Fundamental Defect in Appellate Review of Error in the Texas Jury Charge Procedure Forum.

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I. INTRODUCTION

In recent history, no doctrine of the criminal jurisprudence of this state has created as much discussion as that of fundamental error contained in the court's instructions to the jury.[1] As Judge Douglas remarked in his dissent in *Cleland v. State:*[2]

> The hundreds of cases reversed for fundamental error during the last two years by a majority of the court would apparently mean that there has been a change in this court or that the trial courts are less able to try cases than they ever have been in the history of Texas.[3]

Continued expansion of the doctrine, and its attendant per se reversal of criminal convictions,[4] has prompted a call in many circles for

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1. *See* Mims v. State, 612 S.W.2d 933, 934 (Tex. Crim. App. 1981) (McCormick, J., concurring); Braswell, *Fundamental Error In the Court's Charge to the Jury in Texas Criminal Cases,* 46 TEX. B.J. 409, 416 (1983); Odom & Valdez, *A Review of Fundamental Error in Jury Charges in Texas Criminal Cases,* 33 BAYLOR L. REV. 749, 749 (1981).

2. 575 S.W.2d 296, 299 (Tex. Crim. App. 1978) (Douglas, J., dissenting).

3. *Id.* at 299 (Douglas, J., dissenting).

4. *See* Glenn v. State, 659 S.W.2d 438, 439 (Tex. Crim. App. 1983) (omission of culpa-

its reexamination and return to the requirement that prejudicial harm be demonstrated before appellate intervention disturbs a trial court judgment.[5]

This article traces the history of fundamental error in the court's charge from the days of the Republic of Texas to the present,[6] points to various pitfalls inherent in the doctrine's current (mis)application by case example, and advocates a retreat from rote appellate reversals of otherwise valid convictions.

II. HISTORY OF JURY INSTRUCTIONS

The earliest references to trial by jury in the jurisprudence of Texas appear in the Laws and Decrees of Coahuila and Texas.[7]

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ble mental state from jury charge fundamental error); Britton v. State, 653 S.W.2d 438, 439 (Tex. Crim. App. 1983) (failure of charge to include mental states alleged in indictment fundamental error); Sears v. State, 651 S.W.2d 263, 264 (Tex. Crim. App. 1982) (charge omitting some elements of statute fundamentally erroneous); Messenger v. State, 638 S.W.2d 883, 887-88 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g) (charge for aggravated sexual abuse which submitted disjunctively allegations of use of force and use of threats of serious bodily injury fundamentally defective); Johnson v. State, 627 S.W.2d 426, 427-28 (Tex. Crim. App. 1982) (charge fundamentally defective because enlarged allegations in indictment).

5. *See* Doyle v. State, 631 S.W.2d 732, 749 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g) (McCormick, J., dissenting) (precedent from court of criminal appeals clearly holds that judgments should not be reversed unless error in charge "calculated to injure rights of defendant"); Cleland v. State, 575 S.W.2d 296, 300 (Tex. Crim. App. 1978) (Douglas, J., dissenting) (appellate review of charge error should be conducted in accordance with article 36.19 of Texas Code of Criminal Procedure, and case should not be reversed unless error harmful to defendant); Braswell, *Fundamental Error in the Court's Charge to the Jury In Texas Criminal Cases,* 46 TEX. B.J. 409, 416 (1983). Judge Braswell wrote:

> Any doctrine that plays as much havoc with convictions as this one does leads one to suspect that there must be something radically wrong, either with the Texas Court of Criminal Appeals' perception of fundamental error as it relates to the charge or with the way in which our trial courts are going about instructing the jury or both.

Id. at 416. "The phrase 'fundamentally defective' has become a mantra for this Court, its chant blinding us from a consideration of the merits of a case and the applicable law." Wilson v. State, 625 S.W.2d 331, 336 (Tex. Crim. App. 1981) (McCormick, J., dissenting).

6. The authors acknowledge the historical research of Judge Sam Houston Clinton in the area of fundamental error in the court's charge in Texas, much of which appears in *Doyle v. State,* 631 S.W.2d 732, 739-44 (Tex. Crim. App. 1982) (Clinton, J., concurring) and in an unpublished appendix to Judge Clinton's concurring opinion in *Almanza v. State,* No. 242-83 (Tex. Crim. App. February 8, 1984) (not yet reported).

7. *See* Decree No. 277, Laws and Decrees of Coahuila and Texas, 1 H. GAMMEL, LAWS OF TEXAS 364 (1839). Decree number 277, published in 1834, was styled "A Plan, For the Better Regulation of the Administration of Justice in Texas." *Id.* Section 1, article 1 provided that "Texas shall be formed into the Judicial Circuit, which shall be denominated 'The Superior Judicial Court of Texas'." *Id.* § 1, art. 1. Article 2 of the decree specifically

With the advent of trial by jury, came also the requirement for jury instruction by the court. In the procedure "of the Trial Criminal Plenario",[8] article 72 provided that at the close of trial by jury "[t]he judge shall then make such observations upon the evidence and facts deduced in the trial as he may think proper and necessary for the instruction of the jury, who shall then retire for deliberation."[9] Relative to the subject of this article, there also appeared the following standard for use in appellate court review of trial error:

> This court shall try the appeal solely upon the proceedings of the court below, without commencing a new prosecution, or requiring the presence of the parties, nor shall any attention be paid to defects that may appear in the Summario unless they be such as materially affect the case.[10]

Apparently, this standard of review remained in effect through the days of the Republic of Texas.[11] This was recognized in *Chandler v. State,*[12] the first reported Texas criminal case addressing the subject of jury charge error, wherein the court wrote that "[t]o authorize a reversal *it must appear that the error complained of was in a matter material to the issue.*"[13]

The next significant development in Texas' law of court instructions and appellate review was the legislature's creation of a Code of

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required that in the judicial circuit, "[a]ll causes civil and criminal shall be tried by juries, in the manner and form prescribed by this law." *Id.* § 1, art. 2. Following this were detailed procedures relative to the trial of civil and criminal causes. *Id.* § 1, arts. 3-18, 1 H. GAMMEL, LAWS OF TEXAS 364-65.

8. The trial criminal plenario means the formal criminal trial.

9. *Id.* § 3, art. 72, 1 H. GAMMEL, LAWS OF TEXAS 372.

10. *Id.* § 4, art. 79, 1 H. GAMMEL, LAWS OF TEXAS 373. "Summario" equals summary or record.

11. *See* TEX. CONST., schedule, § 1 (1836). Section 1 of the schedule provided the following:

> That no inconvenience may arise from the adoption of this constitution, it is declared by this constitution that all laws now in force in Texas, and not inconsistent with this constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation.

Id.

12. 2 Tex. 306 (1847). In *Chandler,* the jury was instructed that "the admissions or confessions of the accused were evidence of the highest order to establish his guilt." *Id.* at 308. The defendant argued that this erroneous instruction mandated a reversal of his conviction. *See id.* at 308. Defendant's conviction, however, was not reversed because it was not established that the charge error was material to the judgment. *See id.* at 308-09.

13. *Id.* at 309 (emphasis in original).

Criminal Procedure—The Old Code.[14] Under the Code's provisions, the trial judge in a felony case was required, after argument to the jury had been concluded, to deliver a written charge "in which he shall distinctly set forth the law applicable to the case," but not expressing any opinion on the weight of evidence or summing up testimony.[15]

The leading case construing these provisions of the Old Code was *Bishop v. State.*[16] In *Bishop,* the court recognized two grounds of charge error in the appeal of a theft conviction. The first ground was properly preserved, and concerned "charging substantially on the weight of evidence excepted to at the time of trial."[17] The second ground, "the material deficiency in the charge, not objected to below, but apparent on the record," was also "deemed to be an error calculated to injure the rights of the defendant."[18] Chief Justice Roberts addressed the court's ability to review the unassigned error, and wrote that it "results from the general power of revision and correction of errors given to the Supreme Court by the Constitution and laws of this State, in acting under the laws regulating proceedings in criminal trials."[19] Significantly, the opinion also recognized that different standards of review apply to assigned and unassigned charge errors urged on appeal.[20] Although properly preserved charge error at the time might have necessarily required automatic reversal, the *Bishop* court held that unexcepted-to-error required a

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14. *See* Tex. Code Crim. Proc. (Paschal 2d ed. 1870) (repealed 1879).

