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punishments are constitutionally permissible as well.[90] The intent of the Framers of the fifth amendment was that a person should be neither tried nor punished twice for the same offense, but the *Hunter* decision authorizes multiple punishments despite the clear historical message.

Criminal defendants in Oklahoma who find themselves under the protection of Oklahoma's double jeopardy policy may rest easy in the knowledge that they are better protected than their counterparts in jurisdictions controlled by *Hunter*. The Oklahoma statute provides the added protection against multiple punishments that the Supreme Court of the United States finds lacking in the double jeopardy clause of the fifth amendment to the Constitution of the United States.

Steven Paul Shreder

Criminal Procedure: Oklahoma's Motion for New Trial in Criminal Cases

Oklahoma criminal defense lawyers find themselves in a peculiar and unsatisfactory situation when they seek either to preserve trial errors for appellate review or to argue them on direct appeal to the Oklahoma Court of Criminal Appeals. Defense counsel cannot rely solely on court rules or statutes to learn the basics of initiating and perfecting an appeal.[1] They must look beyond rules and statutes to discover two elementary procedural requirements that appear only in Court of Criminal Appeals decisions.

First, lawyers find in Oklahoma case law that the motion for new trial is a jurisdictional document, which must be filed within a prescribed period to invoke the powers of the Court of Criminal Appeals.[2] No court rule or statute reveals this procedural requirement. Second, appellate review of criminal cases is limited to assignments of error in the motion for new trial, unless the error is fundamental or jurisdictional.[3]

90. In his famous dissent from the decision in *Pearce*, Justice Harlan found such a result equally unpalatable in terms of previous case law. "It cannot be that the provision does not comprehend 'sentences'—as distinguished from 'offenses' . . . ." North Carolina v. Pearce, 395 U.S. 711, 747 (1969).

1. The Oklahoma legislature has delegated responsibility for prescribing criminal appellate procedure to the Court of Criminal Appeals. 22 OKLA. STAT. § 1051(b)(1981). The court announces its requirements in rules that have the force of statute and, like statutes elsewhere, may require interpretation. No one can deny the need for judicial interpretation of statutes and rules. However, the practice of requiring lawyers to go to court decisions to learn the most basic steps needed in order to initiate and perfect an appeal is questionable.

2. *See, e.g.*, Clonts v. State, 644 P.2d 1377 (Okla. Crim. App.1982), *infra* in text accompanying notes 4-28.

3. Again, this is a judicially created requirement. *See, e.g.*, Eads v. State, 640 P.2d 1370 (Okla. Crim. App. 1982). Failure to comply with a procedural rule creates a forfeiture by pro-

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In Oklahoma, court decisions give criminal defense lawyers first notice of essential procedural requirements involving the motion for new trial. The cases, however, fail to provide uniform guidelines or a basis for predicting which allegations of trial error will survive to be considered by the appellate court.

The purpose of this note is to identify the problems for lawyers and criminal defendants created by the confusing motion-for-new-trial requirements. It examines the burdens placed on the occasional criminal defense lawyer and new counsel on appeal who turn to the court rules and statutes for guidance. A constitutional issue is raised, and finally, recommendations for changes in Oklahoma criminal appellate procedure are made.

Appellate Jurisdiction

The problem criminal defense lawyers face is best introduced by a careful examination of a recent Court of Criminal Appeals decision and the authorities on which the court relied. In *Clonts v. State*,[4] the court stated without reservation what it had indicated before: the motion for new trial is a jurisdictional document.

The procedural history prompting *Clonts* began when the district court imposed judgment and sentence in September 1981 and then appointed the state Appellate Public Defender to represent Clonts on his appeal. The Appellate Public Defender's office discovered that no motion for new trial had been filed and returned the case file to the district court. Some four months after judgment and sentence, three months beyond the thirty-day statutory maximum, a motion for new trial was filed and overruled by the trial court. The case was returned to the Appellate Public Defender, who filed a request for the Court of Criminal Appeals to determine whether the appellate defender had the authority to represent the petitioner. The court held that the Appellate Public Defender was without authority to represent Clonts because all the jurisdictional requirements had not been met in accordance with state statutes and the rules of the court.[5]

The court relied on three sources of authority to support its conclusion: Title 22, section 953 of the Oklahoma Statutes,[6] *Bogue v. State*,[7] and rule 3.1(A)

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cedural default that denies a defendant the right to raise the error on appeal. "[T]he ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel." Wainwright v. Sykes, 443 U.S. 72, 194 (1972) (Brennan, J., dissenting).

For recent commentaries on the subject of procedural default in the context of federal habeas corpus review, *see* Dix, *Waiver in Criminal Procedure: A Brief For More Careful Analysis*, 55 TEX. L. REV. 193 (1977); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050 (1978); Rosenberg, *Jettisoning Fay v. Noia; Procedural Defaults by Reasonably Competent Counsel*, 62 MINN. L. REV. 341 (1978). An older and often quoted article is Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

4. 644 P.2d 1377 (Okla. Crim. App. 1982).

5. *Id.* at 1377.

6. 22 OKLA. STAT. § 953 (1981).

7. 556 P.2d 272 (Okla. Crim. App. 1976).

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of the Rules of the Court of Criminal Appeals.[8] Neither the statute nor the rule explicitly state that the motion for new trial is a jurisdictional requirement; the court had to follow an indirect route to reach its result.

First, the *Clonts* order cites Title 22, section 953: "The application for a new trial must be made before judgment is entered; but the court or judge thereof may for good cause shown allow such application to be made at any time within thirty (30) days after the rendition of judgment."[9] The statute is important in *Clonts* because it recites the time for filing the motion. Clonts's trial attorney failed to file a motion for new trial within the statutory period. However, only a strained interpretation of the provision will lead to the conclusion that the section was intended to prescribe an appellate procedural requirement.

Section 953 is found among the statutes that define the motion for new trial, prescribe grounds for granting a new trial, and give the time for applying for a new trial.[10] On their face, these provisions relate to trial procedure, not to the requirements for making the transition from trial to appellate court. The section itself says nothing about the motion for new trial as a requirement for perfecting an appeal.

