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APPELLATE REVIEW OF CRIMINAL CASES IN TEXAS

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I. INTRODUCTION

This Article is designed to guide the Texas practitioner in effectively preparing and presenting criminal cases on appeal. The primary focus of this Article concerns the standards of review used by appellate courts in determining the merits of the issues raised before them.[1] Equally important are the proper preservation and presentation of those issues. If error is not preserved at trial, not properly presented to the reviewing court, or raised in the wrong forum, even the most persuasive application of the appropriate standard of review will fail to result in a grant of relief. Similarly, convincing the appellate court that the trial court erred may not

1. For an excellent discussion of the importance of understanding and applying the proper standard of review on appeal, see W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1041, 1048–50 (1993).

result in relief unless counsel clearly grasps the concept of harmfulness and can effectively apply that concept to the case at hand.[2]

This Article certainly does not exhaust the matters that may be raised on appeal in a criminal case. Rather, it covers a variety of issues and errors commonly raised in the "ordinary" criminal appeal. Issues peculiar to capital cases are beyond this Article's scope.

Some appellate issues are measured by a standard of review unique to that issue. For example, courts employ a specific standard when reviewing the sufficiency of the evidence—whether, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[3] A variety of other standards of review used by appellate courts are illustrated below.

Many issues are reviewed according to the more amorphous "abuse of discretion" standard. When addressing an issue under this standard, a party must go beyond convincing the appellate court that the trial court exercised dubious judgment or that the appellate court would have reached a contrary decision. While the concept of abuse of discretion may be difficult to grasp, it is not, as some would urge, the equivalent of an "it just ain't fair" standard of review. As articulated by the Court of Criminal Appeals, the appellant must demonstrate that the trial court's decision was "so clearly wrong as to lie outside that zone within which reasonable persons might disagree."[4] Thus, the abuse of discretion standard is not an invitation for the appellate court to second-guess the rulings of the trial court, but is merely an opportunity for the appellate courts to ensure that trial court rulings are based on the law and facts.

Appellate courts have formulated tests or factors to guide the trial court's exercise of its discretion. A number of these tests are set out below. After the consideration of all pertinent factors, the ultimate determination of the issue still remains within the discretion of the trial court. While failure to consider the proper factors or to apply the appropriate legal test may be deemed an abuse of discretion, the weight given those factors and the manner in which

2. *See id.* at 1055–57 (distinguishing concepts of waiver and harm).
3. Jackson v. Virginia, 443 U.S. 307, 319 (1979).
4. Cantu v. State, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992) (citations omitted).

the trial court applies them in reaching its ultimate decision will seldom constitute an abuse of discretion.

The information contained in this Article cannot transform bad facts into good ones or create reversible error when none exists. Understanding and utilizing this information in the presentation of issues on appeal will, however, help the practitioner direct the appellate court to find reversible error where it does exist and lead to the result that justice requires.

II. APPELLATE JURISDICTION

A. *Court of Appeals Jurisdiction*

The appellate jurisdiction of the courts of appeals is "coextensive with the limits of their respective districts in all criminal cases except those in which the death penalty has been assessed."[5] This jurisdiction does not include appeals from an inferior court to a county court, county criminal court, or county court at law if the fine imposed by the inferior court does not exceed one hundred dollars, unless the sole issue raised is the constitutionality of the statute or ordinance upon which the conviction is based.[6] In addition, the courts of appeals lack jurisdiction over appeals concerning the denial of bail under Article I, Section 11a of the Texas Constitution.[7]

B. *Court of Criminal Appeals Jurisdiction*

The Court of Criminal Appeals has "final appellate and review jurisdiction in criminal cases coextensive with the limits of the state, and its determinations shall be final."[8] Cases that result in the assessment of the death penalty are directly appealed to the Court of Criminal Appeals.[9] The Court of Criminal Appeals may review any court of appeals decision in a criminal case on petition

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5. TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 1995); *accord* TEX. CONST. art. V, § 6.

6. TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 1995); Abrams v. State, 563 S.W.2d 610, 612 n.2 (Tex. Crim. App. 1978).

7. Primrose v. State, 725 S.W.2d 254, 255–56 (Tex. Crim. App. 1987).

8. TEX. CODE CRIM. PROC. ANN. art. 4.04, § 2 (Vernon Supp. 1995); *accord* TEX. CONST. art. V, § 5.

9. TEX. CODE CRIM. PROC. ANN. art. 4.04, § 2 (Vernon Supp. 1995); TEX. CONST. art. V, § 5.

for discretionary review by one of the parties or on its own motion.[10]

III. General Principles of Appellate Review

A. *Miscellaneous Principles*

1. Right to Review

There is no constitutional right to appellate review of a criminal conviction.[11] A party may only appeal in circumstances authorized by the Texas Legislature.[12] Article 44.02 of the Texas Code of Criminal Procedure states a defendant's general right to appeal,[13] while Article 44.01 contains the State's limited right to appeal.[14]

2. Discretionary Review

a. Exercise of Discretionary Review

Although review in the courts of appeals is a matter of right if brought in compliance with applicable statutes and rules, review by the Court of Criminal Appeals is within the court's sound judicial discretion.[15] Rule 200(c) of the Texas Rules of Appellate Procedure lists a variety of reasons that the court will consider in determining whether to grant or deny discretionary review.[16]

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10. Tex. Code Crim. Proc. Ann. art. 4.04, § 2 (Vernon Supp. 1995); Tex. Const. art. V, § 5.

11. Phynes v. State, 828 S.W.2d 1, 2 (Tex. Crim. App. 1992).

12. Olowosuko v. State, 826 S.W.2d 940, 941 (Tex. Crim. App. 1992); *accord* Galitz v. State, 617 S.W.2d 949, 951 (Tex. Crim. App. 1981).

13. Tex. Code Crim. Proc. Ann. art. 44.02 (Vernon 1979).

14. *Id.* art. 44.01.

15. *Id.* art. 4.04; Tex. R. App. P. 200(b).

16. Tex. R. App. P. 200(c). The enumerated reasons are:

(1) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;

(2) Where a court of appeals has decided an important question of state or federal law which has not been, but should be, settled by the Court of Criminal Appeals;

(3) Where a court of appeals has decided an important question of state of federal law in conflict with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States;

(4) Where a court of appeals has declared unconstitutional, or appears to have misconstrued, a statute, rule, regulation, or ordinance;

(5) Where justices of the court of appeals have disagreed on a material question of law necessary to its decision; and

Nevertheless, this list neither controls nor fully measures the limits of the Court of Criminal Appeals's discretion.[17]

The scope of the Court of Criminal Appeals' discretionary review is limited to decisions of the courts of appeals.[18] Thus, the court will not address any issue not first presented to and considered by the court of appeals.[19]

In exercising its discretionary review, the Court of Criminal Appeals will not reverse the decision of a court of appeals merely on the basis that it might have reached a contrary decision, especially if sufficient evidence supporting the lower court's decision exists.[20] For example, in *Arcila v. State*, the Court of Criminal Appeals did not determine as an empirical matter whether the appellate court was correct. Instead, while using the appropriate legal criterion, evaluating all pertinent evidence in the record, and "affording proper deference to the trial judge as primary fact finder," the court limited its review to whether the lower court fairly assessed the voluntariness of appellant's consent.[21] The court then stated:

> Like this Court, the courts of appeals are duty-bound to uphold the constitution and laws of this State and of the United States. So long as it appears that they have discharged that duty conscientiously by impartial application of pertinent legal doctrine and fair consideration of the evidence, it is our duty in turn to respect their judgments. Our principal role as a court of last resort is the caretaker of Texas law, not the arbiter of individual applications. When different versions of the law, including unsettled applications of the law to signifi-

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(6) Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

Id.

17. *See* TEX. R. APP. P. 202(k) (noting that four judges on court must vote to grant petition for discretionary review, but five judges may thereafter vote that discretionary review was improvidently granted and dismiss petition).

18. Farrell v. State, 864 S.W.2d 501, 502 (Tex. Crim. App. 1993); *see also* TEX. R. APP. P. 200(a), 202(a) (authorizing review of courts of appeals decisions).

19. *Farrell*, 864 S.W.2d at 502–03; *see also* Tallant v. State, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987) (asserting that on appeal, State must contend that error was not preserved). By the same token, the court of appeals must address every issue raised and necessary to the disposition of the case; failure to do so may result in summary reversal by the Court of Criminal Appeals. *See* Ikner v. State, 848 S.W.2d 161, 162 (Tex. Crim. App. 1993) (granting summary reversal for failure to address State's contention that defendant's error was not preserved).

20. Arcila v. State, 834 S.W.2d 357, 361 (Tex. Crim. App. 1992).

21. *Id.* at 360.

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> cantly novel fact situations, compete for control of an issue, it is finally the job of this Court to identify and elaborate which is to control thereafter. But, except under compelling circumstances, ultimate responsibility for the resolution of factual disputes lies elsewhere.[22]

A footnote disclaiming any interpretation of the court's constitutional powers followed this statement:

> Our holding is not an interpretation of this Court's constitutional jurisdiction. Although the Texas Constitution does confer different authority upon this and upon the lower appellate courts, we have not yet fully explored the limit of our own power under the Constitution to review decisions of the courts of appeals, and we do not purport to do so here. Rather, we mean to establish a general rule of restraint, insofar as our discretionary review function is concerned, which will largely leave business of basic appellate review to the intermediate courts.[23]

The court then reiterated the importance of reserving its discretionary review prerogative for instances in which confusion over its prior decisions exists.[24] Moreover, the court noted that discretionary review is likewise warranted to reconcile settled differences between the various courts of appeals and to foster the fair administration of justice by Texas trial and appellate courts.[25]

b. Effect of Refusal of Discretionary Review

Practitioners should be aware that the refusal of discretionary review in any case is of no precedential value and does not constitute approval of the language or reasoning of the court of appeals.[26] This is true whether discretionary review is refused with or without opinion.[27] Thus, while citation to a Court of Criminal Appeals opinion should include the petition history in that court, a "petition refused" case technically has no greater weight than a "no petition" case.

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22. *Id.*
23. *Id.* at 360 n.2.
24. *Arcila*, 834 S.W.2d at 361.
25. *Id.*
26. Raetzsch v. State, 733 S.W.2d 224, 224 (Tex. Crim. App. 1987); Sheffield v. State, 650 S.W.2d 813, 814 (Tex. Crim. App. 1983); Campbell v. State, 647 S.W.2d 660, 660 (Tex. Crim. App. 1983).
27. *Sheffield*, 650 S.W.2d at 814.

3. Advisory Opinions

Neither the Court of Criminal Appeals nor the courts of appeals have authority to render advisory opinions.[28] An advisory opinion occurs when a court undertakes to resolve an issue not arising from a genuine dispute capable of final adjudication.[29] Similarly, the Court of Criminal Appeals is not authorized to consider certified questions.[30]

B. *Preservation of Error*

1. Necessity of Objection

A basic tenet of appellate practice requires that error be preserved at the trial level.[31] To preserve an issue for appellate review, Rule 52(a) of the Rules of Appellate Procedure requires a party to present at trial a timely objection specifically stating the legal bases for the objection.[32] Courts have repeatedly reaffirmed this requirement.[33] In addition, any appellate arguments must comport with the objection made at trial.[34]

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28. Armstrong v. State, 805 S.W.2d 791, 794 (Tex. Crim. App. 1991); *see Ex parte* Ruiz, 750 S.W.2d 217, 218 (Tex. Crim. App. 1988) (recognizing well-established rule that Court of Criminal Appeals generally has no authority to render advisory opinions).

29. Garrett v. State, 749 S.W.2d 784, 803 (Tex. Crim. App. 1986).

30. *Ruiz*, 750 S.W.2d at 218; *see* Trevino v. State, 655 S.W.2d 209, 210 (Tex. Crim. App. 1983) (acknowledging that Court of Criminal Appeals lacks jurisdiction to answer certified questions).

31. Tatum v. State, 798 S.W.2d 569, 571 (Tex. Crim. App. 1990).

32. TEX. R. APP. P. 52(a). Rule 52(a) states that, "to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context." *Id.*

33. *See, e.g.*, Butler v. State, 872 S.W.2d 227, 236 (Tex. Crim. App. 1994) (recognizing requirements to preserve error under Rule 52(a)); Ethington v. State, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) (commenting on proper method of error preservation); Rezac v. State, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990) (noting that "for an issue to be preserved on appeal, there must be a timely objection which specifically states the legal basis for the objection"); Little v. State, 758 S.W.2d 551, 564 (Tex. Crim. App.) (explaining that failure to timely object can even waive error involving constitutional rights), *cert. denied*, 488 U.S. 934 (1988).

34. *Butler*, 872 S.W.2d at 236; *Rezac*, 782 S.W.2d at 870.

