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The State Can Rest: Texas Rule of Appellate Procedure 44.2(b) and "Harmless" Error

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THE STATE CAN REST: TEXAS RULE OF APPELLATE PROCEDURE 44.2(b) AND "HARMLESS" ERROR

I. INTRODUCTION

One of the cornerstones of the American criminal justice system is the inviolable right to a fair trial.[1] Indeed, the highest court in the land has declared that "fundamental fairness [is] essential to the very concept of justice."[2] In furtherance of this ideal, "our system of law has always endeavored to prevent even the probability of unfairness."[3] In an attempt to secure the right possessed by all Americans to a fair trial, courts operate under a system of rules that have been formulated to comply with constitutionally mandated protections[4] and to comport with the American ideal of fundamental fairness.[5]

Unfortunately, these rules are not always observed at trial with the fidelity that justice demands. As a result, courts of appeals can and do throw out convictions that are reached where the right to a fair trial has been violated. In modern times, these reversals are qualified by the so-called "harmless error" statutes that exist in every jurisdiction.[6] These statutes, for the most part, were enacted by legislatures in the early years of the twentieth century in response to a public perception that duly convicted criminals were being freed on "technicalities."[7] To an extent, there were some otherwise apparently sound convictions

1. *See* Estes v. Texas, 381 U.S. 532, 540 (1965).
2. Lisenba v. California, 314 U.S. 219, 236 (1941).
3. *In re* Murchison, 349 U.S. 133, 136 (1955).
4. *E.g.*, U.S. CONST. art. I, § 9; *id.* art. II, §§ 2, 3; *id.* amends. IV, V, VI, VII, VIII, XIV § 1.
5. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 1.03(5) (Vernon 1977) ("[This Code is intended] [t]o insure a fair and impartial trial . . . ."). *See also* FED. R. CRIM. P. 2 ("These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.").
6. *See generally* 1 WIGMORE ON EVIDENCE § 21 n.17 (Tillers rev. 1983) (providing an exhaustive but dated historical survey of every American jurisdiction's version of harmless error statutes).
7. *See* Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 219 (1925); Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1005 n.56 (1973).

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reversed due to violations of seemingly legalistic minutia.[8] Against this historical backdrop, Texas has recently made a substantive and far-reaching change in its harmless error rule. Among the many changes incorporated into the new Rules of Appellate Procedure that became effective on September 1, 1997, is the change in the way the appellate courts will review trial errors. The former Texas Rule of Appellate Procedure 81(b)(2) provided:

> If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.[9]

The new Texas Rule of Appellate Procedure 44.2 holds:

> (a) *Constitutional Error.* If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.
>
> (b) *Other Errors.* Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.[10]

The reader will recognize that the procedure for reviewing errors of constitutional dimension has remained relatively unchanged.[11] However, the change effected by Rule 44.2(b) on the review of non-constitutional errors is substantial. This Note will outline the contours of Rule 44.2(b) by examining: (1) the reasons and motivations behind the adoption of the new rule; (2) the case law interpreting the new standard contrasted against the old rule; and (3) the potentialities inherent in the new rule for harm to the rights of the accused. Finally, this Note will illustrate why, in the interest of justice, the new rule should be discarded in favor of the old rule.

II. Response to a Perceived Imbalance

In the early part of the twentieth century, the perception among both the general public and many in the legal community was that the convictions of rightly convicted criminals were increasingly being reversed by appellate decisions,[12] that the appellate courts had become "impregnable citadels of technicality,"[13] and that these criminals were

8. *See* Kavanagh, *supra* note 7, at 219. *See also* cases cited *infra* note 23.

9. Tex. R. App. P. 81(b)(2), 944-945 S.W.2d (Tex. Cases) xxxvii (Tex. Crim. App. 1986, repealed 1997).

10. Tex. R. App. P. 44.2.

11. Aguirre-Mata v. State, 992 S.W.2d 495, 498 (Tex. Crim. App. 1999) ("The standard of harm under subsection (a) [of Rule 44.2] is essentially the same as former Rule 81(b)(2).").

12. Saltzburg, *supra* note 7, at 1005 n.56.

13. Kavanagh, *supra* note 7, at 222.

being released by appellate courts over insubstantial and benign errors that in no way genuinely affected the fairness of their trials.[14] A backlash against the courts was foreseeable due to the dramatic changes then occurring. At this time, the country was undergoing significant, fundamental, and stressful transitions as it went from a predominantly rural, agrarian country to an urban, industrial nation. The United States was a country whose burgeoning population was increasingly being forced to assimilate a seemingly endless stream of immigrants while living in cities with population densities never before experienced.[15] With these increases in population and density also came real or perceived increases in crime.[16] In response, the federal government in 1919 enacted 28 U.S.C. § 391,[17] the precursor to the modern Federal Rule of Criminal Procedure 52(a),[18] from which the new Texas Rule of Appellate Procedure 44.2(b) was taken.[19] It bears mentioning that by the time of the new federal harmless error statute, many states had already enacted or were very near to enacting their own harmless error statutes.[20] The first of Texas's harmless error statutes was enacted in 1856.[21] In the years following, Texas courts interpreted the statute to mean that

> [if an error occurs] and an exception is reserved to it as shown by bill of exception, on appeal to this court, then it is the duty of this court to reverse the case for the error, without further inquiry as to the effect such error may have had upon the result of the trial.[22]

14. *See* Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 522 (1998).

15. *See* JOHN M. BLUM ET AL., THE NATIONAL EXPERIENCE: A HISTORY OF THE UNITED STATES 485–90 (8th ed. 1993); 2 SAMUEL ELIOT MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 109–11 (7th ed. 1980); L. EDWARD PURCELL, IMMIGRATION 40–46 (1995).

16. MICHAEL J. GREENWOOD, MIGRATION AND ECONOMIC GROWTH IN THE UNITED STATES 4–5 (Academic Press 1981).

17. Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 998 (current versions at FED. R. CRIM. P. 33, 52).

18. *See* FED. R. CRIM. P. 52(a) (providing that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); Chapel, *supra* note 14, at 522.

19. Carranza v. State, 980 S.W.2d 653, 657 (Tex. Crim. App. 1998) (en banc).

20. *See* Saltzburg, *supra* note 7, at 1006 n.58.