The second authority for the court's ruling is *Bogue v. State.*[11] The *Clonts* court interpreted *Bogue* as holding that "the filing of the motion for new trial is a prerequisite to the invocation of this Court's appellate jurisdiction."[12] In *Bogue* the court observed that the record failed to show that the defendant had filed a motion for new trial; nevertheless, the court chose to assume the appeal was properly perfected.[13] The decision does not explain why the court assumed power to hear the appeal when all the jurisdictional requirements had not been met.

The third authority supporting the *Clonts* decision is rule 3.1(A) of the Rules of the Court of Criminal Appeals.[14] The rule provides that the appellant's petition in error must contain "[t]he date the motion for new trial was filed and the date it was overruled."[15] This rule has been the real source of the motion-for-new-trial requirement since 1973, when the court decided

8. OKLA. CT. CRIM. APP. R. 3.1(A)(4), 22 OKLA. STAT. ch. 18 app. (1981).

9. Clonts v. State, 644 P.2d 1377 (Okla. Crim. App. 1982), *citing* 22 OKLA. STAT. § 953 (1981). The statute was also discussed in Application of Jones, 365 P.2d 833, 834 (Okla. Crim. App. 1961) (a petition for writ of mandamus to provide a case made must be denied where no motion for new trial was filed and there was no fundamental error).

10. 22 OKLA. STAT. §§ 951, 952 (1981).

11. 556 P.2d 272 (Okla. Crim. App. 1976).

12. Clonts v. State, 644 P.2d 1377 (Okla. Crim. App. 1982). The actual wording of the *Bogue* holding was: "A motion for new trial must be filed in the trial Court in accordance with Rule 2.3 of the Rules of this Court for an appeal to be properly perfected." Bogue v. State, 556 P.2d 272, 274 (Okla. Crim. App. 1976). The *Bogue* holding was actually based on the court's decision in McCullar v. State, 509 P.2d 137 (Okla. Crim. App. 1973), discussed *infra* in text accompanying notes 16-22.

13. Bogue v. State, 556 P.2d 272, 274 (Okla. Crim. App. 1976).

14. OKLA. CT. CRIM. APP. R. 3.1(a)(4), *supra* note 8.

15. *Id.*

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McCullar v. State[16] and overruled all authority to the contrary. In *McCullar* the court held that a petition in error that does not recite the timely filing of a motion for new trial is fatally defective and does not invoke the jurisdiction of the court.[17]

McCullar discusses what is now rule 3.1(A), stating:

> We recognize there has been much confusion arising from past decisions of this Court regarding the effect of the motion for new trial in perfecting an appeal. Rule 2.4 *by implication* recognizes the requirement of filing a motion for new trial and the necessity of allowing the trial court a final study of the issues before an appeal may be perfected. For this reason and for the reason that prior decisions have been decided under different rules, we expressly overrule all contra authority.[18]

The statement indicates the appellate court's deference to the trial court and its interest in giving the trial court an opportunity to correct errors in its proceedings before they are raised on appeal. This aspect of the motion for new trial will be discussed later.[19] The *McCullar* decision deserves attention for the new interpretation of appellate procedure it gave attorneys and for a more important distinction that became apparent three years later when the court decided *Bogue.*

In *McCullar* the appellant's petition in error stated: "A motion for a new trial was not filed on behalf of the appellant."[20] Noting this, the Court of Criminal Appeals phrased the question before it as "whether a petition in error which states a motion for new trial was not filed on behalf of the defendant meets the mandatory requirement of Rule 2.4. . . ."[21] In other words, the appellant called attention to the missing motion by explicitly stating that it had not been filed. Accordingly, the court refused to consider the one proposition of error the appellant raised because the petition in error was "fatally defective" and did not invoke the jurisdiction of the court.[22]

In *Bogue*, however, the appellant's petition in error said nothing about whether a motion for new trial was filed.[23] Under current case law, this in itself should be a jurisdictional defect. As the court stated in *Clonts*, rule 3.1(A) (previously rule 2.4) requires that the petition in error indicate when the motion for new trial was filed and overruled. The rule could be interpreted to mean "*if* a motion for new trial is filed at all." The court, however, has chosen another translation. It sees in the rule an implicit requirement that

16. 509 P.2d 137 (Okla. Crim. App. 1973).
17. *Id.* at 138.
18. *Id.* at 139 (emphasis added). Rule 2.4, discussed in *McCullar*, is now Rule 3.1(A).
19. See discussion *infra* in text accompanying notes 71-75.
20. McCullar v. State, 509 P.2d 137, 138 (Okla. Crim. App. 1973).
21. *Id.* See *supra* note 18.
22. 509 P.2d 137, 138 (Okla. Crim. App. 1973).
23. Bogue v. State, 556 P.2d 272, 274 (Okla. Crim. App. 1976).

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trial attorneys file a motion for new trial as a prerequisite for appellate jurisdiction.

In *Bogue* the court assumed the appeal was properly perfected and decided the question before it. In *McCullar*, where the absence of the filing of a motion for new trial was conspicuous, the court refused to review the asserted error. If the motion for new trial is truly a jurisdictional requirement, no distinction should be made between cases where the petition in error states that no motion was filed (*McCullar*) and those where the petition is silent on the matter (*Bogue*). These two inconsistent decisions make any clear understanding of what is required to make the transition from trial to appellate court impossible.

The *Clonts* opinion did not cite any court rule requiring a motion for new trial to invoke appellate jurisdiction because one does not exist—except by implication in rule 3.1(A) as seen in *McCullar*. Rule 3.1(A) (contents of petition in error) is found in the section that dictates procedures for *perfecting* an appeal in the Court of Criminal Appeals.[24]

The section of the rules preceding rule 3.1(A) describes the procedure for *initiating* an appeal from the trial court.[25] Originally, rule 2.1 (initiating an appeal) stated the time period for filing a motion for new trial.[26] A trial attorney who read rule 2.1 might infer from the location of the provision that a motion for new trial had to be filed, even though the rule did not state this explicitly.

Effective May 20, 1981, however, the first paragraph of the old rule 2.1 was deleted entirely from the new rule 2.1.[27] Now the rule begins with a discussion of the requirements for filing a motion for new trial based on newly discovered evidence, an altogether different creature from the motion being discussed here. Nowhere in the present rule 2.1 is there a reference to the more commonplace motion for new trial. The omission was probably inadvertent. The result, however, is to mislead trial attorneys who rely on the rules alone.[28] If they compare the old (February 1, 1981) and the new (May 20, 1981) rule 2.1, they could conclude that the court has eliminated the motion for new trial as a requirement for initiating an appeal.

