later affirmed upon reconsideration in light of *Beck* and *Gilbert*. *Ex parte Patterson*, however, was not overruled, and, in limited circumstances,

54. 740 S.W.2d at 775.
55. 769 S.W.2d 525 (Tex. Crim. App. 1989).
56. *Id.* at 526.
57. *Id.*
58. *Id.* at 526-27.
59. *Id.*
60. 769 S.W.2d 535 (Tex. Crim. App. 1989).
61. *Id.* at 536.
62. *Id.*
63. *Id.* at 536-37. The court of criminal appeals subsequently extended the holdings in *Beck* and *Gilbert* to cases where the indictment merely alleged that the defendant attempted to cause death by the use of a named weapon. *See Ex parte* Brown, 773 S.W.2d 332, 333 (Tex. Crim. App. 1989); Eason v. State, 768 S.W.2d 312, 313 (Tex. Crim. App. 1989). The court justified this extension on the theory that the allegation of specific intent to commit murder with the device necessarily included an allegation that the weapon named in the indictment was deadly in the manner of its intended use. *Id.*

it can still prevent the State from obtaining a deadly weapon finding if the State has failed to provide some type of notice to the defendant and the indictment neither explicitly nor implicitly alleges the use or exhibition of a deadly weapon. For example, in *Luken v. State*[64] the burglary indictment alleged that Luken, "with intent to commit sexual assault, entered a habitation owned by . . . the [C]omplainant, without the effective consent of the [C]omplainant . . . ."[65] The indictment failed to allege the use of any instrumentality, and furthermore, because the indictment made no allegation that the defendant either caused death or serious bodily injury, the holdings in *Beck* and *Gilbert* did not apply.[66]

The question of whether the defendant has received proper notice that the deadly weapon question will be an issue at the punishment stage must be distinguished from the actual finding of the use or exhibition of a deadly weapon. In *Polk v. State*[67] the court of criminal appeals established three ways to make an affirmative finding of the use or exhibition of a deadly weapon.[68] The court can automatically make such a finding upon a jury verdict of guilty as charged in the indictment[69] if the indictment contained an explicit allegation concerning a deadly weapon, or if the indictment named the use of a weapon which is deadly per se.[70] If the indictment satisfies neither of these prerequisites, the court can only make an affirmative finding if the court gives the jury a special issue concerning the use or exhibition of a deadly weapon.[71] Thus, in *Gilbert* and *Beck* the allegations in the indictments sufficed to give the defendant notice that the State might attempt to prove that the named device was a deadly weapon, but would not suffice to lay the groundwork for an automatic jury finding of use or exhibition of a deadly weapon. Had the jury not answered a special issue that the gun and the hot liquid involved in those cases constituted deadly weapons, the court could not have made an affirmative finding even if the jury had returned a verdict of guilty as charged in the indictment.[72]

Under the present state of the law, all indictments fall into one of three categories. First, the indictment sufficiently provides notice and establishes the basis for a per se finding of the use or exhibition of a deadly weapon. For example, D caused bodily injury by stabbing the victim with a knife, a deadly weapon, or, D caused the death of the victim by shooting him with a rifle. Second, the indictment sufficiently provides notice, but not for an automatic finding upon a properly worded jury verdict. For example, D caused bodily harm by stabbing the victim with a knife. In this situation, the court can only make an affirmative finding if the court submits a special issue to

64. 780 S.W.2d 264 (Tex. Crim. App. 1989).
65. *Id.* at 266.
66. *Id.*
67. 693 S.W.2d 391 (Tex. Crim. App. 1985).
68. *Id.* at 393-94.
69. A reference to the indictment in the verdict is apparently required for there to be an affirmative finding. *See* De Anda v. State, 769 S.W.2d 522, 523 (Tex. Crim. App. 1989).
70. *Polk*, 693 S.W.2d at 394.
71. *Id.*
72. *See Ex parte* Beck, 769 S.W.2d 525, 528 (Tex. Crim. App. 1989).

the jury. Third, the indictment does not sufficiently provide notice and the court cannot even submit the issue to the jury unless the State explicitly provides the defense with notice by some adequate method other than through the indictment. For example, D entered the home of the victim without the victim's effective consent with intent to commit sexual assault.

A finding that has such a crucial impact on the question of the type and length of sentence served should not have such a cumbersome and needlessly complex administration. In addition to streamlining the procedural method of making a deadly weapon finding, the legislature should reconsider the purpose that such a finding serves. Several cases from the survey period demonstrate that the deadly weapon concept has undergone such an expansion that in any case in which injury was caused or intended, a deadly weapon finding could be made unless the defendant was merely guilty as a party to the offense.[73] For example, courts have held "hands,"[74] "hot liquid"[75] and an "automobile"[76] to be deadly weapons by the manner of their use. Furthermore, an appellate court sustained a deadly weapon finding even though the object used to commit the crime was unknown.[77]

What may have begun as a defensible additional deterrent to the use of dangerous weapons, like firearms, has become an amorphous tool for prosecutorial leverage. If the prosecution seeks no deadly weapon finding and avoids using explicit or implicit deadly weapon language in the indictment, a court will not make such a finding even if the defendant used or exhibited a deadly weapon. In fact, even when an indictment explicitly alleges that the defendant used a deadly weapon, the State may bargain to provide that a deadly weapon finding will not be part of the judgment.[78] Yet in other cases, where, for example, a defendant injures with his own hands,

73. Courts must base a deadly weapon finding on the defendant's own use or exhibition of a deadly weapon, and courts may not premise a deadly weapon finding on a party liability theory. *See* Travelstead v. State, 693 S.W.2d 400, 402 (Tex. Crim. App. 1985).

74. Cooper v. State, 773 S.W.2d 749, 750 (Tex. App.—Corpus Christi 1989, *no pet.*); Johnson v. State, 770 S.W. 72 (Tex. App.— Texarkana 1989, *pet. granted*) (feet and hands can constitute deadly weapons).

75. Gilbert v. State, 769 S.W.2d 535, 536 (Tex. Crim. App. 1989).

76. Morgan v. State, 775 S.W.2d 403 (Tex. App.—Houston [14th Dist.] 1989, *no pet.*). *Morgan* illustrates the broad scope of the concept of deadly weapon. The State indicted Morgan for felony theft of an automobile based upon an incident in which Morgan attempted to drive away from a car dealership in a car that the dealership had allowed him to test drive. The salesman jumped on the car in an attempt to prevent the theft. Despite the fact that the salesman did not fall from the car and was not injured, the jury found that the car was a deadly weapon. *Id.* at 406. The court of appeals affirmed, holding that a rational trier of fact could have found that defendant used the car in a way that was capable of causing death or serious bodily injury. *Id.* at 407.

77. Mixon v. State, No. A14-89-00202-CR, slip op. (Tex. App.— Houston [14th Dist.] Oct. 12, 1989). In *Mixon* the defendant pleaded nolo contendere to the offense of murder, and the trial court sentenced him. At trial, the medical examiner testified that he did not know what object was used to strangle the victim. The Court of Appeals stated: "The fact that [the instrument used to strangle the victim] was not specifically named did not make it any less a deadly weapon, and the judge, as fact finder, was entitled to consider the evidence and make such an affirmative finding." *Id.* at 4-5.

78. *See Ex parte* Hopson, 688 S.W.2d 545 (Tex. Crim. App. 1985). Although the defendant pleaded guilty to an indictment that explicitly alleged that he threatened to use a deadly weapon in order to escape from custody, the court reformed the judgment to omit the deadly

little reason exists to provide an additional penalty beyond that which is already provided for in a crime where the defendant causes injury.

C. Texas Death Penalty

Two important United States Supreme Court cases[79] last term construed the Texas death penalty statute.[80] While *Franklin v. Lynaugh* reaffirmed the constitutionality of the statute and the United States Supreme Court's previous approval of it in *Jurek v. Texas*,[81] *Penry v. Lynaugh* raised serious doubts about whether the facially valid death penalty statute could be applied constitutionally.

Following the capital murder conviction of Donald Gene Franklin, the defense presented its sole mitigating evidence at the punishment phase: Franklin's clean disciplinary record while incarcerated from 1971-1974 and again from 1976-1980.[82] Franklin submitted five specially requested jury instructions. The instructions would have informed the jury that any mitigating evidence should be taken into account and could *alone* be enough to return a negative answer to one or more of the issues, even if the jury otherwise believed that the special issues warranted yes answers.[83] The trial court refused to give the requested instruction. After the court of criminal appeals affirmed Franklin's conviction,[84] Franklin filed a petition for writ of habeas corpus, arguing that, absent his requested instructions, the special issues of the Texas capital murder statute[85] limited the jury's consideration of mitigating evidence, contrary to several leading United States Supreme Court opinions.[86] Franklin argued that the jury may have harbored residual doubts about his guilt and that the judge should have instructed the jury that it could consider any such doubts in arriving at its answers to the special

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weapon finding because one of the terms of the plea agreement stated that the court would not make a deadly weapon finding. *Id.* at 548.

79. Penry v. Lynaugh, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (plurality opinion); Franklin v. Lynaugh, 487 U.S. 164 (1988) (plurality opinion).

80. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1990).

81. 428 U.S. 262 (1976).

82. *Franklin*, 108 S. Ct. at 2324, 101 L. Ed. 2d at 162.

83. *Id.*

84. Franklin v. State, 693 S.W.2d 420 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1031 (1986).

85. TEX. CODE CRIM. PROC. ANN. Art. 37.071(b) (Vernon Supp. 1990).

86. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). In *Lockett* the Supreme Court held unconstitutional an Ohio death penalty statute. 438 U.S. at 597. The statute mandated a sentence of death if the court found one aggravating circumstance, and only upon a finding of one of three statutory mitigating circumstances would the death sentence not be mandatory. The Court reasoned that under the Eighth and Fourteenth Amendments, any aspect of the defendant's character or record and the circumstances of the offense may not be precluded from consideration by the sentencer as mitigating factors. *Id.* at 602-09. Thus, the Ohio statute, by limiting the factors to be considered to those statutorily provided for, violated the Constitution. *Id.* at 609. *Eddings* involved the Oklahoma death penalty statute which allowed the sentencer to consider relevant mitigating circumstances. The sentencing judge concluded, however, that, as a matter of law, he could not consider the evidence offered of the defendant's childhood abuse and emotional disturbance. The Supreme Court, applying its reasoning in *Lockett*, concluded that if a state is precluded from statutorily preventing a sentencer from consideration of mitigating evidence, the sentencer may not refuse to consider, as a matter of law, mitigating evidence. *Eddings*, 455 U.S. at 112-16.

issues. On appeal from the affirmance of the denial of Franklin's federal habeas corpus petition,[87] a plurality opinion by Justice White[88] rejected the argument that a capital defendant has a constitutional right to an instruction informing the jury to revisit guilt-innocence questions.[89] Furthermore, the court pointed out that the trial court placed no limitation on the opportunity of Franklin's attorney to argue the residual doubt question to the sentencing jury.[90]

Franklin also argued that, absent his requested jury instruction, the jury had no opportunity to give independent mitigating weight to his prison record. Again, the plurality opinion emphasized that the trial court had accorded Franklin a full opportunity to have the sentencing jury consider the evidence that he presented concerning his prison record, and that the court had allowed Franklin to argue the issue fully before the jury.[91] Thus, the court distinguished Franklin's case from *Skipper v. South Carolina*,[92] where evidence of the defendant's conduct while incarcerated was wholly excluded from the jury's consideration. The second special issue submitted to the jury, concerning the probability of the defendant's future dangerousness, was an adequate vehicle by which the jury could weigh and evaluate Franklin's disciplinary record.[93]

Justice Stevens, joined in dissent by Justices Brennan and Marshall, disagreed with the majority's view of the prison conduct evidence. They found that such evidence encompassed more than the matters considered by the jury when the court asked it to answer the second special issue concerning a probability of future criminal acts of violence. Justice Stevens stated:

> Past conduct often provides insights into a person's character that will evoke a merciful response to a demand for the ultimate punishment even though it may shed no light on what may happen in the future. Evidence of past good behavior in prison is relevant in this respect just as is evidence of honorable military service or kindness to those in the defendant's community or regular church attendance.[94]

The concurring opinion by Justice O'Connor, joined by Justice Blackmun, rejected the dissent's analysis of the relevance of a prison record. According to Justice O'Connor, while "[e]vidence of voluntary service, kindness to others, or of religious devotion might demonstrate positive character traits that might mitigate against the death penalty," a positive prison record

87. Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987), *aff'd*, 487 U.S. 164 (1988) (plurality opinion).