21. TEX. CODE CRIM. PROC. art. 672 (1856), *reprinted in* WILLIAM S. OLDHAM & GEORGE W. WHITE, A DIGEST OF THE GENERAL STATUTE LAWS OF THE STATE OF TEXAS 643 (1859). "New trials, in cases of felony, shall be granted for the following causes, and no other . . . [w]here the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant." *Id.* But case law in the same time period also allowed for reversible error. *E.g.*, Draper v. State, 22 Tex. 400, 401 (1858).

22. Pauline v. State, 21 Tex. Ct. App. 426, 448, 1 S.W. 453, 454 (1886) (citing Bravo v. State, 20 Tex. Ct. App. 188, 189 (1886); Niland v. State, 19 Tex. Ct. App. 166 (1885)).

Ensuing cases found criminal defendants in Texas being granted new trials for seemingly innocuous errors.[23] In 1965, the Texas Legislature attempted to counter such reversals by prohibiting reversals of criminal convictions based "on mere technicalities or on technical errors."[24] The standard remained virtually unchanged until 1986 when the Texas Court of Criminal Appeals adopted Rule 81(b)(2).[25]

It would not be an overstatement to declare that in the early years of the twentieth century, the per se reversal of guilty verdicts upon nearly any error did serve an injustice to the State and the people in some cases.[26] When contrasted against this historical backdrop of reversal for almost any error, Rule 81(b)(2) as it existed from 1986 until 1997 appears to strike a more reasoned balance of the competing interests that are present in criminal trials. So what factors impelled the change to the new standard articulated in Rule 44.2(b)?

As the new Rules of Appellate Procedure were being formulated by the advisory committee to the Texas Supreme Court in the years leading up to the 1997 adoption, the old Rule 81(b)(2) was virtually ignored by all of the advisory committees and subcommittees.[27] In actuality, the new Rule 44.2 was written and adopted entirely by the Texas Court of Criminal Appeals under their statutorily granted rule-making authority.[28] The January 1997 working copy of the new rules

23. *See, e.g.*, Mattison v. State, 54 Tex. Crim. 514, 515, 114 S.W. 824, 824 (1908) (granting a new trial because a jury charge addressed an additional defense that was not raised by the defendant); Lyles v. State, 48 Tex. Crim. 119, 122, 86 S.W. 763, 764 (1905) (granting a new trial because a jury verdict of murder failed to specify the degree); Oates v. State, 48 Tex. Crim. 131, 137, 86 S.W. 769, 771 (1905) (granting a new trial because the names of previously unchosen jurors were not replaced in the jury pool, leaving a jury pool composed of 370 persons rather than 520); Venters v. State, 47 Tex. Crim. 270, 283, 83 S.W. 832, 836 (1904) (failing to charge the jury on the correct standard for evaluating a murder victim's "insulting conduct towards a female relative" of the accused, which was a defense to murder at the time); Welch v. State, 46 Tex. Crim. 528, 532, 81 S.W. 50, 52 (1904) (allowing the State to introduce evidence that the defendant attempted to commit the offense of abortion on his first wife).

24. Act of June 18, 1965, 59th Leg., R.S., ch. 722, 1965 Tex. Gen. Laws 516, *repealed by* Act of June 14, 1985, 69th Leg., R.S., ch. 685, § 4, 1985 Tex. Gen. Laws 2472, 2473.

25. TEX. R. APP. P. 81, 944-945 S.W.2d (Tex. Cases) xxxvii (Tex. Crim. App. 1986, repealed 1997).

26. It is relevant to remind the reader that a reversal and remand for a new trial does not necessarily let the defendant go free but merely instructs that a new trial be held. TEX. CODE CRIM. PROC. ANN. arts. 44.25, 44.29(a) (Vernon Supp. 2001).

27. *See generally* Texas Supreme Court Appellate Rules Sub-Committee, Transcripts and Agendas (on file with the Staff Rules Attorney, Texas Supreme Court).

28. Telephone interview with E. Lee Parsley, former Staff Rules Attorney, Texas Supreme Court (Nov. 11, 1999) (responsible for compiling the new rules). "The court of criminal appeals is granted rule making power to promulgate rules of post trial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant." TEX. GOV'T CODE ANN. § 22.108(a) (Vernon 1988 & Supp. 2001).

did not incorporate any changes in the harmless error rule.[29] But two months later, in March of 1997, the new rule had been adopted.[30] Two factors might possibly explain this sudden sea change. First, due to the election in November 1996, three new judges ascended to the Court of Criminal Appeals in January of 1997, all of whom were Republican and two of whom were ex-prosecutors.[31] Additionally, the 75th Texas Legislature was actively working on a new harmless error rule at the same time.[32] Interestingly, the Senate Criminal Justice Committee held hearings on S.B. 114[33] on February 11, 1997, during the very window in which the Court of Criminal Appeals adopted the new rule.[34] This Republican-dominated committee heard testimony from witnesses who represented victims' rights groups, police organizations, prosecutors, and members of the defense bar.[35] In effect, the anecdotal recounting of a handful of high-profile, heinous crimes, where new trials were granted to those who were deemed "obviously guilty," so swayed the Senate committee that the new harmless error rule easily passed out of committee with only one negative vote.[36] The one dissenting committee member specified that his opposition to

29. *See generally* Promulgation of the Texas Rules of Appellate Procedure (Jan. 15, 1997) (on file with the Staff Rules Attorney, Texas Supreme Court).

30. *See generally* Promulgation of the Texas Rules of Appellate Procedure (Mar. 23, 1997) (on file with the Staff Rules Attorney, Texas Supreme Court).

31. Judges Sue Holland, Tom Price, and Paul Womack, all Republicans, replaced Judges Sam Houston Clinton, Frank Maloney, and Bill White, all of whom were Democrats. George Kuempel, *GOP Candidates Win 3 Criminal Appeals Seats: Republicans Gain Control of State High Court*, DALLAS MORNING NEWS, Nov. 6, 1996, 1996 WL 10993256. Judge Holland was a prosecutor in Collin County while Judge Womack was a prosecutor in Williamson County. Clay Robison, *ELECTION 96/Judge Slips in Race for Appeals Slot*, HOUSTON CHRON., Nov. 6, 1996, 1996 WL 11574635.