15. *Id.* art. 3059. Several articles prescribed procedures for the creation, modification, certification, and delivery of the charge. *Id.* arts. 3060-66. These articles were followed by a provision to guide appellate review which provided:

> Whenever it appears by the record in any criminal action, taken to the supreme court upon appeal by defendant, that the instructions given to the jury were verbal (except where so given by consent in a case of misdemeanor), or that the district judge has departed from any of the requirements of the eight preceding articles, the judgment shall be reversed, provided it appears by the record, that the defendant excepted to the order or action of the court at the time of trial.

Id. art. 3067. The Old Code also provided grounds for granting a new trial, including situations "where 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.* art. 3137.

16. 43 TEX. 390 (1875); *see also* Doyle v. State, 631 S.W.2d 732, 739-41 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g) (Clinton, J., concurring) (analysis of *Bishop* opinion).

17. *See* Bishop v. State, 43 Tex. 390, 403 (1875).

18. *Id.* at 403.

19. *Id.* at 399.

20. *See id.* at 401-03.

showing of prejudicial harm.[21]

After *Bishop,* the Code of Criminal Procedure provisions concerning appellate review of jury charge error were revised.[22] Despite these revisions the inherent power of the appellate court to review assigned or "fundamental error" survived.[23] In 1886, the

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21. *See id.* at 401-02.

22. *See* Tex. Code Crim. Proc. art. 685 (1879) (repealed 1895). As amended, former article 602 became article 685. Article 685 provided: "Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles has been disregarded, the judgment shall be reversed; *provided,* the error is excepted to at the time of trial." *Id.* In 1895, the Code was revised, and article 685 was renumbered 723. *See* Tex. Code Crim. Proc. art. 723 (1895) (repealed 1897). The substance of article 723 was then amended by the 25th legislature in 1897. *See* S.B. No. 36, ch. 21, § 1, 1897 Tex. Gen. Laws 17, 10 H. GAMMEL, LAWS OF TEXAS 1071 (1897) *repealed by* Act of April 5, 1913, ch. 138, § 4, 1913 Tex. Gen. Laws 278, 279. Article 723 provided:

> Whenever it appears by the record in any criminal action, upon appeal by the defendant, that any of the requirements of the eight preceding articles have been disregarded, the *judgment shall not be reversed unless* the error appearing from the record was calculated to injure the rights of the defendant, which error shall be excepted to at the time of the trial, or on motion for a new trial.

Id. (emphasis added).

23. *See* Martin v. State, 25 Tex. Ct. App. 557, 576, 8 S.W. 682, 682 (1888); Mace v. State, 9 Tex. Ct. App. 110, 113 (1880); Tuller v. State, 8 Tex. Ct. App. 501, 508 (1880). Willson's annotations to the Code noted:

> If the objection be still further delayed, and for the first time presented on appeal the conviction will not be disturbed because of the error, unless it be error of a fundamental nature . . . calculated, under all circumstances of the case, to injure the rights of the defendant. . . .

Tex. Code Crim. Proc. Ann. art. 723 (Willson's 4th ed. 1896) (repealed 1897) (quote found on page 242 n.l); *see also* Tex. Code Crim. Proc. Ann. art. 723, § 845 (White 1900) (repealed 1913).

Although the 1897 revision was initially perceived to preclude review of unassigned error, the court continued to review fundamental error apparent from the record. *See* Jones v. State, 53 Tex. Crim. 131, 140, 110 S.W. 741, 744 (1908). The *Jones* court characterized amended article 723 as "in the nature of remedial legislation" prohibiting reversals for "mere matters of form, where there had been no invasion of any substantial right of a defendant . . . ." *Id.* at 140, 110 S.W. at 744; *see also* Williams v. State, 53 Tex. Crim. 2, 3, 108 S.W. 371, 372 (1908) (charge authorizing conviction not alleged in indictment mandates reversal). In *Grant v. State,* the court instructed the jury on theft by taking property without the knowledge of the injured party. *See* Grant v. State, 59 Tex. Crim. 123, 125, 127 S.W. 173, 174 (1910). This charge was not alleged in the indictment. *See id.* at 125, 127 S.W. at 174. The state contended that the court of criminal appeals could not review this error because the defendant did not except to the charge as required by article 723. *See id.* at 125, 127 S.W. at 174. The court, however, reviewed the charge error and held:

> It has not been held that a charge which authorizes the conviction of a party for an offense with which he is not charged comes within the purview of article 723. . . . To sustain this conviction would be to hold that a party could be convicted of a felony

court of appeals, in *Leache v. State,*[24] made the following observation:

> It is a well-settled rule that a charge of the court, when first questioned as to its correctness in the motion for new trial, will not be revised on appeal unless, when reviewed in the light of the circumstances, it was calculated to prejudice the rights of the accused.[25]

In 1913, the legislature fashioned a new procedure covering all aspects of the court's charge.[26] Many reversals, the legislature recognized, were "due to the fact that such errors were not pointed out to the trial judge *before* the charge was given . . . ."[27] Thus, the court would be required to draft the charge, offer it for the defendant's objection or requested instructions, and modify it if necessary.[28] The provision regulating appellate review of the charge was also amended. This amended provision, article 743, provided:

> Whenever it appears by the record in any criminal action upon appeal of the defendant that any of the requirements of the nine preceding articles have been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial, and all objections to the charge, and on account of refusal or modification of special charges shall be made at the time of the trial.[29]

Addressing the effect of article 743 upon appellate review of charge error, Judge Harper wrote in the following *Wright v. State:*[30]

> [I]t is clear that the intent and purpose of the Legislature is that we

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without an indictment proferred by a grand jury. This would be directly violative of section 10 of the Bill of Rights.

Id. at 125, 127 S.W. at 174.

24. 22 Tex. Ct. App. 279, 3 S.W. 539 (1886).

25. *Id.* at 314, 3 S.W. at 546; *see also* Doyle v. State, 631 S.W.2d 732, 747 (Tex. Crim. App. 1982) (McCormick, J., dissenting) (characterizing *Leache* opinion as "age old principle of law").

26. *See* Act of April 5, 1913, ch. 138, §§ 1-5, 1913 Tex. Gen. Laws 278, 278-79.

27. *Id.* § 5, 1913 Tex. Gen. Laws 279.

28. *See* Tex. Code Crim. Proc. art. 735 (1913) (repealed 1925). Article 735 provided in pertinent part: "Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection." *Id.* Article 737 provided that the court's modification, if any, should be in writing and the defendant should be afforded another opportunity to present objections to the modified charge. *See id.* art. 737.

29. *Id.* art. 743.

30. 73 Tex. Crim. 178, 163 S.W. 976 (1914).

> should not reverse a case because of error in the charge . . . unless it was excepted to at the time of the trial, and not then unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. . . .[C]onsequently *we are without authority to review the charge* of the court unless complained of at the time of the trial, *unless fundamental error is presented.*[31]

Wright and its progeny made it clear that revised article 743 did not preclude appellate review of fundamental error in the charge despite a failure to object to the charge at trial.[32] The problem, however, was that in cases reversed for fundamental error post *Wright* the court failed to articulate a specific standard of harm different from that used under the guidelines of article 743.[33] The legislature, in effect, had not taken away the court's inherent power to review fundamental error, but simply required that henceforth properly preserved error in the charge should not result in reversal unless it was "calculated to injure the rights of the defendant" or from the record it denied defendant "a fair and impartial trial."[34] Harm was thus required to be shown where error was properly preserved and it was left to the courts to determine what amounted to fundamental error.

Several cases illustrate that review of fundamental error in the charge continued, and was perceived differently than review under article 743 and succeeding revisions.[35] In *Canterberry v. State*[36] for

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31. *Id.* at 180, 163 S.W. at 977-78 (emphasis added).

32. *See* McCauley v. State, 97 Tex. Crim. 1, 4, 259 S.W. 938, 939 (1924) (Opinion on Motion for Reh'g) (if no fundamental error in charge; no review); Castleberry v. State, 88 Tex. Crim. 502, 503, 228 S.W. 216, 217 (1921) (no review of charge because no exception or fundamental error).

33. *See* Johnson v. State, 99 Tex. Crim. 25, 26-28, 267 S.W. 713, 713-14 (1925) (without providing authority, court reversed defendant's conviction because charge did not set forth law applicable to case); Crawford v. State, 90 Tex. Crim. 317, 317-18, 235 S.W. 214, 214 (1921) (Opinion on Motion for Reh'g) (although no statement of facts or bill of exceptions in record, conviction reversed for failure to give written charge). *But see* Powers v. State, 99 Tex. Crim. 345, 346, 269 S.W. 1047, 1048 (1925) (article 743 mandates reversal only if error calculated to affect rights of defendant).