2. Timeliness of Objection

To satisfy the requirement of timeliness, a party must have objected to the evidence, if possible, before its actual admission.[35] If an objection before the actual admission was impossible, the party must have objected immediately upon learning of the objectionable nature of the evidence and must have moved to strike the evidence.[36] Striking a particular piece of evidence removes it from the body of evidence available for the jury's consideration.[37]

A defendant must object to allegedly inadmissible evidence each time it is offered.[38] This requirement exists because an error in the admission of evidence is cured when the same evidence is admitted elsewhere without objection.[39] As the El Paso Court of Appeals noted:

> [T]his [rule] does not necessitate interruption of each sentence of the witness's challenged response. It does, however, require renewal of the appropriate objection at the outset of each discrete attempt to pursue the contested evidence, either with the same witness or with some other witness proffering the same challenged evidence.[40]

The general rule requiring an objection to the admission of evidence at the time it is offered presupposes that the evidence is objectionable at that time.[41] Under certain circumstances, however, the grounds for objection become apparent only after admission of the evidence.[42] In those instances, a party may present a timely objection following the admission of the evidence.[43]

A further exception to the requirement that an objection must be lodged at the time evidence is admitted is found when a defendant obtains an adverse ruling on the admissibility of the evidence outside the hearing of the jury, such as a ruling on a motion to suppress. In these instances, a defendant need not reurge an objec-

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35. *Ethington*, 819 S.W.2d at 858.
36. *Id.*
37. *Id.*
38. Goodman v. State, 701 S.W.2d 850, 863 (Tex. Crim. App. 1985); Hudson v. State, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984).
39. *Ethington*, 819 S.W.2d at 858; *Hudson*, 675 S.W.2d at 511.
40. Mares v. State, 758 S.W.2d 932, 933 (Tex. App.—El Paso 1988, pet. ref'd).
41. Johnson v. State, 878 S.W.2d 164, 167 (Tex. Crim. App. 1994).
42. *Id.*
43. *Id.* at 168; *see also* Sierra v. State, 482 S.W.2d 259, 262–63 (Tex. Crim. App. 1972); Knox v. State, 722 S.W.2d 793, 794–95 (Tex. App.—Amarillo 1987, pet. ref'd).

tion at trial when the evidence is actually admitted.[44] Rule 52(b) provides that objections on which the court ruled prior to trial shall be deemed to apply when the evidence is admitted. This language is mandatory.[45] However, if the defendant states "no objection" at the time the evidence is offered at trial, any error is waived.[46]

A running objection may be sufficient to preserve error if it is properly used.[47] This reflects the realization that constant objections may be disruptive when the trial judge forces an attorney to urge the same objection each time the matter arises just so the attorney can receive the same ruling from the judge to preserve error. As long as the objection satisfies Rule 52's timeliness and specificity requirements, the appellate court should deem the objection preserved. However, as emphasized in *Goodman v. State*,[48] an advocate lodging a running objection should carefully craft the objection so as not to encompass too broad a reach of subject matter over an extensive time period through various witnesses.[49] Nevertheless, the Court of Criminal Appeals has recognized that, in certain situations, running objections not only are adequate methods of preserving error, but are also preferable.[50]

3. Sufficiency of Objection

Rule 52 requires an objection to state the specific grounds for the desired ruling unless the specific grounds are apparent from the context of the objection.[51] Thus, "an otherwise insufficient general objection will be sufficient where the correct ground of exclusion is

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44. TEX. R. APP. P. 52(b); *Ethington*, 819 S.W.2d at 859; Peake v. State, 792 S.W.2d 456, 458–59 (Tex. Crim. App. 1990); Wyle v. State, 777 S.W.2d 709, 715 n.5 (Tex. Crim. App. 1989).

45. *See* Maynard v. State, 685 S.W.2d 60, 65 (Tex. Crim. App. 1985) (construing identical language in Article 40.09, § 6(d)(3) of prior Code of Criminal Procedure).

46. James v. State, 772 S.W.2d 84, 97 (Tex. Crim. App.), *vacated on other grounds*, 493 U.S. 885 (1989); Gearing v. State, 685 S.W.2d 326, 329 (Tex. Crim. App. 1985).

47. *Ethington*, 819 S.W.2d at 858–59.

48. 701 S.W.2d 850 (Tex. Crim. App. 1985).

49. *Ethington*, 819 S.W.2d at 859.

50. *Id.*

51. TEX. R. APP. P. 52(a); *see Butler*, 872 S.W.2d at 237 (finding no preservation of error for lack of specificity in trial objection); *Ethington*, 819 S.W.2d at 858 (reiterating that specific objection is required for preservation of error); *Rezac*, 782 S.W.2d at 870 (acknowledging requirement that specific trial objection must be consistent with appellate objection); *Little*, 758 S.W.2d at 564 (rejecting appellate review of trial objection that lacked specificity and thus could not be related to claim of error).

obvious to the trial court."[52] Prudence suggests, however, that counsel should not rely on the ground of objection being obvious to the trial court or a reviewing court. The better practice is to articulate on the record the specific basis for objection. No specific form of words need be used; "[s]traightforward communication in plain English will always suffice."[53]

The following are examples of objections that courts have deemed too general or otherwise insufficient: (1) failure to lay the proper predicate for particular evidence;[54] (2) irrelevancy of evidence;[55] and (3) failure to establish the proper chain of custody.[56]

4. Obtaining a Ruling

Raising an appropriate objection is the first step in preserving error at trial.[57] Counsel must also obtain a ruling on each objection.[58] If the trial court refuses to rule on an objection, error

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52. Camacho v. State, 864 S.W.2d 524, 533 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1339 (1994); *see* Lankston v. State, 827 S.W.2d 907, 908 (Tex. Crim. App. 1992) (recognizing validity of general objections, although discouraging their use, when grounds are apparent from context); Zillender v. State, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977) (delineating exception to specificity requirement for general objections when correct ground of objection is obvious to judge and opposing counsel).

53. *Lankston*, 827 S.W.2d at 909.

54. *See, e.g.*, Bird v. State, 692 S.W.2d 65, 70 (Tex. Crim. App. 1985) (finding objection too general to preserve error), *cert. denied*, 475 U.S. 1031 (1986); Williams v. State, 596 S.W.2d 862, 866 (Tex. Crim. App. 1980) (refusing objection to admission of evidence consisting of two tire tools as too general); Boss v. State, 489 S.W.2d 582, 584 (Tex. Crim. App. 1972) (contending that objection to admission of evidence must be specific and must state grounds of objection or it will not be considered).

55. *See* Barnard v. State, 730 S.W.2d 703, 716 (Tex. Crim. App. 1987) (holding that general objection of irrelevancy presents no error for review), *cert. denied*, 485 U.S. 929 (1988); McWherter v. State, 607 S.W.2d 531, 535 (Tex. Crim. App. 1980) (determining that objection to testimony as irrelevant and immaterial was insufficient to call trial court's attention to complaint on appeal).

56. *See* Juhasz v. State, 827 S.W.2d 397, 402 (Tex. App.—Corpus Christi 1992, pet. ref'd) (declaring that breaks in chain of custody go to weight rather than admissibility of evidence); Silguero v. State, 654 S.W.2d 492, 493–94 (Tex. App.—Corpus Christi 1983, pet. ref'd) (denying appellant's contention that rule more strict than general rule should apply).

57. TEX. R. APP. P. 52(a).

58. *Id.*; *see also* Flores v. State, 871 S.W.2d 715, 722–23 (Tex. Crim. App. 1993) (finding that appellant preserved nothing for review by failing to pursue objection until adverse ruling was obtained), *cert. denied*, 115 S. Ct. 313 (1994); *Ethington*, 819 S.W.2d at 858 (asserting that objection to judge's refusal to rule on objection is sufficient to preserve error); Johnson v. State, 504 S.W.2d 493, 494 (Tex. Crim. App. 1974) (holding that defendant's motion, which was never brought to court's attention, was not preserved for review). It is also necessary to obtain a ruling on a request for an instruction to disregard or a motion for

may be preserved by an objection to the court's refusal to rule.[59]

5. Requesting Further Relief

If a party's objection is sustained and no further relief is sought, the reviewing court will deem that all relief sought was received and that nothing is presented for review.[60] To preserve error following a sustained objection, the movant must request an instruction to disregard and, after obtaining such an instruction, move for a mistrial.[61] These steps must be taken in sequence; counsel cannot make an objection, request an instruction, and move for a mistrial without first obtaining a ruling on the objection.[62]

6. Comporting with the Complaint Raised on Appeal

If the error presented on appeal fails to comport with the objection raised at trial, nothing is preserved for review.[63] This rein-

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mistrial. *See* Turner v. State, 719 S.W.2d 190, 194 (Tex. Crim. App. 1986) (suggesting that parties must require trial judge to make definite ruling on record).

59. TEX. R. APP. P. 52(a); *see Ethington*, 819 S.W.2d at 858 (stating that objection to judge's refusal to rule is sufficient to preserve error).

60. *See* Harris v. State, 784 S.W.2d 5, 16 (Tex. Crim. App. 1989) (finding that prosecutor's improperly elicited hearsay testimony was not preserved for review when defendant did not object on that ground), *cert. denied*, 494 U.S. 1090 (1990); Boyd v. State, 643 S.W.2d 700, 707 (Tex. Crim. App. 1982) (contending that appellant obtained all relief requested because he did not request jury instruction); Earnhart v. State, 582 S.W.2d 444, 449 (Tex. Crim. App. 1979) (noting defendant's failure to preserve error with respect to his objection to prosecutor's closing argument); Lasker v. State, 573 S.W.2d 539, 543 (Tex. Crim. App. 1978) (concluding that error was not preserved because there was no request to disregard judge's prejudicial remark); Cowan v. State, 562 S.W.2d 236, 239 (Tex. Crim. App. 1978) (determining that general objection did not present prosecutor's specific question for review).

61. *See* Moody v. State, 827 S.W.2d 875, 890 (Tex. Crim. App.) (construing appellant's timely objection to testimony, instruction from trial court, and motion for mistrial properly preserved claim of error), *cert. denied*, 113 S. Ct. 119 (1992); Coe v. State, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984) (declaring counsel's method of preserving error sufficient even though it did not strictly follow preservation of error steps); Brooks v. State, 642 S.W.2d 791, 798 (Tex. Crim. App. 1982) (asserting that failure to ask for instruction to disregard resulted in failed presentation of error).

62. *See* DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979) (overruling appellant's motion for mistrial when presented before obtaining instruction to disregard).

63. Allridge v. State, 762 S.W.2d 146, 157 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1040 (1989); *Little*, 758 S.W.2d at 564; Pyles v. State, 755 S.W.2d 98, 116 (Tex. Crim. App.), *cert. denied*, 488 U.S. 986 (1988); *see* Ranson v. State, 707 S.W.2d 96, 99 (Tex. Crim. App.) (asserting that objection must comply with error raised on appeal), *cert. denied*, 479 U.S. 840 (1986).

forces the need for a specific trial objection. In *Turner v. State*,[64] the Court of Criminal Appeals noted that the trial court could have sustained appellant's objection—"Your Honor, I object to that"—for a variety of reasons. Because of the general nature of the objection and the ambiguity of the court's ruling, the reviewing court could not determine that the objection at trial was sustained on the same ground as was raised on appeal.[65] The court concluded that "[t]he groundless objection was insufficient to preserve error."[66]

7. Error in the Charging Instrument

Since the 1985 amendment to Article V, Section 12(b) of the Texas Constitution, the Court of Criminal Appeals has held that error is waived unless a party raises the error in the charging instrument before trial.

> [T]he mere presentment of an information to a trial court invests that court with jurisdiction over the person of the defendant, regardless of any defect that might exist in the underlying complaint. . . . Defects in complaints . . . must now be raised before trial pursuant to Article 27.03 [of the Code of Criminal Procedure]; they are no longer "jurisdictional" in the traditional sense.[67]

8. Motion in Limine

The granting of a motion in limine does not preserve error.[68] To preserve error with regard to the subject matter of the motion in limine, a party must object at the time the issue is raised during the trial.[69]

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64. 719 S.W.2d 190 (Tex. Crim. App. 1986).

65. *See Turner*, 719 S.W.2d at 194 (suggesting that trial court could have sustained objection for several reasons).

66. *Id.*

67. Aguilar v. State, 846 S.W.2d 318, 320 (Tex. Crim. App. 1993); *see also* TEX. CONST. art. V, § 12(b); TEX. CODE CRIM. PROC. ANN. art. 27.03 (Vernon 1983); *id.* art. 1.14(b) (Vernon Supp. 1995) (mandating that defect in form or substance is waived if not raised prior to day of trial).

68. Gonzales v. State, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985), *cert. denied*, 472 U.S. 1009 (1985); *see* Goss v. State, 826 S.W.2d 162, 168–69 (Tex. Crim. App. 1992) (noting well-established rule that motion in limine alone will not sustain error for appellate review), *cert. denied*, 113 S. Ct. 3035 (1993).

69. *Gonzales*, 685 S.W.2d at 50.

9. Bill of Exception or Offer of Proof

Excluded evidence may be preserved in the record for appellate review by an offer of proof or bill of exception.[70] According to the Court of Criminal Appeals:

> In order for a complaint concerning the exclusion of evidence to be considered by an appellate court, the record must show what the excluded testimony would have been. Absent a showing of what such testimony would have been, or an offer of a statement concerning what the excluded evidence would show, nothing is presented for review.[71]

If the trial court excludes evidence, the proponent of that evidence has an absolute right to make an offer of proof or to perfect a bill of exception.[72] The trial court has no discretion to deny a request for a bill of exception.[73] Furthermore, a party who desires to perfect a bill of exception in question-and-answer form is absolutely entitled to do so; the trial court has no discretion to require that the bill be perfected in summary form.[74]

The importance of preserving error for appellate review by bill of exception cannot be overstated. "[T]he cases are legion in which appellants have lost appeals for lack of preservation of error due to counsel's failure to request the opportunity to make an offer of proof."[75]

10. Fundamental Error

While Rule 52 requires a timely request, objection, or motion to preserve error for appellate review, the jurisdiction of the appellate

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70. TEX. R. APP. P. 52(b); TEX. R. CRIM. EVID. 103(b).

71. Stewart v. State, 686 S.W.2d 118, 122 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 866 (1985); *see* Rumbaugh v. State, 629 S.W.2d 747, 754 (Tex. Crim. App. 1982) (excluding videotape from appellate review because nothing in record indicated that contents of video establish relevance); James v. State, 546 S.W.2d 306, 311 (Tex. Crim. App. 1977) (requiring showing of contents of excluded testimony or offer of proof to preserve testimony for appellate review).

72. Kipp v. State, 876 S.W.2d 330, 333 (Tex. Crim. App. 1994); *Tatum*, 798 S.W.2d at 571; *Spence*, 758 S.W.2d at 599.

73. *Kipp*, 876 S.W.2d at 333.