32. Senate Bill 114 and its companion House Bill 859 each contained the language of the Federal Rule of Criminal Procedure 52(a). Tex. S.B. 114, 75th Leg., R.S. (1997); Tex. H.B. 859, 75th Leg., R.S. (1997).

33. Tex. S.B. 114, 75th Leg., R.S. (1997).

> The courts of appeals or the Court of Criminal Appeals may not reverse a judgment in a criminal action on the basis of an error of less than constitutional dimension, including a violation of a statute or court rule, unless the record shows that it is more probable than not that the error materially affected the verdict or sentence to the detriment of the appealing party.

Id.

34. *See generally* audio tape: Proceedings of Senate Committee on Criminal Justice (Feb. 11, 1997) [hereinafter tapes] (on file with the Sam Houston Building, Room 925, 201 E. 14th St., Austin, Texas 78701) (transcript available with the Texas Wesleyan Law Review).

35. *See id.* Testimony by these committee witnesses included the recounting of recent examples of technical errors at the trial stage causing new trials to be granted to defendants whom the witnesses felt were not deserving due to their obvious guilt; the 1992 Houston slaying of Tracy Gee was dwelt on extensively. *See id.* The defendant in the case, Lionell Rodriguez, was granted a new trial by the Court of Criminal Appeals because the prosecution asked for and was granted a second jury shuffle. Kathy Walt, *Senate Oks Bill Making It Easier for Court to Uphold Convictions*, HOUSTON CHRON., Feb. 19, 1997, 1997 WL 6541098.

36. *See generally* tapes, *supra* note 34.

the bill was based on his belief that trial judges would be able to "pick and choose" which statutes they would follow and that the bill would place appellate judges in the role of fact-finders who evaluate evidence—a role specifically unsuited for appellate judges.[37] Though there appears to be nothing to show that the judges on the Court of Criminal Appeals were even aware of, much less took into account, the desires of the general public, as evidenced by the tone of the committee hearing, the clear action of the judges makes it more probable than not that the judges, who are popularly elected officeholders, after all, were reflecting the majoritarian and popular chord to be seen as being "tough on crime."[38] Because the rule was voted on and adopted during judicial conferences,[39] which are confidential, perhaps we will never know the answer.[40]

III. TEXAS COURTS' INTERPRETATIONS

A. *The New Rule 44.2(b)*

Of some importance for any evaluation of what test Texas appellate courts have used to interpret Rule 44.2(b) is to define as concretely as possible what a "substantial right" is. Texas courts stated early after the adoption of the new rules that because "[Rule] 44.2(b) . . . [was] taken from Federal Rule of Criminal Procedure 52(a) without substantive change,"[41] they would look for guidance to the interpretations enunciated by the federal courts in their review of non-

37. *See* Walt, *supra* note 35.

38. Bracy v. Gramley, 81 F.3d 684, 689 (7th Cir. 1996), *rev'd on other grounds*, 520 U.S. 899 (1997).

> If we were to inquire into the motives that lead some judges to favor the prosecution, we might be led, and quickly too, to the radical but not absurd conclusion that *any* system of elected judges is inherently unfair because it contaminates judicial motives with base political calculations that frequently include a desire to be seen as "tough" on crime.

Id. See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726–29 (1995) (discussing the potential danger of an elected judiciary's bias based on contemporary majoritarian views).

39. Telephone interview with Charles F. Baird, Judge, Texas Court of Criminal Appeals (Nov. 13, 1999); telephone interview with Paul Womack, Judge, Texas Court of Criminal Appeals (Nov. 14, 1999).

40. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1583–84 (1990).

> [I]t hardly seems far-fetched that the most principled of jurists will hesitate—consciously or unconsciously—to void an electoral mandate in the face of a pending election. Furthermore, even if we are to assume that some judges will be able to ignore the prospect of voter reprisal and engage in serious "checking," the voters have the final word. Judges who fail to heed voter messages may soon find themselves replaced by those with better hearing.

Id.

41. TEX. R. APP. P. 44 cmt. (Vernon 1999).

constitutional error under Federal Rule 52(a).[42] Texas courts of appeals have recognized *Kotteakos v. United States*[43] as the seminal case for the review of non-constitutional error in the federal system.[44]

The initial Texas Court of Criminal Appeals case to address the new harmless error rule was *King v. State*.[45] In this death penalty case, the defense claimed that the trial court erroneously admitted hearsay evidence that was prejudicial to the defendant.[46] During the punishment phase of the trial, the State sought to prove the future dangerousness of the defendant (thereby allowing the imposition of the death sentence) by the use of alleged improperly certified "pen packets" that contained, among other things, the defendant's disciplinary record from his prior incarcerations in the Texas Department of Corrections.[47] The Court of Criminal Appeals adopted the language in *Kotteakos* and held that "[a] substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict."[48] The court looked at all of the other properly admitted evidence of future dangerousness, prophesied that a jury could have found future dangerousness even without the use of improperly admitted hearsay evidence, and ruled the error harmless.[49] This analysis does, however, problematically echo the "weight of the evidence" appellate review standard, which contradicts the *Kotteakos* admonishment that appellate judges should not delve into the area of deciding whether or not the trial court's result was correct.[50] Instead, the court directed that "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. Rather, it is whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."[51] The Court of Criminal Appeals further defined in *Johnson v. State*[52] the test for assessing the harm of Rule 44.2(b) error to provide that "[a] criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as whole,

42. Mosley v. State, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070 (1999).

43. 328 U.S. 750 (1946).

44. Contreras v. State, 998 S.W.2d 656, 661 (Tex. App.—Amarillo 1999, pet. granted). *See also* Rodriguez v. State, 974 S.W.2d 364, 372–73 (Tex. App.—Amarillo 1998, pet. ref'd) (Dodson, J., concurring).

45. 953 S.W.2d 266 (Tex. Crim. App. 1997).

46. *Id.* at 271.

47. *Id.*

48. *See id.* at 273 (citing Kotteakos v. United States, 328 U.S. 750, 766 (1946)).

49. *Id.* at 273.

50. *See* Kotteakos v. United States, 328 U.S. 750, 764 (1946) ("And the question is, not were they right in their judgment . . . . It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.").

51. *Id.* at 765.