34. *See* Tex. Code Crim. Proc. art. 743 (1913) (repealed 1925).

35. *Compare* Garza v. State, 162 Tex. Crim. 655, 657-58, 288 S.W.2d 785, 787 (1956) (charge which erroneously stated what constituted violation of law in question required reversal) *and* Castoreno v. State, 151 Tex. Crim. 379, 382, 208 S.W.2d 563, 564-65 (1948) (On Motion to Reinstate Appeal) (after reviewing charge alone, court found no fundamental error) *with* Tex. Code Crim. Proc. art. 743 (1913) (repealed 1925) (reversal required only if error "calculated to injure the rights of the defendant, or . . . defendant has not had a fair and impartial trial"). *But see* Martin v. State, 109 Tex. Crim. 101, 102-03, 3 S.W.2d 90, 90-

instance, appellant complained that the charge failed to inform the jury that he would be guilty of manslaughter only if he struck and killed the deceased under the facts presented.[37] There was no exception to such an omission,[38] and in finding that the charge presented no fundamental error the court stated: "[Under the code of criminal procedure], we are forbidden to reverse a judgment for errors in the charge, unless it appears . . . that the error was calculated to injure the rights of the party on trial, or . . . that he has not had a fair and impartial trial."[39] Similarly, Judge Woodley in *Garza v. State*[40] found the jury instructions to be error of "a fundamental nature" requiring reversal because the instructions went "to the basis of the case and [were] contrary to and fail[ed] to state the law under which appellant was prosecuted."[41] This result was reached by the *Garza* court despite the recognition that under the Code "[e]rrors in the charge which are not fundamental cannot be considered in the absence of an exception under the statute."[42] In *Masters v. State,*[43] however, the court rejected defendant's contention of fundamental error in the jury charge.[44] The court reasoned: "[i]n the absence of

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91 (1927) (no reversal because error in charge did not injure rights of defendant); Canterberry v. State, 101 Tex. Crim. 550, 552, 275 S.W. 1040, 1040-41 (Opinion on Motion for Reh'g) (manslaughter charge which omitted words "killed him" not fundamentally defective because reversal required only if error calculated to injure rights of defendant under article 743). Despite interim revisions, the substance of article 743 remains intact today. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981). Article 36.19 provides:

> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of the trial.

Id.

36. 101 Tex. Crim. 550, 275 S.W. 1040 (1925) (Opinion on Motion for Reh'g).

37. *See id.* at 552, 275 S.W. at 1040-41.

38. *See id.* at 552, 275 S.W. at 1040.

39. *Id.* at 553, 275 S.W. at 1041. After reviewing the evidence and the entire charge, the court held that the error was not fundamental and therefore, did not mandate a reversal of defendant's conviction. See id. at 553, 275 S.W. at 1041. The court reasoned: "we cannot conceive that the jury could have possibly been misled into believing the court had authorized a conviction for manslaughter, unless they believed the blow stuck by appellant resulted in deceased's death." *Id.* at 553, 275 S.W. at 1041.

40. 162 Tex. Crim. 655, 288 S.W.2d 785 (1956).

41. *Id.* at 658, 288 S.W.2d at 787.

42. *Id.* at 657, 288 S.W.2d at 787.

43. 170 Tex. Crim. 471, 341 S.W.2d 938 (1960).

44. *See id.* at 475, 341 S.W.2d at 942.

an objection to the charge and because we are at a loss to see how the jury could have been misled or appellant injured by the charge, we hold this to be a harmless error."[45]

Out of this confusion decisions appeared which engrafted fundamental error review into the statutory standard for review of charge error, provided by the Code of Criminal Procedure.[46] The synthesis is apparent from a close reading of the following rule as announced in *Peterson v. State:*[47]

> Where objection is *not* made to the court's charge in accordance with Article 36.14, V.A.C.C.P., a case will not be reversed on appeal because of an error in the charge *unless* the error was calculated to injure the rights of the defendant, or unless it appears that he has not had a fair and impartial trial. Article 36.19, V.A.C.C.P. . . . Thus, we are confronted with the question of whether the alleged errors in the court's charge constituted fundamental error.[48]

This synthesis paved the way for the present review of all fundamental case law under what is now article 36.19 of the Code of Criminal Procedure and complete abandonment of the harm standard contained therein.[49]

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45. *Id.* at 475, 341 S.W.2d at 941-42; *see also* Hargiss v. State, 360 S.W.2d 881, 882 (Tex. Crim. App. 1962) (article 666 of Code only authority for decision that charge was favorable to defendant and thus, error in charge was harmless).

46. *See* Jefferson v. State, 487 S.W.2d 331, 332 (Tex. Crim. App. 1972) (following statutory standard of review for unobjected to error, court found no fundamental error); Fennell v. State, 424 S.W.2d 631, 632-33 (Tex. Crim. App. 1968) (article 36.19 authority for reversal of defendant's conviction because charge of court "did not fairly and adequately protect the rights of the appellant"); Johnson v. State, 423 S.W.2d 318, 319 (Tex. Crim. App. 1968) (no reversal for unobjected to charge error because no showing that error injured rights of defendant); Ashworth v. State, 418 S.W.2d 668, 670 (Tex. Crim. App. 1967) (no fundamental error in charge because error did not injure rights of defendant nor did error deprive defendant of fair trial).

47. 508 S.W.2d 844 (Tex. Crim. App. 1974).

48. *Id.* at 848-49 (emphasis added).

49. *See* Doyle v. State, 631 S.W.2d 732, 738-39 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g) (charge that omitted mental state in application paragraph fundamentally defective); Cumbie v. State, 578 S.W.2d 732, 735 (Tex. Crim. App. 1979) (indictment alleged defendant placed complainants in fear of imminent bodily injury; no fundamental error in charge which authorized conviction if jury found defendant placed complainants in fear of imminent bodily injury "or death"); Harris v. State, 522 S.W.2d 199, 202 (Tex. Crim. App. 1975) (fundamental error shown where charge failed to apply law under which defendant was charged).

III. PITFALLS OF "PER SE REVERSAL" OF CHARGE ERRORS

The mainstay of recent Texas case law regarding fundamental error in the court's charge has been *Cumbie v. State.*[50] In *Cumbie,* the court categorized four types of "fundamental" error requiring automatic reversal, regardless of whether or not the error was excepted to in the trial court.[51] The four categories are: (1) those in which there is an omission from the application paragraph of the charge of an allegation in the indictment that is required to be proven;[52] (2) those which "substitute a theory of the offense completely different from the theory alleged in the indictment;"[53] (3) those which authorize conviction on one or more theories not alleged in the indictment and on the theory alleged in the indictment;[54] and (4) those which authorize "conviction for conduct which is not an offense, as well as for conduct that is an offense."[55]

In its opinions, the Texas Court of Criminal Appeals has usually referred to article 36.19 of the Code of Criminal Procedure as the standard under which unobjected to charge error is to be analyzed.[56] Frequently, the court's opinions even allude to the harm standard enunciated within that provision of the Code.[57] In *Doyle v. State,*[58] Judge Teague, writing for the majority on rehearing, noted that after the court has determined error is present in the charge, the court must then "make the determination whether or not the error was calculated to injure the rights of the defendant, and also determine, if such error exists, whether or not it prevented the defendant from receiving a fair and impartial trial."[59]

A reading of the court's opinions, however, indicates that the im-

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50. 578 S.W.2d 732 (Tex. Crim. App. 1979).

51. *See id.* at 733-35.

52. *See id.* at 733.

53. *Id.* at 733.

54. *See id.* at 734.

55. *Id.* at 734-35.

56. *See* Thomas v. State, 605 S.W.2d 290, 294 (Tex. Crim. App. 1980); Boles v. State, 598 S.W.2d 274, 278 (Tex. Crim. App. 1980); *see also* TEX. CODE CRIM. PROC. ANN.art. 36.19 (Vernon 1981) (appellate review of jury charge).

57. *See* Grady v. State, 634 S.W.2d 316, 318 (Tex. Crim. App. 1982); Thomas v. State, 605 S.W.2d 290, 294 (Tex. Crim. App. 1980); *see also* TEX. CODE CRIM. PROC. ANN.art. 36.19 (Vernon 1981) (error must harm rights of defendant or prevent defendant from receiving fair and impartial trial).