88. Justice Rehnquist, Justice Scalia and Justice Kennedy joined Justice White. Justice O'Connor wrote a concurring opinion joined by Justice Blackmun. Justice Stevens led the dissent joined by Justice Brennan and Justice Marshall.

89. *Franklin*, 108 S. Ct. at 2326-27.

90. *Id.*

91. *Id.* at 2329.

92. 476 U.S. 1 (1985).

93. *Franklin*, 108 S. Ct. at 2329. The majority pointed out that the court's discussion in *Skipper* of the relevancy of disciplinary record evidence in capital sentencing decisions dealt exclusively with the question of how such evidence reflected on a defendant's likely future behavior. *Id.*

94. *Id.* at 2336 (Stevens, J., dissenting).

"reveals nothing about a defendant's character except that the defendant can exist in a highly structured environment of a prison without endangering others."[95] Despite the rejection of Franklin's argument, opponents of the Texas death penalty system who have long been thwarted by the Supreme Court's approval of the Texas death penalty scheme in *Jurek*, found a hopeful note in the concurring opinion. Justice O'Connor emphasized that since the decision in *Jurek*, the court had made clear that the Constitution guarantees a defendant facing a possible death sentence not only the right to introduce mitigating evidence, but also the right to consideration of that evidence by the sentencing authority.[96] Although the concurrence found that the jury was free to give mitigating effect to the prison disciplinary evidence through the second special issue, Justice O'Connor cautioned:

> If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions or, that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence.[97]

Just four days after the decision in *Franklin*, the Supreme Court heard such a case.[98] In an opinion written by Justice O'Connor, the Court held that while the Texas death penalty statute was facially constitutional, the court had applied it in the trial of Johnny Paul Penry in a manner that violated the Eighth Amendment.[99] Penry argued that mitigating evidence of his mental retardation and childhood abuse had relevance to his moral culpability beyond the scope of the special issues and that the jury was unable to express its reasoned moral response to that evidence in determining the appropriateness of the death penalty.[100] Unlike the mitigating evidence of a favorable prison disciplinary record, which could be fully considered by the jury in answering the second special issue, Penry's mental retardation and history of abuse was a two-edged sword: Penry's mental retardation and history of abuse diminished his blameworthiness for the crime, but it also indicated a probability of future dangerousness.[101] The court's opinion in *Penry* emphasized that the mitigating evidence concerning Penry's mental retardation indicated that one effect of his retardation was his inability to learn from his mistakes.[102] Although this evidence was relevant to the second issue, it was relevant only as an *aggravating* factor because it suggested a yes answer to the question of future dangerousness. Although the court al-

95. *Id.* at 2333-34 (O'Connor, J., concurring). In fact, the concurrence pointed out that Franklin argued to the sentencing jury that his prison record demonstrated his lack of future dangerousness. His lack of disciplinary violations, however, revealed nothing more about any other positive character trait.

96. *Id.* at 2333.

97. *Id.*

98. Penry v. Lynaugh, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

99. 109 S. Ct. at 2948, 106 L. Ed. 2d at 280.

100. *Id.*

101. *Id.* at 2949, 106 L. Ed. 2d at 281.

102. *Id.*

lowed Penry to offer evidence of his mental retardation and abused childhood, the court never instructed the jury that it could consider these circumstances as *mitigating* evidence because the special issues did not, as the Constitution requires, provide a vehicle for such consideration.[103]

Penry may result in the invalidation of the death sentences of many who are already on death row in Texas. Because article 37.071 is still facially constitutional, however, those whose cases are like *Franklin*'s, in that they did not present any mitigating evidence that could not be fully considered through the special issues, will not be subject to reversal. Furthermore, those defendants who failed to make a specific objection at trial on the ground upon which Penry prevailed will likely be barred from presenting a *Penry* claim on collateral attack. A majority in *Penry* stated that the holding involved the application of settled precedent. As a result, *Penry* can be applied to others who were tried prior to *Penry* because no issue exists about whether the *Penry* holding is the type of new rule that the courts should give only prospective application.[104] While this retroactivity aspect of *Penry* will give hope to many now on death row, this same analysis may well doom the chances of those who had raised a *Penry* claim on collateral attack, but who did not make a contemporaneous objection at trial. Without a contemporaneous objection to preserve error, a claim cannot be presented in a federal habeas corpus petition absent a showing of cause for failing to object and prejudice as a result of failing to do so.[105] One of the few ways in which a defendant can show cause for failing to object is by demonstrating that a claim is so novel that courts must excuse the failure to object.[106] *Penry* most likely will not provide relief for those on death row who did not make a *Penry*-type objection at trial because the *Penry* court's declaration that the decision is nothing more than application of well-established precedent means that a claim of cause, based upon novelty, will not succeed.

Penry casts a longer shadow into the future than into the past. Defense counsel in capital cases will no doubt attempt to build-in *Penry*-type error by

103. *Id.* at 2952, 106 L. Ed. 2d at 284. Justices Brennan, Marshall, Blackmun, and Stevens joined the portion of Justice O'Connor's opinion that found the Texas special issues to be unconstitutionally applied in Penry's case. Justices Rehnquist, White, Scalia, and Kennedy dissented to this part of the opinion, but these same four judges formed a majority with Justice O'Connor in rejecting Penry's claim that the Eighth Amendment prohibits executing capital murderers who are retarded. The four justices who, with Justice O'Connor, formed the majority on the jury instruction issue (Brennan, Marshall, Blackmun, and Stevens) dissented to this portion of the opinion for the Court.

104. The threshold issue that the Court considered in *Penry* was whether the Court should consider Penry's claim on federal habeas corpus based upon whether or not a decision in Penry's favor could be given retroactive application. In an important decision earlier in the term, the United States Supreme Court held that unless a new decision can be given full retroactive application, courts cannot consider the merits of any new claim on federal habeas corpus review. In addition to its significance to the Texas Capital Sentence Statute, *Penry* is an important decision because it represents the first application of Teague v. Lane, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), by a majority of the Court and the first application of this new requirement for federal habeas corpus review involving a capital sentence. A majority of the Court in *Penry* held that *Penry* involved the application of settled precedents rather than the creation of a new rule. Thus, the new rule was fully retroactive.

105. *See* Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977).

106. *See, e.g.*, Reed v. Ross, 468 U.S. 1 (1984).

presenting evidence of a mitigating nature that could provide a reason for the jury to extend mercy and vote for life, but which could also prompt a juror to answer the special issues yes.[107] Trial courts may attempt to accommodate *Penry* by drafting an instruction that informs jurors that they may consider all mitigating evidence in deciding the special issues. The implications of *Penry*, however, most likely cannot be so easily evaded. So long as the court instructs the jury to concern itself with answering the special issues yes or no, and a penalty of death or life follows depending solely on these answers, a jury instruction dealing with mitigating evidence will be ineffective in curing the vice recognized in *Penry*. Only if the court drafts a jury instruction that creates a fourth special issue allowing the jury to vote no to death based upon the reduced blameworthiness of mitigating evidence that is not already accommodated by the existing special issues can courts avoid *Penry* error. The creation of such a jury instruction, however, amounts to an amendment of the Texas capital sentencing statute. Such an action is beyond the proper authority of the courts and requires legislative action. Legislators who wish to continue providing a penalty of death in the state of Texas will have to amend article 37.071 of the Texas Code of Criminal Procedure.

II. THE CONSTITUTIONALITY OF PRIOR CASE LAW AND STATUTES

A. Batson-Discrimination in Selection of Jury

Since the 1965 Supreme Court decision in *Swain v. Alabama*,[108] courts have recognized that a defendant may challenge the composition of a jury that has been selected in a manner that discriminates against members of the defendant's race. In order to establish a prima facie case under *Swain*, however, a defendant must prove a pattern of discrimination over a period of time. *Swain* prohibited defendants from making an equal protection challenge based solely on the jury selection proceedings in his or her own case.[109] The difficulty in implementing this equal protection right led to the Supreme Court's decision in *Batson v. Kentucky*,[110] which, unlike *Swain*, allowed a criminal defendant to challenge the composition of the petit jury on the ground that the prosecution discriminated against jurors of the defendant's race through the use of racially motivated peremptory challenges in the defendant's own case.[111]

In order to establish a prima facie *Batson* claim, the movant must establish that the defendant is a member of a cognizable racial group and that the

107. How easily the courts will find that factors are not susceptible to consideration under the current special issues remains to be seen. Judge Clinton, for one, sees the potential for evidence that is both mitigating and damning under the special issues for a number of factors. *See* Kunkle v. State, 771 S.W.2d 435, 449 (Tex. Crim. App. 1986), *cert. denied*, 109 S. Ct. 3259, 106 L. Ed. 2d 604 (1989) (Clinton, J., dissenting).

108. 380 U.S. 202 (1965).

109. *See id.* at 223; Cuesta v. State, 763 S.W.2d 547, 551 (Tex. App.—Amarillo 1988, *no pet.*).

110. 476 U.S. 79 (1986).

111. *Id.* at 96.

prosecution exercised a pattern of peremptory strikes[112] to remove venire members of the defendant's race.[113] If the defendant establishes a prima

112. Some confusion has developed concerning the question of whether a single racially motivated peremptory challenge establishes a *Batson* violation or whether multiple instances are necessary to establish a pattern of discrimination. Munson v. State, 774 S.W.2d 778 (Tex. App.—El Paso 1989, *no pet.*), held that only one strike based upon an improper motivation was insufficient as a matter of law to establish a pattern. This holding conflicts with the court of criminal appeal's decision in Henry v. State, 729 S.W.2d 732, 737 (Tex. Crim. App. 1987), which stated:

> If the State is unable to properly explain its use of peremptory strikes on minority members of the prospective jury panel such that the trial court concludes that purposeful discrimination was the sole motivating factor behind *any* [emphasis in original] of the State's strikes, then appellant's conviction must be reversed and remanded by the Court of Appeals.