74. *Id.* at 334; *see* TEX. R. APP. P. 52(b) (directing mandatory allowance for making of offer of proof in question and answer form at request of party); TEX. R. CRIM. EVID. 103(b) (requiring court to direct making of offer of proof in question and answer form at request of party).

75. *Spence*, 758 S.W.2d at 599.

courts is not so limited. Thus, an appellate court may review unpreserved error, particularly if it deems that "[f]undamental unfairness and considerations of due process" require its attention.[76] The courts have consistently addressed fundamental error within the jury charge. However, the standard for reversible error is considerably more stringent than for preserved error.[77] Of course, the better practice is to specifically bring all error to the attention of the trial court on the record to avoid questions regarding preservation of error for appellate review.

C. *Presentation of Error*

1. Rules of Appellate Procedure

Rule 74 of the Rules of Appellate Procedure provides the requisites for briefs filed in the courts of appeals.[78] Requisites of petitions for discretionary review in the Court of Criminal Appeals are stated in Rule 202.[79] If review is granted, the parties must file briefs in compliance with Rule 74.[80]

2. Reference to Pages in the Record

An appellate court can accept as fact only those allegations or assertions in an appellant's brief that are supported by the record.[81] Thus, it is crucial that appellate briefs in criminal cases refer to the relevant pages in the record.[82] The Court of Criminal Appeals has emphasized that "the right to appellate review in this state extends only to complaints made in accordance with our published rules of appellate procedure—which require an appellant to specify the

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76. *See* Boutwell v. State, 719 S.W.2d 164, 173 (Tex. Crim. App. 1985) (op. on reh'g) (addressing issue raised for first time on appeal out of unfairness, due process, and prejudicial concerns).

77. See discussion *infra* Part III(D)(3).

78. TEX. R. APP. P. 74.

79. TEX. R. APP. P. 202.

80. TEX. R. APP. P. 203.

81. Beck v. State, 573 S.W.2d 786, 788 (Tex. Crim. App. 1978); *e.g.*, Franklin v. State, 693 S.W.2d 420, 431 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1031 (1986); Vanderbilt v. State, 629 S.W.2d 709, 717 (Tex. Crim. App. 1981), *cert. denied*, 456 U.S. 910 (1982); Holcomb v. State, 523 S.W.2d 661, 662 (Tex. Crim. App. 1975).

82. *See* TEX. R. APP. P. 74(d), (f) (requiring that points made on appeal refer to pages in record).

pages in the record where the alleged error can be found . . . ."[83] Failure to specify such pages fails to preserve issues for appellate review.[84]

3. Argument and Authorities

Because the Court of Criminal Appeals will not hesitate to overrule points of error on the ground that counsel failed to present argument or authorities, counsel should not simply state a point of error and then conclude that reversal is warranted.[85]

For example, in *Garcia v. State*,[86] a capital murder direct appeal, the court rejected twenty-five points of error as inadequately briefed. The court also took the opportunity to vent some of its frustration with inadequate briefs.[87] In a concurring and dissenting opinion, Judge Baird lamented that the majority's disposition of twenty-five points of error for briefing deficiencies did not serve the interests of judicial economy and justice.[88] Instead, Judge Baird would have ordered the brief redrawn pursuant to Rule 74 of the Rules of Appellate Procedure.[89] Although Judge Overstreet concurred in the result and Judge Clinton dissented, no other judge joined Judge Baird's opinion.

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83. Narvaiz v. State, 840 S.W.2d 415, 429 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 1422 (1993).

84. *See id.* (holding that appellant's complaint was not properly preserved for appellate review because brief failed to reference record).

85. *See, e.g.*, State v. Gonzalez, 855 S.W.2d 692, 697 (Tex. Crim. App. 1993) (affirming judgment of lower court that overruled point of error for failure to support point with argument or authority); Goodwin v. State, 799 S.W.2d 719, 723 n.1 (Tex. Crim. App. 1990) (refusing to address point that was inadequately briefed), *cert. denied*, 111 S. Ct. 2913 (1991); Pierce v. State, 777 S.W.2d 399, 418 (Tex. Crim. App. 1989) (characterizing point of error as being of constitutional dimension, but failing to argue specific theories), *cert. denied*, 496 U.S. 912 (1990); McWherter v. State, 607 S.W.2d 531, 536 (Tex. Crim. App. 1980) (concluding that appellant's attempt to raise ground of error on appeal failed because it did not cite supporting authority).

86. 887 S.W.2d 862 (Tex. Crim. App. 1994), *cert. denied*, 1995 U.S. LEXIS 2081 (Mar. 20, 1995).

87. *See Garcia*, 887 S.W.2d at 871, 876, 881–82 (stating that "appellant offer[ed] no legal argument or authority supporting his points," but instead merely quoted conclusory assertions, and insisting "that appellant meet his burden of providing clear and specific arguments"). The court lamented that the appellant's arguments were "the most egregious examples of multifarious and inadequately briefed points presented before this court in recent memory." *Id.* at 881–82.

88. *Garcia*, 887 S.W.2d at 884 (Baird, J., concurring and dissenting).

89. *Id.*

4. Unassigned Error

Texas appellate courts have jurisdiction and authority to review unassigned error.[90] Once jurisdiction is properly invoked, the exercise of the court's reviewing functions is limited only by the court's discretion and any applicable statute.[91] Of course, counsel should raise and brief all available points of error with merit and should not leave to chance whether an appellate court will recognize as fundamental any particular unassigned error.

5. Distinguishing State and Federal Claims

The Court of Criminal Appeals has held that the federal and state constitutions are not necessarily coextensive.

> [W]e recognize that state constitutions cannot subtract from the rights guaranteed by the United States Constitution, but they can provide additional rights to their citizens. The decisions of the Supreme Court represent the *minimum* protections which a state must afford its citizens. "The federal constitution sets the floor for individual rights; state constitutions establish the ceiling."[92]

For this reason, practitioners must be careful to present their state and federal constitutional arguments distinctly, providing substantive analysis or argument on each separate ground.[93] If counsel fails to do so, an appellate court "may overrule the ground as multifarious."[94]

Simply raising a claim under the Texas Constitution separately from a federal constitutional argument is not sufficient to present the state issue for review. The appellant must also offer arguments and authorities distinguishing the protection guaranteed under the state constitution from that guaranteed by the federal constitu-

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90. *See* Perry v. State, 703 S.W.2d 668, 670 (Tex. Crim. App. 1986) (stating that, although court disagreed with appellate court's decision, it recognizes ability to review unassigned error).

91. Rezac v. State, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990); *see* Carter v. State, 656 S.W.2d 468, 469 (Tex. Crim. App. 1983) (finding that, "after jurisdiction attaches to a particular cause, a broad scope of review and revision has been asserted by appellate courts of this state").

92. *See* Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (citing LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. Crim. App. 1986)).

93. McCambridge v. State, 712 S.W.2d 499, 501–02 n.9 (Tex. Crim. App. 1986).

94. *Id.*

tion.[95] In the absence of such a showing, the reviewing court will not consider the state issue.[96]

On the other hand, if federal and state constitutional issues are separately briefed, a court of appeals errs if it fails to separately address those contentions.[97] For example, in *Lockett v. State*,[98] the court of appeals overruled the appellant's search and seizure points without separately addressing his arguments under the Fourth Amendment and Article I, Section 9 of the Texas Constitution.[99] The Court of Criminal Appeals summarily granted appellant's petition for discretionary review, vacated the judgment of the court of appeals, and remanded the cause to that court for proper review of appellant's point of error.[100]

6. Lost or Destroyed Record

The appellant has the burden to provide a sufficient record that demonstrates reversible error.[101] If, however, an appellant has properly requested a statement of facts, "but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts."[102] To obtain relief under Rule 50(e) of

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95. *See* Johnson v. State, 853 S.W.2d 527, 533 (Tex. Crim. App. 1992) (refusing to address arguments because appellant failed to delineate difference between state and federal constitutions), *cert. denied*, 114 S. Ct. 154 (1993); Muniz v. State, 851 S.W.2d 238, 251 (Tex. Crim. App.) (explaining that state and federal constitutional issues must be argued on separate grounds using separate analysis or argument for each ground), *cert. denied*, 114 S. Ct. 116 (1993); *Narvaiz*, 840 S.W.2d at 432 (declining to review appellant's state constitutional claims because of failure to discuss state constitutional arguments or explain differences between state and federal constitutions).

96. *See Johnson*, 853 S.W.2d at 533 (declining "to pursue appellant's Texas Constitutional arguments for him"); *Muniz*, 851 S.W.2d at 252 (stating that "[w]e will not make appellant's state constitutional arguments for him").

97. *See* Lockett v. State, 861 S.W.2d 253, 253 (Tex. Crim. App. 1993) (granting discretionary review because court of appeals did not review appellant's search and seizure points of error separately).

98. 861 S.W.2d 253 (Tex. Crim. App. 1993).

99. *Lockett*, 861 S.W.2d at 253.

100. *Id.*

101. TEX. R. APP. P. 50(d).

102. TEX. R. APP. P. 50(e); Kirby v. State, 883 S.W.2d 669, 670 (Tex. Crim. App. 1994); *see* Culton v. State, 852 S.W.2d 512, 514 (Tex. Crim. App. 1993) (stating that Rule 50(e) requires appellants to diligently attempt to secure complete statement of facts); Dunn v. State, 733 S.W.2d 212, 216 (Tex. Crim. App. 1987) (holding that, if defendant is denied statement of facts, case should be reversed).

the Rules of Appellate Procedure, the appellant must show that he made a timely request for the statement of facts and that the notes were lost or destroyed without his fault.[103] The appellant must further demonstrate that he exercised due diligence in obtaining a complete statement of facts.[104]

Rule 50(e) provides that an incomplete record may be remedied if the parties agree on a statement of facts.[105] If the parties cannot agree, however, the trial court cannot assume facts. The defendant is entitled to a new trial.[106] The error is not subject to a harm analysis.[107]

7. New Grounds Raised on Rehearing and Remand

When a party raises a ground for the first time on motion for rehearing, the decision of whether to consider that new matter rests solely within the sound discretion of the appellate court.[108] Moreover, a court of appeals is free to consider new grounds of error presented after the case is remanded to that court from the Court of Criminal Appeals.[109] This holds true even if the new grounds of error are beyond the scope of the remand order.[110]

> [F]or [the Court of Criminal Appeals] to issue an order of remand to restrict the court of appeals in renewed exercise of its own jurisdiction, power and authority would seem to be an impermissible and unwarranted abridgement of constitutional grant of same to courts of appeals by Article V, § 6, Constitution of Texas, as implemented by Articles 4.03, 44.24 and 44.25, V.A.C.C.P.[111]

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103. *Culton*, 852 S.W.2d at 514.

104. *Id.*

105. TEX. R. APP. P. 50(e).

106. Lewis v. State, 844 S.W.2d 750, 752 (Tex. Crim. App. 1993).

107. Perez v. State, 824 S.W.2d 565, 568 (Tex. Crim. App. 1992).

108. Rochelle v. State, 791 S.W.2d 121, 124 (Tex. Crim. App. 1990); *accord* Riley v. State, 825 S.W.2d 699, 700 (Tex. Crim. App. 1992).

109. Spindler v. State, 740 S.W.2d 789, 791 (Tex. Crim. App. 1987). Importantly, the appellant stands in the same position as when the initial appeal was filed on remand from the court of appeals. Theus v. State, 863 S.W.2d 489, 490–91 (Tex. Crim. App. 1993). The appellant has 30 days following return of the record to the court of appeals in which to file a new brief. *Id.* at 491.

110. *Garrett*, 749 S.W.2d at 787.

111. *Id.*

D. *Reversible Error*

1. General Harm Analysis

The general "harmless error" rule for criminal cases is stated in Rule 81(b)(2) of the Rules of Appellate Procedure:

> 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.[112]

Note that Rule 81(b)(2)'s language presumes that the error is reversible. The reviewing court must be convinced beyond a reasonable doubt that the error *did not* contribute to conviction or punishment; the test is not that the court must be convinced that it *did* contribute. If the court determines that the error contributed, the error is reversible. Even so, the Court of Criminal Appeals has noted that

> [t]he State has no "burden of proof" or "burden of persuasion" in the sense that it would if it bore the responsibility to come forth with arguments establishing the harmlessness of an error in order to prevail, but it will indeed suffer reversal on appeal if the reviewing court cannot determine after its examination of the record that an error was harmless beyond a reasonable doubt.[113]

In determining whether an error was harmless, the court must review the entire record "in a neutral, impartial and even-handed manner and not 'in the light most favorable to the prosecution.' "[114] As the Court of Criminal Appeals has noted:

> [A] reviewing court in applying the harmless error rule should not focus upon the propriety of the outcome of the trial. Instead, an

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112. TEX. R. APP. P. 81(b)(2) (emphasis added); *see* Higginbotham v. State, 807 S.W.2d 732, 734 (Tex. Crim. App. 1991) (finding that reviewing court should focus on integrity of process leading to conviction rather than propriety of outcome of case); Arnold v. State, 786 S.W.2d 295, 297–98 (Tex. Crim. App.) (noting that, to avoid reversal, Texas Rules of Appellate Procedure require appellate court to find error harmless beyond reasonable doubt), *cert. denied*, 498 U.S. 838 (1990).

113. Mayes v. State, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); *see Arnold*, 786 S.W.2d at 298 (explaining that beneficiary of error bears burden to show beyond reasonable doubt it did not contribute to verdict).

114. *See Harris*, 790 S.W.2d at 586 (recognizing importance of neutral review of entire record in harmless error analysis); *accord Higginbotham*, 807 S.W.2d at 734 (stressing need to articulate coherent standard for determining when error was harmless).