24. OKLA. CT. CRIM. APP. R. 3.1-3.17.

25. OKLA. CT. CRIM. APP. R. 2.1-2.5.

26. The old rule last appeared in this form in the Order Adopting New Rules for the Court of Criminal Appeals of the State of Oklahoma, effective Feb. 1, 1981. Okla. Dec. (621 P.2d-626 P.2d).

27. OKLA. CT. CRIM. APP. R. 2.1(A) revised and effective May 20, 1981.

28. Another source of confusion is found in OKLA. CT. CRIM. APP. R. 1.3(D)(4), which states: "Review of an order revoking a suspended sentence is governed by the same procedure as perfection of a regular misdemeanor or felony appeal." This rule raises the question of whether a motion for new trial must be filed following an order revoking a suspended sentence. The answer should be no, because a motion for new trial is not appropriate after most revocation proceedings.

Moreover, the statutory grounds for a new trial do not apply to revocation hearings. *See* 22 OKLA. STAT. § 952 (1981). The court has accepted jurisdiction when the petition in error did not recite the filing of a motion for new trial. *See, e.g.*, Mack v. State, 637 P.2d 1262 (Okla. Crim. App. 1981).

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Problems for Trial Lawyers

Oklahoma trial lawyers risk prejudicing their clients and facing accusations of ineffective representation if they fail to interpret properly the motion-for-new-trial requirement. The state constitution and statutes guarantee an appeal as a matter of right to a criminal defendant, but the appeal must be taken in the manner dictated by the applicable statutes and court rules.[29] Should lawyers fail to file the motion for new trial, they deprive their clients of the ability to take the quickest, simplest, and most secure path to the Court of Criminal Appeals.[30]

Lawyers who do not regularly practice criminal law but who accept court-appointed cases on an irregular basis may overlook the motion-for-new-trial requirement. Lawyers must recognize that the rules for criminal and civil appeals differ significantly. The rules for appellate procedure in civil cases no longer require a motion for new trial to prosecute an appeal from a decision of the district court.[31]

Furthermore, lawyers apparently must file a motion for new trial in criminal cases even when a new trial is not desirable. For example, when insufficiency of the evidence is the ground for a postverdict motion, the case should be dismissed if the postverdict motion is granted.[32] The defendant does not seek a new trial. Logically, if the postverdict motion is denied, the appeal should be taken from judgment and sentence alone. No motion for new trial should be required.

Errors Considered on Appeal

Assuming that a lawyer knows to file a motion for new trial in order to protect his client's right to appeal, the next question concerns the contents of

29. OKLA. CONST. art. 2, § 6 states that "[t]he courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." This provision has been interpreted to mean that an accused has a constitutional right to an appeal. Johnson v. State, 79 Okla. Crim. 363, 155 P.2d 259 (1945). The same right is guaranteed by statute in 22 OKLA. STAT. § 1051 (1981). *See* Baker v. State, 496 P.2d 1195 (Okla. Crim. App. 1972).

30. The *Clonts* court concluded that the decision did not prejudice Clonts, who could file a postconviction application for an appeal out of time. Clonts v. State, 644 P.2d 1377, 1378 (Okla. Crim. App. 1982).

Statutory grounds for obtaining postconviction relief are listed in 22 OKLA. STAT. § 1080 (1981). Applications for postconviction review must be made in the district court where the defendant was convicted. 22 OKLA. STAT. § 1081 (1981). *See generally* 22 OKLA. STAT. § 1084 (1981); OKLA. CT. CRIM. APP. R. 5.1-5.4; Smith v. State, 611 P.2d 276 (Okla. Crim. App. 1980); Maines v. State, 597 P.2d 774 (Okla. Crim. App. 1979).

31. CIV. APP. PROC. R. 1.12, 12 OKLA. STAT. § 991 (1981).

32. The sixth statutory ground for a motion for new trial is "when the verdict is contrary to law or evidence." 12 OKLA. STAT. § 952 (1981). Despite this legislative authorization, it seems that some other motion, perhaps a motion to set aside the verdict and direct a verdict of acquittal, would be more appropriate when the defendant contends the state has failed to prove its case beyond a reasonable doubt. It is inconsistent to require the defendant to file a motion for new trial when the error raised is the trial court's failure to direct a verdict.

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the motion. The statutory grounds for a new trial are, by the plain wording of the statute, exclusive.[33] It is not enough to state simply, "Comes now the defendant and requests a new trial."[34]

The Court of Criminal Appeals has often held that appellate review is limited to assignments of error listed in the motion for new trial, unless the errors are jurisdictional or fundamental.[35] The challenge of defining fundamental error aside, the cases that cite this rule present their own problems because the rule, though quoted, is not followed.

In *Adams v. State*,[36] for example, the appellant's first and second assignments of error were not reviewed by the court because they were not raised in the motion for new trial. The court stated: "Since the record is void of any objection to the interrogatories or of a motion for a new trial, the errors have not been preserved, and have thus been waived."[37] The third assignment of error, however, *was* considered by the court and rejected even though the issue was not preserved for review.[38] The court ended its discussion of the

33. 22 OKLA. STAT. § 952 (1981). The seven statutory grounds for a new trial are:

First. When the trial has been in his absence, if the charge is for a felony.

Second. When the jury have received any evidence out of court, other than that resulting from a view of the premises.

Third. When the jury have separated without leave of the court, after retiring to deliberate on their verdict, and before delivering or sealing the same, if it be sealed, or have been guilty of any misconduct by which a fair and due consideration of the case has been presented.

Fourth. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of the jury.

Fifth. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.

Sixth. When the verdict is contrary to law or evidence.

Seventh. When new evidence is discovered, material to the defendant, and which he could not with reasonable diligence have discovered before the trial, or when it can be shown that the grand jury was not drawn, summoned or impaneled as provided by law, and that the facts in relation thereto were unknown to the defendant or his attorney until after the trial jury in the case was sworn and were not of record. . . .

34. Strong v. State, 547 P.2d 383 (Okla. Crim. App. 1976).

35. Eads v. State, 640 P.2d 1370 (Okla. Crim. App. 1982); Shipman v. State, 639 P.2d 1248 (Okla. Crim. App. 1982); Assadollah v. State, 632 P.2d 1215 (Okla. Crim. App. 1981); McFarthing v. State, 630 P.2d 324 (Okla. Crim. App. 1981).