But see Daniels v. State, 768 S.W.2d 314 (Tex. App.—Tyler 1988, *pet. ref'd*) (two racially motivated strikes sufficient to establish pattern of discrimination); Lewis v. State, 775 S.W.2d 13 (Tex. App.—Houston [14th Dist.] 1989, *pet. ref'd*) (three strikes clearly sufficient to create presumption of pattern of discrimination).

113. Batson v. Kentucky, 476 U.S. 79, 96-99 (1986). *Batson*, based upon an equal protection theory, requires that the movant be of the same race as the stricken jurors. In addition, evidence must be in the record by sworn testimony or stipulation to establish both the race of the defendant and of the jurors struck by the prosecution. Under Peters v. Kiff, 407 U.S. 493, 496-505 (1972), however, a defendant who is not the same race as jurors who have been peremptorily struck on the basis of race may make a due process challenge. *Peters* allowed a white defendant to challenge the exclusion of black veniremembers on the due process theory of deprivation of a jury that represents a cross-section of the community. *Batson* represents a liberalization of the proof requirements for a showing of discrimination in the selection of the jury by allowing evidence of the prosecutor's actions in the defendant's own case. *Batson* provides no indication, however, that the same liberalization applies to claims arising under Peters v. Kiff. Perhaps because courts view *Batson* as a pro-defense case, two defendants, in cases decided during the survey period, raised claims that cited *Batson* even though the defendants in those cases were not members of the same race as the excluded jurors. *See* Mead v. State, 759 S.W.2d 437 (Tex. App.—Fort Worth 1988, *no pet.*) (white defendant challenged exclusion of black jurors); Castillo v. State, 761 S.W.2d 495 (Tex. App.—Waco 1988, *pet. granted*) (hispanic defendants challenged exclusion of blacks). Relying on Keeton v. State, 724 S.W.2d 58 (Tex. Crim. App. 1987), the courts in *Mead* and *Castillo* held that a *Batson* movant had to be members of the same race as the challenged jurors. In Crawford v. State, 770 S.W.2d 51 (Tex. App.—Texarkana 1989, *no pet.*), a white defendant, citing Peters v. Kiff, challenged, on due process grounds, the exclusion of black jurors. The trial court held that the defendant had established a prima facie case of discrimination based upon the actions of the prosecutor in the case before the court and ruled that the same procedures should be followed as in a *Batson* case. *Id.* at 54. Unfortunately for the defendant, the trial court found the prosecutor's justifications for the use of peremptory challenges credible. *Id. Crawford* perhaps implicitly holds that *Batson* also modified the standards and the procedures used for *Peters*-type claims as well. If that implicit holding is correct, *Castillo* and *Mead* suggest that it is not, the same race requirement of *Batson* is unimportant because courts treat due process and equal protection claims the same. As this article went to press, the United States Supreme Court considered the appeal of a white defendant who claimed that the prosecutor's use of peremptory challenges to strike two black venire members violated the fair cross-section requirement of the 6th Amendment. *See* Holland v. Illinois, 58 U.S.L.W. 4162 (U.S. Jan. 22, 1990) (Justice Kennedy concurred and Justices Marshall, Brennan, Blackmun, and Stevens dissented). The majority opinion noted that, in order to assert an equal protection claim under *Batson*, a defendant must show that he is a member of a cognizable racial group and that the prosecution exercised peremptory challenges to remove from the venire members of the defendant's race. *Id.* at 4163. The Court held that such a correlation between the accused and the group identification of the excluded venire members was not required for the purpose of establishing *standing* to assert a fair cross-section under the 6th Amendment. *Id.*

The Court, however, held that Holland's 6th Amendment claim lacked merit because the Court believed that a prohibition against the exclusion of cognizable groups through peremptory challenges has no basis in the text of the 6th Amendment or in the cases interpreting it.

facie case of discrimination, the burden then shifts to the prosecutor to rebut the inference of discrimination. The State must show that the use of the peremptory challenges rested on racially neutral grounds.[114]

Cases decided during the survey period frequently litigated such *Batson* issues as the remedy to be applied upon a finding of a *Batson* violation, the criteria for evaluating neutral reasons offered by the prosecution, and the procedural mechanisms for implementing *Batson*. Several cases held that in order to preserve a *Batson* challenge, the defense must object at trial and introduce evidence into the record to support an inference of the prosecutor's purposeful discrimination.[115] Even for cases tried before the *Batson* decision, a failure to object at trial waived any *Batson* claim.[116]

To be timely, a defendant must make a *Batson* objection after the membership of the jury is known and prior to the swearing of the jury.[117] The fact

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Id. at 4164. The majority opinion held that the Amendment's requirement that the venire from which the parties choose the jury represent a fair cross section of the community constitutes "a means of assuring, not a *representative* jury (which the constitution does not demand), but an *impartial* one (which it does)." *Id.* According to Justice Scalia's opinion for the Court, peremptory challenges serve the 6th Amendment's goal of impartiality by permitting both the defense and the State to eliminate prospective jurors belonging to groups they think would unduly favor the other side, thereby removing extremes of partiality on both sides. *Id.* at 4165. The constitutional goal of an impartial jury would be obstructed by a petit jury fair cross-section requirement that would cripple the peremptory challenge system. *Id. Holland* held that the rule of *Batson* cannot be incorporated into the 6th Amendment. *Id.* at 416-36.

Texas defendants who are not members of the same race as the excluded venire members may have a broader right under Texas statutory law than is true of a *Batson* claim based on the federal Constitution. In a recent case, the Houston Court of Appeals (1st District) held that article 35.261 of the Texas Code of Criminal Procedure, unlike *Batson*, "does not require the defendant to be of the same race as the challenged venire person." Atuesta v. State, No. 01-88-1194-CR (Tex. App.—Houston [1st Dist.], Jan. 24, 1990, *no pet.*) (not yet reported). As a result, in a trial of a Columbian national in *Atuesta*, the court properly required the prosecutor to provide neutral explanations for the use of peremptory challenges against black venire members as well as an Hispanic member of the venire. *See id.* at 4; *see also* Seubert v. State, 749 S.W.2d 585 (Tex. App.—Houston [1st Dist.] 1988, *pet. granted*) (a defendant may establish a prima facia due process challenge when the prosecutor strikes jurors based on race in the defendant's case, even when the defendant is not the same race as the prospective jurors). *But see* Clarke v. State, No. 02-88-101-CR (Tex. App.—Fort Worth, Feb. 14, 1990, *no pet.*) (not yet reported) (defendants may not rely on a *Batson* challenge when the defendant is of a race different from the stricken prospective jurors); Perry v. State, 770 S.W.2d 950 (Tex. App.—Fort Worth 1989, *no pet.*) (defendants are required to show systematic discrimination in a number of cases, in order to establish a prima facia due process challenge to the striking of venire members of a different race).

114. *Batson*, 476 U.S. at 97.

115. *See* Williams v. State, 773 S.W.2d 525 (Tex. Crim. App. 1989), *cert. denied*, 110 S. Ct. 257 (1989); Allen v. State, 769 S.W.2d 563 (Tex. Crim. App. 1989); Mathews v. State, 768 S.W.2d 731 (Tex. Crim. App. 1989).

116. *See* McGee v. State, 774 S.W.2d 229 (Tex. Crim. App. 1989).

117. *See* Henry v. State, 729 S.W.2d 732, 736 (Tex. Crim. App. 1987); Green v. State, 771 S.W.2d 576, 576-77 (Tex. App.—Houston [14th Dist.] 1989, *no pet.*); Cruz v. State, 762 S.W.2d 624, 625 (Tex. App.—Houston [14th Dist.] 1989, *no pet.*). *Henry* involved a *Batson* objection made after the jury had been sworn. Henry's conviction, however, preceded the *Batson* decision. Nevertheless, defense counsel had made an anticipatory objection to the State striking black jurors prior to the exercise of peremptory strikes. *Henry*, 729 S.W.2d at 736-37. Although under the circumstances Henry's objection was considered timely, the court cautioned, "We prospectively declare that a defendant may make a timely objection within the *Batson* lines if such objection is made after the composition of the jury is known but *before* the jury is sworn and the venire panel is discharged." *Id.* at 737 (*emphasis in original*). A recent

that the trial court has held a *Batson* hearing does not cure the failure to make a timely objection.[118]

If the defense makes a timely objection and establishes a prima facie *Batson* claim, the prosecutor can defeat the *Batson* challenge by providing racially neutral explanations for the exercise of peremptory strikes. Reasons found acceptable in one case, however, may not be sustained as racially neutral in another. For example, in *Daniels v. State*[119] the trial judge rejected the prosecutor's explanation that the stricken jurors were inattentive and gave more attention to the defense counsel.[120] In *Campbell v. State*,[121] however, the trial judge accepted the same justifications as racially neutral.[122] The two cases are not necessarily inconsistent. To test the credibility of the prosecutor's explanation, the *Daniels* judge applied a previously developed five factor analysis: (1) the reason given does not relate to the facts of the case; (2) there is an absence of any questions or meaningful questions on the part of the prosecutor; (3) disparate treatment, as evidenced by a failure to strike similarly situated members of the venire; (4) disparate examination of the jurors, such as asking a question of one juror and not of others; (5) a justification based on a group bias where the bias is not specifically shown to apply to the individual venire member.[123] In *Daniels* the judge concluded that, since the prosecutor never sought to engage the excluded jurors in discourse, the asserted explanations of lack of attentiveness and greater interest in the defense lacked merit.[124]

Prosecutors have asserted a prolific array of justifications for exercising peremptory strikes. In *Williams v. State*[125] the trial court accepted as valid a host of justifications: youth, having no family, failing to disclose one's entire criminal background, and a convicted relative.[126] Although judges more closely scrutinize explanations based on subjective reasons than objective reasons, subjective reasons may still suffice. In *Branch v. State*[127] the trial court accepted the subjective explanations of the prosecutor, but only after applying a higher level of scrutiny to the subjective reasons than to the

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court of appeals decision interpreted *Henry* as requiring an objection prior to the dismissal of the remainder of the venire. Hawkins v. State, No. 05-88-01389-CR slip op. at 3 (Tex. App.—Dallas Dec. 19, 1989). *Hawkins*, however, declared that a better reference point for measuring the timeliness of a *Batson* objection is the swearing of the jury. *Id.* slip op. at 4. The *Hawkins* court did not feel bound by *Henry*, however, because it interpreted article 35.261 of the Texas Code of Criminal Procedure, enacted subsequent to the *Henry* decision, as mandating the swearing of the jury as the point by which the *Batson* objection must be made. *Id.*

118. *Green*, 771 S.W.2d at 576.

119. 768 S.W.2d 314 (Tex. App.—Tyler 1988, *pet. ref'd*).

120. *Id.* at 317.

121. 775 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1989, *no pet.*).

122. *Id.* at 422.

123. *See* Lewis v. State, 775 S.W.2d 13, 15 (Tex. App.—Houston [14th Dist.] 1989, *pet. ref'd*).

124. *Daniels*, 768 S.W.2d at 317.

125. 769 S.W.2d 682 (Tex. App.—Beaumont 1989, *no pet.*).

126. *Id.* at 682-83.

127. 774 S.W.2d 781 (Tex. App.—El Paso 1989, *pet. ref'd*).

objective reasons.[128] In *Campbell v. State*[129] the court held that similarity in age to the accused, national origin (Haiti when the case involved drugs), doubting the credibility of the police, and radiating the impression of just wanting to get the ordeal over with, all constituted racially neutral justifications.[130] The acceptance of such reasons underscores the fact that the prosecutor is justifying a peremptory challenge and not a challenge for cause.