> appellate court should be concerned with the integrity of the process leading to the conviction. Consequently, the court should examine the source of the error, the nature of the error, whether or to what extent it was emphasized by the State, and its probable collateral implications. Further, the court should consider how much weight a juror would probably place upon the error. In addition, the Court must also determine whether declaring the error harmless would encourage the State to repeat it with impunity. In summary, the reviewing court should focus not on the weight of the other evidence of guilt, but rather on whether the error at issue might possibly have prejudiced the jurors' decision-making. . . . In other words, a reviewing court must always examine whether the trial was an essentially fair one.[115]

If the error complained of concerns the introduction of inadmissible evidence, the appellate court must determine the impact of that error:

> The untainted evidence is not to be weighed in its own right, nor is it to be examined to see if it is cumulative with the tainted evidence; it is to be considered only to uncover the potentially damaging ramification of the error. In other words, the impact of the error cannot be properly evaluated without examining its interaction with the other evidence.[116]

Although overwhelming evidence of guilt is not in itself a sufficient reason to find an error harmless, it is a factor that may be considered.[117]

2. Error Not Requiring Harm Analysis

The Court of Criminal Appeals has determined that certain errors are reversible without regard to harm. The court has concluded that, because it is difficult to ascertain whether specific types of error affected the litigation's outcome, it is not in the interest of judicial economy to attempt a harm analysis.[118] Thus, the court has limited the application of Rule 81(b)(2) to those trial er-

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115. *Harris*, 790 S.W.2d at 587–88; *see Higginbotham*, 807 S.W.2d at 734–35 (reiterating concern for integrity of process leading to result of case).

116. *Harris*, 790 S.W.2d at 586; *accord Higginbotham*, 807 S.W.2d at 734 (outlining methodology for harmless error determination).

117. *See Harris*, 790 S.W.2d at 588 (establishing two-step procedure for determination of error and recognizing overwhelming evidence as factor).

118. Sodipo v. State, 815 S.W.2d 551, 554–55 (Tex. Crim. App. 1990).

rors for which the record is likely to provide "concrete data from which an appellate court can meaningfully gauge or quantify the effect of the error."[119] The rule does not apply "to any error the ultimate consequence of which defies empirical examination on the basis of a typical appellate record alone."[120]

The following are examples of errors that are not subject to harm analysis: (1) total failure to admonish a defendant under Article 26.13(a) of the Code of Criminal Procedure;[121] (2) violation of the requirement that a defendant sign and file a jury waiver pursuant to Article 1.13;[122] (3) failure to grant severance of cases;[123] (4) failure to allow appointed counsel a ten-day preparation period before trial;[124] (5) failure to allow a ten-day preparation period when the charging instrument is amended prior to the day of trial;[125] (6) allowing the State to amend the charging instrument, over the defendant's objection, on the day of trial;[126] (7) allowing a second shuffle of the jury panel;[127] (8) denying a defendant's timely request for a jury shuffle, provided that the jury has not yet been

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119. Marin v. State, 851 S.W.2d 275, 282 (Tex. Crim. App. 1993).

120. *Id.*

121. *See* Morales v. State, 872 S.W.2d 753, 754 (Tex. Crim. App. 1994) (asserting that complete failure to admonish as required by statute must result in reversal); *Ex parte* Cervantes, 762 S.W.2d 577, 578 (Tex. Crim. App. 1988) (denying motion for rehearing because of failure to admonish on immigration effect of plea on non-citizen); *Ex parte* McAtee, 599 S.W.2d 335, 335 (Tex. Crim. App. 1980) (setting aside conviction because of failure to admonish on range of punishment).

122. *See* Townsend v. State, 865 S.W.2d 469, 470 (Tex. Crim. App. 1993) (noting that courts have held that Article 1.13 violation is not subject to harm analysis); Meek v. State, 851 S.W.2d 868, 871 (Tex. Crim. App. 1993) (holding that failure to have defendant sign and file written jury waiver rendered conviction null and void and necessitated automatic reversal).

123. *See* Warmowski v. State, 853 S.W.2d 575, 578 (Tex. Crim. App. 1993) (finding harm analysis unnecessary because right to severance is absolute with discretion vested in defendant).

124. *See Marin*, 851 S.W.2d at 281 (referring to finding in *Sodipo v. State* that failure to permit 10 days preparation time after amendment of indictment is not subject to harm analysis).

125. *See* Beebe v. State, 811 S.W.2d 604 (Tex. Crim. App. 1991) (holding harm analysis inapplicable because appellant was tried eight days after State amended indictment).

126. Sodipo v. State, 815 S.W.2d 551, 556 (Tex. Crim. App. 1991) (op. on reh'g) (declaring that harm analysis was unwarranted because error was committed when trial court allowed State to amend charging instrument on day of trial over defendant's objection).

127. *See* Chappell v. State, 850 S.W.2d 508, 512 (Tex. Crim. App. 1993) (finding reversible error upon trial court's grant of State's request for second jury shuffle, even without showing of harm).

shuffled at the State's request;[128] (9) refusing a proper question during voir dire;[129] and (10) allowing jurors to submit questions to be asked of witnesses during trial.[130]

3. Harm Analysis for Charge Error

In *Almanza v. State*,[131] the Court of Criminal Appeals addressed the issue of reversible harm once error in the jury charge has been demonstrated. The court concluded that

> [i]f the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of defendant," which means no more than that there must be *some* harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.
>
> On the other hand, if no proper objection was made at trial and the accused must claim that the error was "fundamental," he will obtain a reversal only if the error is so egregious and created such harm that he "has not had a fair and impartial trial"—in short "egregious harm."
>
> In both situations the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole.[132]

Theoretical harm to the accused is not sufficient to warrant a reversal.[133] If actual harm occurs because of an error preserved by objection, the presence of any harm, regardless of degree, is sufficient to mandate reversal.[134]

Unlike the general harmless error standard contained in Rule 81(b)(2), the burden of proving harm from charge error lies with the appellant.[135] There are circumstances, however, in which a

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128. Jones v. State, 833 S.W.2d 146, 147–48 (Tex. Crim. App. 1992).

129. Nunfio v. State, 808 S.W.2d 482, 485 (Tex. Crim. App. 1991).

130. Morrison v. State, 845 S.W.2d 882, 889 (Tex. Crim. App. 1992).

131. 686 S.W.2d 157 (Tex. Crim. App. 1985) (op. on reh'g).

132. Arline v. State, 721 S.W.2d 348, 351–52 (Tex. Crim. App. 1986); *Almanza*, 686 S.W.2d at 171.

133. *See Arline*, 721 S.W.2d at 351 (instructing that second part of inquiry mandates determination of actual harm).

134. *Arline*, 721 S.W.2d at 351.

135. Abdnor v. State, 871 S.W.2d 726, 732 (Tex. Crim. App. 1994).

charge error implicates a state or federal constitutional right. In those situations, Rule 81(b)(2) analysis applies.[136]

4. Curing the Error

Error in asking an improper question or in admitting improper testimony in a criminal proceeding may generally be cured or rendered harmless by its withdrawal or by an instruction to disregard. The exception lies in extreme cases in which the question or evidence was clearly calculated to inflame the minds of the jurors and was of such a character as to suggest the impossibility of withdrawing the impression produced on the juror's minds.[137] This curative rule also applies to improper jury argument.[138]

E. *Statutory Construction*

In construing a statute, an appellate court attempts to effectuate the legislature's collective intent or purpose.[139] The court begins

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136. *See* Beathard v. State, 767 S.W.2d 423, 432–33 (Tex. Crim. App. 1989) (holding that failure to give "no-adverse-inference" instruction was harmless error); Rose v. State, 752 S.W.2d 529, 553–54 (Tex. Crim. App. 1987) (op. on reh'g) (applying standard of harm analysis to unconstitutional instruction on parole law); *see also* Arnold v. State, 786 S.W.2d 295, 298–313 (Tex. Crim. App. 1990) (discussing at length application of Rule 81(b)(2) to *Rose* error).

137. *See* Kemp v. State, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992) (concluding that reference to extraneous offense was not overly inflammatory), *cert. denied*, 113 S. Ct. 2361 (1993); Livingston v. State, 739 S.W.2d 311, 335 (Tex. Crim. App. 1987) (determining that reference to lineup did not "inflame the minds of the jury"), *cert. denied*, 487 U.S. 1210 (1988); Carter v. State, 614 S.W.2d 821, 824–25 (Tex. Crim. App. 1981) (finding that question calling for hearsay response was harmless).

138. *See Carter*, 614 S.W.2d at 823–24 (holding that harm is usually obviated by instruction to disregard argument).

139. Ward v. State, 829 S.W.2d 787, 790 (Tex. Crim. App. 1992); *see* Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (explaining that Texas Constitution gives lawmaking function to legislature); Dillehey v. State, 815 S.W.2d 623, 624 (Tex. Crim. App. 1991) (overruling technical interpretation of statute and analyzing legislative intent instead). The Government Code provides seven non-exclusive construction aids that the court may consider when determining whether a statute is ambiguous on its face:

(1) object sought to be attained;
(2) circumstances under which the statute was enacted;
(3) legislative history;
(4) common law or former statutory provisions, including laws on the same or similar subjects;
(5) consequences of a particular construction;
(6) administrative construction of the statute; and
(7) title, preamble, and emergency provision.

TEX. GOV'T CODE ANN. § 311.023 (Vernon 1988).

by reviewing the literal text of the statute.[140] The words used are typically construed according to their plain meaning,[141] but a court may give a word a broader or narrower meaning than is provided by ordinary usage.[142] Thus, if literal interpretation of the statute's language would lead to an absurd result, the court will look to extratextual factors to determine its true intended meaning.[143] If more than one statutory construction is possible, the court will interpret it to accomplish the intended purpose or benefit.[144]

A reviewing court must presume that all the language found in a statute is used with a meaning and purpose.[145] If a statute has been amended, the court must presume that the legislature intended to change the law.[146] The court should thus construe the statute to give effect to the intended change, instead of rendering the amendment useless.[147]

F. *Constitutional Challenge of a Statute*

The constitutionality of a statute upon which a conviction was based may be raised for the first time on appeal.[148] In reviewing the statute's constitutionality, a reviewing court must presume that the statute is valid and that the legislature did not enact an unreasonable or arbitrary statute.[149] The burden rests on the party challenging the statute to establish its unconstitutionality.[150] If the statute is capable of two constructions, only one of which is consti-

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140. *See Boykin*, 818 S.W.2d at 785 (explaining that text is definitive evidence of legislature's intent).

141. TEX. CODE CRIM. PROC. ANN. art. 3.01 (Vernon 1977). The Code of Criminal Procedure specifically provides that all "words, phrases and terms" used therein "are to be taken and understood in their usual acceptation in common language, except where specially defined." *Id.*

142. *Ward*, 829 S.W.2d at 791; *see* Camacho v. State, 765 S.W.2d 431, 433 (Tex. Crim. App. 1989) (stating that, when statute has more than one construction, court should secure benefit legislature intended).

143. *Boykin*, 818 S.W.2d at 785.

144. *Ward*, 829 S.W.2d at 791.

145. Polk v. State, 676 S.W.2d 408, 410 (Tex. Crim. App. 1984).

146. *Ex parte* Trahan, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979).

147. *Id.*

148. Rabb v. State, 730 S.W.2d 751, 752 (Tex. Crim. App. 1987); Morris v. State, 786 S.W.2d 451, 453 (Tex. App.—Dallas 1990, pet. ref'd).

149. *Ex parte* Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978); *see* Ely v. State, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979) (noting that statute is vested with presumption of constitutionality).

150. *Granviel*, 561 S.W.2d at 511.

tutionally valid, the court must interpret the statute in such a way as to sustain its validity.[151] Thus, the appellant has the burden to establish that the only possible construction of the statute renders it unconstitutional.

IV. PRETRIAL RULINGS

A. *Pretrial Hearing*

Article 28.01 of the Texas Code of Criminal Procedure provides that the trial court may set certain matters for a pretrial hearing.[152] This statute is permissive rather than mandatory. The trial court may, in its discretion, elect to determine the merits of pretrial motions at the time the subject matter is raised at trial.[153] If a pretrial hearing is set and the defendant is given appropriate notice, any of the issues enumerated in the statute[154] that are not raised or filed seven days before the hearing cannot be raised or filed, except by the court's permission on good cause.[155] Thus, the trial court has discretion concerning whether to hold a pretrial hearing and the issues to be determined at that hearing.

B. *Pretrial Bail*

1. Denial of Bail

a. Article I, Section 11

Article I, Section 11 of the Texas Constitution provides all prisoners the right of bail by sufficient sureties "unless for capital offenses, when the proof is evident."[156]

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151. *Id.*

152. TEX. CODE CRIM. PROC. ANN. art. 28.01 (Vernon 1989).

153. *See* Bell v. State, 442 S.W.2d 716, 719 (Tex. Crim. App. 1969) (placing application of Article 28.01 within judge's discretion).

154. TEX. CODE CRIM. PROC. ANN. art. 28.01 (Vernon 1989). The matters enumerated in the statute include arraignment, appointment of counsel, defense pleadings, special pleas, exceptions to the charging instrument, motions for continuance, motions to suppress, motions for change of venue, discovery, entrapment, and motions for appointment of an interpreter. *Id.*

155. TEX. CODE CRIM. PROC. ANN. art. 28.01, § 2 (Vernon 1989); *see* Devereaux v. State, 473 S.W.2d 525, 529 (Tex. Crim. App. 1971) (op. on reh'g) (declining to reverse denial of motion to change venue because motion was not raised at pretrial hearing).

156. TEX. CONST. art. I, § 11; *see* Criner v. State, 878 S.W.2d 162, 163 (Tex. Crim. App. 1994) (reciting circumstances under which bail may be denied); Taylor v. State, 667 S.W.2d 149, 151 (Tex. Crim. App. 1984) (noting general rule favoring bail).