58. 631 S.W.2d 732 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g).

59. *Id.* at 736.

position of any harm standard is simply non-existent.[60] The majority of the court apparently believes that a separate analysis regarding harm after the reviewing court has identified "fundamental" error in the charge is not mandated by article 36.19:

> Rather, the rule is that where such error is contained in the charge, the standard for prejudice under Article 36.19 is automatically met. In other words, in determining that there is fundamental error, we are determining that the error was calculated to injure the rights of the defendant. Thus, not only is that process of finding fundamental error in compliance with Article 36.19, it is additionally a finding that the 'legislative mandate' of Article 36.14 has been violated.[61]

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60. *See* Lewis v. State, 656 S.W.2d 472, 475 (Tex. Crim. App. 1983) (aggravated rape instruction fundamentally defective because submitted disjunctively allegations of use of force and use of threats); Britton v. State, 653 S.W.2d 438, 439 (Tex. Crim. App. 1983) (charge that omitted culpable mental states from application paragraph fundamentally defective); Sears v. State, 651 S.W.2d 263, 264 (Tex. Crim. App. 1982) (charge which omitted elements of indictment and statute fundamentally erroneous); Newton v. State, 648 S.W.2d 693, 694 (Tex. Crim. App. 1983) (fundamental error when charge does not apply abstract principles to facts); Atunez v. State, 647 S.W.2d 649, 650-51 (Tex. Crim. App. 1983) (charge fundamentally defective because did not apply abstract law to facts of case); Jefcoat v. State, 644 S.W.2d 719, 723 (Tex. Crim. App. 1982) (reversal required when fundamentally erroneous charge authorized conviction on lesser included offense of voluntary manslaughter which was not alleged in indictment); Barnes v. State, 644 S.W.2d 1, 2 (Tex. Crim. App. 1982) (charge contained fundamental error because instructed jury on lesser included offense which was not alleged in indictment); Messenger v. State, 638 S.W.2d 883, 887 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g) (jury charge on aggravated sexual abuse which submitted disjunctively allegations of use of force and use of threats of serious bodily injury fundamentally defective); Wilson v. State, 625 S.W.2d 331, 333 (Tex. Crim. App. 1981) (charge authorizing conviction on lesser culpable mental state than that alleged in indictment fundamentally defective); Deitch v. State, 617 S.W.2d 695, 696 (Tex. Crim. App. 1981) (charge contained fundamental error because authorized conviction on lesser included offense which was not alleged in indictment); Phillips v. State, 615 S.W.2d 756, 756 (Tex. Crim. App. 1981) (charge which contained paragraph improperly applying law to facts of case fundamentally erroneous); Ward v. State, 615 S.W.2d 752, 753 (Tex. Crim. App. 1981) (charge authorizing conviction on theory not alleged in indictment constituted fundamental error); Ford v. State, 615 S.W.2d 727, 728 (Tex. Crim. App. 1981) (fundamental error because omitted culpable mental state); Moore v. State, 612 S.W.2d 932, 933 (Tex. Crim. App. 1981) (variance between indictment which alleged burglary by entering habitation and committing theft, and jury charge which alleged burglary by entering habitation with intent to commit theft constituted fundamental error); Gooden v. State, 576 S.W.2d 382, 383 (Tex. Crim. App. 1979) (charge fundamentally defective because authorized conviction not alleged in indictment).

61. Hill v. State, 640 S.W.2d 879, 883-84 (Tex. Crim. App. 1982). The *Hill* court reversed a conviction for aggravated robbery because the application paragraph of the jury charge omitted the element of the theft: "without the owner's effective consent." *See id.* at 880. *Hill* has been overruled to the extent that omission of this element constituted funda-

The application of such a "per se" rule of reversal when an error is found or deemed to fit into a *Cumbie* category is historically unsound,[62] and relegates appellate review of charge error cases to a rote, technical operation.[63] Under the rule of per se reversal a case would necessarily be reversed for some error in the charge designated as fundamental, even where such error is beneficial to the defendant.[64] As Judge Douglas noted:

> This . . . is contrary to Article 36.19, V.A.C.C.P., which provides that a case should *not* be reversed for an error in the court's charge unless such error appearing from the record was calculated to injure the rights of a defendant, or unless it appear[ing] from the record that the defendant has not had a fair and impartial trial.[65]

It would seem apparent that under the terms of article 36.19, "when [the] Court chooses to declare a charge to be fundamentally erroneous, it has a duty to set forth with clarity exactly how the appellant was harmed, and not summarily recite trite expressions of general principles of law without indicating why [a] particular conclusion

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mental error. *See* Woods v. State, 653 S.W.2d 1, 5 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g).

62. *Compare* Bishop v. State, 43 Tex. 390, 396 (1875) (unobjected to error in charge mandates reversal only if error relates to material matter and calculated to injure rights of defendant) *and* Tuller v. State, 8 Tex. Ct. App. 502, 508 (1880) (unexcepted to error in charge necessitates reversal only if it appears from record that defendant's rights were injured) *and* Sue v. State, 52 Tex. Crim. 122, 130-31, 105 S.W.804, 809 (1907) (no appellate review of unexcepted to errors in jury charge) *with* Wilson v. State, 625 S.W.2d 331, 333 (Tex. Crim. App. 1981) (variance between allegations in indictment and jury charge renders charge fundamentally defective) *and* Cumbie v. State, 578 S.W.2d 732, 733-35 (Tex. Crim. App. 1979) (four categories of fundamental error in jury charge which mandate reversal).

63. *See* Martinez v. State, 641 S.W.2d 526, 529 (Tex. Crim. App. 1982) (McCormick, J., dissenting) (reciting "trite expressions of general principles of law," court held charge fundamentally defective without explaining how defendant was harmed); Wilson v. State, 625 S.W.2d 331, 336 (Tex. Crim. App. 1981) (McCormick, J., dissenting) (term "fundamentally defective" has evolved into "magical doctrine [that] has lost all logical nexus with the protection of the rights of defendant"); Cleland v. State, 575 S.W.2d 296, 299-300 (Tex. Crim. App. 1978) (Douglas, J., dissenting) (application of "fundamental error" rule has led to reversal of cases without regard to whether defendant's rights were injured); *cf.* MacLeod, *The California Constitution and the California Supreme Court in Conflict Over the Harmless Error Rule,* 32 HASTINGS L.J. 687, 692 (1981) (criticism of per se reversal merely upon identification of certain jury instruction error and without review for harm). MacLeod characterized the California court's per se reversal approach as the *ipse dixit* approach to appellate review, i.e., review made without proof or authority. *See id.* at 692.

64. *See* Cleland v. State, 575 S.W.2d 296, 299 (Tex. Crim. App. 1978) (Douglas, J., dissenting); Brewer v. State, 572 S.W.2d 940, 940-41 (Tex. Crim. App. 1978).

65. Cleland v. State, 575 S.W.2d 296, 299 (Tex. Crim. App. 1978) (Douglas, J., dissenting).

has been reached."[66]

A review of some of the recent cases, handed down by the court since *Cumbie* and reversed per se, illustrates that if the "harm standard" of article 36.19 had been applied, the outcome of the cases would have been drastically affected.[67] In *Antunez v. State,*[68] appellant was indicted for aggravated robbery.[69] The court charged on the alleged offense and on the lesser included offense of robbery.[70] The jury convicted Antunez of robbery.[71] The court of criminal appeals reversed the conviction because of unassigned fundamental error in the jury charge.[72] The court found that although the application paragraph of the charge pertaining to aggravated robbery correctly applied the law to the facts, the application paragraph addressing the lesser included offense following immediately thereafter did not.[73] This application paragraph merely negated the existence of the aggravating factor, the use or exhibition of a deadly weapon.[74] As the dissent aptly pointed out, the jury clearly knew that in order to convict Antunez for robbery they must find the same

66. Martinez v. State, 641 S.W.2d 526, 529 (Tex. Crim. App. 1982) (McCormick, J., dissenting).

67. *Compare* Britton v. State, 653 S.W.2d 438, 439 (Tex. Crim. App. 1983) (without reviewing evidence in case, court found charge fundamentally defective because application paragraph of charge omitted mental state) *and* Antunez v. State, 647 S.W.2d 649, 650-51 (Tex. Crim. App. 1983) (based on reading of isolated part of charge, court reversed defendant's conviction because charge failed to apply clearly abstract principles of law to facts of case) *and* Cumbie v. State, 578 S.W.2d 732, 733-35 (Tex. Crim. App. 1979) (harm presumed if charge error fits into one of four categories) *with* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981) (error in jury charge mandated only if "error appearing from the record was calculated to injure the rights of defendant, or . . . the defendant has not had a fair and impartial trial"). A harm standard is to be distinguished from the harmless error rule. *Compare* Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (harm is found if the erroneous instruction "by itself so infected the entire trial that the resulting conviction violates due process") *and* Bishop v. State, 43 Tex. 390, 396 (1875) (test for harm in jury charge is whether such charge error was material and calculated to injure rights of defendant) *with* Harrington v. California, 395 U.S. 250, 254 (1969) (constitutional error harmless because evidence of guilt overwhelming) *and* Chapman v. California, 386 U.S. 18, 23 (1967) (test for harmless error is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").