The defense has the right to cross-examine the prosecutor regarding his or her motivation for exercising the peremptory strikes, and the denial of such cross-examination is reversible error.[131] In order to sustain a *Batson* claim, the defense must convince the trial judge by a preponderance of the evidence that the prosecutor purposefully discriminated against the suspect race.[132] The appellate court applies an abuse of discretion standard in reviewing the trial court's ruling. The reviewing court must look at the evidence in the light most favorable to the decision rendered.[133] Appellate courts use this deferential standard based on the belief that the trial judge, who heard the voir dire and the prosecutor's statement of reasons for exercising the peremptory challenges, is in the best position to determine credibility. Regardless of whether the trial court sustains or denies the *Batson* motion, the abuse of discretion standard has led to few appellate reversals.[134]

Disagreement has developed as to what remedy courts should apply when they sustain a *Batson* challenge. Article 35.261(b) of the Texas Code of Criminal Procedure provides that a judge shall quash the array after sustaining a *Batson* challenge.[135] *State ex rel. Skeen v. Tunnell*[136] concluded that the language of article 35.261(b) is mandatory, and that a judge must resort to calling a new array as the sole remedy when the judge sustains a *Batson* challenge.[137] *Sims v. State*,[138] however, held that the statute is not mandatory and that more than one remedy exists for a successful *Batson* challenge.[139] According to *Sims*, as an alternative to quashing the array, the trial court can also reinstate the jurors who are struck by the prosecutor.[140]

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128. *Id.* at 784.

129. 775 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1989, *no pet.*).

130. *Id.* at 442.

131. *See* Newsome v. State, 771 S.W.2d 620, 621 (Tex. App.—Dallas 1989, *pet. ref'd*); Williams v. State, 767 S.W.2d 872, 874 (Tex. App.—Dallas 1989, *no pet.*) (en banc).

132. *See* Cuesta v. State, 763 S.W.2d 547, 550 (Tex. App.—Amarillo 1988, *no pet.*).

133. Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987), *on remand*, 749 S.W.2d 861 (Tex. Crim. App. 1988).

134. *See* Barnett v. State, 771 S.W.2d 654 (Tex. App.—Corpus Christi 1989, *no pet.*); *Daniels*, 768 S.W.2d 314 (Tex. App.—Tyler 1988, *pet. ref'd*); Catley v. State, 763 S.W.2d 465 (Tex. App.—Houston [14th Dist.] 1988, *pet. ref'd*).

135. The statute states: "If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case." TEX. CODE CRIM. PROC. ANN. art. 35.261(b) (Vernon 1989).

136. 768 S.W.2d 765 (Tex. App.—Tyler 1989, *no pet.*).

137. *Id.* at 768; *accord* McKinney v. State, 761 S.W.2d 549, 550 (Tex. App.—Corpus Christi 1988, *no pet.*).

138. 768 S.W.2d 863 (Tex. App.—Texarkana 1989, *pet. granted*).

139. *Id.* at 864.

140. *Id.* at 864-65.

B. Parole Law Jury Instruction—Rose v. State

In *Rose v. State*[141] the Texas Court of Criminal Appeals declared unconstitutional a legislatively mandated instruction given to juries at the sentencing phase of criminal trials.[142] The instruction provided information about the possible release of prisoners prior to the expiration of a sentence due to the laws concerning good time and parole.[143] The court based its decision on the doctrine of separation of powers prescribed in Article II, section 1 of the Texas Constitution and the doctrine of due course of law guaranteed by Article I, sections 13 and 19 of the Texas Constitution.[144] Upon its own motion for rehearing, the court determined that the giving of the erroneous instruction was subject to a harmless error analysis under the standard provided by rule 81(b)(2) of the Texas Rules of Appellate Procedure.[145] *Rose* has had a staggering impact on the appellate courts of the state. The court

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141. 752 S.W.2d 529 (Tex. Crim. App. 1987).

142. *Id.* at 534-37.

143. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (Vernon Supp. 1990). The statute provides:

> In the penalty phase of the trial of the felony case in which the punishment is to be assessed by the jury rather than the court, if the offense of which the jury has found the defendant guilty is listed in § 3g(a)(1), Article 42.12, of this code or if the judgment contains an affirmative finding under § 3g(a)(2), Article 42.12, of this code, unless the defendant has been convicted of a capital felony the court shall charge the jury in writing as follows:
>
> "Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> "Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-fourth of the sentence imposed or 15 years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than six years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.
>
> "It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> "You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant."

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a) (Vernon 1990).

144. *Rose*, 752 S.W.2d at 535-37.

145. *Id.* at 553. The court of criminal appeals held that the error involved in *Rose* was statutory error, not charging error. *Id.* This distinction provided the basis for the court's rejection of the harm analysis mandated by Almanza v. State. *Id.* (citing Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1985), *cert. denied*, 481 U.S. 1019 (1987)). *Almanza* dealt specifically with harm arising from error in jury instructions and placed the burden on the appellant to show some harm. *Almanza*, 686 S.W.2d at 171. Despite the court's rejection of this analysis in *Rose*, some courts continue to rely on *Almanza* for its guidance on the issue of

of criminal appeals has remanded hundreds of cases to the intermediate courts for a harm analysis.[146]

In its opinion on its own motion for rehearing, the court of criminal appeals in *Rose* (*Rose* II) considered three factors in concluding that the instruction the court gave in that case did not, beyond a reasonable doubt, make any contribution to the punishment assessed: 1) the giving of an additional curative instruction beyond that contained in the statutory instruction, 2) the facts of the offense which militated in favor of a harsh sentence, and 3) the appellant's criminal record.[147] *Rose* failed to indicate whether these factors were inclusive or merely illustrative, given the particular case before the court. Thus, the intermediate courts of appeals have struggled with how to apply the harm analysis required by *Rose*.

The most divisive issue in the intermediate courts of appeals concerns the question of whether *Rose* II limits the analysis of harm to the three factors used in *Rose* II.[148] A close reading of *Rose* I may help clarify the apparent confusion. In *Rose* I the majority indicated that the analysis was not limited to specific factors, but would include consideration of the evidence admitted, the charge on punishment, the argument of the parties, and *other relevant* indicia of record.[149] Furthermore, the standard that rule 81(b)(2) of the Texas Rules of Appellate Procedure has established requires a review of the entire appellate record.[150] Nevertheless, some courts of appeals adhere to a rigid, predetermined list of factors to apply in the *Rose* analysis.[151] The

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which factors to consider for harm generally. *See* Hernandez v. State, 771 S.W.2d 596, 597 (Tex. App.—Corpus Christi 1989, *no pet.*).

146. Brooks v. State, 768 S.W.2d 481, 483 (Tex. App.—Houston [1st Dist.] 1989, *no pet.*) (O'Connor, J., dissenting) (390 cases remanded by court of criminal appeals since *Rose*).

147. *Rose*, 752 S.W.2d at 554-55.

148. *Compare* Taylor v. State, 763 S.W.2d 926, 929 (Tex. App.—Dallas 1989), *aff'd sub nom.*, Arnold v. State, No. TC-90-02-003 (Tex. Crim. App. Jan. 24, 1990) (en banc) (court limiting analysis to two factors in *Rose*: additional curative and harsh facts); Le v. State, 763 S.W.2d 504, 505 (Tex. App.—Houston [14th Dist.] 1988, *no pet.*) (court must consider three factors of *Rose*); Bledsoe v. State, 763 S.W.2d 482, 483 (Tex. App.—Houston [14th Dist.] 1988, *pet. granted*) (same); Evans v. State, 760 S.W.2d 760, 761 (Tex. App.—Beaumont 1988, *pet. ref'd*) (limiting analysis to three factors of *Rose*) *with* Nunez v. State, 769 S.W.2d 599, 601 (Tex. App.—El Paso 1989, *no pet.*) (court persuaded by additional factor of finding of use of deadly weapon and requirement that one-third of sentence be served); Rodriguez v. State, 762 S.W.2d 727, 732 (Tex. App.—San Antonio 1988, *pet. granted*) (notes sent from jury are factors); Allen v. State, 761 S.W.2d 384, 386 (Tex. App.—Houston [14th Dist.] 1988, *pet. ref'd*) (argument or absence thereof of prosecutor regarding parole is a factor); Fair v. State, 758 S.W.2d 898, 901 (Tex. App.—Corpus Christi 1988, *no pet.*) (award of probation significant factor).

149. *Rose*, 752 S.W.2d at 536.

150. *See* Carson v. State, 765 S.W.2d 889, 890 (Tex. App.—Dallas 1989, *no pet.*); Hartley v. State, 765 S.W.2d 883, 884 (Tex. App.—Dallas 1989, *pet. ref'd*); Rodriguez v. State, 762 S.W.2d 727, 732 (Tex. App.—San Antonio 1988, *pet. granted*). The broad review analysis these cases require appears to be the more reasoned and logical conclusion given the specific language of 81(b)(2) which provides in relevant part, "If the appellate record in a criminal case reveals error . . . ." TEX. R. APP. P. 81(b)(2).

151. *See* Dickerson v. State, 769 S.W.2d 281, 283 (Tex. App.—Houston [14th Dist.] 1989, *no pet.*) (four factors to be applied, citing Taylor v. State, 755 S.W.2d 548, 551 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*) and Fast v. State, 755 S.W.2d 515 (Tex. App.—Houston [14th Dist.] 1988, *pet. ref'd*). *See also* cases cited *supra* note 148.

courts, however, have given this general division less attention than they have given the issues raised by application of the three factors themselves.

The court of criminal appeals in *Rose* II found significant the trial court's inclusion of an additional curative instruction beyond that provided by the statute.[152] After noting this additional curative, the court stated that a rebuttable presumption exists that the jury followed the instructions given by the trial judge.[153] The court, however, did not make clear whether the presumption arises upon the issuance of the additional instruction or if the statutory curative instruction alone suffices.

Montgomery v. State[154] represents the most thorough argument concerning the two curative instructions. *Montgomery* compared the language of the two curative instructions and concluded that any differences related to form rather than to substance.[155] Focusing on the statute's language proscribing consideration of the parole law as opposed to the additional instruction's proscription of discussion of the parole law, the majority in *Montgomery* reasoned that the statutory admonition was in fact more restrictive than that found in *Rose*.[156] *Montgomery* held that the statutory

152. *Rose*, 752 S.W.2d at 554. The statutory curative admonishes jurors as follows: "[Y]ou are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a) (Vernon Supp. 1990). The additional curative instruction found significant in *Rose* further instructed the jury:

> that in determining the punishment in this case, you are not to discuss among yourselves how long the defendant will be required to serve any sentence you decide to impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor of the State of Texas and are no concern of yours.

Rose, 752 S.W.2d at 554.