> The term "proof is evident" means that the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense of capital murder has been committed; that the accused is the guilty party; and that the accused will not only be convicted but that the jury will return findings which will require a sentence of death.[157]

The State has the burden of showing that the proof is evident.[158] The Court of Criminal Appeals has stressed that this burden requires the State to introduce evidence not only that the jury would convict the accused of capital murder, but also that it would return findings that would require imposition of the death penalty.[159]

The trial court's decision that proof is evident is entitled to weight on appeal; however, the reviewing court must examine the evidence and determine whether bail was properly denied.[160] Because the Texas Rules of Criminal Evidence apply in proceedings to deny bail, hearsay is not admissible over proper objection.[161] "Unobjected-to hearsay," however, has probative value and may be considered in assessing the sufficiency of the evidence.[162]

The circumstances of the capital offense alone may be sufficient to sustain an affirmative finding with respect to the probability of future harm, which is relevant to whether the jury will assess the death penalty.[163] Other factors that may be considered are the defendant's background, use of narcotics, unadjudicated extraneous offenses, and reputation for being a peaceful law-abiding citizen.[164] The existence of a prior criminal record is not necessary, nor is

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157. *E.g.*, *Ex parte* Alexander, 608 S.W.2d 928, 930 (Tex. Crim. App. 1980); *Ex parte* Ott, 565 S.W.2d 540, 541 (Tex. Crim. App. 1978); *Ex parte* Hammond, 540 S.W.2d 328, 330 (Tex. Crim. App. 1976); *Ex parte* Wilson, 527 S.W.2d 310, 311 (Tex. Crim. App. 1975).

158. *Alexander*, 608 S.W.2d at 930; *Ott*, 565 S.W.2d at 541; *Hammond*, 540 S.W.2d at 330; *Wilson*, 527 S.W.2d at 311.

159. *Alexander*, 608 S.W.2d at 930; *Ott*, 565 S.W.2d at 541; *Hammond*, 540 S.W.2d at 331; *Wilson*, 527 S.W.2d at 311.

160. *Alexander*, 608 S.W.2d at 930; *Ott*, 565 S.W.2d at 543; *Hammond*, 540 S.W.2d at 331; *Wilson*, 527 S.W.2d at 311.

161. TEX. R. CRIM. EVID. 802, 1101(c)(3)(C), *Ex parte* Graves, 853 S.W.2d 701, 703–04 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

162. *Graves*, 853 S.W.2d at 704.

163. *Alexander*, 608 S.W.2d at 930.

164. *Id.*; *see* McKenzie v. State, 777 S.W.2d 746, 751 (Tex. App.—Beaumont 1989, no pet.) (providing that testimony regarding reputation of accused is material).

psychiatric testimony.[165] Appeals of orders denying bond pursuant to Article I, Section 11 are to the courts of appeals.[166]

b. Article I, Section 11a

Article I, Section 11a of the Texas Constitution provides that pretrial bail may be denied in a non-capital case in the following circumstances:

> Any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor, (2) accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted, (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony, or (4) accused of a violent or sexual offense committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, after a hearing, and upon evidence substantially showing the guilt of the accused of the offense in (1) or (3) above, of the offense committed while on bail in (2) above, or of the offense in (4) above committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony . . . .[167]

Procedural safeguards require that the order denying bail be issued within seven days after the time the accused is incarcerated.[168] Furthermore,

> if the accused is not accorded a trial upon the accusation under (1) or (3) above, the accusation and indictment used under (2) above, or the accusation and indictment used under (4) above within sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused.[169]

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165. *Alexander*, 608 S.W.2d at 930; *McKenzie*, 777 S.W.2d at 751.

166. Primrose v. State, 725 S.W.2d 254, 255–56 (Tex. Crim. App. 1987).

167. TEX. CONST. art. I, § 11a.

168. *Id.*

169. *Id.*; *see Criner*, 878 S.W.2d at 164 (discussing procedural safeguards).

Because granting of bail is favored, if the State is seeking to deny bail pursuant to Section 11a, it bears the burden to show strict compliance with various limitations and safeguards.[170]

Appeals from the denial of bail under Article I, Section 11a are directly to the Court of Criminal Appeals.[171] However, if the sixty-day period found in Section 11a expires during the pendency of the appeal, the Court of Criminal Appeals presumes compliance with the constitution. Furthermore, the court presumes that the appellant has either been brought to trial or that the trial court set reasonable bail after automatically setting aside the denial of bail.[172] In this case, the Court of Criminal Appeals will dismiss the appeal as moot.[173]

2. Reduction of Bail

The primary purpose of bail is to secure the defendant's presence in court for the trial of the crime charged.[174] To further that objective, Article 17.15 of the Code of Criminal Procedure states that bail should be sufficiently high so as to give reasonable assurance that the defendant will appear at trial. Bail should not, however, be used as an instrument of oppression.[175] Article 17.15 also requires a court to consider the nature of the offense and the circumstances under which it was committed, the ability to make bail, and the future safety of the alleged victim and the community.[176]

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170. *Taylor*, 667 S.W.2d at 151–52.

171. TEX. CONST. art I, § 11a; *see Primrose*, 725 S.W.2d at 255–56 (distinguishing appellate jurisdiction over denial of bail under § 11 and § 11a).

172. *Criner*, 878 S.W.2d at 164.

173. *Id.*; *see* Holloway v. State, 781 S.W.2d 605, 606 (Tex. Crim. App. 1989) (holding that, because no indication of continuance was present, court must presume order was set aside and dismiss appeal as moot).

174. TEX. CODE CRIM. PROC. ANN. art. 17.15 (Vernon Supp. 1995). *Ex parte* Rodriguez, 595 S.W.2d 549, 550 (Tex. Crim. App. 1980); *Ex parte* Ivey, 594 S.W.2d 98, 99 (Tex. Crim. App. 1980); *Ex parte* Vasquez, 558 S.W.2d 477, 479 (Tex. Crim. App. 1977).

175. TEX. CODE CRIM. PROC. ANN. art. 17.15 (Vernon Supp. 1994). *Ivey*, 594 S.W.2d at 99; *Vasquez*, 558 S.W.2d at 479.

176. TEX. CODE CRIM. PROC. ANN. art. 17.15 (Vernon Supp. 1995); *see Rodriguez*, 595 S.W.2d at 550 (stating that judge must consider these factors when using discretion); *Vasquez*, 558 S.W.2d at 480 (considering indigence of defendant). Before its amendment effective September 1, 1993, the statute stated that "the future safety of a victim of the alleged offense may be considered." TEX. CODE CRIM. PROC. ANN. art. 17.15 (Vernon Supp. 1995). The present statute mandates that the court consider not only the safety of the victim, but also that of the community. *Id.* The broader scope of this provision cures the anomaly under the prior law that the court could not consider the threat posed by a

Although attorneys generally focus solely on the accused's ability to make bail, this factor is not controlling.[177] Additionally, the person seeking a reduction has the burden to show that the bail set is excessive.[178] This burden requires a showing of the inability to furnish bail in the amount fixed.[179]

3. Release Due to Delay

If the State is not ready for trial within a specified period of time, a defendant who is detained pending trial must be released on personal bond or the amount of bail must be reduced.[180] The statute does not contain any exceptions for periods of delay caused by the defendant or by exceptional circumstances.[181] When faced with the State's failure to prepare for trial by the appointed time, the trial court has no discretion to refuse to release the defendant.[182] A

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person accused of murder because the only victim of his crime is dead and could not be placed in future danger. *Id.*

177. *See Ex parte* Charlesworth, 600 S.W.2d 316, 317 (Tex. Crim. App. 1980) (emphasizing that ability to make bail alone does not control amount of bail); *Rodriguez*, 595 S.W.2d at 550 (stating that ability to make bail is not dispositive); *see also Ivey*, 594 S.W.2d at 99 (considering nature of offense and circumstances of its commission); *Vasquez*, 558 S.W.2d at 480 (stressing that indigence is not controlling circumstance).

178. *Ex parte* Rubac, 611 S.W.2d 848, 849 (Tex. Crim. App. 1981); *Charlesworth*, 600 S.W.2d at 317; *Rodriguez*, 595 S.W.2d at 550; *Vasquez*, 558 S.W.2d at 479.

179. *Ex parte* Stembridge, 472 S.W.2d 155, 155 (Tex. Crim. App. 1971); *see Ex parte* Williams, 467 S.W.2d 433, 434 (Tex. Crim. App. 1971) (explaining that complaint of excessive bail will not stand in absence of evidence that defendant tried to furnish bail).

180. TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon Supp. 1995). The time periods are as follows:

(1) 90 days from the commencement of his detention if he is accused of a felony;

(2) 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;

(3) 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or

(4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

Id. § 1. Section 2 of Article 17.151 enumerates certain exceptions to the application of § 1. *Id.* § 2.

181. Rowe v. State, 853 S.W.2d 581, 582 (Tex. Crim. App. 1993).

182. *See* TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon Supp. 1995) (requiring State, when not ready for trial, to release defendant or reduce bail). The validity of this statute was not affected when the Court of Criminal Appeals struck down the Speedy Trial Act in *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987). Jones v. State, 803 S.W.2d 712, 714 (Tex. Crim. App. 1991). The court has specifically upheld Article 17.151 in the face of a constitutional challenge based on separation of powers. *Id.* at 717.

reduction of bond is adequate only when the reduction effects the defendant's release.[183]

C. *Venue*

"Venue is not a 'criminative fact' and thus, not a constituent element of the offense."[184] The State must prove venue by a preponderance of the evidence, rather than beyond a reasonable doubt.[185] Furthermore, venue may be established by either direct or circumstantial evidence.[186]

Because venue bears no jurisdictional import, the defendant may waive venue by failing to raise it as an issue at trial.[187] Thus, the appellate court will presume that venue was established unless the defendant presented the issue below.[188] When the issue is raised at trial, failure to establish venue in the county of prosecution constitutes reversible error.[189]

A change of venue may be effected upon the court's own motion, the State's motion, or the defendant's motion.[190] The standard of review of a denial of a motion to transfer venue is whether the trial court abused its discretion.[191] Thus, as long as the trial court's decision is "within the realm of reasonableness," it will not be disturbed on appeal.[192]

In determining whether the trial court abused its discretion in denying a motion for change of venue, the reviewing court examines "whether there existed such a prejudice in the community that the likelihood that the defendant received a fair trial by an impar-

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183. *See Rowe*, 853 S.W.2d at 582 (holding that trial court erred by reducing bond rather than releasing defendant on personal bond when record showed defendant could not make any bond).

184. Fairfield v. State, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981) (citation omitted).

185. TEX. CODE CRIM. PROC. ANN. art. 13.17 (Vernon 1977); *see Fairfield*, 610 S.W.2d at 779 (stating that plea of not guilty puts venue at issue).

186. Black v. State, 645 S.W.2d 789, 790 (Tex. Crim. App. 1983).

187. *Fairfield*, 610 S.W.2d at 779.

188. *Id.*

189. *Black*, 645 S.W.2d at 791.

190. TEX. CODE CRIM. PROC. ANN. arts. 31.01, 31.02, 31.03 (Vernon 1989).

191. Narvaiz v. State, 840 S.W.2d 415, 428 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 1422 (1993); DeBlanc v. State, 799 S.W.2d 701, 705 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991); Allen v. State, 333 S.W.2d 855, 856 (Tex. Crim. App. 1960).

192. *Narvaiz*, 840 S.W.2d at 428.

tial jury is doubtful."[193] In this regard, extensive knowledge in the community of the offense or the defendant alone is insufficient to render a trial unconstitutional.[194] The appellant must demonstrate the jury's actual, identifiable prejudice, which can be attributed to publicity.[195] The case must receive pervasive, prejudicial, and inflammatory publicity.[196] Courts must consider whether the publicity surrounding the case is so pervasive that the prospective jurors' initial opinions cannot be altered.[197] Because the trial court resolves any evidentiary conflicts, evidence indicating that an appellant can receive a fair trial may be sufficient to defeat a motion for change of venue even if it is controverted.[198]

D. *The Charging Instrument*

1. Motion to Quash

A defect of form or substance in an indictment or information is waived unless the defendant objects before trial through a motion to quash.[199] Thus, the indictment need not allege every element of the offense charged to invoke the jurisdiction of the trial court.[200]

A motion to quash must be in writing.[201] "[A]n oral motion expanding upon or raising a different ground from the written motion

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193. Etheridge v. State, No. 71,189, 1994 WL 273325, at *1 (Tex. Crim. App. June 22, 1994); *see* Beets v. State, 767 S.W.2d 711, 742 (Tex. Crim. App. 1987) (op. on reh'g) (considering whether influences that affect community opinion are inherently suspect), *cert. denied*, 492 U.S. 912 (1989); Phillips v. State, 701 S.W.2d 875, 879 (Tex. Crim. App. 1985) (commenting that media publicity alone does not establish prejudice), *cert. denied*, 477 U.S. 909 (1986).

194. *Etheridge*, 1994 WL 273325, at *1 (citations omitted).

195. *Id.*

196. *Id.*

197. Coble v. State, 871 S.W.2d 192, 200 (Tex. Crim. App. 1993) (quoting Cockrum v. State, 758 S.W.2d 577, 584 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1072 (1989)), *cert. denied*, 115 S. Ct. 101 (1994).

198. *Id.*

199. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1995); *see* State v. Murk, 815 S.W.2d 556, 558 (Tex. Crim. App. 1991) (emphasizing that defendant cannot fail to object to defective indictment, get convicted, then later complain of error); Studer v. State, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990) (holding that defendant waived any complaint about the indictment when State presented issue to trial court).

200. *See Murk*, 815 S.W.2d at 558 (providing that indictment is not required to state every element of offense to invest trial court with jurisdiction); *Studer*, 799 S.W.2d at 271–72 (reasoning that indictment conformed to Article V, § 12 of Texas Constitution even though it was flawed by matters of substance).