36. 645 P.2d 1028 (Okla. Crim. App. 1982). The first and second assignments of error alleged that improper rebuttal and cross-examination occurred when the prosecutor commented on the defendant's postarrest silence.

37. *Id.* at 1029. It is not clear why the court had jurisdiction to hear the appeal since there was no record of a motion for new trial having been filed.

Some courts speak of a defendant having "waived" certain allegations of error. One writer has suggested that errors are "forfeited" and not "waived" since waiver requires the voluntary relinquishment of a known right or privilege. *See* Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DEPAUL L. REV. 753, 758 (1980).

38. Adams v. State, 645 P.2d 1028, 1029-30 (Okla. Crim. App. 1982). The third issue concerned an alleged invalid consent to search. One judge dissented on the ground that the uncon-

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third allegation of error by stating: "Moreover, none of the alleged errors were argued in a motion for new trial, and have not been properly preserved for appeal."[39]

Adams raises an important question that has not been answered in Court of Criminal Appeals decisions. It is not clear why in some cases the court quotes the rule as a ground for refusing to consider the errors, yet in other cases cites it as an afterthought to a precedent-establishing holding.[40] If the court finds some nonfundamental issues deserving of consideration even though the right to raise these issues has been forfeited by procedural default, the court's standards for review have not been articulated.

In some of the cases reviewed for this note, the alleged trial errors appear to have been lost to appellate review not because they were omitted altogether but because the motion for new trial was too general or too specific. The fifth and sixth statutory grounds for a new trial are sufficiently general that the words of the statute alone should cover most errors that could be raised on appeal: "Fifth. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial. Sixth. When the verdict is contrary to law or evidence."[41] Some degree of specificity is required, however, if the motion is to fulfill its purpose of giving the trial judge one last occasion to review the proceedings and correct errors.[42] How general or specific the motion for new trial should be is an open question. The court rarely quotes the wording of the motion filed in district court.[43] It simply states that the motion was inadequate.

In *Garcia v. State*,[44] for example, the defendant's motion for new trial stated: "That the court made numerous and substantial errors in the rulings

stitutional search and the use of the appellant's postarrest silence constituted fundamental error and warranted reversal of the case. *Id.* at 1030 (Brett, Presiding Judge, dissenting).

39. *Id.* at 1030.

40. In *Adams*, the holding that the defendant's sister could consent to a search of his apartment might be troublesome precedent to those who agree with the dissent. See *supra* note 38.

41. 22 OKLA. STAT. § 952 (1981).

42. *See, e.g.*, McCullar v. State, 509 P.2d 137, 139 (Okla. Crim. App. 1973).

43. An exception is found in Nutter v. State, 658 P.2d 492 (Okla. Crim. App. 1983). The court quoted the defendant's motion for new trial. *Id.* at 493 n.1. Although the motion tracked the statutory language, the court concluded that "the general language utilized in his motion for new trial is insufficient to place the trial judge on notice of the errors now complained of, and failed to allow him an opportunity to cure the alleged errors. . . ." *Id.* at 493.

All errors were waived except a jurisdictional question and insufficiency of the evidence. This recent opinion is unusual in several respects. First, the court clearly states the rule that errors must be raised in the motion for new trial and then declines to even discuss them in the body of the opinion. Second, the court explains in the appendix to the opinion why the forfeited errors are not fundamental. Third, the court quotes the motion for new trial. In attempting to identify the qualities of a successfully written motion for new trial, this note analyzes several motions taken from the original records filed in district court and compares them with the treatment of the same motions in the Court of Criminal Appeals decisions. The results of the analysis, however, offer little guidance to criminal defense attorneys who wish to write a motion for new trial that will preserve trial errors for appellate review.

44. 639 P.2d 88 (Okla. Crim. App. 1981).

on the law and evidence over defendants [sic] objections. That the jury erred in finding the defendant guilty on the evidence offered by the state."[45] On appeal, Garcia alleged four errors: (1) an impermissibly suggestive extrajudicial identification, (2) failure to deliver cautionary instructions on eyewitness identification, (3) admission of a hearsay statement, and (4) failure to give instructions concerning accomplice and confession corroboration. The court held that all but the hearsay issue had been waived by failure of trial counsel to object or to request instructions during the trial.[46] The alleged hearsay testimony was examined and found not to be hearsay, even though it was not specifically mentioned in the motion for new trial.[47]

The court then stated:

> Furthermore, the defendant failed to raise any of the propositions that he now argues as errors in his motion for new trial. We have held on numerous occasions that only assignments of error presented in the motion for new trial will be considered on appeal unless such error complained of is fundamental.[48]

Apparently, even if proper objections and requests had been made in the trial court, all errors would have been waived by the general language of the motion for new trial despite the language tracking the wording of the statute reciting grounds for new trial.[49]

In *Nealy v. State*,[50] on the other hand, alleged errors at the trial level were not preserved for appellate review, even though the defendant's motion for new trial listed twelve assignments of error.[51] On appeal, the defendant

45. The language of the motion, not quoted in the court's opinion, appears in the following court files: State v. Garcia, CRF-78-1196 (Comanche County Dist. Ct. 1978) *on appeal*, Garcia v. State, F-80-343 (Okla. Crim. App. 1980).

46. Garcia v. State, 639 P.2d 88, 89 (Okla. Crim. App. 1981).

47. *Id.*

48. *Id.*

49. 22 OKLA. STAT. § 952 (1981), cited in full, *supra* note 33.

50. 636 P.2d 378 (Okla. Crim. App. 1981).

51. *See* State v. Nealy, CRF-79-45, CRF-79-46 (Cotton County Dist. Ct. 1979) *on appeal*, Nealy v. State, F-80-235 (Okla. Crim. App. 1980). The motion lists the following errors:

> 1. Irregularity in the proceedings of the Court, including abuse of discretion of said Court, by which the Defendant was prevented from having a fair trial.
> 2. Misconduct on the part of the jury.
> 3. Misconduct upon the part of the Court.
> 4. Misconduct upon the part of the attorney for the state.
> 5. Misconduct upon the part of the Court attendants, including, but not limited to the bailiffs, court reporter, and/or Court clerk.
> 6. Excess sentence by the jury, appearing to have been given under the influence of passion or prejudice.
> 7. That the verdict of the jury is not sustained by sufficient evidence proving the Defendant guilty beyond a reasonable doubt and is contrary to law.
> 8. That the jury verdict is contrary to and in disregard of the Court's instructions.
> 9. Errors of law occurring at the trial and excepted to by the Defendant.