153. *Id.* (citing Cobarrubio v. State, 675 S.W.2d 749, 752 (Tex. Crim. App. 1983)). An analysis of *Cobarrubio* reveals that the instruction given to the jury in that case contained an improper application of the law to the facts of the case. *Id.* at 751-52. *Rose*, on the other hand, dealt with a statutorily mandated instruction that has been found unconstitutional. Arguably, because the entire instruction is unconstitutional, no part of it should be considered. The intermediate courts of appeals have not adopted this view and are divided over the sufficiency of the statutory curative. *See* Payne v. State, 766 S.W.2d 585, 588 (Tex. App.—Dallas 1989), *rev'd sub nom*, Arnold v. State, No. TC-90-02-003 (Tex. Crim. App., Jan. 24, 1990) (en banc) (Enoch, C.J., concurring) (raising but rejecting the argument). *Compare* Diaz v. State, 769 S.W.2d 307, 308-0 (Tex. App.—San Antonio 1989, *no pet.*) (statutory curative sufficient for presumption); Lett v. State, 768 S.W.2d 947, 948 (Tex. App.—Fort Worth 1989, *no pet.*) (statutory instruction no less curative than additional instruction of *Rose*); Montgomery v. State, 760 S.W.2d 323, 327 (Tex. App.—Dallas 1988, *pet. granted*) (difference between additional curative of *Rose* and statutory curative is one of form, not substance) *with* Washington v. State, 768 S.W.2d 497, 501 (Tex. App.—Houston [1st Dist.] 1989, *no pet.*) (O'Connor, J., dissenting) (unreasonable to assume jury followed instruction of judge to disregard what judge himself had told jury to do); *Payne*, 766 S.W.2d at 590 (McClung, J., dissenting) (additional curative of *Rose* necessary); Kelly v. State, 762 S.W.2d 225, 226 (Tex. App.—El Paso 1988, *no pet.*) (mere tracking of statutory language insufficient in absence of clear curative found in *Rose*).

154. 760 S.W.2d 323 (Tex. App.—Dallas 1988, *pet. granted*).

155. *Id.* at 327.

156. *Id.* The basis for this holding is that consideration includes both verbal and mental processes while discussion involves only a verbal process. Further, *Montgomery* read the last sentence of the additional curative to imply to the jury the existence of parole laws, an implication which presumably would compound any difficulties the jury may already face in disre-

instruction was no less curative than the additional instruction found in *Rose*.[157] Thus, the presumption that the jury followed the court's instruction would have to be overcome even in the absence of an additional curative instruction.

Another significant issue in the aftermath of *Rose* concerns the effect of prosecutorial argument of parole to the jury. The court of criminal appeals in *Rose* I made only brief reference in dicta to the impropriety of prosecutorial invitation to jury consideration of the parole laws.[158] On its own motion for rehearing, the court in *Rose* II was not concerned with the issue simply because the issue did not occur in the particular facts of *Rose*.[159] While the appellate courts agree that prosecutorial argument of parole is a factor in the *Rose* analysis, the same cannot be said concerning the proper application of this factor.[160] Prosecutorial argument concerning parole laws may not always result in a finding of harm. Courts have determined a number of factors that effectively neutralize any harm from such argumentation.[161]

Whether the defense must object to a prosecutor's argument about parole

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garding those laws. In addition, the majority pointed to the identical timing of the two instructions and to the fact that they both constituted the judge's last word on the issue of parole, a factor which led the *Rose* court to conclude the additional curative was significant. *Id.* (citing *Rose*, 752 S.W.2d at 554).

157. 760 S.W.2d at 327. *Montgomery*'s analysis, however, is not the only position espoused by the appellate courts on the issue. *See* Brooks v. State, 768 S.W.2d 481, 483-91 (Tex. App.—Houston [1st Dist.] 1989, *no pet.* (O'Connor, J., dissenting). In *Brooks* Justice O'Connor's dissent found that despite the inclusion of the additional instruction by the trial judge, several factors rendered the presumption rebutted. *Id.* at 485-91. In a lengthy and cogent discussion, Justice O'Connor analyzed the legislative intent of article 37.07, the prominence of the references to parole in the charge, and the abstract nature of the instruction itself. Each of these alone, the dissent argued, sufficed to rebut the presumption that the jury disregarded what they had been told to disregard. *Id.* at 490.

In another case, the San Antonio Court of Appeals held that the absence of the additional curative instruction, together with the burden placed on the State under rule 82(b)(2), results in a presumption that the jury did consider the parole laws. *See* Olivarez v. State, 756 S.W.2d 113 (Tex. App.—San Antonio 1988, *no pet.*); *but see* Shorten v. State, 764 S.W.2d 358, 359-60 (Tex. App.—Beaumont 1989, *pet. ref'd*) (criticizing *Olivarez* as narrow and disregarding other important factors).

158. Rose v. State, 752 S.W.2d 529, 532 (citing cases).

159. The general requirements of rule 81(b)(2), commanding review of the *entire* appellate record, notwithstanding the debate over the extent to which *Rose* itself limits the factors to be considered in the review, allow, if not require, the appellate courts to consider any adverse effects of prosecutorial argumentation, or even mentioning, of the parole laws. This may be particularly important when such actions occur *after* the trial judge has given any curative instruction to the jury. *See* Hupp v. State, 774 S.W.2d 56, 63 (Tex. App.—Dallas 1989, *no pet.*) (en banc) (Rowe, J., dissenting).

160. *See* Johnson v. State, 774 S.W.2d 276, 280 (Tex. App.—Beaumont 1989, *no pet.*) (Burgess, J., dissenting) (prosecutor's argument significant factor in harm analysis; Woods v. State, 766 S.W.2d 328, 329-30 (Tex. App.—Houston [14th Dist.] 1989, *no pet.*) (prosecutor's argument, although other factors of *Rose* satisfied, enough to prevent finding of no harm beyond a reasonable doubt); Allen v. State, 761 S.W.2d 384, 386 (Tex. App.—Houston [14th Dist.] 1988, *pet. ref'd*) (implying prosecutor's argumentation a factor for consideration).

161. *See* Escobar v. State, 770 S.W.2d 24, 27 (Tex. App.—Dallas 1989, *no pet.*) (prosecutor's argument in response to defense counsel's argument and thus proper, citing Albiar v. State, 739 S.W.2d 360, 362 (Tex. Crim. App. 1987) (en banc)); Harvey v. State, 762 S.W.2d 760, 762 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*) (prosecutors argument harmless where pen-packets implied existence of parole and opposing counsel argued same matter).

at the trial bench in order to preserve error for appellate review is unclear.[162] The well established general rule provides that, even if the basis for objection was clear, if the complainant failed to timely object, the complainant has waived any error that may have resulted.[163] In *Rose*, however, the court declared the unconstitutional statutory instruction void ab initio and, thus, relieved the appellant of the necessity of objecting to preserve error.[164] Although the lower appellate courts have only infrequently discussed the necessity of an objection to prosecutorial argument about parole laws, some division among the courts still seems to exist.[165]

A particularly interesting issue that has not received enough attention concerns the question of whether Texas Rule of Criminal Evidence 606(b) allows a juror to testify on the issue of the effect that the instruction given in article 37.07(4)(a) of the Texas Code of Criminal Procedure has on the jury. Rule 606(b) provides that a juror may not testify as to matters or statements during deliberations nor as to matters influencing his/her mental process, upon an inquiry into the validity of a verdict or indictment.[166] The rule, however, also provides that a juror may testify as to any matter relevant to the validity of the verdict or indictment.[167]

The court's opinion in *Rose* considered rule 606(b) only so far as to state that the rule prohibits jurors from testifying as to any matter or statement during deliberation or to the effects of anything upon their mental processes.[168] Furthermore, on its own motion for rehearing, the opinion for the Court remained completely silent on the issue.[169]

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162. *Rose* pointed out that discussion of the parole laws constitutes improper argumentation. *Rose*, 752 S.W.2d at 532 (citing Heredia v. State, 528 S.W.2d 847, 853 (Tex. Crim. App. 1975)). Generally, courts limit prosecutorial argumentation to four areas: 1) summation of the evidence, 2) reasonable deductions from the evidence, 3) answers to the argument of opposing counsel, and 4) pleas for law enforcement. Alejandro v. State, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973).

163. *See* Hernandez v. State, 774 S.W.2d 319, 323 (Tex. App.—Dallas 1989, *no pet.*) (emphasizing need to object, disposing of argument as summation of law, and disregarding issue as factor in harm analysis).

164. *Rose*, 752 S.W.2d at 553. *See* Casares v. State, 768 S.W.2d 298, 299 (Tex. Crim. App. 1989) (en banc). *But see* Gilliam v. State, 766 S.W.2d 867, 868 (Tex. App.—Houston [1st Dist.] 1989, *no pet.*) (noting in harm analysis that defense counsel made no objection to jury charge).

165. *Compare* Rolling v. State, 768 S.W.2d 834, 839 (Tex. App.—Dallas 1989, *no pet.*) (Kinkeade, J., dissenting) (failure to object to prosecutor's argument and to seek curative instruction precludes use of such argument as factor for consideration in harm analysis) *with* Purcella v. State, 762 S.W.2d 696, 699 (Tex. App.—San Antonio 1988, *no pet.*) (unclear whether defense is relieved of obligation to object to improper parole argumentation).

166. TEX. R. CRIM. EVID. 606(b).

167. *Id.*

168. *Rose*, 752 S.W.2d 536.

169. Justice Teague, however, asserted that analysis of harm under rule 81(b)(2), in the particular situation created by the unconstitutional instruction to the jury, could only be determined by a harmless error hearing at the trial court level where all the jurors would be required to testify. *Id.* at 543 (Teague, J., concurring in part, dissenting in part). The second half of rule 606(b), which provides that the juror may testify to any matter relevant to the validity of the verdict or indictment, according to Justice Teague, clearly eliminates the first half of the rule which generally proscribes juror testimony. *Id.* at 556 (Teague, J., concurring). Thus, reasoned Justice Teague, juror testimony is not prohibited in the harm analysis under rule 81(b)(2), particularly in light of the fact that the analysis concerns the imposition of pun-

The appellate courts have given conflicting signals concerning the question of whether rule 606(b) would allow a juror to testify as to the effect of the instruction mandated by article 37.07.[170] The question is important because *Rose* declared that a rebuttable presumption arises that the jury followed the curative instruction given by the court to disregard parole in its deliberations. Evidence to rebut this presumption may be difficult to find and may only consist of juror testimony.[171] The only other evidence that may be available to rebut the presumption is notes from the jury, and such evidence, if it exists at all, will often be inconclusive.[172]

In November of 1989 Texas voters passed by an overwhelming majority a proposed constitutional amendment that grants the Texas Legislature the authority to enact the mandatory parole law instruction found in article 37.07 of the Texas Code of Criminal Procedure.[173] Earlier in 1989, the state legislature enacted a bill that was virtually identical to the instruction declared unconstitutional in *Rose* to become effective upon adoption of the constitutional amendment.[174]

Prior to the adoption of the amendment, the Texas Court of Criminal Appeals held in a long line of cases that jury discussion of parole laws constituted juror misconduct.[175] This rule had as its constitutional basis the doctrine of separation of powers.[176] Parole laws were the sole province of the executive branch and any discussion of parole laws by a jury in its deliberations was misconduct. Not all instances of such misconduct, however, constituted reversible error, and the courts developed numerous inconsistent

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ishment, not the verdict on guilt or innocence. *Id.* at 543-44 (Teague, J., concurring in part, dissenting in part).