201. Nichols v. State, 653 S.W.2d 768, 769 (Tex. Crim. App. 1981).

will not cure the inadequacies of the written motion to quash."[202] The motion to quash must also sufficiently apprise the trial court of the alleged deficiency. A form motion to quash containing only general allegations of inadequate notice fails to adequately inform the trial judge of the manner in which notice is deficient.[203] In such circumstances, overruling the motion to quash is not an abuse of discretion.[204]

Convincing the appellate court that the charging instrument is deficient is not sufficient to obtain relief.[205] The appellate court must conduct a harm analysis examining the impact of the failure to give notice on the defendant's ability to prepare a defense.[206]

2. Amendment

Amendment of an indictment or information requires leave of the court.[207] Article 28.10 of the Code of Criminal Procedure governs the circumstances in which a charging instrument may be amended.[208] The statute does not allow the State to amend an in-

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202. McDonald v. State, 692 S.W.2d 169, 174 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd).

203. *See* Jones v. State, 672 S.W.2d 798, 800 (Tex. Crim. App. 1984) (concluding that form motion to quash did not contain requisite specificity); *McDonald*, 692 S.W.2d at 174 (holding that form motion to quash failed to inform trial judge of manner in which indictment was deficient).

204. *See Jones*, 672 S.W.2d at 800 (upholding trial judge's decision because motion to quash was not adequate to relate how indictment was defective).

205. *See* Geter v. State, 779 S.W.2d 403, 407 (Tex. Crim. App. 1989) (stating that "simply because an indictment fails to convey some requisite item of notice does not necessarily require reversal of a conviction").

206. *Id.*; *see* Chambers v. State, 866 S.W.2d 9, 17 (Tex. Crim. App. 1993) (asserting that appellant must show deleterious impact on ability to prepare defense to prove reversible error), *cert. denied*, 114 S. Ct. 1871 (1994).

207. TEX. CODE CRIM. PROC. ANN. art. 28.11 (Vernon 1989).

208. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989). Article 28.10 states:

> (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.
>
> (b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.
>
> (c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

Id.

dictment on the day of trial, even when the trial has not yet begun.[209] This error may be waived by a failure to object.[210] If error is preserved, however, it is not subject to harm analysis.[211]

Article I, Section 10 of the Texas Constitution "guarantees an accused the right to be informed of the nature and cause of the accusation against him in a criminal prosecution."[212] Such information must be obvious from the face of the indictment.[213] Thus, while the State must request leave of the trial court to amend a pleading, neither the motion for leave to amend nor the granting thereof constitutes an amendment.[214] Amendment requires an actual alteration on the face of the charging instrument.[215]

3. Joinder

Article 21.24(a) of the Code of Criminal Procedure authorizes joinder of two or more offenses in a single indictment, information, or complaint, with each offense presented in a separate count, if the offenses originate from the same criminal episode.[216] Section 3.01 of the Texas Penal Code previously limited the definition of "criminal episode" to the repeated commission of offenses against property.[217] Since September 1, 1987, however, the Texas Legislature has defined "criminal episode" as follows:

> In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

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209. *See* Sodipo v. State, 815 S.W.2d 551, 555 (Tex. Crim. App. 1991) (op. on reh'g) (surveying statute and finding that subsection (a) addresses amendments that occur before date of trial, and subsection (b) envisions amendments after commencement of trial); *Murk*, 815 S.W.2d at 558 (detailing that State may amend indictment until day before trial begins).

210. *Sodipo*, 815 S.W.2d at 554.

211. *See id.* (determining that provision is mandatory and cannot be subjected to harm analysis because record will not show effects of error).

212. Ward v. State, 829 S.W.2d 787, 794 (Tex. Crim. App. 1992).

213. *Id.*

214. *Id.* at 793.

215. *Id.* at 794; *see* Rent v. State, 838 S.W.2d 548, 551 (Tex. Crim. App. 1990) (concluding that trial court's order granting motion to amend was not amendment, but rather was vehicle to initiate amendment process).

216. TEX. CODE CRIM. PROC. ANN. art. 21.24(a) (Vernon 1989).

217. *See* Holcomb v. State, 745 S.W.2d 903, 905 (Tex. Crim. App. 1988) (noting previous definition of criminal episode).

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> (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
> (2) the offenses are the repeated commission of the same or similar offenses.[218]

If a defendant is convicted of two offenses misjoined in the indictment, the proper remedy is to uphold the conviction for the "more serious" offense and dismiss the less serious offense.[219]

E. *Right to Counsel*

1. Invocation of Right to Counsel—Fifth Amendment

When faced with a claim that the appellant's Fifth Amendment right to counsel was violated, the reviewing court will first "examine the totality of the circumstances and determine whether appellant actually invoked his right to counsel."[220] Not every reference to counsel or every mention of the word "lawyer" constitutes an invocation of the right to counsel.[221] Texas courts have held that custodial interrogation need not terminate upon an equivocal request for counsel, but the scope of interrogation is narrowed:

> When an accused's desires are related in an equivocal manner, the interrogating officers are not required to automatically cease the interview. Instead, they are allowed to continue questioning; however, the questions must be specifically aimed at discovering the accused's true desire. Further, an interrogating officer may not use the guise of clarification in order to coerce or intimidate the accused into making a statement. Nor may it be used to elicit further information about the event in question.[222]

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218. TEX. PENAL CODE ANN. § 3.01 (Vernon 1994).

219. *See Ex parte* Pena, 820 S.W.2d 806, 809–10 (Tex. Crim. App. 1991) (adopting and applying "most serious offense" test in determining which conviction to uphold).

220. Etheridge v. State, No. 71,189, 1994 WL 273325, at *14 (Tex. Crim. App. June 22, 1994).

221. Collins v. State, 727 S.W.2d 565, 568 (Tex. Crim. App.), *cert. denied*, 484 U.S. 924 (1987); Russell v. State, 727 S.W.2d 573, 575 (Tex. Crim. App.), *cert. denied*, 484 U.S. 856 (1987).

222. *Russell*, 727 S.W.2d at 577; *see* Upton v. State, 853 S.W.2d 548, 552–53 (Tex. Crim. App. 1993) (noting that Fifth Amendment invocation protects with respect to other crimes and interrogators); Robinson v. State, 851 S.W.2d 216, 223–24 (Tex. Crim. App. 1991) (requiring further questions to be specifically aimed at discovering accused's desire for counsel), *cert. denied*, 114 S. Ct. 2765 (1994).

The federal constitution does not mandate the restrictive questioning following an equivocal request for counsel required by Texas courts. The United States Supreme Court recently held in *Davis v. United States*[223] that only a clear and unambiguous request for counsel requires the officers to cease interrogation. If the request is equivocal, the officers may proceed to interrogate even without clarifying questions.[224] However, clarification of a suspect's desire for counsel is encouraged.[225]

If the reviewing court determines that the appellant did in fact invoke the right to counsel, it will thereafter review the record to determine whether the appellant initiated further discussion with the police and knowingly and intelligently waived the invoked right.[226]

2. Waiver of Right to Counsel—Sixth Amendment

The Sixth Amendment right to counsel in a formal adversarial judicial proceeding is "not forfeitable, but may only be waived by the conscious and intelligent decision of the person to whom it belongs."[227] Thus, the right to counsel cannot be waived simply by failure to request counsel in the trial court.[228] An appropriate waiver need not be in writing and need not be explicit, but must provide a basis for determining that the defendant "knowingly, voluntarily, and intelligently relinquished or abandoned his right to the assistance of counsel."[229] A simple failure to request counsel does not meet this burden.[230]

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223. 114 S. Ct. 2350 (1994).

224. *Id.* at 2355.

225. *Id.* at 2356.

226. *Etheridge*, 1994 WL 273325, at *15; Smith v. State, 779 S.W.2d 417, 426 (Tex. Crim. App. 1989).

227. Oliver v. State, 872 S.W.2d 713, 714 (Tex. Crim. App. 1994) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

228. *Oliver*, 872 S.W.2d at 715–16.

229. *Id.* at 715.

230. *Id.*; *see* Green v. State, 872 S.W.2d 717, 719 (Tex. Crim. App. 1994) (confirming that Sixth Amendment right is not waived by failure to request counsel).

F. *Discovery*

1. Defendant's Right to Discovery

There is no general constitutional right to discovery in a criminal case.[231] A defendant has no general right to discover evidence in the possession of the State,[232] and the prosecution has no general duty to disclose inculpatory evidence.[233] Nevertheless, Article 39.14 of the Texas Code of Criminal Procedure creates a limited statutory right to discovery.[234] Whether evidence that is not exculpatory, mitigating, or privileged is discoverable is within the discretion of the trial court.[235]

Due process requires the State to disclose evidence favorable to the accused if that evidence is material to guilt or punishment.[236] A three-part test determines whether a violation of this duty has occurred.[237] "Such a violation occurs when a prosecutor (1) fails to disclose evidence (2) which is favorable to the accused (3) that creates a probability sufficient to undermine the confidence in the outcome of the proceeding."[238]

Favorable evidence includes both exculpatory evidence and impeachment evidence[239] which, "if disclosed and used effectively, . . . may make the difference between conviction and acquittal."[240]

Evidence is material only if a reasonable probability exists that, had the evidence been disclosed to the defense, the result of the

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231. Weatherford v. Bursey, 429 U.S. 545, 559 (1977); State *ex rel.* Wade v. Stephens, 724 S.W.2d 141, 143 (Tex. App.—Dallas 1987, no pet.).

232. Washington v. State, 856 S.W.2d 184, 187 (Tex. Crim. App. 1993); Kinnamon v. State, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990), *overruled on other grounds* by Cook v. State, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994).

233. Rivera v. State, 808 S.W.2d 80, 95 (Tex. Crim. App.), *cert. denied*, 112 S. Ct. 279 (1991).

234. *Washington*, 856 S.W.2d at 187.

235. *Kinnamon*, 791 S.W.2d at 91; Quinones v. State, 592 S.W.2d 933, 940 (Tex. Crim. App.), *cert. denied*, 449 U.S. 893 (1980).

236. Brady v. Maryland, 373 U.S. 83, 87 (1963); *see Ex parte* Kimes, 872 S.W.2d 700, 702 (Tex. Crim. App. 1993) (asserting that prosecutor has duty to produce all material exculpatory evidence).

237. Thomas v. State, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

238. *Ex parte* Mitchell, 853 S.W.2d 1, 4 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 183 (1993); *Thomas*, 841 S.W.2d at 404.

239. *Thomas*, 841 S.W.2d at 404.

240. *Mitchell*, 853 S.W.2d at 4; *Thomas*, 841 S.W.2d at 404.

proceedings would have been different.[241] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[242] The reasonable probability standard used to determine materiality is different from the reasonable doubt standard.[243]

In determining materiality, the reviewing court must examine the alleged error in the context of both the entire record and the overall strength of the State's case.[244] The court may also directly consider the effect of nondisclosure on the defendant's ability to prepare or present his case.[245] As the Court of Criminal Appeals noted in *Thomas v. State*:[246]

> The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's [failure to disclose].[247]

Under *Brady v. Maryland*,[248] the State has a continuing duty to disclose evidence when it comes into the State's possession.[249] However, *Brady* does not require the prosecution to disclose exculpatory information that is not in its possession and that is not known to exist.[250] Moreover, the prosecution is not obligated to furnish information that is available to the defendant or that could be obtained through reasonable diligence.[251] Finally, *Brady* does

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241. United States v. Bagley, 473 U.S. 667, 682 (1985); *Kimes*, 872 S.W.2d at 702; Harris v. State, 827 S.W.2d 949, 958 (Tex. Crim. App.), *cert. denied*, 113 S. Ct. 381 (1992).

242. *Bagley*, 473 U.S. at 682; *Kimes*, 872 S.W.2d at 702; *Harris*, 827 S.W.2d at 948.

243. *Thomas*, 841 S.W.2d at 404.

244. *Id.* at 404–05.

245. *Id.* at 405.

246. 841 S.W.2d 399 (Tex. Crim. App. 1992).

247. *Id.* at 405 (quoting *Bagley*, 473 U.S. at 683).

248. 373 U.S. 83 (1963).

249. May v. State, 738 S.W.2d 261, 273 (Tex. Crim. App.), *cert. denied*, 484 U.S. 872 (1987); Granviel v. State, 552 S.W.2d 107, 119 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977).

250. Hafdahl v. State, 805 S.W.2d 396, 399 n.3 (Tex. Crim. App. 1990), *cert. denied*, 500 U.S. 948 (1991).

251. May v. Collins, 904 F.2d 228, 231 (5th Cir. 1990), *cert. denied*, 498 U.S. 1055 (1991).

not require disclosure of evidence that would be inadmissible at trial.[252]

2. State's Right to Discovery

The Court of Criminal Appeals has held that the State "has no right of discovery into the defendant's case."[253] In *Washington v. State*,[254] the court expressly declined to elaborate on that pronouncement, yet precluded the State's discovery of a defense tape under the work-product doctrine.[255]

G. *Suppression*

The trial court is afforded broad discretion in determining preliminary questions regarding the admissibility of evidence.[256] The court's ruling on the admission or exclusion of evidence will not be disturbed unless the record clearly shows an abuse of discretion.[257] Likewise, the trial court has discretion concerning whether to hold a hearing on a pretrial motion to suppress.[258] Instead of a hearing, the court may elect to determine the merits of the motion during trial after counsel lodges the proper objection.[259] Thus, refusal to hold a pretrial hearing on the issue of suppression does not constitute an abuse of discretion.[260] Moreover, the trial court "may determine the merits of a motion to suppress 'on the motions

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252. *Kimes*, 872 S.W.2d at 703; *see* Iness v. State, 606 S.W.2d 306, 310 (Tex. Crim. App. 1980) (noting that withholding inadmissible material does not violate *Brady* rule).

253. Demouchette v. State, 731 S.W.2d 75, 81 (Tex. Crim. App. 1986), *cert. denied*, 482 U.S. 920 (1987).

254. 856 S.W.2d 184 (Tex. Crim. App. 1993).