68. 647 S.W.2d 649 (Tex. Crim. App. 1983).

69. *See id.* at 650.

70. *See id.* at 650.

71. *See id.* at 650.

72. *See id.* at 651.

73. *See id.* at 651.

74. *See id.* at 650; see also TEX. PENAL CODE ANN. § 29.03(a) (Vernon 1974) (aggravated robbery). This section provides:

facts necessary for a conviction for aggravated robbery, except that they must have a reasonable doubt as to whether a deadly weapon was used or exhibited.[75] The court failed to address the error in light of the facts conveyed by both application paragraphs, or to state how the error was "calculated to injure the rights of the defendant" or from the record denied defendant "a fair and impartial trial."[76]

Similarly, in *Britton v. State,*[77] the court reversed defendant's burglary conviction after finding that the application paragraph of the court's charge omitted the culpable mental states.[78] Yet the charge, when read as a whole, properly instructed the jury not to convict Britton unless they found he had acted with the requisite mens rea.[79] Again, no prejudice to Britton was shown.

(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

(1) causes serious bodily injury to another; or

(2) uses, or exhibits a deadly weapon

(b) An offense under this section is a felony of the first degree.

Id.

75. *See id.* at 652 (Onion, P.J., dissenting).

76. *See id.* at 652-53 (Onion, P.J., dissenting). The application paragraphs of the charge read as follows:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 6th day of March, 1979, in El Paso County, Texas, the defendant, EDUARDO GARCIA ANTUNEZ did then and there unlawfully while in the course of committing theft and with intent to obtain property of ROBERT URRUTIA, to-wit: American Currency, without the effective consent of the said ROBERT URRUTIA of said property, did then and there by using and exhibiting a deadly weapon, to-wit: a knife that in the manner of its use and intended use was capable of causing death and serious bodily injury, intentionally and knowingly threaten and place ROBERT URRUTIA in fear of imminent bodily injury and death, then you will find the defendant GUILTY of aggravated robbery as charged in the indictment (Verdict Form 'B'). If you find from the evidence beyond a reasonable doubt that the defendant, EDUARDO GARCIA ANTUNEZ, committed the offense of robbery as herein defined, but you have a reasonable doubt as to whether he used or exhibited a deadly weapon in committing said robbery, then you will find the defendant guilty only of robbery, and not of aggravated robbery (Verdict Form 'B-1').

Id. at 650. The same fact situation of the *Antunez* case was presented again in the case of Newton v. State, 648 S.W.2d 693, 694 (Tex. Crim. App. 1983). Once again, Newton's conviction was reversed under a per se rule of prejudice for unassigned error in the charge. *See id.* at 694-95.

77. 653 S.W.2d 438 (Tex. Crim. App. 1983).

78. *See id.* at 439.

79. *See id.* at 440 (McCormick, J., dissenting). The jury charge in pertinent part provided:

> 1. Our law provides that a person commits an offense if, without the effective consent

of the owner, he intentionally enters a habitation and commits theft of corporeal personal property therein.

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3. In this case, the indictment *having charged that the defendant intentionally entered* the building in question and committed the offense of theft of personal property therein, you are instructed on the law of theft as follows:

"Theft," as used herein, is the unlawful appropriation of the corporeal personal property of another *with the intent to deprive such other person of said property.*

"Appropriation" and "appropriate," as those terms are used herein, mean to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's consent.

"Property" means tangible or intangible personal property or documents, including money, that represents or embodies anything of value.

"Deprive" means to withhold property from the owner permanently.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by force, threats, or fraud.

"Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the person charged. "Possession" means actual care, custody, control, or management of the property.

4. A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

5. Now if you find from the evidence beyond a reasonable doubt that in Brazos County, Texas on or about the 11th day of January, 1979, the Defendant, Norris Britton, did enter a building then and there occupied, controlled and in the possession of Robert Carlton Powell, hereinafter called owner, without the effective consent of said owner, and that such building was then and there an enclosed structure intended for use or occupation as a habitation and then and there in actual use by said owner as a habitation, as that term has been defined, and that the defendant did then and there commit the offense of *theft, as hereinbefore defined,* of corporeal personal property therein being and owned by Robert Carlton Powell, then you will find the Defendant *guilty as charged.*

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty.

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In all criminal cases, the burden of proof is on the State. All persons are presumed to be innocent and *no person may be convicted unless each element of the offense is proved beyond a reasonable doubt.* The fact that a defendant has been arrested, confined, or indicted for, or otherwise charged with, an offense gives rise to no inference of guilt at his trial. *'Element of an offense' means (a) the forbidden conduct; (b) the required culpability; and (c) the required result (if any).* 'Conduct' means an act or omission and its accompanying mental state. *'Required culpability' means the mental state required by law such as intent, knowledge, recklessness or criminal negligence. Now bearing in mind the foregoing instructions and definitions, if you find the State has failed to prove each element of the offense beyond a reasonable doubt* or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict 'Not Guilty.'

Id. at 440-41 (McCormick, J., dissenting) (emphasis added).

In *Almanza v. State,*[80] the Fort Worth Court of Appeals reversed the conviction for aggravated rape because of fundamental error in the charge. The court of appeals, in a two paragraph opinion, found that although the indictment alleged the aggravating element and the standard form allegation of rape conjunctively, the court's charge combined these elements disjunctively.[81] Relying on *Messenger v. State,*[82] the court of appeals reversed Almanza's conviction.[83] The court of criminal appeals initially granted the State's petition for discretionery review to determine if the jury charge contained fundamental error. On February 8, 1984, however, the court issued an opinion holding that the petition for discretionery review had been improvidently granted and the court of appeals had reached the correct result.[84] A close reading of *Almanza,* however, reveals that had the harm standard been applied, the case would not have been reversed.

The record of the *Almanza* case[85] reflects that the victims, Mary and Michael Smith, were a mentally retarded couple who shared a home with another couple.[86] The Smiths were at home alone on the night of December 28, 1979, when appellant and another man displaying a pistol demanded entrance into their home.[87] They were acquainted with appellant and knew him as "Junior," but they did not know his companion, Archie.[88] Appellant and Archie terrorized the couple. Archie raped the woman while appellant held the pistol on the husband and forced him to watch the rape of his wife.[89] The woman submitted out of fear for the life of her husband, whom Archie had threatened to kill if the wife did not submit sexually, and

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80. 645 S.W.2d 885 (Tex. App.—Ft. Worth 1983) (Opinion on Motion for Reh'g), *pet. ref'd,* No. 242-83 (Tex. Crim. App. February 8, 1984) (not yet reported).

81. *See id.* at 886.

82. 638 S.W.2d 883 (Tex. Crim. App. 1982).

83. Almanza v. State, 645 S.W.2d 885, 886 (Tex. App.—Ft. Worth 1983) (Opinion on Motion for Reh'g), *pet. ref'd,* No. 242-83 (Tex. Crim. App. February 8, 1984) (not yet reported).

84. Almanza v. State, No. 242-83 (Tex. Crim. App. February 8, 1984) (not yet reported).

85. All references to the facts and charge in this case are taken from the statement of facts and transcript of the trial of this case.

86. Record Vol. III at 33. The names used are fictitious.

87. *Id.* at 35.

88. *Id.* at 36. Appellant testified that he knew the companion only as "Archie." Archie was never apprehended or further identified. *Id.* Vol. V at 42.