52. 967 S.W.2d 410 (Tex. Crim. App. 1998).

has fair assurance that the error did not influence the jury or had but a slight effect."[53]

Texas appellate courts have used the "new, more lenient test"[54] for harmless error afforded by Rule 44.2(b) to expand the envelope of acceptable trial judge conduct in the area of jury selection errors. In *Jones v. State*,[55] a juror was erroneously removed for cause at the request of the State even though she stated that she could follow the law regarding the "reasonable doubt" standard of proof.[56] The Court of Criminal Appeals held "that the erroneous excusing of a veniremember will call for reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury."[57] A strident dissent pointed out that the majority did not follow its own previously announced analysis regarding non-constitutional trial error[58] (noting that the "fair assurance" test as established in *Johnson* appeared nowhere in the decision),[59] reversed direct precedent,[60] and was based on inapplicable federal case law that concerned *constitutional* error.[61] The holding in *Jones* was presciently (as will be discussed below) interpreted by the concurrence in *Roberts v. State*[62] to relieve the trial courts of complying with the many statutes controlling jury selection.

Growing from the fertile ground provided by the *Jones* decision to cause mischief in the area of jury selection is the holding of *Roberts v. State*. In *Roberts*, the trial court erred by granting a jury shuffle[63] to the prosecution after voir dire had ended.[64] The Tyler appellate court,

53. *Id.* at 417.

54. *See* Brown v. State, 960 S.W.2d 265, 271 (Tex. App.—Corpus Christi 1997, no pet.).

55. 982 S.W.2d 386 (Tex. Crim. App. 1998) (en banc).

56. *See id.* at 389–90.

57. *Id.* at 394.

58. *Id.* at 400–01 (Meyers, J., dissenting).

59. *Id.* (citing Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)). *See also supra* text accompanying notes 47–48.

60. *Jones*, 982 S.W.2d at 402 (citing Howard v. State, 941 S.W.2d 102 (Tex. Crim. App. 1996); Zinger v. State, 932 S.W.2d 511 (Tex. Crim. App. 1996)).

61. *Id.* at 401.

62. 978 S.W.2d 580, 580–81 (Tex. Crim. App. 1998) (en banc) (Myers, J., concurring), *remanded to*, No. 12-94-00205-CR, 1999 WL 115104 (Tex. App.—Tyler, Feb. 26, 1999, pet. filed).

63. A jury shuffle rearranges the order in which the prospective jurors are seated. Because potential jurors are examined in the order in which they are seated, those seated closer to the end of the panel might never be reached before twelve jurors are selected. Hence, a jury shuffle can move those who might otherwise never be reached forward into the area where they may be examined, and vice versa. A party will often request a jury shuffle in the hope of rearranging the panel to achieve a jury composed of those who might be more inclined to support its position. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon 2000).

64. *Roberts*, 978 S.W.2d at 580 (en banc) (per curiam).

relying on precedent, reversed the conviction.[65] The Court of Criminal Appeals remanded the case for a harm analysis with the understanding that, with certain exceptions, "no error . . . is categorically immune to a harmless error analysis . . . [unless] the error involved defies analysis by harmless error standards or the data is insufficient to conduct a meaningful harmless error analysis."[66]

On remand, the Tyler Court of Appeals again reversed for a new trial, holding that

> it is difficult, if not impossible, to determine whether the error had a substantial effect on the jury's verdict when the error involves the composition of the jury itself. . . . Based upon the relatively unusual facts of this particular case, we conclude that the error committed by the trial court defies analysis by harmless error standards, and thus cannot be proven harmless.[67]

The concern here is that it is impossible for the defendant to show how this type of error harmed his case. Under *Jones*, "a defendant has no right that any particular individual serve on the jury."[68] But this analysis begs the question: Why then, has the Texas Legislature chosen to enact legislation prescribing the manner and procedure for selecting and challenging jurors? Is it not to ensure that each criminal defendant is afforded a trial by a fair and impartial jury? As succinctly pointed out by the dissent in *Jones*, a "substantial right" includes the right to be judged by a jury selected using the legislatively mandated scheme as promulgated in the Code of Criminal Procedure.[69] One of the courts of appeals agreed with this analysis and reversed when the State was granted a jury shuffle after having reviewed the juror information sheets.[70] However, on the State's petition for discretionary review, the Court of Criminal Appeals sidestepped the harm analysis issue of whether a substantial right was affected; instead, the court ruled that voir dire had not actually begun upon the mere inspection of the juror information sheets and reversed the court of appeals.[71]

65. *See id. See also* Davis v. State, 782 S.W.2d 211, 214 (Tex. Crim. App. 1989) ("A motion to shuffle the names of the venire must be timely presented to the trial court. We have determined that a motion to shuffle is untimely if presented after the voir dire has commenced.").

66. *Roberts*, 978 S.W.2d at 580.

67. Roberts v. State, No. 12-94-00205-CR, 1999 WL 115104, at *3–*4 (Tex. App.—Tyler, Feb. 26, 1999, pet. filed).

68. Jones v. State, 982 S.W.2d 386, 393 (Tex. Crim. App. 1998) (en banc).

69. *Id.* at 399. *See generally* TEX. CODE CRIM. PROC. ANN. arts. 35.01, 35.28 (Vernon 2001).

70. Garza v. State, 7 S.W.3d 164, 166 (Tex. Crim. App. 1999) (holding that the trial court has discretion on allowing parties to review written questionnaires before requesting a jury shuffle and that voir dire does not commence upon inspection of juror information sheets), *remanded and aff'd on other grounds*, 18 S.W.3d 813 (Tex. App.—Fort Worth 2000, pet. ref'd).

71. *See id.* at 164–65.

Yet another error concerning a jury shuffle took place in *Montez v. State*.[72] In this case, a timely request for jury shuffle by the defense was refused by the trial court.[73] The Dallas Court of Appeals held this violation to be harmless error under Rule 44.2(b).[74] The court implicitly asserted that a review under the former Rule 81(b)(2) would likely call for reversal.[75] The court, in its finding of harmless error, utilized the growing practice of examining the entire record for overwhelming evidence of guilt[76]—thus putting itself in the role of fact-finder[77]—a scenario expressly prohibited by *Kotteakos*.[78] Conversely, the Fort Worth Court of Appeals in *Ford v. State*,[79] when faced with the exact same circumstances, held that the harm resulting from the refusal of a timely request for a jury shuffle could not be measured and subsequently reversed the decision.[80] In any event, the state of disarray surrounding jury selection errors may soon reconcile as both *Roberts* and *Ford* are currently pending before the Court of Criminal Appeals.