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argued that the trial court's instructions authorized conviction for a crime not charged in the information.[52] The decision states that this issue was not properly preserved because it was not included in the motion for new trial or in the petition in error.[53] Once again, however, the court goes on to discuss the issue, to give the appropriate test for the sufficiency of an information, and to hold that the information was adequate.[54]

Other errors in *Nealy* were waived for failure to state them in the motion for new trial.[55] One error, a failure to suppress allegedly illegally obtained evidence, was considered in detail although it was not specifically raised in the motion for new trial.[56] In this instance, the court did not note the absence of the error from the motion.

Lawyers who try to preserve all bases for appeal with a catchall motion for new trial risk the result in *Nealy*, where a list of assignments of errors, though long, was too general.[57] The motion for new trial may be so general as to waive all issues except fundamental error and that the verdict was not sustained by the evidence.[58] On the other hand, it may be too specific and

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10. Error of the Court in giving certain instructions which were fundamentally improper in cases of this nature.

11. Newly discovered evidence, material for the Defendant, which he could not with reasonable diligence have discovered and produced at the trial.

12. Error of the Court in failing to sustain the demurrer of the Defendant to the evidence of the State.

52. Nealy v. State, 636 P.2d 378, 380 (Okla. Crim. App. 1981).

53. *Id.*

54. *Id.*

55. Prosecutorial misconduct in closing argument, *id.* at 381 (see motion for new trial allegation of error number 4, *supra* note 51); insufficient instructions to the jury, omission of an element of the crime, *id.* at 382 (see allegation of error number 8, *supra* note 51). The *Nealy* opinion concludes that these two assignments of error did not warrant relief. *Id.* at 381-82. It is difficult to understand what the court means by stating an issue is not properly before the court and has been waived by failure to raise it in the motion for new trial, and then considers the proposition anyway and concludes it is without merit. *Id.*

56. *Id.* at 381.

57. The same problem may arise regarding the petition in error. *See, e.g.*, Ball v. State, 509 P.2d 908, 910 (Okla. Crim. App. 1973) (lack of specificity was fatal to an issue).

58. "Fundamental error," like its cousin "public policy," is undefinable, though it is used to refer to errors that affect a defendant's substantive rights and the fairness and impartiality of the proceedings. *See, e.g.*, Cobbs v. State, 629 P.2d 368 (Okla. Crim. App. 1981) (prosecutorial misconduct resulted in a new trial for the defendant). *Cf.* Jones v. State, 557 P.2d 447 (Okla. Crim. App. 1976) (prosecutorial misconduct did not rise to the level of fundamental error). Presumably ineffective assistance of counsel will always be fundamental error because the trial lawyer will seldom raise this issue in the motion for new trial. *See* Smith v. State, 650 P.2d 904 (Okla. Crim. App. 1982).

The United States Supreme Court attempted to define fundamental error, also called "plain error," in United States v. Atkinson, 297 U.S. 157, 160 (1936): "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *See also* Bartone v. United States, 375 U.S. 52 (1963); Sibler v. United States, 370 U.S. 717 (1962).

One of the strangest results reached in Oklahoma is found in Lovick v. State, 646 P.2d 1296

omit certain grounds for appeal entirely.[59] Because the appellate decisions rarely quote the motion for new trial, lawyers have no guidance in determining what is or is not acceptable. And, as has been seen, lawyers should not rely upon the grounds for new trial recited in the statute, whatever may be their inclination to do so.[60]

Constitutional Questions

The court's arbitrary enforcement of the rule that the only errors that may be considered on appeal are those raised in the motion for new trial invites an argument that the procedural rule, which has the force of statute, is unconstitutional as applied.[61] The United States Supreme Court repeatedly has held

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(Okla. Crim. App. 1982). In *Lovick*, the court stated that an assignment of error alleging that the state failed to prove an essential element of the crime (intent) was waived for failure to raise it in the motion for new trial or petition in error. *Id.* at 1298. One wonders how the right to raise insufficiency of the evidence to support a conviction could ever be forfeited, given the presumption of innocence and the burden upon the state to prove each element of the crime. *See* Chapman v. California, 386 U.S. 18 (1967). In *Lovick*, as has often occurred, the court explores the issue even though it was waived.

59. In Gibson v. State, 637 P.2d 874 (Okla. Crim. App. 1981) the court held that the defendant waived the right to assert as error alleged evidentiary harpoons. ("Evidentiary harpoon" refers to prejudicial other-crimes evidence that is volunteered by a police officer on direct examination). The defendant's motion, reproduced below, was quite specific, but in its specificity it failed to raise directly the question of the prosecutor's prejudicial statements. Consequently, we can only assume that the court, in stating that "none [of the evidentiary harpoons] were raised in the appellant's motion for new trial. . . ," must have been condemning the motion because it was too specific and not comprehensive enough. *Id.* at 876:

> (a) That the verdict of 20 years was excessive, and predicated upon the repeated demand of the District Attorney to assess such punishment, further, that the excessive verdict was a result of the District Attorney addressing the jury as to the social consequences of a finding of not guilty, objection being made by the Defendant at the appropriate time and sustained, however, such argument could not be erased in the Jury's mind by the admonition of the trial Judge and such is evidenced by the excessive punishment granted the Defendant herein.
>
> (b) Error of the Trial Court in not directing a verdict at the end of the State's case in chief, in regard to the principle [sic] charge of Assault With Intent To Kill, in that the State having failed to prove sufficient evidence whereby the element of (Intent to Kill) may be inferred by the evidence.
>
> (c) Error of the trial Court in permitting the investigating officer to set [sic] at the trial table of the District Attorney, after the Defendant had moved for all witnesses to be removed from the Courtroom, in contravention of the rights of the Defendant to have all known witnesses excluded during the testimony of all witnesses for the State.
>
> (d) That the verdict was not supported by the evidence.

See State v. Gibson, F-79-210 (Pittsburg County Dist. Ct. 1979), *on appeal*, Gibson v. State, F-80-341 (Okla. Crim. App. 1980).