89. *See id.* Vol. III at 53.

out of fear for her own life.[90] Appellant did not personally rape the woman, however, he did later attempt anal intercourse with her.[91] Appellant testified at the guilt stage and acknowledged on direct examination that he and Archie had been at the victims' home on the night in question and that Archie had indeed raped the woman while threatening the couple with a pistol. Appellant, however, denied that he was a party to the offense[92] and claimed he had not participated in the offense but was held at gunpoint by Archie during the rape.[93]

The case was submitted to the jury on two counts of aggravated rape of the woman, the first count alleging the woman as the recipient of the "threat of death to be imminently inflicted" and the second count alleging the husband as the recipient of that threat.[94] The jury charge contained a paragraph applying the law to the facts with regard to each of these two counts.[95] Each "charging" paragraph was comprised of two parts. The first part applied the basic law of aggravated rape to the facts of the case in terms of what *Archie* would had to have done to commit aggravated rape of the wife. The second part of each charging paragraph invoked the law of parties in terms of what *appellant* would had to have done to be criminally responsible for the aggravated rape committed by Archie.[96] The

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90. *See id.* at 58, 66.

91. *See id.* at 58.

92. *See id.* Vol. V at 49, 52.

93. *See id.* at 49.

94. *See* Transcript at 35-43.

95. *See id.* at 39-40.

96. *See id.* at 39-40. The two charging paragraphs, which were preceded by correct abstract definitions of rape and aggravated rape were phrased as follows:

[Charging paragraph for Count One]

6. Now, if you find from the evidence, beyond a reasonable doubt, that on or about the 28th day of December, 1979, in Tarrant County, Texas, a person known as "Archie" did then and there intentionally or knowingly without the consent of Mary Smith, a female, have sexual intercourse with the said Mary Smith, and that the said Mary Smith was not then the wife of said "Archie", and that the said "Archie" intentionally or knowingly compelled submission to the sexual intercourse by force that overcame such earnest resistance as might reasonably be expected under the circumstances on the part of the said Mary Smith, or if said "Archie" intentionally or knowingly compelled submission to the sexual intercourse by threat of death to be imminently inflicted upon the said Mary Smith and that such threat to said Mary Smith was such that it would prevent resistance by a woman of ordinary resolution under the same or similar circumstances because of a reasonable fear of harm, and if you further find from the evidence beyond a reasonable doubt that on such occasion the Defendant, Cipriano Ramon Almanza, Jr., acting with intent to promote or assist the commission of the offense, if any,

jury convicted appellant under the second charging paragraph which alleged the husband as the recipient of the death threat.[97] The only substantive difference between the two counts was the identity of the person threatened with death.

Although the charging paragraph did erroneously combine the aggravating element disjunctively with the standard allegation of rape, this error occurred in the top portion of the charging paragraph which dealt exclusively with *Archie's* conduct. There was no error in that portion of the charge dealing with *appellant's* conduct and the law of the parties. Neither the court of appeals nor the court of criminal appeals inquired as to any harm standard suffered by Almanza as the result of the charge error.

Several cases have recently been reversed due to fundamental error in the charge even though the evidence is overwhelming as to the defendant's guilt.[98] In these cases, under the per se reversal rule, the court makes no attempt to determine *from the record* whether or

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solicited, encouraged, aided or attempted to aid the said "Archie" in committing such offense, if any, then you will find the Defendant guilty of aggravated rape as charged in Count One of the indictment and say so by your verdict.

[Charging paragraph for Count Two]

If you do not so believe or if you have a reasonable doubt thereof, you will acquit the Defendant of the offense of aggravated rape as charged in Count One of the indictment and next consider whether the Defendant, Cipriano Ramon Almanza, Jr., is guilty of the offense of aggravated rape as charged in Count Two of the indictment.

7. Therefore, if you find from the evidence beyond a reasonable doubt that on or about the 28th day of December, 1979, in Tarrant County, Texas, a person known as "Archie" did then and there intentionally or knowingly without the consent of Mary Smith, a female, have sexual intercourse with the said Mary Smith, and that the said Mary Smith was not then the wife of said "Archie" and that said "Archie" intentionally and knowingly compelled submission to such sexual intercourse by a force that overcame such earnest resistance as might reasonably be expected under the circumstances *or that said* "Archie" intentionally or knowingly compelled submission to the sexual intercourse by a threat of death to be imminently inflicted upon Michael Smith, and that such threat was such that it would prevent resistance by a woman of ordinary resolution, under the same or similar circumstances because of a reasonable fear of harm, and if you further believe from the evidence beyond a reasonable doubt that on such occasion the Defendant, Cipriano Ramon Almanza, Jr., acting with intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid said "Archie" in the commission of the offense, if any, then you will find the Defendant guilty of the offense of aggravated rape as charged in Count Two of the indictment and so say by your verdict.

Id.

97. *See id.* Transcript at 44.

98. *See* Messenger v. State, 638 S.W.2d 883, 887-88 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g); Infante v. State, 612 S.W.2d 603, 604-05 (Tex. Crim. App. 1981).

not harm resulted from the charge.[99] In *Infante v. State,*[100] Infante and Ismael Vasquez were indicted for murder under section 19.02(a)(1) of the penal code.[101] The jury was charged, however, on both sections 19.02(a)(1) and 19.02(a)(2).[102] The court determined that the charge, "clearly went beyond the allegations of the indictment" and reversed both men's convictions, but went on to review the sufficiency of the evidence.[103] The evidence revealed that Infante, Vasquez, Antonio Garcia, and the victim had been drinking on the day of the offense.[104] An argument ensued between the victim and Ismael Vasquez, and Vasquez shot the victim several times.[105] Garcia testified that when Infante saw that the victim was still alive, Infante stated to Vasquez, "Give me the gun. I will finish him."[106] Infante then took the gun. At that point, Garcia ran from the scene, but as he was running, heard more shots.[107] It appears from the evidence set out in the court's opinion that Infante had the intent to commit murder under section 19.02(a)(1). As a per se reversal, the court offered no rationale as to how the jury could have been misled into convicting Infante under section 19.02(a)(2), which requires only the intent to cause serious bodily injury.[108]

The case of *Messenger v. State,*[109] is a classic example of per se reversal where failure to apply the harm standard directly affected the outcome of the case. Messenger was alleged to have committed

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99. *See* Messenger v. State, 638 S.W.2d 883, 887-88 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g); Infante v. State, 612 S.W.2d 603, 604 (Tex. Crim. App. 1981).

100. 612 S.W.2d 603 (Tex. Crim. App. 1981).

101. *See id.* at 604. Section 19.02(a)(1) provides:

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

TEX. PENAL CODE ANN. § 19.02(a)(1) (Vernon 1974).

102. *See* Infante v. State, 612 S.W.2d 603, 604 (Tex. Crim. App. 1981). Section 19.02(a)(2) provides:

(a) A person commits an offense if he:

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(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual;

TEX. PENAL CODE ANN. § 19.02(a)(2) (Vernon 1974).

103. *See* Infante v. State, 612 S.W.2d 603, 604-05 (Tex. Crim. App. 1981).

104. *See id.* at 604.

105. *See id.* at 605.

106. *See id.* at 605.

107. *See id.* at 605.

108. *See id.* at 604.

109. 638 S.W.2d 883 (Tex. Crim. App. 1982).

aggravated sexual abuse.[110] The aggravating element alleged in the information was "by force *and* by threatening the imminent infliction of serious bodily injury and death. . . ."[111] The allegation of the use of force was not an aggravating factor under section 21.05, as it existed at the time of the offense.[112] In the charge to the jury, the court in effect made "force" an aggravating factor by wording the phrase disjuntively: "by force *or* by threatening the imminent infliction of serious bodily injury or death . . . ."[113] Theoretically, the jury could have convicted using force as the sole aggravating element, and for this reason the court reversed the conviction.[114]

A summary of the evidence from the *Messenger* case, however, shows that the victim submitted to the defendant's assault because of the threat of serious bodily injury or death.[115] Early one morning, the victim and her seven-year-old daughter were awakened when the light in their bedroom was turned on.[116] The victim saw the defendant standing in the doorway carrying a baseball bat.[117] The defendant then motioned with his hand for the victim to come to him.[118] As the victim neared the defendant, he grabbed her shirt and pulled her to the front bedroom of the house.[119] When the woman's daughter began calling to her mother, the defendant told the little girl that something bad would happen to her mother if she did not stop yelling.[120] Throughout this time the defendant had contin-

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110. *See id.* at 884.

111. *See id.* at 888 (Opinion on Motion for Reh'g) (emphasis added).