The relaxed standard afforded by Rule 44.2(b) has likewise enabled the courts to admit testimony that would otherwise mandate a reversal. In *Fowler v. State*,[81] improper admission of expert testimony was held to be harmless error by the Waco Court of Appeals. The court, like the Dallas Court of Appeals in *Montez*,[82] admitted in its opinion that evaluating this error under the prior Rule 81(b)(2) would have mandated a new trial.[83] The court also found that using the new rule did not render an injustice—which would have triggered a requirement of using the old rule.[84] The Court of Criminal Appeals agreed, holding that the appellant was entitled to nothing more than an appellate review of his conviction under the rules then applicable, which he received.[85] Of course, as mentioned by the concurrence,[86] under this

72. 975 S.W.2d 370 (Tex. App.—Dallas 1998, no pet.).
73. *See id.* at 371.
74. *Id.* at 374.
75. *See id.* at 372.
76. *See id.* at 373–74.
77. *See id.*
78. *See* Kotteakos v. United States, 328 U.S. 750, 763 (1946) ("[I]t is not the appellate court's function to determine guilt or innocence.").
79. 977 S.W.2d 824 (Tex. App.—Fort Worth 1998, pet. granted).
80. *Id.* at 829.
81. 991 S.W.2d 258 (Tex. Crim. App. 1999) (en banc) (reviewing only the retroactive application of Rule 44.2(b) instead of Rule 81(b)(2) and not otherwise considering the Waco Court of Appeals's substantive holding).
82. *Montez*, 975 S.W.2d at 370.
83. Fowler v. State, 958 S.W.2d 853, 866 (Tex. App.—Waco 1997), *aff'd*, 991 S.W.2d 258 (Tex. Crim. App. 1999) (en banc).
84. *See* TEX. R. APP. P. pmbl. ¶ 2, Final Approval of Revisions, 948-949 S.W.2d (Tex. Cases) xliii–iv (1997) (stating in part that the revised rules "shall govern all proceedings . . . thereafter brought and in all such proceedings then pending, except to the extent that in a particular proceeding then pending would not be feasible or would work injustice").
85. *Fowler*, 991 S.W.2d at 260.
86. *See id.* at 262 (Price, J., concurring).

circular reasoning no injustice would ever occur by utilizing the new rules (because they are the rules that were then in effect), thus making the "injustice" language of the court's final order[87] adopting the new rules nothing more than empty rhetoric.

Improperly admitted evidence was at issue in *Reeves v. State*[88] as well. In *Reeves*, the Waco Court of Appeals determined that the admission of evidence that the defendant's four-year-old son was familiar with the area where the defendant's murdered wife was buried (thus allowing the jury to infer that the defendant had taken his son there when he buried his wife's body) was irrelevant, overly prejudicial, and therefore erroneous.[89] However, the court also found the error to be harmless.[90] The court, citing its own precedent in *Fowler*,[91] delved into the entire record to re-weigh the evidence to determine if the tainted evidence affected the outcome of the trial. The court found itself able to determine that the inadmissible evidence had little or no effect on the minds of the jury.[92] Yet again, the court looked to the weight of all the correctly admitted evidence and determined that the error did not "have more than a slight influence on the jury."[93] Unfortunately, and as some of the courts of appeals have recognized, the Court of Criminal Appeals has given unclear guidance on how to determine a Rule 44.2(b) violation.[94] As a result, there is disagreement among the appellate courts concerning the proper Rule 44.2(b) analysis.

One area that has only lately been addressed by the Court of Criminal Appeals, however, is whether appellate review of trial error will place a burden of showing harm on the party claiming error. Prior to the recent decision in *Johnson v. State*,[95] the appellate courts in Houston[96] and El Paso[97] had blazed a trail by placing the burden to show harm under Rule 44.2(b) on the defense. In *Johnson*, the defendant requested and was denied challenges for cause against two prospective jurors who could not consider the minimum punishment in the case at

87. TEX. R. APP. P. pmbl. ¶ 2, 948-949 S.W.2d (Tex. Cases) xliii–iv (1997).

88. 969 S.W.2d 471 (Tex. App.—Waco 1998, pet. ref'd), *cert. denied*, 526 U.S. 1068 (1999).

89. *See id.* at 490.

90. *Id.* at 491.

91. *Id.* (citing Fowler v. State, 958 S.W.2d 853, 864–66 (Tex. App.—Waco 1997), *aff'd*, 991 S.W.2d 258 (Tex. Crim. App. 1999) (en banc)).

92. *Id.* at 491.

93. *Id.*

94. *See* Wheeler v. State, 988 S.W.2d 363, 369 (Tex. App.—Beaumont 1999, pet. granted) ("[I]t is still unclear how a reviewing court applies Rule 44.2(b)."); Garza v. State, 963 S.W.2d 926, 929 (Tex. App.—San Antonio 1998, no pet.).

95. 43 S.W.3d 1 (Tex. Crim. App. 2001) (en banc).

96. Merritt v. State, 982 S.W.2d 634 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

97. Sanford v. State, 21 S.W.3d 337, 345 (Tex. App.—El Paso 2000, no pet.).

bar.[98] The 14th District Houston Court of Appeals affirmed the conviction.[99] The Court of Criminal Appeals granted the petition for discretionary review, found error in the refusal to strike for cause, and remanded the case for a harm analysis under Rule 44.2(b).[100] On remand, the 14th Court of Appeals found the error harmless, stating that because the appellant did not show any infringement of his substantial rights, he did not meet his burden under *Merritt v. State*.[101] The Court of Criminal Appeals again granted the petition,[102] vacated the decision of the Court of Criminal Appeals, and remanded the case for a new trial.[103] The opinion is noteworthy because it provides that, among other things, when reviewing error under the Rule 44.2(b) framework, appellate courts should not use burdens or presumptions in their analysis.[104] Instead, it is the reviewing court's responsibility to decide whether the error probably had an adverse effect on the proceedings.[105] In this case, the defendant could show harm because he was forced to use two peremptory challenges on the jurors who should have been challenged for cause.[106]

Perhaps the most far-reaching effect of the new Rule, as construed by *King v. State*,[107] is that appellate judges apparently have the freedom to re-weigh all the evidence produced at trial.[108] The problem with this reasoning is that the appellate court puts itself in the position of the jury—weighing evidence and finding fact—an area where appellate courts have no business.[109] In effect, the appellate courts are using Rule 44.2(b) to contrast admitted errors against the weight of the evidence showing the defendant's guilt. This practice, specifically

98. *Johnson*, 43 S.W.3d at 2. Note that jurors unable to consider the full range of punishment are to be removed for cause per article 35.16(c)(2) of the Texas Code of Criminal Procedure. Johnson v. State, 996 S.W.2d 288, 288–89 (Tex. App.—Houston [14th Dist.] 1999), *vacated*, 43 S.W.3d 1 (Tex. Crim. App. 2001).