60. Oklahoma civil procedure requires lawyers, if they file a motion for new trial, to adequately inform the trial court of the alleged errors. 12 OKLA. STAT. § 991(b) (1981). However, attorneys may state errors in the admission and exclusion of evidence in general terms. DIST. CT. R. 17, 12 OKLA. STAT. ch. 2 app. (1981).

61. 22 OKLA. STAT. § 1051(b) (1981) provides that the court's rules have the force of statute. For an analysis of a state criminal procedure law that was nondiscriminatory on its face but

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that although states are not required to establish avenues of appellate review, "once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[62] Invidious discrimination among persons and groups of persons seeking appellate review is a violation of due process of law and equal protection.[63]

Following one of its discussions of the American concept of equal justice, the Supreme Court wrote: "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' "[64] On these grounds, the Court has struck down state statutes and criminal procedure rules that discriminate against indigents.[65]

The Supreme Court has not gone so far as to suggest that the arbitrary denial of appellate review of some nonfundamental trial errors is unconstitutional. Yet, a procedural rule used to exclude claims by certain defendants, but not claims of other defendants who have made the same procedural error, should at least further some state interest and have a rational basis.[66] The state has a legitimate interest in procedural finality, that is, in requiring criminal defendants to follow established trial procedure for preserving error so that proceedings can be orderly and at some point reach a final judgment.[67] No government interest is served, however, by selective enforce-

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discriminatory in its operation, *see* Griffin v. Illinois, 351 U.S. 12 (1956) (free transcript denied indigents, depriving them of appellate review of alleged trial errors, though constitutional errors would be considered).

62. Williams v. Oklahoma City, 395 U.S. 458, 459 (1969); Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966).

63. This note presents only a superficial discussion of the possible constitutional questions. For an indication of the difficulties of arriving at a standard for review, or even deciding whether the rule would be in violation of due process or equal protection, see the disagreements in the plurality, concurring, and dissenting opinions in Griffin v. Illinois, 351 U.S. 12 (1956).

64. Griffin v. Illinois, 351 U.S. 12, 17 (1956), *quoting* Chambers v. Florida, 309 U.S. 227, 241 (1939).

65. *See, e.g.*, Mayer v. Chicago, 404 U.S. 189 (1971); Entsminger v. Iowa, 386 U.S. 748 (1967); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

66. Burns v. Ohio, 360 U.S. 252, 257-58 (1959) ("There is no rational basis for assuming that indigents' motion for leave to appeal will be less meritorious than those of other defendants.").

67. The classic argument in favor of the goal of finality is Bator, *supra* note 3. For an argument contending that the protection of guaranteed rights must not be subordinated to the goal of procedural finality, *see* Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970).

The Burger Court recovered the finality rule that the Warren Court had abandoned by rejecting the analysis of Fay v. Noia, 372 U.S. 391 (1963), in Wainwright v. Sykes, 433 U.S. 72 (1972). Since *Wainwright*, state prisoners seeking federal habeas corpus relief must show both a "cause" for a procedural default (i.e., a failure to act on errors in accordance with state procedural requirements) and "prejudice" produced by it in order to obtain federal review. 433 U.S. at 88-91. In *Fay*, the Court had held that failure to file a timely appeal did not bar federal habeas corpus relief. 372 U.S. at 399.

ment of a procedural rule. The Court of Criminal Appeals appears to be making the sort of "unreasoned distinction" the United States Constitution forbids.

Evaluation: The Motion for New Trial in Context

One way to evaluate the problems created by the motion-for-new-trial requirements is to place the motion in the context of the criminal justice system and the purpose of that system.[68] The motion, like any other procedural requirement, has little meaning unless so considered. Certainly one of the major goals of the criminal justice system is to provide a fair and impartial trial for the criminal defendant. This goal requires a trial free from serious errors that would prejudice the defendant's right to a fair trial.

Unless defendants represent themselves at trial, they have an attorney whose responsibility it is to recognize prejudicial errors and to call them to the attention of the court. At the trial level, the defense lawyer invites the court to rule on an issue by making an objection and, if appropriate, requesting an instruction or asking for an inquiry into a matter outside the hearing of the jury. All of this seems elementary, but the role of the attorney is crucial in protecing the defendant's right to a fair trial because trial errors, unless fundamental, can be waived by the lawyer who does not recognize them and preserve them for later review.[69]

If possible, the trial lawyer should object to errors as they occur during trial. If the trial court overrules the objection, defense counsel may wish to try again to persuade the trial court by raising the error in the motion for new trial. Sometimes the lawyer may wish to use the motion and its hearing before the court to develop arguments researched after the heat of the trial has passed. But, if the lawyer has nothing new to add and has made all the available arguments when the issue was raised during trial and the court ruled on it, there seems to be no point to filing a motion for new trial and having a hearing. The defendant should be able to appeal from the judgment and sentence by filing notice of intent to appeal.[70]

Some allegations of error cannot be raised during trial; for example, jury

68. Grateful acknowledgment is due to George Fraser, Alfred P. Murrah Professor of Law, College of Law, Oklahoma University, whose conversations with the writer led to this discussion of the issues and an understanding of the approach the drafters of the Oklahoma Rules of Civil Procedure have taken. The Oklahoma Rules for Civil Appellate Procedure and the corresponding statutes have struck a compromise on the problems discussed here. No motion for new trial is required to perfect an appeal, but if the motion is filed, appellate review is limited to issues raised in the motion. CIV. APP. PROC. R. 1.12; 12 OKLA. STAT. § 991 (1981).

69. *See* Wangerin, *supra* note 37, at 758.

The writer has identified three reasons criminal defense counsel fail to make timely motions or contemporaneous objections: ignorance, strategy, and "sand-bagging," that is, deliberate attempts to allow reversible error. The article also discusses appellate court review of errors that never have been called to the trial court's attention, even by objections.

70. A criminal appeal in Oklahoma is "commenced" by filing a written notice of intent to appeal and a designation of record within ten days of judgment and sentence. OKLA. CT. CRIM. APP. R. 2.1(b).

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misconduct during deliberations must be raised in the motion for new trial.[71] In this situation, the trial court conducts its first inquiry into errors alleged to have occurred during the proceedings. One purpose of objections and the motion for new trial is to give the trial court an opportunity to correct errors that allegedly occurred between the time the defendant became an object of a criminal prosecution and the moment judgment and sentence is imposed. Traditional thought is that if the motion for new trial is not filed, the trial court should not be surprised later by errors that are raised on appeal, but which were never objected to and argued during trial. The question, however, is whether the trial court should be given a second opportunity to review the trial proceedings if all the arguments have been made. Moreover, is this second opportunity, through the vehicle of the motion for new trial, taken seriously by either the trial court or defense counsel?