112. *See* Tex. Penal Code. Ann. § 21.05 (Vernon 1974), *amended by* Act of Sept. 1, 1981, ch. 96, § 2, 1981 Tex. Gen. Laws 203. Section 21.05 provided:

(a) A person commits an offense if he commits sexual abuse as defined in Section 21.04 of this code or sexual abuse of a child as defined in Section 21.10 of this code and he:

(1) causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode; or

(2) compels submission to the sexual abuse by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone.

(b) An offense under this section is a felony of the first degree.

Id.

113. *See* Messenger v. State, 638 S.W.2d 883, 888 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g).

114. *See id.* at 888.

115. *See id.* at 884-85.

116. *See id.* at 884.

117. *See id.* at 885.

118. *See id.* at 885.

119. *See id.* at 885.

120. *See id.* at 885.

ually held the baseball bat.[121] The defendant then ordered the victim to engage in various sexual acts with him, and she complied.[122] While the victim was engaging in these acts, she was able to partially free herself and tell her daughter to run out of the house and call a friend.[123] The defendant then dragged the victim through the house looking for the daughter. A struggle ensued, and the victim was able to escape.[124] The defendant's threat to the daughter, coupled with the fact that the defendant continually held a baseball bat in his hand, justified the jury's finding that the allegations of the information were true. The court's opinion does not suggest how the jury could have convicted the appellant on a showing of force alone. There is no evidence in the record to support such a finding or to suggest that the jury found the appellant guilty solely on the basis of force as an aggravating element. It appears from the record that the error was not "calculated to injure the rights of the defendant" or to deprive the defendant of "a fair and impartial trial."

Probably the harshest results of per se reversal due to a finding of fundamental error occur in those cases where the defendant takes the witness stand and in effect admits guilt while testifying. This was the situation in *Luera v. State.*[125] Luera was indicted for attempted murder, specifically, for shooting and narrowly missing the victim.[126] The court charged the jury on attempted murder and the lesser included offense of aggravated assault.[127] The charge allowed the jury to convict Luera of aggravated assault if they found he actually caused bodily injury or threatened to inflict imminent bodily injury.[128] The court found fundamental error in the charge because the offense of aggravated assault by the infliction of bodily injury was not a lesser included offense of the offense charged in the indictment.[129]

At trial Luera testified that he shot his gun at a point in front of the victim in order to scare him.[130] Based on this testimony alone, it

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121. *See id.* at 885.
122. *See id.* at 885.
123. *See id.* at 885.
124. *See id.* at 885.
125. No. 60,872 (Tex. Crim. App. Oct. 26, 1983) (not yet reported).
126. *See id.*
127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.*

seems the jury could only have voted to convict Luera on the basis of the threat to inflict imminent bodily injury. Once again, the court's opinion did not address the question of harm, and failed to apply the harm standard to the record and the charge.

Another pitfall of the court's per se reversal rule as applied to error deemed fundamental in the court's charge is that it has vitiated the contemporaneous objection rule in this area of the law.[131] Even a cursory review of the reported cases emanating from the court of criminal appeals, which were reversed due to fundamental error in the charge, indicates that in the vast majority of cases the error was not even urged by the defendant on appeal.[132] Can it not be said, "[w]ith the trend being established by the 'fundamental error' rule, [that] there should be no need for defense counsel because a majority will search the record to see if it would have tried the case, with the benefit of hindsight, as the trial court and defense counsel tried it."?[133]

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131. *See* Martinez v. State, 641 S.W.2d 526, 529 (Tex. Crim. App. 1982) (McCormick, J., dissenting) (duty should be on defendant to object if feels charge would in any manner be harmful to him); Mims v. State, 612 S.W.2d 933, 934 (Tex. Crim. App. 1981) (McCormick, J., dissenting) (requirements of article 36.14 relating to objections to jury charge ignored since adoption of "fundamental error" doctrine); Cleland v. State, 575 S.W.2d 296, 299-300 (Tex. Crim. App. 1978) (Douglas, J., dissenting) (following expansive trend of "fundamental error" doctrine, "no need for defense counsel;" failure to object does not waive error in jury charge); *see also* Tarpley v. Estelle, 703 F.2d 157, 159 n.4 (5th Cir. 1983) (habeas review of unobjected to charge error from Texas state case permissible because state court does not follow contemporaneous objection rule); Braswell, *Fundamental Error in the Court's Charge to the Jury in Texas Criminal Cases,* 46 TEX. B.J. 409, 409 (1983) ("principle vice of the fundamental error doctrine as applied to the jury charge is that it encourages defense counsel to 'lay behind the log' and withhold assistance to the trial judge in ferreting out certain errors in the charge").

132. *See* Britton v. State, 653 S.W.2d 438, 439 (Tex. Crim. App. 1983); Newton v. State, 648 S.W.2d 693, 694 (Tex. Crim. App. 1983); Antunez v. State, 647 S.W.2d 649, 650 (Tex. Crim. App. 1983); Barnes v. State, 644 S.W.2d 1, 1-2 (Tex. Crim. App. 1982); Duwe v. State, 642 S.W.2d 804, 805 (Tex. Crim. App. 1982); Doyle v. State, 631 S.W.2d 732, 733 (Tex. Crim. App. 1980); Williams v. State, 622 S.W.2d 578, 578 (Tex. Crim. App. 1981).

133. Cleland v. State, 575 S.W.2d 296, 299 (Tex. Crim. App. 1978) (Douglas, J., dissenting). Prior to 1981, article 40.09(13) provided that the court of criminal appeals should review all grounds of error urged in the defendant's brief and any unassigned error which the court felt should be reviewed in the interest of justice. *See* Acts 1965, ch. 722, art. 40.09, 1965 Tex. Gen. Laws 317, 478, *amended by* Act of Sept. 1, 1981, ch. 291, § 108, 1981 Tex. Gen. Laws 804, 804-08. Article 40.09(13) specifically provided: "Upon refusal of the court to grant defendant a new trial, the clerk shall thereupon promptly transmit the record and briefs to the Court of Criminal Appeals, in which court all grounds of error and arguments in support thereof urged in defendant's brief in the trial court shall be reviewed, as well as any unassigned error which in the opinion of the Court of Criminal Appeals should be

In the absence of an objection in the trial court, error resulting from the admission into evidence of identification testimony, confessions, and items illegally searched and seized in violation of the fourth and fifth amendments to the Constitution are waived.[134] It is difficult, if not impossible to rationalize the survival, absent objection, of an error in the form of jury charges in light of the cases prohibiting appellate review to a defendant failing to object to error of constitutional magnitude.

IV. PROPOSAL FOR REFORM

The authors of this article believe that it is time to recognize that fundamental error is not susceptible to definition by type or list, but is error so egregious that it directly affects the outcome of the case. It is, in essence, an appellate doctrine of last resort intended to ensure that justice prevails over form or technicality only where substantial and material deviations from the law make it apparent that

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reviewed in the interest of justice." *Id.* The provision allowing appellate courts to consider and reverse for unassigned error "in the interest of justice" was deleted by the legislature in 1981. *See* Act of Sept. 1, 1981, ch. 291, § 108, 1981 Tex. Gen. Laws 804, 804-08. Despite the legislature's implied mandate, the court of criminal appeals has continued to find unassigned fundamental error. The court's action in continuing to consider unassigned fundamental error has been rationalized under the guise that at the time notice of appeal was given, the 1981 amendment to article 40.09 was not yet in effect. *See* Barnes v. State, 644 S.W.2d 1, 2 (Tex. Crim. App. 1982). In *Barnes,* Judge Teague wrote: "The appellate procedure applicable to this appeal is the appellate procedure in effect at the time notice of appeal was given, January 10, 1979, which was prior to September 1, 1981, the date the amendment of Art. 40.09, which deleted subdivision 13, became effective." *Id.* at 2; *see also* Britton v. State, 653 S.W.2d 438, 439 n.1 (Tex. Crim. App. 1983). It remains to be seen if the court will continue to review unassigned error in the interest of justice in cases in which notice of appeal was given *after* September 1, 1981. Presiding Judge Onion wrote:

> It is sad to note that S.B. 265, Acts 1981, 67th Legislature, R.S., amending Article 40.09, V.A.C.C.P., deleted said § 13 as it now reads including the right of this Court to consider an unassigned error 'in the interest of justice.' It is hoped that the Legislature will quickly correct this blunder.

Bell v. State, 620 S.W.2d 116, 123 n.1 (Tex. Crim. App. 1981) (Opinion on Motion for Reh'g).