99. *Johnson*, 43 S.W.3d at 3.

100. *Id.*

101. *Johnson*, 996 S.W.2d at 290.

102. *Johnson*, 43 S.W.3d at 3.

103. *Id.* at 7.

104. *Id.* at 5.

105. *Id.* at 4.

106. *Id.* at 7.

107. 953 S.W.2d 266 (Tex. Crim. App. 1997).

108. *See, e.g.*, Montez v. State, 975 S.W.2d 370 (Tex. App.—Dallas 1998, no pet.); Rodriguez v. State, 974 S.W.2d 364 (Tex. App.—Amarillo 1998, pet. ref'd); Reeves v. State, 969 S.W.2d 471(Tex. App.—Waco 1998, pet. ref'd); Coggeshall v. State, 961 S.W.2d 639 (Tex. App.—Fort Worth 1998, pet. ref'd).

109. Weiler v. United States, 323 U.S. 606, 611 (1945).

> We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.

Id.

proscribed by *Kotteakos*,[110] was more effectively dealt with under the former Rule 81(b)(2).

B. *The Former Rule 81(b)(2)*

In 1989, the Court of Criminal Appeals, recognizing that it had not yet enunciated a "coherent standard" for evaluating harmless error under Rule 81(b)(2), established a clear, relevant, and workable test in *Harris v. State*.[111] The court first cautioned what an appellate court is not to do:

> [I]t must be emphasized that the function of an appellate court's harmless error analysis is not to determine how the appellate court would have decided the facts, but to determine to what extent, if any, an error contributed to the conviction or the punishment. The language of the rule dictates that a reviewing court's responsibility transcends determining whether the conviction was correct.[112]

The court then stated:

> In performing a harmless error analysis the easiest and consequently the most convenient approach one could employ is to determine whether the correct result was achieved despite the error. Or, notwithstanding the error, in light of all the admissible evidence was the fact finder's determination of guilt clearly correct? Stated another way, was there overwhelming evidence of guilt that was not tarnished by the error? This approach is incorrect because the language of the rule focuses upon the error and not the remaining evidence. Thus, it logically follows that the inherent difficulty with such an equation is that in applying only that standard the appellate court necessarily envisages what result it would have reached as a trier of fact, thereby effectively substituting itself for the trial court or the jury.[113]

To remove any further doubts, the court then expressed that

> an appellate court should not determine the harmfulness of an error simply by examining whether there exists overwhelming evidence to support the defendant's guilt. The impropriety of this standard is: a court that makes a finding of harmlessness under the overwhelming evidence test is not finding that the . . . [error] did not in fact affect the verdict.[114]

The court, while stating that the harmless error rule is intrinsically subjective, nevertheless attempted to "set out general considerations which may be relevant, and trust individual judges to use these observations in their personal calculus."[115] These factors include:

110. *See* Kotteakos v. United States, 328 U.S. 750, 763 (1946).
111. 790 S.W.2d 568 (Tex. Crim. App. 1989) (en banc).
112. *Id.* at 585.
113. *Id.* at 585 (footnote omitted).
114. *Id.* at 587 (citation omitted).
115. *Id.*

> [(1)] the source . . . [and] nature of the error, [(2)] whether or to what extent it was emphasized by the State . . . [(3)] its probable collateral implications . . . [(4)] how much weight a juror would probably place upon the error . . . [(5) and] whether declaring the error harmless would encourage the State to repeat it with impunity.[116]

The court then underscored that "a reviewing court in applying the harmless error rule should not focus upon the propriety of the outcome of the trial. Instead, an appellate court should concern itself with the integrity of the process leading to the conviction."[117] However, the court did forewarn the preceding with the fact that "overwhelming evidence of guilt plays a determinative role in resolving the issue" when reviewing harmless error under Rule 81(b)(2),[118] though of less import than the five factors listed above. In short, the court was able to provide a sense of regularity to an inherently subjective process by delineating an objective test for reviewing harmless error. In further support of retaining Rule 81(b)(2) are the words of two judges of the Court of Criminal Appeals: "[W]e question the wisdom of abandoning Rule 81(b)(2), and eleven years of jurisprudence interpreting that rule, to adopt the federal rule when our state court judges have little or no federal experience and the federal circuits have contrary beliefs on how the federal rule should be interpreted and applied."[119]

Another observer has opined that the factors laid out in *Harris* constitute "[a]n excellent framework for the analysis of harm."[120] Additionally, the *Harris* factors gave the courts of appeals clear guidance in their reviews of trial error. A few examples will suffice to illustrate this point.

In *Enos v. State*,[121] a bank robbery case, the court of appeals found error in the trial court's refusal to allow the defendant to review the written victim impact statement following the victim's testimony on direct examination[122] (thus possibly allowing defense counsel to impeach the witness). The court found the error harmless beyond a reasonable doubt by applying the *Harris* test to the trial error.[123] The court first examined the "source and nature of the error" and deter-