The Court of Criminal Appeals has taken the position that contemporaneous objections, timely motions, and arguments during trial are never sufficient in themselves. In *Robinson v. State*,[72] the court gave its most complete statement of the purpose of the motion for new trial:

> The underlying principal [sic] requiring that a Motion for New Trial be filed prior to the rendition of judgment and sentence, setting forth specifically those errors of which the defendant complains that he has been denied a fair trial, is founded upon the rationale that the trial court should be given an opportunity to intelligently consider and pass upon the alleged errors prior to the rendition of the judgment and sentence. It is reasoned that if the trial court is appraised of the commission of prejudicial errors, then he will correctly grant a new trial, thus obviating the necessity of the costly expense of an unnecessary appeal to this Court.[73]

The Oklahoma appellate court's concern for the trial court dates to before statehood. The Oklahoma Supreme Court first adopted the rule that alleged errors occurring at trial must be called to the attention of the trial court by a motion for new trial in 1898 when it decided *Beall v. Mutual Life Insurance Co.*[74] The rule entered Oklahoma civil procedure from Kansas case law and was applied to criminal cases in 1911 in *Ledgerwood v. State*.[75] It may be, however, that in the past seventy years the motion for new trial has ceased to

71. *See, e.g.*, Lumpkin v. State, 482 P.2d 947 (Okla. Crim. App. 1971).

72. 444 P.2d 845 (Okla. Crim. App. 1968).

73. *Id.* at 847. The court rules do not explain the difference between commencing an appeal and invoking the appellate jurisdiction of the Court of Criminal Appeals. It is not clear from the rules exactly at what point the appellate court has power over the parties, especially since the court decisions speak of "all the jurisdictional requirements" that must be met to effect the transition from trial to appellate court. *See* Clonts v. State, 644 P.2d 1377 (Okla. Crim. App. 1982). A petition in error also must be filed in order to properly perfect an appeal. McCullar v. State, 509 P.2d 137 (Okla. Crim. App. 1973); OKLA. CT. CRIM. APP. R. 3.1.

74. 7 Okla. 285, 54 P. 474 (1898).

75. 6 Okla. Crim. 105, 116 P. 202 (1911). *See also* May v. State, 12 Okla. Crim. 108, 152 P. 338 (1915).

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serve the purpose it once furthered. Perhaps its continued use as a jurisdictional requirement that also limits errors for appellate review creates a situation which, at best, is confusing to lawyers and, at worst, is harmful to the rights of criminal defendants.

Problems for Appellate Lawyers

Appellate courts that review criminal cases also protect defendants from prejudicial legal error in proceedings leading to conviction.[76] Some legal scholars, however, have insisted that the most important function of appellate courts is to make and interpret the law, not just correct errors. As one has written: "Appeal, then, serves that aspect of justice which tells us that the same law ought to apply to different people similarly circumstanced, and, curiously, in this sense does not subvert repose but creates it."[77]

Criminal appellate lawyers fit into this scheme by perusing records and transcripts of proceedings involving their clients, recognizing when their clients' rights may have been violated based on current substantive and procedural law, and presenting legal arguments to the Court of Criminal Appeals in briefs and oral arguments, when permitted or requested.[78] Appellate lawyers seem to be in the best position to develop and refine criminal law because they make the arguments, based on the facts of the cases before them, that may persuade the appellate court to modify present law or to adopt new law. Furthermore, appellate lawyers promote consistency by citing precedent to the court.

The word "issue" has been used to denote a line of attack or legal argument that does not involve any factual controversy and is so used here.[79] As criminal procedure now stands in Oklahoma, issues cannot be raised on appeal unless they are supported by objections during the proceedings in the court below and preserved in the motion for new trial, with the usual exception for fundamental error. Because trial lawyers make objections and file the motion for new trial, appellate lawyers are forced to rely on them to pre-

76. According to the American Bar Association (ABA) STANDARDS RELATING TO CRIMINAL APPEALS (Approved Draft, 1970), at 22, the purposes of appellate review are:

> 1.2(a)(i) To protect defendants against prejudicial legal error in the proceedings leading to conviction and, within limits, against verdicts unsupported by sufficient evidence;
>
> (ii) Authoritatively to develop and refine the substantive and procedural doctrines and principles of criminal law; and
>
> (iii) To foster and maintain uniform, consistent standards and practices in criminal process.

77. Bator, *supra* note 3, at 453-54.

78. The ABA Standards Relating to Criminal Appeals recommend that trial counsel continue to represent a criminal defendant on appeal. The other view, adopted in most jurisdictions and encouraged by specialization within the legal profession, emphasizes the virtue of fresh appellate counsel, knowledgeable about appellate practice. ABA STANDARDS RELATING TO CRIMINAL APPEALS (Approved Draft, 1970), at 47, 50.

79. Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652 (1951).

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serve alleged errors upon which legal arguments can be based. As has been seen,[80] the trial lawyer is required to recall each specific objection or allegation of error made during the proceedings and recount them all in the motion for new trial in order for the appellate lawyer to develop the issues on appeal.

Recent cases suggest that the Court of Criminal Appeals is scrutinizing more carefully the motion for new trial filed in cases before it, citing the rule that no allegations of error will be considered on appeal unless raised in the motion, and then summarily dismissing the assertion.[81] On the other hand, appellate attorneys must recognize that the court has reviewed issues in the past that were not raised in the motion for new trial. Respect for the court dictates that appellate lawyers ignore issues omitted from the motion. Yet, their responsibility to their clients requires them to make every legitimate legal argument supported by the facts of the case and the nature of the proceedings in the trial court. Overlooking issues may have such a drastic effect on a criminal defendant that appellate attorneys would be expected to resolve this dilemma in favor of their clients.