170. *Compare* Buentello v. State, 770 S.W.2d 917, 919 (Tex. App.— Amarillo, 1989, *pet. granted*) (606(b) allows juror to testify to determine misconduct based on discussion of parole) *with* Leach v. State, 770 S.W.2d 903, 908 (Tex. App.—Corpus Christi 1989, *pet. ref'd*) (606(b) prohibits inquiry into jury foreman's conduct to show bias). *See also* Blackwell v. State, 768 S.W.2d 9, 11-12 n.1 (Tex. App.—Fort Worth 1989, *no pet.*) (unclear whether juror is permitted to testify as to consideration of parole under 606(b)).

171. *See Blackwell*, 768 S.W.2d at 11-12 n.1; Spelling v. State, 768 S.W.2d 949, 952 n.1 (Tex. App.—Fort Worth 1989, *no pet.*).

172. *See Spelling*, 768 S.W.2d at 952 n.1 (jury note may be only routinely available evidence to rebut presumption); Martin v. State, 768 S.W.2d 12, 13 (Tex. App.—Fort Worth 1989, *no pet.*) (jury note on parole clear indication of consideration of parole). *But see* Payne v. State, 766 S.W.2d 585, 588 (Tex. App.—Dallas 1989), *rev'd sub nom.*, Arnold v. State, No. TC-90-02-003 (Tex. Crim. App. Jan. 24, 1990) (en banc) (jury note not indicative of consideration where judge instructed jury to refer to charge that contained statutory curative.)

173. TEX. CONST. art. IV, § 11 (amended 1989). This amendment provides in relevant part: "The Legislature shall have authority to enact parole laws and laws that require or permit courts to inform juries about the effect of good-conduct time and eligibility for parole or mandatory supervision on the period of incarceration served by a defendant convicted of a criminal offense." *Id.* § 11(a).

174. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (Vernon Supp. 1990). The language of current article 37.07 is virtually identical to that in *Rose*, with two minor exceptions: replacement of the word "sentence" with the term "period of incarceration" and changes in the time required for parole eligibility according to changes in the parole laws.

175. *See* Munroe v. State, 637 S.W.2d 475, 476 (Tex. Crim. App. 1982) (en banc) (citing cases).

176. *Id.* at 477 (citing Sanders v. State, 580 S.W.2d 349, 351-52 (Tex. Crim. App. 1978).

standards to determine when reversal was required.[177] *Sneed v. State*,[178] however, finally settled the issue by establishing a five-prong test to determine reversible error. The *Sneed* court stated that reversible error existed when there was: 1) a misstatement of the law, 2) asserted as a fact, 3) by one professing to know the law, 4) which the other jurors relied upon, 5) who for that reason changed their vote to a harsher punishment.[179]

The new constitutionally sanctioned parole law jury instruction statute, like the nearly identical one declared unconstitutional in *Rose*, contains a statutory curative instruction that instructs a jury that has just been informed about parole, not to consider parole in determining the punishment in the defendant's case.[180] Despite this ambivalent attitude about the proper role of the subject of parole in the punishment deliberations of Texas juries, *Sneed*, or any of the earlier parole discussion cases, most likely carry no precedential force now that the constitutional amendment nullifies the separation of powers basis for these decisions. Furthermore, if *Rose* II is a guide, the statutory curative instruction creates a presumption that the jury followed the instruction and parole was not considered. The presumption seems meaningless, however, if the constitutional basis for the jury misconduct itself is absent.

If *Sneed* has any applicability, it will be in the situation where a jury's discussion of parole contains inaccuracies,[181] a scenario made less likely by the fact that the jury takes into deliberation an accurate statement of the parole law in the charge. Even if the defense shows a misstatement of the parole law, the required showing of prejudice under *Sneed* would be necessary to rebut the presumption that the jury followed the instruction and was not erroneously influenced. Furthermore, the admissibility of affidavits by jurors establishing the fact of discussion and consideration of erroneous statements about parole remains uncertain under Texas Rule of Evidence 606(b). Thus, *Sneed* appears to be of limited utility in evaluating the nearly fossilized claim of jury misconduct based upon discussion of parole law.[182]

177. *See* Heredia v. State, 528 S.W.2d 847, 850-53 (Tex. Crim. App. 1975).

178. 670 S.W.2d 262 (Tex. Crim. App. 1984) (en banc).

179. *Id.* at 266.

180. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(b) (Vernon Supp. 1990).

181. *Sneed* and its predecessors stated or assumed that any discussion of parole by the jury was misconduct. *Sneed*, 670 S.W.2d at 264-67. *Sneed*, on a separation of powers theory, required an inaccurate statement about parole in order for the error to require reversal. *Id.* at 266. Accuracy merely constituted one of the elements of *Sneed*'s five-part test to determine if the error was harmless. *Id.* A due process claim might exist, however, in that sentencing decisions cannot be based upon inaccurate information. *See* Townsend v. Burke, 334 U.S. 736, 738-41 (1948).

182. As this article went to press, the court of criminal appeals consolidated several cases raising the problem of the harmless error analysis of the parole law jury instruction. *See* Arnold v. State, No. TC-90-02-003 (Tex. Crim. App. Jan. 24, 1990) (en banc).

The majority asserted that courts should base the harm analysis on the premise that a jury that was given the unconstitutional instruction *did* consider parole in assessing punishment for a particular defendant. *Id.* slip op. at 8-9. Addressing the factors found in *Rose*, the court held that the additional curative instruction, which creates a rebuttable presumption that the jury followed the instructions of the trial judge, must remain subordinate to the presumption of harm created by Rule 81(b)(2) of the Texas Rules of Appellate Procedure. *Id.* slip op. at 31. The majority reasoned that a so called curative instruction was more fiction than fact, and,

C. Videotape of Child Sexual Assault Victim

In *Long v. State*[183] the court of criminal appeals addressed the constitutionality of article 38.071, section 2 of the Texas Code of Criminal Procedure,[184] which authorized the admission of a pretrial videotape of a child sexual abuse victim without prior cross-examination by the defense.[185] The

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thus, courts should consider the additional curative instruction as only a factor in the overall harm analysis. *Id.* slip op. at 32. If a jury is shown to have considered parole and good-time, the probative value of the curative instruction as a factor is completely lost because the instruction failed to accomplish its purpose. *Id.* slip op. at 33. In addition, in a footnote, the court rejected the analysis adopted by several courts that interpreted certain statutory provisions of the parole instruction as having an independent curative affect. *Id.* slip op. at 32 n.23 (citing cases).

The court rejected those cases that asserted that the heinousness of the crime alone could support a finding that the parole law instruction did not contribute to the punishment assessed. *Id.* at 33-35 (citing cases). The court described heinousness as "a slippery indicator for gauging how a jury evaluated conduct of appellant in assessing punishment." *Id.* slip op. at 34.

As for the third factor of significance in *Rose*, the defendant's criminal record, the court clarified any misconceptions regarding the independent weight assigned to this factor. The court stated that an extensive prior record alone did not establish the absence of harm beyond a reasonable doubt. *Id.* slip op. at 35. Thus, the court reduced the importance of the three factors used in the harmless error analysis of *Rose*, and settled another major issue by holding that these factors were by no means the only relevant issues for review under Rule 81(b)(2). *Id.* slip op. at 9.

The majority opinion identified argument by counsel as significant to the overall process of review. *See id.* slip op. at 12-17. Although the court held that argumentation concerning parole law was not error per se, it stated that:

> [A]n argument . . . . made in terms tending to induce consideration of the eligibility formula and other teachings of a § 4 instruction compounds *Rose* error and may influence the jury in its deliberations on punishment.

Id. slip op. at 13.

Another factor of particular importance to the harmless error analysis was the existence of a note from the jury relating to parole. *Id.* slip op. at 17. The court held that such a note "[p]atently . . . . reveals that jurors are then and there 'discussing' and 'considering' the subject." *Id.* slip op. at 19.

The court took great issue with those cases in which courts had found harmless error based upon the term of years finally assessed:

> [I]t is not enough to say that a § 4 instruction made no contribution to punishment merely because the term assessed is "mid-range" relative to the potential maximum. To the contrary, once a jury comes to understand that any term of years beyond the formula number has no effect on eligibility for parole, . . . [it is] willing to settle on a term higher than the minimum but within limits of the formula . . . . Thus a verdict on punishment alone is not a gauge for harm; rather, it serves somewhat as a barometric measure of other pressures we have found are likely to influence the jury in assessing punishment.

Id. slip op. at 21-22.

The court made no mention of the recently approved constitutional amendment authorizing the legislature to reenact the parole and good-time instruction requirement. *See* supra notes 173-74 and accompanying text. Thus, courts will have to confront challenges to the now apparently constitutional instruction in future cases, including the basic question of whether any discussion of parole by the jury remains per se jury misconduct.

183. 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 993 (1988).

184. TEX. CODE CRIM. PROC. ANN. art. 38,071, § 2 (Vernon Supp. 1990).

185. The statute did authorize the defendant to cross-examine the child-victim at trial, but only if the defendant called the victim to the stand, a requirement that the *Long* court also found objectionable. *See infra* notes 156-157 and accompanying text. The videotape interview of the child was admissible under § 2 of article 38.071 even though the defendant was not allowed to be present when the recording was made. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 Vernon Supp. 1990).

court held that section 2 of the statute violated an accused's right to face-to-face confrontation and due process as guaranteed under both the Texas and federal Constitutions.[186] Although the court recognized that the prevention of undue trauma to a child sexual abuse victim constituted a compelling state interest, it found the statute unconstitutionally overbroad because the statute assumed that confrontation in every case would produce unnecessary trauma to a child.[187] *Long* held that a compelling state interest could diminish a defendant's right to confrontation only when the prosecutor demonstrated the significance of the state interest based upon the particular facts of each case.[188] Furthermore, even assuming that confrontation in every case posed a sufficient threat to the child's welfare, thus rendering the child unavailable for live testimony at trial, the videotaped testimony lacked the requisite indicia of reliability because the statute did not afford the defendant an adequate opportunity to cross-examine the child. The court failed to allow cross-examination at the time of the videotaping, and the defendant had no right to be present.[189] Although, the statute gave the defendant the right to call and cross-examine the child at trial, the court held that fundamental fairness prevented imposing upon the abused the Hobson's choice between relinquishing his right to test the credibility of the victim on cross-examination and invoking that right but risking the wrath of the factfinder for having to subject the child to the very trauma the statute was supposed to alleviate.[190]

The decision in *Long* left a number of issues unresolved, including the constitutionality of other parts of the statute. Although presiding Judge McCormick dissented in *Long*, he wrote the opinion for a unanimous court of criminal appeals in *Powell v. State*,[191] which dealt with the constitutionality of sections 4 and 5 of article 38.071 of the Texas Code of Criminal Procedure. Section 4 allows the trial court, on the motion of the defense or the prosecution, to order that the testimony of a child sexual abuse victim be taken outside of the courtroom and recorded for showing in the courtroom.[192] In addition, section 4 permits the defendant to observe and hear the testimony of the child in person, but requires that the child be screened so that he or she cannot hear or see the defendant.[193] In *Powell* the State

186. *Long*, 742 S.W.2d at 309-10.
187. *Id.* at 316.
188. *Id.* at 314.
189. *Id.* at 304.
190. *Id.* at 320.
191. 765 S.W.2d 435 (Tex. Crim. App. 1989).
192. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4(a) (Vernon Supp. 1990).
193. The section provides in part:

> After an indictment has been returned or a complaint filed charging the defendant with an offense to which this article applies, on its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact . . . The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact but shall attempt to ensure that the child cannot hear or see the defendant.

requested that the child-victim's testimony be taken outside of court and videotaped. The trial court overruled the defense's objections to these procedures, and a videotaped interview occurred that the court allowed the State to admit at trial, over Powell's objection.[194] At the conclusion of the guilt/innocence stage of trial, Powell requested that the child-victim be called to testify under cross-examination. Relying on section 6 of article 38.071, the trial court denied Powell's request.[195] Based upon the reasoning of *Long*, the court of criminal appeals had little trouble in reaching the conclusion that, like section 2 of article 38.71, sections 4 and 5 constituted an unconstitutional infringement on the right to confrontation under both the state and federal Constitutions.[196] Although the court allowed Powell's attorney to cross-examine the child during the videotaped interview, this cross-examination did not satisfy the right to confrontation because it denied Powell the right to face-to-face confrontation and the right to be present during cross-examination, which includes the opportunity to communicate with counsel during cross-examination.[197] The United States Supreme Court bolstered the court of criminal appeals' holding in a decision handed down after *Long*, but before *Powell*. In *Coy v. Iowa*[198] the United States Supreme Court held that a statute which allowed complaining witnesses to testify in the defendant's presence but separated by a screen, violated the right to confrontation.[199]

The holding that sections 4 and 5 of the statute are unconstitutional did not, however, mean that the defendant was automatically entitled to a reversal of his conviction for indecency with a child. Rather, the court of criminal appeals remanded the case to the court of appeals for a determination of whether the erroneous admission of the videotape testimony constituted harmless error.[200] The decision to remand in *Powell* for a determination of harmless error is consistent with the approach in *Mallory v. State*,[201] which held that *Long* was subject to a harmless error analysis.[202] Courts determine the harmless error issue under the standard established by rule 81(b)(2) of the Texas Rules of Appellate Procedure, which provides that a finding of error requires reversal "unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the

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Id.

194. *Powell*, 765 S.W.2d at 436.

195. Section 6 of article 38.071 the Texas Code of Criminal Procedure provides:

> If the court orders the testimony of a child to be taken under Section 3 or 4 of this article or if the court finds the testimony of the child taken under Section 2 or 5 of this article is admissible into evidence, the child may not be required to testify in court at the proceeding for which the testimony was taken, unless the court finds there is good cause.

TEX. CODE CRIM. PROC. ANN. art. 38.071, § 6 (Vernon Supp. 1990).

196. *Powell*, 765 S.W.2d at 436-37.

197. *Id.* at 436 n.1.

198. 487 U.S. 1012 (1988).

199. *Id.* at 1016.

200. *Powell*, 765 S.W.2d at 437.

201. 752 S.W.2d 566 (Tex. Crim. App. 1988).

202. *Id.* at 569.

punishment."[203] Generally, in cases where the State anticipated the possible confrontation problems with the videotape statute and called the child to testify at trial, courts hold the error harmless.[204] In contrast, where the child-victim did not testify at trial, the appellate courts have been less likely to find that the error made no contribution, beyond a reasonable doubt, to the conviction.[205]

Another important issue in the wake of *Long* deals with whether that decision should apply retroactively and, if so, to what extent. *Ex parte Hemby*[206] appeared to give full retroactive effect to *Long*. Although the *Hemby* court stated that it did not necessarily adopt the standard of *Stovall v. Denno*[207] in determining the retroactive effect of a new ruling,[208] the court analyzed the problem using the three-prong test derived from that case. Under the three-prong test, inquiry is made into "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[209] *Hemby* held that the three prongs of the test do not carry equal weight, and that the first prong, the purpose to be served, demands the most attention.[210] Particularly where the rule affects the truth-finding function of a trial, as is the case with questions of confrontation and cross examination, full retroactive application is appropriate. Holding that the rights of confrontation and cross-examination have a direct bearing on the integrity of the fact-finding process, the court of criminal appeals gave *Hemby* the benefit of the ruling in *Long*, despite the affirmance of his conviction on appeal and the presentation of his *Long* claim on collateral attack.[211]

Later cases demonstrated that the retroactive application of *Long* would be limited. *Hemby* had made an objection at trial on the basis of denial of the right to confrontation and, thus, he had preserved error that could be raised on state habeas corpus.

The habeas corpus applicant in *Ex parte Crispen*,[212] however, failed to make a contemporaneous objection at trial. The court held that the applicant was not entitled to consideration of his *Long* claim on the merits even though the State tried the applicant prior to the decision in *Long*.[213] The failure to object to the showing of the videotaped interview of the complainant was not excused by the fact that *Long* had not yet been decided. The

203. TEX. R. APP. P. 81(b)(2).
204. *See* Severn v. State, 767 S.W.2d 914, 914-15 (Tex. App.—Texarkana 1989, *no pet.*); Whittemore v. State, 766 S.W.2d 869, 871 (Tex. App.—Beaumont 1989, *pet. ref'd*). *But see Lowrey*, 764 S.W.2d 4 (Tex. App.—Texarkana 1988, *no pet.*).
205. *See* Lawson v. State, 757 S.W.2d 122, 123-24 (Tex. App.—Houston [1st Dist.] 1988, *no pet.*).
206. 765 S.W.2d 791 (Tex. Crim. App. 1989).
207. 388 U.S. 293 (1967).
208. *Hemby*, 765 S.W.2d at 794.
209. 388 U.S. at 297.
210. 765 S.W.2d at 792 (quoting Desist v. United States, 394 U.S. 244, 249 (1969)).
211. 765 S.W.2d at 793-94.
212. 777 S.W.2d 103 (Tex. Crim. App. 1989).
213. *Id.* at 105.

court noted that the rights to confrontation and due process upon which *Long* was based were well-established doctrines at the time of trial.[214]

Not only is *Long* available retroactively only to those who had the foresight to object at trial, but the state constitutional aspects of *Long* cannot be collaterally attacked notwithstanding the language about full retroactivity in *Hemby*. In an analysis concerning the scope of state habeas corpus, the court in *Ex parte Dutchover*[215] held that because *Mallory v. State*[216] had held that *Long* was subject to harmless error analysis, the court could not consider the issue on collateral attack even if the defense made a contemporaneous objection at trial.[217] As the *Dutchover* opinion candidly admitted, under *Long*, the retroactivity of state constitutional claims has become a moot issue.[218]

III. STATE HABEAS CORPUS

One of the most important developments in the criminal law field in the cases decided during the survey period concerned the trend to limit the availability of state habeas corpus to collaterally attack criminal convictions. Courts erected procedural barriers to collateral attack under article 11.07 of the Texas Code of Criminal Procedure[219] and restricted the scope of the substantive issues that defendants can raise in a state habeas corpus petition. These barriers and restrictions appeared in holdings that seem to have been influenced by several United States Supreme Court decisions that have curtailed the availability of federal habeas corpus.[220]

In *Ex parte Banks*[221] the court of criminal appeals evinced a stricter view of the procedural requirements necessary for considering the merits of claims brought under article 11.07.[222] Although defense counsel for *Banks* raised an objection at trial to the granting of the State's challenges for cause because of bias under article 35.16 of the Texas Code of Criminal Procedure, the defense failed to present this claim on direct appeal.[223] Citing the often repeated language that "the Great Writ should not be used to litigate matters which should have been raised on appeal," the *Banks* court held that the

214. *Id.*
215. 779 S.W.2d 76 (Tex. Crim. App. 1989).
216. 752 S.W.2d 566 (Tex. Crim. App. 1988).
217. *Dutchover*, 779 S.W.2d at 77.
218. *Id.*
219. TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977 and Supp. 1990).
220. The term federal habeas corpus denotes collateral attacks by state inmates on the validity of a state court conviction in federal court under 28 U.S.C. § 2254 (1982). The first indication of the reduced availability of state habeas corpus and the adoption of an approach consistent with a more restrictive federal view of collateral attack came in *Ex parte* Reneir, 734 S.W.2d 349 (Tex. Crim. App. 1987), which abandoned the formally broad Texas view of the requirement that an inmate be in custody before being able to have a habeas corpus petition considered.
221. 769 S.W.2d 539 (Tex. Crim. App. 1989).
222. *Id.* at 540-41. The court of criminal appeals denied, without written opinion, all the grounds that Banks raised in his application for writ of habeas corpus except those concerning the alleged improper excusal of three prospective jurors.
223. *Id.* at 540.

improper exclusion of a prospective juror on statutory grounds could not be considered for the first time in an application for writ of habeas corpus.[224] The court's holding represents a subtle but important change in the law. As Judge Clinton pointed out in his dissenting opinion, past cases that had referred to the language about the unavailability of the writ of habeas corpus to litigate matters that should have been raised on direct appeal meant that the scope of collateral attack is narrower than direct appeal.[225] Many claims, such as insufficient evidence, which can be raised on direct appeal cannot be raised on collateral attack because the issue does not involve a claimed deprivation of a fundamental or constitutional right. *Ex parte Banks*, however, cited this language in creating a new procedural requirement. Even if the court considers the *state* law claim fundamental, the failure to present the claim on direct appeal results in a procedural default.[226] If the defense omits the state law claim on direct appeal, the court will not consider the question of whether the claim is sufficiently fundamental or of constitutional dimension to justify habeas corpus relief.[227] *Ex parte Banks* carefully distinguished the holding in *Ex parte Bravo*,[228] in which the court considered a claim on the merits that the defense had not raised on direct appeal, because the claim of the improper exclusion of a prospective juror in that case was based upon the federal constitution and not on state statutory grounds.[229] Courts echoed this preference for federal constitutional claims over state constitutional claims in other collateral attack cases decided during the survey period.

Although *Ex parte Banks* concerned only a state statutory claim, the habeas corpus applicant in *Ex parte Crispen*[230] raised state and federal constitutional issues. Nonetheless, the court of criminal appeals refused to consider the merits of the claim because of another type of procedural default: the failure of the defendant to object at trial.[231] Although the court of criminal appeals has long required a contemporaneous objection in order to preserve error for review both on direct appeal and collateral attack, the importance of *Ex parte Crispen* was the court's refusal to excuse the procedural default despite the fact that the applicant's trial preceded the case upon which he based his claim. A pretrial videotaped interview, made in accordance with article 38.07(2) of the Texas Code of Criminal Procedure, of the child-sexual abuse complainant by a social worker, was introduced at Crispen's trial.[232] Even though the court of criminal appeals decided *Long v. State*,[233] which declared the child videotape statute unconstitutional, after the defendant's trial, and the only court of appeals to address the issue prior

224. *Id.*
225. *Id.* at 547 (Clinton J., dissenting).
226. *Id.* at 540-41.
227. *Id.*
228. 702 S.W.2d 189 (Tex. Crim. App. 1982).
229. *Banks*, 769 S.W.2d at 540-41.
230. 777 S.W.2d 103 (Tex. Crim. App. 1989).
231. *Id.* at 105.
232. *Id.* at 104.
233. 742 S.W.2d 302 (Tex. Crim. App. 1987).

to applicant's trial had upheld the statute,[234] the court of criminal appeals refused to excuse the defendant's failure to raise an objection.[235] The *Crispen* court stated that the *Long* decision was based on well-recognized principles of due process and the right of confrontation. Thus, although the court had not yet declared the specific statute at issue unconstitutional, the court believed that the claimed defect was not so novel as to excuse the failure to object.[236]

Crispen's stringent view of procedural default coincides with recent federal case law with respect to the impact of a failure to make a contemporaneous objection on collateral review. Since the landmark decision in *Wainwright v. Sykes*,[237] if a federal habeas corpus applicant fails to object at trial, the court may not consider the claim on collateral attack unless the defendant shows cause for failing to object and prejudice from having failed to do so.[238] One of the few ways available for the defendant to show cause is by establishing that the claim raised was too novel to require an objection.[239] Recent decisions of the United States Supreme Court, however, have only grudgingly conceded this narrow exception and have required a contemporaneous objection for constitutional claims that were embryonic in their develop-

234. *See* Jolly v. State, 681 S.W.2d 689 (Tex. Crim. App.—Houston [14th Dist.] 1984), *rev'd*, 739 S.W.2d 345 (Tex. Crim. App. 1987).