116. *Id.*
117. *Id.*
118. *Id.* The difference between "overwhelming evidence of guilt" as a reason for finding an error harmless, or as merely a factor that may be considered as part of an overall test for harmlessness, is obviously substantial. *Id.*
119. TEX. R. APP. P., Statement Accompanying Approval of Revisions, 944-945 S.W.2d (Tex. Cases) xxxvii (1997) (Baird, Overstreet, JJ., holding reservations).
120. J. Thomas Sullivan, *The "Burden" of Proof in Federal Habeas Litigation*, 26 U. MEM. L. REV. 205, 219 (1995).
121. 909 S.W.2d 293 (Tex. App.—Fort Worth 1995), *pet. dism'd, improvidently granted*, 959 S.W.2d 620 (Tex. Crim. App. 1997) (en banc) (per curiam).
122. *Id.* at 295.
123. *Id.*

mined that the State was not responsible; rather, the trial judge committed the error on a question of law that had not before been addressed.[124] The court further declared that the error was not introduced in an attempt to taint the process—thus remaining focused on the *Harris* admonishment to concentrate on the fairness of the trial and the integrity of the process.[125] The court then assayed the degree with which the State emphasized the error.[126] The court stated that at trial, the State placed heavy and repeated emphasis on the testimony of the victim/witness, a witness that the defendant was not afforded a fair opportunity to impeach because the written victim impact statement was not ruled to be discoverable.[127] The court then analyzed the probable collateral implications of the error.[128] Because the defendant pled guilty, the court looked only to any effect the error might have had on the sentence.[129] While the prosecution requested the maximum sentence of ninety-nine years, the jury assessed a sentence of only seventy-five years, allowing the court to conclude that a review of the record did not disclose "any probable collateral implications of the error on sentencing."[130] Next, the court looked to the probable weight placed on the error by the jury.[131] Pointing out that the victim impact testimony was substantially covered by other witnesses' testimony and the defense counsel's cross examination of the victim, centered on the defendant's actions during the robbery rather than on the effect of the robbery on the victim, the court found that the jury most likely placed little weight on the effect of the error.[132] Finally, the court questioned whether finding the error harmless would encourage the State to repeat the error. The court noted that the State did not cause the error and that, furthermore, this was a matter of first impression.[133] Observing that this case was on remand from the Court of Criminal Appeals, where it was held for the first time that the so-called *Gaskin* rule applied to victim impact statements,[134] the court explained that trial judges in the future would know that these victim impact statements were now discoverable per the Court of Criminal Appeals's holding.[135] Having examined all the factors mandated by

124. *Id.*
125. *Id.* at 295–96.
126. *Id.* at 296.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 296–97.
132. *Id.* at 297.
133. *See id.*
134. Enos v. State, 889 S.W.2d 303, 305 (Tex. Crim. App. 1994) (citing Gaskin v. State, 353 S.W.2d 467, 469 (Tex. Crim. App. 1961) (establishing the rule that prior written statements of prosecution witnesses are discoverable by the defense for cross examination and impeachment purposes)).
135. *See Enos*, 909 S.W.2d at 297.

Harris, the court found the error harmless beyond a reasonable doubt and upheld the conviction and sentence.[136] Note that even though one of the *Harris* factors was in favor of the defendant, the court still upheld the trial court's verdict.

Another example of Rule 81(b)(2) jurisprudence under the *Harris* test is found in *Blackburn v. State*.[137] In this drug possession case, the trial judge admitted into evidence a photograph seized at the defendant's residence depicting a woman with a large cardboard tube held up to her nose pointed toward a mirror upon which a "rail" of white powdery substance was laid.[138] The sponsoring witness did not know the woman's identity, when or where the picture was taken, or the substance depicted on the mirror.[139] The witness testified further that he thought the photograph was a "joke."[140] The court of appeals held that the photograph was at worst, irrelevant, and at best, prejudicial; in either event, it was erroneous to admit it into evidence.[141] The court did not directly address all of the *Harris* factors, finding that the prosecutor's repetitive references to the photograph during the guilt/innocence and punishment phases, coupled with the probable weight the jury assigned to the photograph, warranted a reversal of the trial court.[142]

A third example of the clarity of the *Harris* test for assessing harmless error is shown in *Smith v. State*.[143] In this case, where a public university official was convicted of accepting a benefit from a prospective public contractor, the court erroneously allowed testimony concerning the National Association of Educational Buyers' ethics code.[144] Though the trial court admonished the jury that the case was being tried under the laws of the State of Texas, and not under the ethics code, the appellate court found that the evidence concerning the ethics code was irrelevant, inadmissible, and an abuse of discretion to allow its admission.[145] The court then applied the *Harris* framework to determine whether the error was harmless.[146] The court found that: (1) the State was the source of the error; (2) the nature of the error was to confuse the jury as to what standard the jury was to use to determine the defendant's guilt; (3) the State made no further reference to the code of ethics in the trial; (4) due to specific instructions to the jury that the laws of Texas were the standard for judging

136. *Id.*
137. 820 S.W.2d 824, 827 (Tex. App.—Waco 1991, pet. ref'd).
138. *Id.* at 825.
139. *Id.*
140. *Id.*
141. *Id.* at 826.
142. *Id.* at 827–28.
143. 959 S.W.2d 1 (Tex. App.—Waco 1997, pet. ref'd).
144. *Id.* at 14–15.
145. *See id.*
146. *See id.*

the defendant's actions, "the jury placed little, if any, weight on this evidence and followed the court's instructions;" and (5) due to the unusual nature of this case, finding the error harmless would not encourage the State to repeat the error with impunity.[147] The court concluded its analysis by holding that the error had no effect on the defendant's conviction or sentence.[148]

These three examples of appellate court interpretation of the *Harris* test illustrate the viability that was inherent in the framework it provided. The clarity of the *Harris* test is even more striking when contrasted against the present harmless error standard. Far from indiscriminately releasing rightly convicted criminals on mere "technicalities," Rule 81(b)(2) and the *Harris* test simply allowed judges to review trial error in a light that did not require the appellate courts to sift through all the evidence admitted at trial—and to weigh that evidence as a surrogate fact-finder.