Conclusions and Recommendations

The philosophy of the Court of Criminal Appeals, though unarticulated, appears to be that of protecting the integrity and reputation of the judicial system through the application of procedural rules.[82] The effect of the motion-for-new-trial requirements is to place the responsibility for recognizing and preserving trial errors on defense counsel and to encourage finality of trial court determinations. If the court continues to follow its present policy, the rules of the court should alert the bar to the hazards of an ill-conceived motion for new trial or the failure to file one. Moreover, in fairness to defendants and to promote consistency, the court should always decline to accept jurisdiction when the motion for new trial has not been filed and to refuse even to discuss nonfundamental errors that have been forfeited by procedural default.

However, objections, motions, and arguments during proceedings in the trial court, complemented by the motion for new trial when it is appropriate, are sufficient to serve the purpose without risk to defendants who must depend on their lawyers to follow the procedural rules.[83] In some instances, particularly when the evidence is closely balanced and the error can be shown

80. See *supra* text accompanying notes 33-60.

81. *See, e.g.*, Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983) (defendant forfeited the right to appellate review of allegations that the felony-murder doctrine is unconstitutional; that the trial court erred by not granting a second preliminary hearing; that his confession, introduced with deletions, was prejudicial; that a prospective juror who stated she would not impose the death penalty on anyone was improperly dismissed; and that the trial court erred in failing to provide services of a court-appointed psychiatrist).

82. *See generally* Clonts v. State, 644 P.2d 1377 (Okla. Crim. App. 1982).

83. The general rule of procedural finality has exceptions. *See, e.g.*, Note, *Failure to File Timely Notice of Appeal in Criminal Cases: Excusable Neglect*, 41 NOTRE DAME LAW. 73 (1965).

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to be prejudicial, or when a defendant's substantive rights clearly have been violated, the defendant should not forfeit the right to raise an error on appeal, even if no objection was made in the court below.

A 1979 unpublished opinion illustrates the different responses appellate judges may have to alleged trial errors in light of procedural default and suggests some disagreement among the members of this court.[84] The sole issue the court considered was whether the trial court had erred in overruling the appellant's motion to suppress. The evidence the defendant sought to exclude was a weapon that was essential to establishing the defendant's conviction for concealing stolen property.

Because the facts of the case are important to understanding the result, they are quoted here in full from the unpublished opinion:

> The facts are that on March 9, 1977, at approximately 1:10 a.m., Officer Asper received a radio report concerning a disturbance at the Ram's Inn Club. Upon arrival he observed the appellant raise the trunk lid of a car and drop what he thought was a "baggie containing marihuana" into the trunk. The officer dismounted the patrol unit and immediately placed the appellant in the back seat of the unit.
>
> The keys to the vehicle were passed from the appellant to the officer. The latter then opened the trunk and found a sawed-off shotgun and a plastic bag containing marihuana. Officer Asper returned to the patrol unit and informed the appellant he was under arrest for possession of marihuana and in violation of the Federal Firearms Act by possessing an illegal gun. Concealment of the weapon forms the basis for the appellant's conviction in this case.[85]

The majority reversed the case and remanded it to district court with instructions to dismiss. The state's argument that the warrantless search was justified as an inventory or consented-to search was rejected and the majority held that the search met none of the well-defined exceptions to the search warrant requirement.[86] In addition, the warrantless arrest was held invalid.[87] The court raised this issue on its own, though the appellant had not questioned the validity of the arrest on appeal.[88] Presumably, the majority considered the error to be one that not even appellate defense counsel could waive for his client.

84. Green v. State, F-78-163 (Okla. Crim. App. Nov. 7, 1979) (unpub. op.). *See also* Williams v. State, 658 P.2d 499 (Okla. Crim. App. 1983) (The majority reversed and remanded the case for a new trial because of improper arguments by the prosecuting attorney. The dissent would affirm the case because the errors were not objected to at trial or raised in the motion for new trial.).

85. Green v. State, F-78-163, slip op. at 1 (Okla. Crim. App. Nov. 7, 1979) (unpub. op.).

86. *Id.* at 2-3.

87. *Id.* at 2.

88. *Id.* at 1-2.

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Had the dissent prevailed, however, the appellant's right to allege any error would not have survived in the appellate court. In a paragraph of two sentences, the dissent noted that the defendant failed to object when the weapon was introduced and did not question its admissibility in the motion for new trial. Accordingly, the appellant had "waived the right to object to its admission."[89] To the dissent, the defendant's motion to suppress must have been insufficient to preserve the error for appellate review.

The majority's opinion in this case reflects an alternative judicial philosophy that seeks justice and fairness by providing defendants with trials free from serious error regardless of the evidence of guilt. Because the search question was a constitutional one, it was no doubt fundamental though not described as such in the opinion. The dissent's insistence that the right to assert this sort of error can be forfeited by procedural default creates a sense of unease about the extremes to which procedural finality can be taken.

If the motion for new trial is to have any meaning, it has to serve a legitimate purpose and be taken seriously by defense counsel and trial courts. The motion and its attendant hearing provide an opportunity for the trial court to consider new allegations of error and supporting arguments and may support the defendant's request for a new trial free from prejudicial error. To file the motion when none of these needs exist, however, is to use it toward a dilatory and meaningless end. Nevertheless, tutored criminal trial lawyers realize they must assert all errors in the motion for new trial, with an uncertain degree of specificity, in order to invoke appellate jurisdiction and to preserve errors for review.

This state already has a procedural rule that by itself could invoke the jurisdiction of the Court of Criminal Appeals, i.e., the filing of notice of intent to appeal.[90] In federal court and the majority of state courts, filing some statement of intention or desire to have appellate review effects the transition from the trial court to the appellate court in criminal cases.[91] Oklahoma could simplify its criminal appellate procedure by requiring notice alone.

Likewise, timely pretrial and trial motions and contemporaneous objections by themselves could raise and preserve most errors for appellate review. Errors that occur after both parties have rested, and new arguments that need to be made, could still be raised in the motion for new trial, but in many cases the motion would not be required. In short, the motion-for-new-trial requirements simply duplicate procedural requirements that already exist. If for no other reason than to maintain the integrity of the motion, it deserves to be relieved of the additional burdens it now carries, which are inimical to its purpose and, in some instances, disastrous in their effect on criminal defendants.

The motion for new trial should be eliminated as a jurisdictional re-

89. *Id.* at 4.

90. OKLA. CT. CRIM. APP. R. 2.1(B).

91. ABA STANDARDS RELATING TO CRIMINAL APPEALS (Approved Draft, 1970), at 22; FED. R. APP. PROC. 3(a).

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