255. *Washington*, 856 S.W.2d at 187.

256. *See* McVickers v. State, 874 S.W.2d 662, 664 (Tex. Crim. App. 1993) (noting that such questions are "within the province of the trial court"); TEX. R. CRIM. EVID. 104(a) (stating that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court" and that the court "is not bound by the rules of evidence"). However, the rules of evidence apply in hearings on motions to suppress evidence. *McVickers*, 874 S.W.2d at 666. Even so, hearsay is generally admissible in these hearings. *Id.*

257. *See* Maddox v. State, 682 S.W.2d 563, 564 (Tex. Crim. App. 1985) (noting strict limitations on scope of appellate review).

258. Calloway v. State, 743 S.W.2d 645, 649 (Tex. Crim. App. 1988).

259. *Id.*

260. *Id.*

themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court.' "[261]

If the trial court's decision on a suppression issue is correct on any theory of law that finds support in the evidence, then an erroneous reason offered by the court in support of its decision will not mandate reversal.[262] Thus, the State need not list or verbalize every conceivable basis for upholding a search to prevent waiver in the trial court for appeal purposes.[263] The State may also contest an appellant's standing to complain of an illegal search for the first time on appeal.[264]

It is important to note that the trial court is the sole trier of fact on a motion to suppress and may believe or disbelieve all or any of a witness's testimony.[265] An appellate court is not at liberty to disturb any finding that is supported by the record.[266]

In determining whether a trial court's overruling of a pretrial motion such as a motion to suppress is supported by the record, an appellate court should consider only the evidence adduced at the hearing on that motion.[267] However, if the issue is consensually relitigated by the parties during the trial on the merits, the appel-

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261. Hahn v. State, 852 S.W.2d 627, 629 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (quoting TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1(6) (Vernon 1989)).

262. *See* Romero v. State, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990) (finding statement inadmissible when judge's decision was correct on theory of law because no reason was given); *Calloway*, 743 S.W.2d at 651–52 (declining reversal if correct ruling is given for wrong reason).

263. Lewis v. State, 664 S.W.2d 345, 347 (Tex. Crim. App. 1984). The First Court of Appeals has held, however, that the State may not rely on a theory on appeal that was not presented to the trial court. Sedani v. State, 848 S.W.2d 314, 319 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). That court relied upon the language in *Calloway* stating that the decision of the trial court will be upheld on any theory of law applicable to the case. *Id.* A theory not raised in the trial court is not applicable to the case. *Id.*

264. *See* Flores v. State, 871 S.W.2d 714, 720 n.7 (Tex. Crim. App. 1993) (noting that defendant is on notice that State can raise lack of standing for first time on appeal), *cert. denied*, 115 S. Ct. 313 (1994); *Sullivan*, 564 S.W.2d at 704 (negating necessity for State to raise every possible challenge to validity of search to preserve appeal).

265. *See* Johnson v. State, 803 S.W.2d 272, 287 (Tex. Crim. App. 1990) (stating that trial court may choose whether to believe any or all witness testimony), *cert. denied*, 501 U.S. 1259 (1991).

266. *See* Arnold v. State, 873 S.W.2d 27, 34 (Tex. Crim. App. 1993) (refusing to disturb trial court ruling supported by record), *cert. denied*, 115 S. Ct. 103 (1994); *Johnson*, 803 S.W.2d at 287 (reiterating appellate courts' reluctance to disturb ruling that is supported by trial court's record).

267. *See* Hardesty v. State, 667 S.W.2d 130, 133 n.6 (Tex. Crim. App. 1984) (highlighting rule applicable in consideration of pretrial motions).

late court may properly consider relevant trial testimony.[268] If the State introduces evidence relevant to the suppression issue and the defendant fails to object or subsequently participates in the inquiry, the defendant has elected to reopen the evidence on that issue.[269] Similarly, the reviewing court may look to the statement of facts to determine whether the suppression issue was subsequently waived by the defendant's affirmative assertion that he has "no objection" to admission of the evidence.[270]

H. *Consolidation and Severance*

1. Multiple Charges Against One Defendant

The Texas Penal Code provides that a defendant "may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode."[271] Because the language of the statute is permissive, the defendant does not have a right to consolidate offenses committed in the same criminal episode.[272] Thus, the trial court does not abuse its discretion by denying a defendant's motion to consolidate.[273]

The language of Section 3.04, however, is mandatory: "Whenever two or more offenses have been consolidated or joined for trial under Section 3.02 of this code, the defendant shall have a

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268. *Id.*

269. *Id.*; *cf.* Gaston v. State, 574 S.W.2d 120, 121 (Tex. Crim. App. 1978) (criticizing introduction of testimony regarding validity of arrest when that issue was not previously raised before jury).

270. *E.g.*, Jones v. State, 833 S.W.2d 118, 126 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 1285 (1993); Gearing v. State, 685 S.W.2d 326, 329 (Tex. Crim. App. 1985); Harris v. State, 656 S.W.2d 481 (Tex. Crim. App. 1983); Mayberry v. State, 532 S.W.2d 80 (Tex. Crim. App. 1976). The Court of Criminal Appeals has repeatedly emphasized the principle that, when a court overrules a pretrial motion to suppress evidence, the accused need not object to the admission of the same evidence at trial to preserve error. However, when the accused affirmatively states "no objection" to the admission of the evidence at trial, he waives any error in its admission despite the pretrial ruling. *Id.*

271. TEX. PENAL CODE ANN. § 3.02 (Vernon 1994).

272. Nelson v. State, 864 S.W.2d 496, 498 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1338 (1994); Mock v. State, 848 S.W.2d 215, 219 (Tex. App.—El Paso 1992, pet. ref'd).

273. *See Nelson*, 864 S.W.2d at 498 (noting that court is not required to grant accused's motion to consolidate); *Mock*, 848 S.W.2d at 219 (declaring that § 3.02(a) is not mandatory and that accused is not entitled to consolidation of offenses).

right to a severance of the offenses."[274] The court lacks discretion to deny a defendant's motion for severance.[275]

2. Multiple Defendants

When two or more defendants are "jointly or separately indicted or complained against for the same offense or any offense growing out of the same transaction," Article 36.09 gives the trial court the discretion to try the defendants jointly or separately.[276] However, if a defendant submits a timely motion to sever and offers evidence showing that there is a prior admissible conviction against another defendant or that a joint trial would be prejudicial to any defendant, "the court shall order a severance as to the defendant whose joint trial would prejudice the other defendant or defendants."[277] Upon a proper showing by a defendant, the trial court lacks discretion to deny a motion for severance.

I. *Double Jeopardy*

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against (1) successive prosecution for the "same offense" following acquittal, (2) successive prosecution for the "same offense" following conviction, and (3) multiple punishment for the "same offense."[278]

In the successive prosecution context, courts apply the "same elements" test stated in *Blockburger v. United States*:[279] "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires

274. TEX. PENAL CODE ANN. § 3.04 (Vernon 1994).

275. *See* Warmowski v. State, 853 S.W.2d 575, 576–77 (Tex. Crim. App. 1993) (noting that failure to comply with mandatory language of § 3.04(a) constitutes reversible error); Overton v. State, 552 S.W.2d 849, 850 (Tex. Crim. App. 1977) (reversing trial court decision for failing to grant appellant's request for severance).

276. TEX. CODE CRIM. PROC. ANN. art. 36.09 (Vernon 1981); Wilder v. State, 583 S.W.2d 349, 358 (Tex. Crim. App. 1979) (denying motion for severance within court's discretion), *vacated on other grounds*, 453 U.S. 902 (1981).

277. TEX. CODE CRIM. PROC. ANN. art. 36.09 (Vernon 1981).

278. U.S. CONST. amend. V; State v. Houth, 845 S.W.2d 853, 856 (Tex. Crim. App. 1992); Iglehart v. State, 837 S.W.2d 122, 127 (Tex. Crim. App. 1992).

279. 284 U.S. 299 (1932).

proof of an additional fact which the other does not."[280] The Court of Criminal Appeals has not yet defined the scope of the double jeopardy prohibition contained in Article I, Section 14 of the Texas Constitution.[281]

Double jeopardy may be raised either by a pretrial special plea pursuant to Article 27.05 of the Code of Criminal Procedure or by a pretrial writ of habeas corpus. The special plea protects only against reconviction, not retrial.[282] No right to interlocutory appeal from the trial court's ruling on this plea exists.[283] A defendant who seeks protection from retrial must file a writ of habeas corpus. If the court grants the writ and thereafter denies the relief requested, the defendant may take an immediate appeal.[284]

J. *Jury Waiver*

Article 1.13 of the Code of Criminal Procedure requires that a defendant's waiver of the right to a jury in a non-capital felony case "be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the State."[285] If the defendant is tried before the court without having executed a written jury waiver, the error is automatically reversible and harm analysis is not appropriate.[286]

In determining whether the defendant executed a written jury waiver, the courts indulge a "presumption of regularity and truthfulness of the judgment [referring to a written waiver] where there was not an objection to the accuracy of the judgment, and there was no affirmative showing in the record that a written jury waiver

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280. *Blockburger*, 284 U.S. at 304; *see also* United States v. Dixon, 113 S. Ct. 2849, 2860 (1993) (overruling "same evidence" test, devised in *Grady v. Corbin*, 495 U.S. 508 (1990), and returning to *Blockburger* test).

281. *See* Parrish v. State, 869 S.W.2d 352, 355 (Tex. Crim. App. 1994) (remanding issue of state double jeopardy protection to court of appeals).

282. *See* Apolinar v. State, 820 S.W.2d 792, 794 (Tex. Crim. App. 1991) (stating that special plea provides no protection against retrial).

283. *Id.*

284. *Ex parte* Tarver, 725 S.W.2d 195, 196–97 (Tex. Crim. App. 1986); Rios v. State, 751 S.W.2d 892, 893–94 (Tex. App.—San Antonio 1988, no pet.).

285. TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (Vernon Supp. 1995). A defendant may not waive his right to a jury trial in a capital case in which the death penalty is sought. *Id.* Also, counsel must be appointed before a defendant may waive his right to a jury trial. *Id.* at (c).

286. Townsend v. State, 865 S.W.2d 469, 470 (Tex. Crim. App. 1993); Meek v. State, 851 S.W.2d 868, 871 (Tex. Crim. App. 1993).

was not executed by the defendant."[287] However, this presumption is rebuttable. For example, in *Meek v. State*,[288] the trial court found that there was no written waiver in the file, neither the State nor the court could recall whether a written waiver was signed, and the defendant denied signing a waiver. This evidence was sufficient to overcome the presumption.[289]

If the record is silent on the issue of waiver and the judgment does not recite that the defendant executed a written jury waiver, no presumption of regularity arises. On direct appeal, jury waiver can never be presumed from a silent record.[290]

K. *Continuance*

The granting or denial of a motion for continuance is within the sound discretion of the trial court.[291] Motions for continuance must be in writing[292] and must be sworn to by someone with personal knowledge of the facts relied upon by the movant.[293] An oral motion for continuance presents nothing for review.[294] To find an abuse of discretion for failure to grant a motion for continuance based on inadequate time to prepare, the appellant must show that he was prejudiced by counsel's inadequate preparation time.[295]

When the continuance was sought to obtain the presence of a witness at trial, additional steps must be taken to preserve the issue for review.

> It is well settled that a motion for new trial must be made to preserve complaint of the overruling of a motion for continuance and should have the affidavit of the missing witness or a showing under oath

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287. *Meek*, 851 S.W.2d at 870.

288. 851 S.W.2d 868 (Tex. Crim. App. 1993).

289. *Meek*, 851 S.W.2d at 870.

290. Samudio v. State, 648 S.W.2d 312, 314 (Tex. Crim. App. 1983).

291. Duhamel v. State, 717 S.W.2d 80, 83 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 926 (1987); Hernandez v. State, 643 S.W.2d 397, 399 (Tex. Crim. App. 1982), *cert. denied*, 462 U.S. 1144 (1983).

292. TEX. CODE CRIM. PROC. ANN. art. 29.03 (Vernon 1989).

293. TEX. CODE CRIM. PROC. ANN. art. 29.08 (Vernon 1989); Smith v. State, 676 S.W.2d 379, 385 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1061 (1985); Minx v. State, 615 S.W.2d 748, 749 (Tex. Crim. App. 1981).

294. Lewis v. State, 664 S.W.2d 345, 349 (Tex. Crim. App. 1984); O'Neal v. State, 623 S.W.2d 660, 661 (Tex. Crim. App. 1981); *Minx*, 615 S.W.2d at 749; *see* Hightower v. State, 629 S.W.2d 920, 926 (Tex. Crim. App. 1981) (declaring "[t]here is no abuse of discretion in failing to grant an oral motion for continuance").

295. *Duhamel*, 717 S.W.2d at 83.

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> from some source that the witness would actually testify as to the facts set forth in the motion.[296]

In the absence of this showing, the reviewing court will not disturb the ruling of the trial court.

V. TRIAL RULINGS

A. *Voir Dire*

1. Limitations on Voir Dire

Conducting voir dire is a matter within the sound discretion of the trial court.[297] The court has not only the right, but the duty to impose reasonable limitations on voir dire.[298] The court's actions in this regard are reviewed under an abuse of discretion standard.[299] Voir dire questions designed to reveal a juror's views on an issue pertinent to the case are considered proper.[300] Refusing to allow the defendant to ask a proper question is an abuse of discretion, which constitutes automatic reversible error.[301] However, if the State uses a peremptory strike on the venireperson, there is no right to complain of limited questioning of that venireperson.[302]

In determining whether the trial court abused its discretion by refusing a defendant's request for extra time to conduct voir dire, the reviewing court will consider (1) whether the complaining party

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296. Benoit v. State, 561 S.W.2d 810, 817 (Tex. Crim. App. 1977); *see also Minx*, 615 S.W.2d at 750; Allen v. State, 505 S.W.2d 923, 924 (Tex. Crim. App. 1974).