235. *Ex parte Crispen*, 777 S.W.2d 103, 105 (Tex. Crim. App. 1987).

236. *Id.* at 105-06. In a concurring opinion in *Crispen*, Judge Clinton agreed with the majority, but also raised the question of the proper scope of collateral attack as another reason to deny the applicant habeas corpus relief. *Id.* at 106-10 (Clinton, J., concurring). Judge Clinton referred to his dissenting opinion in *Ex parte Banks*, in which he reviewed the history of the development of state habeas corpus, emphasizing that it was originally available only to attack jurisdictional defects. Through legislative enactment of article 11.07 of the Texas Code of Criminal Procedure and the court of criminal appeals' interpretation of it in *Ex parte Young*, 418 S.W.2d 824 (Tex. Crim. App. 1967), the writ was expanded to provide an avenue of relief for fundamental error and state and federal constitutional claims. In his *Crispen* concurrence, judge Clinton pointed out, however, that "states are not compelled by any provision of the federal constitution to provide post-conviction collateral avenues for vindication of federal constitutional rights." *Crispen*, 777 S.W.2d at 107 (Clinton, J., concurring). Judge Clinton reasoned that if the states are free to dispense with collateral attack altogether, they are free to establish what issues will be recognized on collateral attack. In an opinion that will result in a major reduction of the availability of state habeas corpus if adopted by a majority of the court of criminal appeals, Judge Clinton proposed that the judiciary should only recognize federal constitutional claims that are exceptional or fundamental. *Id.* at 107-8. Preferring to confine the scope of habeas corpus through limitation of subject matter, rather than by the creation of procedural obstacles, Judge Clinton would recognize such exceptional claims even if they were not properly preserved by objection at trial. *Id.* at 108-9. If courts fail to adopt, this approach Judge Clinton suggested in a footnote that courts should at least require the defendant to show in a habeas corpus petition that the alleged constitutional error "in fact more likely than not contributed to his conviction." *Id.* at 109 n.6. In fact, Judge Clinton's views proved influential. Two important decisions narrowing the scope of state habeas review have the clear imprint of the language and reasoning of Judge Clinton's dissent in *Banks* and his concurrence in *Crispen*. *See Ex parte* Dutchover, 779 S.W.2d 76 (Tex. Crim. App. 1989); *Ex parte* Tuan Van Truong, 770 S.W.2d 810 (Tex. Crim. App. 1989). *See infra* notes 244, 252, and 256.

237. 433 U.S. 72 (1977).

238. *Id.* at 77-91.

239. *See* Reed v. Ross, 468 U.S. 1, 12-20 (1984).

ment.[240] As a result of cases like *Crispen* and *Wainwright* and their progeny, criminal defense attorneys must now object at trial in order to insure that they have preserved potential error for claims that are contrary to current law, but which courts may recognize in the future.

In addition to limiting the availability of habeas corpus through restrictive procedural requirements, two important decisions of the court of criminal appeals narrowed the scope of the issues that are cognizable on state habeas corpus. In *Ex parte Tuan Van Truong*[241] the state habeas corpus applicant claimed that the parole law jury charge mandated by article 37.07(4) of the Texas Code of Criminal Procedure, which *Rose v. State*[242] declared unconstitutional, tainted his punishment. The court of criminal appeals failed to reach the merits of the claim, asserting that the error did not constitute such a fatal error as to render the sentence invalid and the judgment void.[243] Thus, even if the defense satisfied the procedural requirements and the applicant was in custody and had preserved error by objecting at trial and raising the claim on appeal, the court will not consider such a claim in a habeas corpus proceeding because the error was not serious enough to render the judgment void.[244]

Judge Teague's dissent clarified the actual holding of the majority opinion. Judge Teague stated:

> [W]hat the majority opinion in this case teaches is that voidness and harmlessness are mutually exclusive concepts. . . . Here, applicant is denied relief because his claim is not cognizable in habeas corpus. It isn't cognizable because, even if his contentions are true, the judgment he attacks is not void. The judgment cannot be void because void judgments aren't subject to a harm analysis. Consequently, any defect subject to the harmless error rule is not cognizable in habeas corpus.[245]

The court made explicit Judge Teague's interpretation of *Tuan Van Truong* later in the term in the per curiam opinion in *Ex parte Dutchover*,[246] in which Teague alone dissented. Like the applicant in *Ex parte Crispen*, Dutchover attacked the validity of his conviction of indecency with a child on the ground that the court admitted into evidence a videotape of the complainant under the authority of article 38.071(2) of the code of criminal procedure, which the court declared unconstitutional in *Long v. State*.[247] *Long*

240. *See* Murray v. Carrier, 477 U.S. 478, 485-95 (1986); Engle v. Isaac, 456 U.S. 107, 124-35 (1984).

241. 770 S.W.2d 810 (Tex. Crim. App. 1989).

242. 752 S.W.2d 529 (Tex. Crim. App. 1987).

243. *Tuan Van Truong*, 770 S.W.2d at 813.

244. Although the opinion was issued as a per curiam opinion, most of the opinion was taken verbatim from the dissenting opinion of Judge Clinton in *Ex parte* Banks. *Compare Tuan Van Truong*, 770 S.W.2d at 811-13 *with Ex parte* Banks, 769 S.W.2d 539, 543-47 (Tex. Crim. App. 1989). Judge Clinton advocates limiting habeas corpus relief to only those claims that go to the most fundamental nature of the fairness of a trial. *Banks*, 769 S.W.2d at 541-48. Significantly, only Judge Teague dissented to the per curiam decision in *Tuan Van Truong*, a dissent apparently influenced by Judge Clinton's analysis. *Tuan Van Truong*, 770 S.W.2d at 813.

245. *Id.* at 814-15.

246. 779 S.W.2d 76 (Tex. Crim. App. 1989).

247. *Id.* at 77.

held that the statute violated both the right to due process and the right to confrontation, which both the Texas and federal Constitutions recognize.[248] As to the claim under the state constitution, the court of criminal appeals, citing *Ex parte Tuan Van Truong*, held that because the *Long* right was subject to a harm analysis, it is "at best voidable, and as such is not subject to a collateral attack by writ of habeas corpus."[249] Thus, after *Dutchover*, applicants cannot raise state statutory and constitutional claims in a state petition for habeas corpus unless the claim is one of the few that would not be susceptible to a harm analysis. Traditionally, a state habeas applicant has had the burden of establishing that a claimed error was prejudicial, but *Dutchover* goes much further; an applicant will not receive review on the merits of a state statutory or constitutional claim, even if he could show harm, if the type of claim raised is one that could constitute harmless error. Only a few such claims exist, and a defendant could probably plead those in federal constitutional terms.[250] Thus, the court has virtually eliminated state constitutional and statutory claims from collateral attack in the state of Texas.

Because *Long* created error under both the state and federal constitution, the court went on to consider the defendant's federal constitutional claims. Finding that the defendant failed to make a contemporaneous objection at trial in *Long* and that the holding in *Ex parte Crispen* did not excuse the failure, the court indicated that the defendant was not entitled to state collateral relief for the federal component of his *Long* claim.[251] Although the court could have ended the opinion at this point with a citation to *Ex parte Crispen*, the per curiam opinion continued.[252]

In a direct appeal from a criminal conviction, any error mandates reversal unless the court determines, beyond a reasonable doubt, that the error made no contribution to the conviction or punishment. In a collateral attack, however, the courts place the burden upon the applicant to establish the illegality of his restraint.[253] As a result, *Dutchover* held that courts ought to require an applicant to plead and prove facts showing that the error actually contributed to his conviction or sentence.[254] After having adopted the equivalent of the federal habeas corpus requirement of showing "cause" for failure to object in *Crispen*, the court in *Dutchover* apparently adopted the

248. Long v. State, 742 S.W.2d 302, 318-21 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 933 (1988); *see supra* notes 183-90 and accompanying text.

249. *Dutchover*, 779 S.W.2d at 77.

250. In addition to claims of lack of jurisdiction and double jeopardy, which relate to the court's power to try the defendant at all, only a few other claims apparently are immune from a harmless error analysis. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding total deprivation of counsel to an indigent immune); Brown v. Mississippi, 297 U.S. 278 (1936) (holding a coerced confession immune); Moore v. Dempsey, 261 U.S. 86 (1923) (holding a mob-dominated trial immune).

251. *Dutchover*, 779 S.W.2d at 77-78.

252. The balance of the *Dutchover* opinion is a virtual verbatim adoption of footnote six of Judge Clinton's concurring opinion in *Crispen*, 777 S.W.2d 103, 109 n.6 (Tex. Crim. App. 1989).

253. *Dutchover*, 779 S.W.2d at 77-78.

254. *Id.* at 78.

equivalent of the federally required showing of "prejudice." The court of criminal appeals, therefore, appears to have adopted the "cause and prejudice" standard of *Wainwright v. Sykes*,[255] which the United States Supreme Court developed for determining the effect of procedural default for federal habeas corpus review.

Dutchover makes it clear that the scope of habeas corpus review will be more restricted in the future, but it is unclear how wide the door has been left open to collateral attack in state court and what exact procedural burdens courts will impose on defendants.[256] Particularly since most inmates file state habeas corpus petitions pro se, the court of criminal appeals should articulate clear procedural requirements and general principles for determining those claims that are of sufficient magnitude to justify collateral relief.

255. 443 U.S. 72 (1977).

256. For example, in one part of the *Dutchover* opinion the court speaks in terms of the requirement that the applicant show that the error was not harmless beyond a reasonable doubt. *See Dutchover*, 779 S.W.2d at 77. In another part, however, the court stated that the applicant must demonstrate that "the error made no contribution to the conviction or to the punishment." *Id.* at 78. Elsewhere in the opinion, the court stated that the defendant must show that the error did in fact contribute to his conviction or punishment. *Id.* at 77-78. The court adopted the entire analysis from footnote six of the concurring opinion of Judge Clinton in *Crispen*, which stated that the error "in fact more likely than not contributed to his conviction." *Crispen*, 777 S.W.2d at 109 n.6. Thus, the exact burden placed on the defendant in a habeas corpus petition raising federal constitutional claims is anything but clear. Similarly, while state statutory and constitutional grounds appear to have been eliminated, uncertainty also exists as to which types of federal constitutional claims are sufficiently fundamental so as to call into question the validity of a conviction attacked collaterally.