IV. POTENTIAL INJUSTICE

From the survey of the cases in Part III.A above, the potential for damage to the rights of the accused by the new rule is clearly illustrated. Notably, the new rule has rendered the Code of Criminal Procedure sections dealing with jury selection virtually optional.[149] The new rule has also made it much easier for the State to use inadmissible evidence because the prosecution and the trial judge know that if the record shows overwhelming evidence of guilt, the case will not likely be reversed on appeal.[150] Additionally, the wording of the new rule has been interpreted by some courts as placing the burden on the defendant to show harm from any error[151] rather than placing the burden on the State to show the harmlessness of any error as the former rule did.[152] Moreover, the analysis of error under the former rule (as outlined by the factors enunciated in *Harris*) specifically addressed whether finding any particular error harmless would encourage the State to repeat the conduct that constitutes error.[153] In contrast, the new harmless error rule has no mechanism in place to discourage the State from deliberately repeating conduct that constitutes error—nor has the Court of Criminal Appeals constructed any mechanism. But

147. *Id.*
148. *Id.*
149. *See supra* text accompanying notes 63–80, 107–14.
150. *See supra* text accompanying notes 81–93.
151. Merritt v. State, 982 S.W.2d 634, 637 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). *See supra* text accompanying notes 91–110.
152. Arnold v. State, 786 S.W.2d 295, 298 (Tex. Crim. App. 1990) ("[A]s beneficiary of the error the State has the burden to show beyond a reasonable doubt that the error did not contribute to the verdict on punishment."), *superseded on other grounds by constitutional amendment as stated in*, Broussard v. State, 809 S.W.2d 556, 557 (Tex. App.—Dallas 1991, pet. ref'd).
153. Harris v. State, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989) (en banc).

perhaps the greatest impact of the new rule is its contaminating effect on appellate review. By necessitating a value judgment evaluation of all the evidence admitted at trial, the new rule places the appellate court in the role of fact-finder, with all the harm to the criminal justice system that engenders. Substantially, the more lenient test,[154] against which harmless error will now be judged, tilts the process more in favor of the prosecution. To exacerbate the situation, some even feel the Court of Criminal Appeals is openly biased in its review of reversible error.[155] The combination of these factors, as demonstrated above, has had a profoundly deleterious effect on the rights of defendants to receive a fair trial and an impartial review on appeal.

Proponents of the new, more lenient standard of reviewing trial error point out that the Constitution demands only a fair trial, not a perfect one.[156] This concept has mutated under Rule 44.2(b) into the concept that if the jury reached the "right" result, the trial was fair.[157] That being the case, why bother with a trial at all if there is overwhelming evidence of guilt? The short answer to this question is that the trial process concerns more than only a factual inquiry into guilt. Manifestly, "our Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination."[158] The criminal justice system has traditionally held the sanctity of individual rights to be of greater import than "correct" verdicts.[159] It is first necessary to recognize that these individual rights are both anti-majoritarian and anti-governmental in nature.[160] Courts, by their very nature, are anointed the sole protectors of these individual rights.[161] By failing in their duty to enforce these rights, and by finding a violation of these rights to be "harmless," the courts tacitly grant permission to the government to violate a given right with impunity. In the words of one commentator, "if committing an error

154. *See* Brown v. State, 960 S.W.2d 265, 271 (Tex. App.—Corpus Christi 1997, no pet.).

155. *See* Anson v. State, 959 S.W.2d 203, 211 n.2 (Tex. Crim. App. 1997) (Baird, J., dissenting) ("Therefore, rather than acting as impartial jurists, the majority acts as partisan advocates advancing an agenda of reaching results which ultimately benefit the State.").

156. Rose v. Clark, 478 U.S. 570, 579 (1986).

157. *See id.* ("The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments.").

158. *Id.* at 588 (Stevens, J., concurring).

159. *See* Chapel, *supra* note 14, at 521. "That it is better 100 guilty persons should escape than that one innocent person should suffer, is a maxim that has been long and generally approved." *Id.* at 521 n.111 (quoting Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 9 THE WRITINGS OF BENJAMIN FRANKLIN 293 (Albert H. Smyth ed., 1906)). *But see* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . .").

160. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 432 (1980).

161. *Id.*

has no adverse effect on the state, the deterrence of official misbehavior becomes difficult. Indeed, the failure to overturn a conviction that is arguably the fruit of an error may reinforce governmental error and abuse."[162] For an illustration of the irrationality that the failure to uphold the rights of the accused inflicts upon our system, consider the words of the presiding judge of the Oklahoma Court of Appeals:

> It must be one of the supreme ironies of our time that appellate courts in the United States routinely deem harmless lower court actions of breaking rules in order to affirm convictions and sentences of those caught breaking rules . . . just as we should not overlook a serious violation of the law by an individual, neither should we overlook a serious violation by the government seeking to deprive a person of his life or liberty.[163]

Finally, the new rule conceivably deprives a defendant of his constitutionally guaranteed right to a trial by a jury of his peers. The importance that the framers of the Constitution placed upon this right is conclusively demonstrated by the fact that the right to a jury trial is the only right to be found both in the body of the Constitution and the Bill of Rights.[164] In support of this ideal, Alexander Hamilton wrote:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[165]

Admittedly, it is much more convenient to affirm a conviction rather than remand for a new trial, especially where the evidence implies the guilt of the accused. Supreme Court Justice Scalia noted in the area of harmless error review that "[f]ormal requirements are often scorned when they stand in the way of expediency."[166] But to allow appellate judges to sift through the evidence, weighing its relative value and assigning its level of probity, opens the door to further erosions of the traditional partitions between appellate review and the sacrosanct role of the jury. To again quote Justice Scalia:

> "[H]owever convenient [intrusions on the jury right] may appear at first (as, doubtless, all arbitrary powers, well executed are the most convenient), yet, let it again be remembered, that delays and little inconveniences in the forms of justice are the price that all free na-

162. Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1336 (1994) (footnote omitted).

163. Chapel, *supra* note 14, at 540.

164. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

165. THE FEDERALIST NO. 83, at 560 (Alexander Hamilton) (The Heritage Press 1945).

166. Neder v. United States, 119 S. Ct. 1827, 1848 (1999) (Scalia, J., dissenting).

> tions must pay for their liberty in more substantial matters . . . and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."[167]

V. CONCLUSION

Texas courts have used the new Rule 44.2(b) as a backstop to avoid reversing convictions gained by the State at the expense of the rights enjoyed by all. Courts are supposed to be the protectors of these rights—not participants to the convictions. Mandating new trials can be inconvenient, costly, and painful for those involved. However, the trend toward trampling the rights of the accused to reach a supposedly "just" result will, in the long run, be more inconvenient, costly, and painful. Former Rule 81(b)(2) is the better alternative to the new Rule 44.2(b) in the safeguarding of individual rights because it more effectively gives judges a workable, objective, and ultimately more just framework to evaluate errors that infringe upon all our rights. For all these reasons, Rule 81(b)(2) should be re-adopted as the test for harmless error.

Mark McAdoo

167. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *350).