134. *See, e.g.,* Hernandez v. State, 538 S.W.2d 127, 129 (Tex. Crim. App. 1976) (fourth amendment violation waived by failure to object); Taylor v. State, 489 S.W.2d 890, 892 (Tex. Crim. App. 1973) (in absence of objection, error attending admission of evidence obtained in violation of fifth amendment waived); Williams v. State, 477 S.W.2d 24, 26 (Tex. Crim. App. 1972) (defendant's claim that trying him in jail clothes infringed his right to be presumed innocent waived because of failure to object); *see also* White v. State, 629 S.W.2d 701, 704-05 (Tex. Crim. App. 1981) (failure to object to *Witherspoon* error in capital case voir dire waives error), *cert. denied,* __U.S.__, 70 L. Ed. 2d 392, 102 S. Ct. 1995 (1981).

a defendant has been denied a fair trial.[135] The recent court of criminal appeals' decision, *Almanza v. State,*[136] seems to suggest that the court is not nearly as "firmly committed" to the present manner of reviewing fundamental error in the charge as one article has suggested.[137] Absent a clear showing of harm, it is inappropriate for review of fundamental error to provide for per se reversal of the case in light of the counsel's conscious failure to follow proper trial procedure in objecting to the charge.[138] This has long been the rule of law followed by the United States Supreme Court[139] and in other jurisdictions,[140] but Texas jurisprudence has over the years strayed with respect to review of unassigned error in the jury charge.

In sum, we must realize that:

> Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.[141]

In 1894, Justice Brewer wrote for the United States Supreme Court on the subject of charge error, unobjected to at trial.[142] From the record, he discovered the following:

> There is no intimation . . . that the defendant at the time thought that the court was trying to coerce the jury, or suggested that its language

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135. *See* Henderson v. Kibbe, 431 U.S. 145, 156-57 (1977); Cupp v. Naughten, 414 U.S. 141, 146-47 (1973).

136. No. 242-83 (Tex. Crim. App. February 8, 1984) (not yet reported).

137. *Compare* Odom & Valdez, *A Review of Fundamental Error in Jury Charges in Texas Criminal Cases,* 33 BAYLOR L. REV. 749, 749 (1981) (court committed to view that fundamental charge error mandates automatic reversal) *with* Almanza v. State, No. 242-83 (Tex. Crim. App. February 8, 1984) (not yet reported) (Miller, J., concurring) (court should redefine fundamental error) *and id.* (Clinton, J., dissenting) (criticizes majority's refusal to redefine fundamental error doctrine).

138. *See* Namet v. United States, 373 U.S. 179, 190 (1963); Boyd v. United States, 271 U.S. 104, 108 (1926); Castoreno v. State, 151 Tex. Crim. 379, 382, 208 S.W.2d 563, 564-65 (1948) (Opinion on Appellant's Motion to Reinstate Appeal).

139. *See* Namet v. United States, 373 U.S. 179, 190 (1963); Boyd v. United States, 271 U.S. 104, 108 (1926).

140. *See* Brooks v. State, 511 S.W.2d 654, 655 (Ark. 1974); State v. Jaramillo, 508 P.2d 1316, 1317 (N.M. Ct. App.), *cert. denied,* 414 U.S. 1000 (1973); People v. Washington, 416 N.Y.S.2d 626, 633 (N.Y. App. Div. 1979), *aff'd,* 413 N.E.2d 1159, 1163 (N.Y. 1980); Schapansky v. State, 478 P.2d 912, 914 (Okl. Crim. App. 1970).

141. Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

142. Allis v. United States, 155 U.S. 117, 120-24 (1894).

> might have such an influence on them. Evidently the claim of coercion is an afterthought from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing the judgment. A party must make every reasonable effort to secure from the trial court rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; . . . . Repeated decisions have emphasized the necessity of a strict adherence to this rule. . . .[J]ustice itself, and fairness to the court which makes the rulings complained of, require that the attention of the court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception.[143]

Fundamental error in the jury charge reviewed on appeal in the absence of objection, therefore, ought to be viable but rare.[144] Review should be made on a case-by-case basis of the alleged error against the entire record including the indictment, the procedures of trial, evidence adduced, arguments of counsel, and the entire charge.[145] The reviewing court should measure the entire record against a proper charge and question whether the error is of such magnitude as to have violated the appellant's right to due process. Such a rule has been expressed thusly:

> The theory . . . appears to be that where the defendant in a criminal prosecution has been deprived of a fair trial because of the omission or misdirection in question, where, in other words, the record indicates clearly that the jury might have acquitted if the excluded or misrepresented element had been correctly charged, the defendant should not be deprived of a retrial because of the negligence or incompetence of his counsel.[146]

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143. *Id.* at 122; *cf.* Estelle v. Williams, 425 U.S. 501, 508 n.3 (1976) (errors not objected to at trial should be waived because defendant has obligation to bring matter to trial court's attention so court can correct alleged error).

144. *See* Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

145. *See* United States v Park, 421 U.S. 658, 675-76 (1975); Cupp v. Naughten, 414 U.S. 141, 146-47 (1973); *see also* Plunkett v. Estelle, 709 F.2d 1004, 1009 (5th Cir. 1983) (court "disagree[s] with the Texas Court of Criminal Appeals' refusal to look beyond the ambiguous charge in answering this question" of fundamental error); WHARTON'S CRIMINAL PROCEDURE § 537 (12th ed. 1976) (in reviewing jury instruction, charge must be "viewed as whole, not as isolated paragraphs").

146. Annot., 169 A.L.R. 315, 352 (1947); *see* Henderson v. Kibbe, 431 U.S. 145, 154 (1977); FLA. STAT. ANN. § 924.33 (West 1973). The Florida statute provides:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected

Article 36.19,[147] on the other hand, should be applied as the statutory procedure and standard for review of *properly preserved* error in the charge.[148] It obviously relates to and should be applied within the context of the preceding five articles of the Code.[149] An oft-quoted portion of article 36.19 makes it clear that:

> the judge shall, before the argument begins, deliver to the jury, . . . written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.[150]

The remainder of article 36.19 is devoted to the procedure for objecting to, and preserving for review any error in the charge.[151] The frequently ignored yet inescapable directive of this procedure is that the defendant must object orally or in writing on record in order to preserve error in the charge prepared by the trial judge.[152] Courts should retreat to the proper construction of article 36.19 as expressed in *Echols v. State:*[153]

> It is just such cases . . . that caused the Legislature to amend . . . the Code of Criminal Procedure, and provide that the errors in the charge should not be cause for reversal, unless objected to when presented to counsel for their inspection . . . . The Legislature desired to correct

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the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Id.

147. TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981).

148. *See id.*

149. *See id.* (article 36.19 applies when requirements of articles 36.14, 36.15, 36.16, 36.17 or 36.18 have been disregarded).

150. *See id.*

151. *See id.*

152. *See id.* art. 36.15. The court of criminal appeals should recognize that the requirements of the articles preceding article 36.19 concern *requirements that the trial judge shall:* draft the charge, offer it to the defendant for inspection, provide an opportunity for objection, provide an opportunity for and receive special requested charges, and tender the charge to the jury. *See id.* arts. 36.14 - 36.18. The view expressed, for example, in Dowden v. State, 537 S.W.2d 5, 6 n.1 (Tex. Crim. App. 1979), that the *defendant's* failure to object to the charge disregards the requirement of article 36.14 triggering review of the unassigned error "appearing from the record" under the harm standard of article 36.19, is untenable. Article 36.19 precludes such a circuitous construction. The view expressed in *Dowden* also circumvents the legislature's purpose in amending the charge provisions to require that all objections to the charge shall be made at the time of trial.

153. 75 Tex. Crim. 369, 380, 170 S.W. 786, 791-92 (1914).

> what it considered an evil, and said this court should not reverse under such circumstances, and should not consider such grounds on appeal when the trial court's attention was not called to such matters before the charge was read to the jury.[154]

V. CONCLUSION

In sum, the court of criminal appeals should unravel the presently intertwined standards of review for preserved and unpreserved error in the court's charge to the jury. As part of that process the court should reanalyze the legislature's reason for instituting in 1913 a detailed procedure for the defendant's objections to the charge, and reaffirm the Code of Criminal Procedure's admonition that all objections to the charge are to be made at the time of trial. Review of fundamental error, with an attendant requirement that the defendant show harm of constitutional magnitude, will restore the Texas fundamental error doctrine to its rightful place.

154. *Id.* at 380, 170 S.W. at 791-92.