297. Camacho v. State, 864 S.W.2d 524, 531 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1339 (1994); Caldwell v. State, 818 S.W.2d 790, 793 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 1684 (1992); Boyd v. State, 811 S.W.2d 105, 115 (Tex. Crim. App.), *cert. denied*, 112 S. Ct. 448 (1991); Williams v. State, 719 S.W.2d 573, 577 (Tex. Crim. App. 1986).

298. Etheridge v. State, No. 71,189, 1994 WL 273325, at *3 (Tex. Crim. App. June 22, 1994); Cantu v. State, 842 S.W.2d 667, 687 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 3046 (1993); *Caldwell*, 818 S.W.2d at 793.

299. Woolridge v. State, 827 S.W.2d 900, 904 (Tex. Crim. App. 1992); *Boyd*, 811 S.W.2d at 115–16; Nunfio v. State, 808 S.W.2d 482, 484 (Tex. Crim. App. 1991).

300. *Nunfio*, 808 S.W.2d at 484; *accord Woolridge*, 827 S.W.2d at 904; Shipley v. State, 790 S.W.2d 604, 609 (Tex. Crim. App. 1990); Smith v. State, 703 S.W.2d 641, 643 (Tex. Crim. App. 1985).

301. *Woolridge*, 827 S.W.2d at 906–07; *Caldwell*, 818 S.W.2d at 793; Cockrum v. State, 758 S.W.2d 577, 584 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1072 (1989); *Smith*, 703 S.W.2d at 643; Clark v. State, 608 S.W.2d 667, 670 (Tex. Crim. App. 1980); Florio v. State, 568 S.W.2d 132, 133 (Tex. Crim. App. 1978).

302. Alldridge v. State, 762 S.W.2d 146, 168 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1040 (1989).

attempted to extend voir dire, (2) whether the excluded questions were proper voir dire questions, and (3) whether the complaining party was allowed to examine venirepersons who later served on the jury.[303]

2. Jury Shuffle

Article 35.11 of the Texas Code of Criminal Procedure gives a defendant the absolute right to require a shuffle of the jury panel.[304] Denial of a defendant's timely request[305] for a jury shuffle constitutes reversible error without any requirement that harm be shown.[306] The absolute right to a jury shuffle, however, may be satisfied if the shuffle is effected at the State's request.[307] Indeed, allowing a second shuffle of the jury panel constitutes automatic reversible error.[308]

3. Challenges for Cause

Article 35.16 of the Code of Criminal Procedure outlines the reasons that will support a challenge for cause.[309] These enumerated reasons are exclusive; no other reasons will support a challenge for cause.[310]

Considerable deference is given to a trial court's decision to dismiss a venireperson upon a sustained challenge for cause.[311] The trial court stands in the best position to evaluate the demeanor of

303. *Etheridge*, 1994 WL 273325, at *6; McCarter v. State, 837 S.W.2d 117, 119 (Tex. Crim. App. 1972); Ratliff v. State, 690 S.W.2d 597, 599–600 (Tex. Crim. App. 1985).

304. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1995); *Ex parte* Daigle, 848 S.W.2d 691, 692 (Tex. Crim. App. 1993); Jones v. State, 833 S.W.2d 146, 147 (Tex. Crim. App. 1992).

305. A timely request is one urged prior to the commencement of the voir dire examination of the panel assigned to the case. *Williams*, 719 S.W.2d at 575. Voir dire commences when the court recognizes that the State has begun voir dire and examination of the jurors is underway. *Id.* at 577. A request made after that time may be summarily denied. *Id.* at 575.

306. *Daigle*, 848 S.W.2d at 691–92; *Jones*, 833 S.W.2d at 146–47; *Williams*, 719 S.W.2d at 573.

307. *Jones*, 833 S.W.2d at 148.

308. Chappell v. State, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993).

309. TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon 1989 & Supp. 1995).

310. *See* Butler v. State, 830 S.W.2d 125, 130 (Tex. Crim. App. 1992) (holding that Article 35.03 now represents comprehensive list of challenges for cause).

311. Chambers v. State, 866 S.W.2d 9, 22 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1871 (1994); *see Cantu*, 842 S.W.2d at 681 (stating that appellate courts generally defer to trial judges' voir dire challenge rulings).

the venireperson and to determine that individual's credibility.[312] The reviewing court must ask whether the totality of the voir dire supports the trial court's finding.[313] Reversal is warranted only in instances of a clear abuse of discretion.[314] No abuse of discretion occurs if the record supports the court's holding.[315]

If the reviewing court determines that the State was improperly permitted a challenge for cause, harm may be demonstrated by a showing that the State used all of its peremptory challenges.[316] In a capital case, however, the error is reversible even though the State may have had peremptory challenges remaining at the end of voir dire.[317]

Denial of a challenge for cause is also governed by the abuse of discretion standard. To preserve reversible error in these instances, the appellant must demonstrate that (1) he exhausted all of his peremptory challenges, (2) the trial court denied his request for additional peremptory challenges, and (3) a venireperson upon whom he would have exercised a peremptory challenge was seated

312. Garcia v. State, 887 S.W.2d 846, 854 (Tex. Crim. App. 1994), *cert. denied*, 1995 U.S. LEXIS 2081 (Mar. 20, 1995); Wheatfall v. State, 882 S.W.2d 829, 833 (Tex. Crim. App. 1994).

313. *Cantu*, 842 S.W.2d at 682; *see Wheatfall*, 882 S.W.2d at 833; *Garcia*, 887 S.W.2d at 854.

314. Robison v. State, 888 S.W.2d 473, 477 (Tex. Crim. App. 1994); *Garcia*, 887 S.W.2d at 872; *Chambers*, 866 S.W.2d at 22.

315. Flores v. State, 871 S.W.2d 714, 718 (Tex. Crim. App. 1993), *cert. denied*, 115 S. Ct. 313 (1994).

316. Bell v. State, 724 S.W.2d 780, 790 (Tex. Crim. App. 1986); Payton v. State, 572 S.W.2d 677, 680 (Tex. Crim. App. 1978); *see* Richardson v. State, 744 S.W.2d 65, 71 (Tex. Crim. App. 1987) (finding that improper excusal of venireperson is harmless when peremptory strikes remain unused).

317. Garrett v. State, 851 S.W.2d 853, 861 (Tex. Crim. App. 1993); *see* Sigler v. State, 865 S.W.2d 957, 961 (Tex. Crim. App. 1993) (upholding *Garrett* and declining to revisit its rule regarding reversible error). *Compare Richardson*, 744 S.W.2d at 71 (finding improper excusal of venireperson harmless when State challenged juror for cause) *with* Grijalva v. State, 614 S.W.2d 420, 425 (Tex. Crim. App. 1981) (holding that error was incurable when state had unused peremptory challenges remaining and juror was dismissed sua sponte).

on the jury.[318] Thus, error in refusing a challenge for cause may be cured by granting additional peremptory challenges.[319]

A corollary to this rule is that the denial of a request for additional peremptory challenges is not an abuse of discretion in the absence of "wrongdoing" by the trial court.[320] "Such wrongdoing may exist if the trial court has improperly overruled a defendant's challenge for cause and the defendant has accordingly used a strike on a juror who is subject to a challenge for cause."[321]

Effective September 1, 1993, a conviction will not be reversed on appeal because an absolutely disqualified juror was seated unless the defendant raised the error before the verdict was entered or, if the error was discovered or raised after that time, the defendant makes a showing of significant harm.[322]

4. Sua Sponte Dismissal or Excusal

If the trial court dismisses or excuses a prospective juror sua sponte, error is waived in the absence of a timely objection.[323] However, the trial court should not dismiss a prospective juror for cause sua sponte unless that person is absolutely disqualified[324] as a matter of law from serving as a juror.[325] Depending upon whether

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318. Coble v. State, 871 S.W.2d 192, 201 (Tex. Crim. App. 1993), *cert. denied*, 115 S. Ct. 101 (1994); *Garcia*, 887 S.W.2d at 852; *Chambers*, 866 S.W.2d at 23; Rousseau v. State, 855 S.W.2d 666, 677 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 313 (1993); Harris v. State, 790 S.W.2d 568, 581 (Tex. Crim. App. 1989).

319. *See* Rector v. State, 738 S.W.2d 235, 247 (Tex. Crim. App. 1986) (curing error by granting three additional peremptory challenges and finding that remaining error was not reversible), *cert. denied*, 484 U.S. 872 (1987).

320. Cooks v. State, 844 S.W.2d 697, 717 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 3048 (1993).

321. *Id.*

322. TEX. CODE CRIM. PROC. ANN. art. 44.46 (Vernon Supp. 1995).

323. *Cooks*, 844 S.W.2d at 718; Warren v. State, 768 S.W.2d 300, 303 n.2 (Tex. Crim. App.), *cert. denied*, 492 U.S. 923 (1989); Mays v. State, 726 S.W.2d 937, 950 (Tex. Crim. App. 1986), *cert. denied*, 484 U.S. 1079 (1988).

324. A juror is absolutely disqualified if he (1) has been convicted of theft or any felony, (2) is under indictment or other legal accusation for theft or any felony, or (3) is insane. TEX. CODE CRIM. PROC. ANN. arts. 35.16(a), 35.19 (Vernon 1989); Green v. State, 764 S.W.2d 242, 246 (Tex. Crim. App. 1989).

325. Harris v. State, 784 S.W.2d 5, 18–19 (Tex. Crim. App. 1989), *cert. denied*, 494 U.S. 1090 (1990); *see* Johnson v. State, 773 S.W.2d 322, 329–30 (Tex. Crim. App. 1989) (holding judge's decision to dismiss juror will not be disturbed unless an abuse of discretion), *aff'd*, 113 S. Ct. 2658 (1993); TEX. CODE CRIM. PROC. ANN. arts. 35.16, 35.19 (Vernon 1989 & Supp. 1995) (addressing challenge for cause and absolute disqualification); *see also* Good-

the excluded juror was qualified or disqualified for service, the error may be subject to harm analysis.[326]

If the trial court excludes a qualified juror, harm is established by a showing that the State used all of its peremptory strikes and that, but for the sua sponte dismissal, the juror would have served.[327] If the trial court erroneously dismisses a disqualified juror—one who is subject to a challenge for cause—the reviewing court will find reversible error only upon a showing that the appellant was tried by a jury to which he had a legitimate objection.[328] Moreover, the defendant must have exhausted his peremptory challenges and then requested additional challenges.[329]

Article 35.03 of the Code of Criminal Procedure gives the trial court the discretion to hear and evaluate excuses offered by a venireperson to justify exclusion from jury service.[330] If the court deems the excuse sufficient, it may either discharge the juror or postpone service to a specified date.[331] Dismissal of an otherwise qualified juror under this provision is within the trial court's broad discretion,[332] but is subject to review under an abuse of discretion standard.[333]

5. Peremptory Challenges

Generally, a peremptory challenge is one made to a venireperson without the assignment of any reason.[334] The courts, however,

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man v. State, 701 S.W.2d 850, 856 (Tex. Crim. App. 1985) (discussing dismissal of juror for language inability).

326. *Nichols*, 754 S.W.2d at 193; *Goodman*, 701 S.W.2d at 856.

327. *Green*, 764 S.W.2d at 246; *Nichols*, 754 S.W.2d at 193; *Goodman*, 701 S.W.2d at 856.

328. Montoya v. State, 810 S.W.2d 160, 170 (Tex. Crim. App. 1989), *cert. denied*, 112 S. Ct. 426 (1991); *Green*, 764 S.W.2d at 246; *Nichols*, 754 S.W.2d at 193; *Goodman*, 701 S.W.2d at 856.

329. *Green*, 764 S.W.2d at 247.

330. TEX. CODE CRIM. PROC. ANN. art. 35.03 (Vernon 1989).

331. *Id.*

332. *See* Kemp v. State, 846 S.W.2d 289, 294–95 (Tex. Crim. App. 1992) (recognizing that trial court has great latitude to excuse prospective juror), *cert. denied*, 113 S. Ct. 2361 (1993); *Butler*, 830 S.W.2d at 130 (explaining that trial court may consider any factor when excusing prospective juror); *Johnson*, 773 S.W.2d at 330 (noting that excusal of prospective juror is responsibility of trial judges and within judge's discretion).

333. *Johnson*, 773 S.W.2d at 330; *accord Butler*, 830 S.W.2d at 130.

334. TEX. CODE CRIM. PROC. ANN. art. 35.14 (Vernon 1989).

have restricted the use of peremptory challenges in the face of certain constitutional claims.

a. *Batson* Claims

Under the United States Supreme Court's holding in *Batson v. Kentucky*,[335] a criminal defendant may establish a prima facie case of racial discrimination based on the State's use of peremptory challenges to strike members of the defendant's race from the venire.[336] Courts have expanded the *Batson* doctrine so that it no longer requires that the defendant be of the same race as the excluded juror.[337] In addition, *Batson* now applies to peremptory strikes exercised by the defendant[338] and to claims of gender discrimination.[339]

To be timely, a *Batson* challenge must be raised before the trial court empanels the jury.[340] A jury is considered empaneled when its members have been both selected and sworn.[341] Whether the court holds a *Batson* hearing or the State objects to the timeliness of the *Batson* challenge is irrelevant to whether the appellant preserved error.[342]

In presenting a *Batson* claim, the complaining party must first establish a prima facie case of discrimination. A prima facie case is "the minimum quantum of evidence necessary to support a rational

335. 476 U.S. 79 (1986).

336. Williams v. State, 804 S.W.2d 95, 96–97 (Tex. Crim. App. 1991) (citing Griffith v. Kentucky, 479 U.S. 314 (1987)), *cert. denied*, 501 U.S. 1239 (1991).

337. *See* Powers v. Ohio, 499 U.S. 400 (1991) (concluding that criminal defendant may raise third-party equal protection claims on behalf of jurors excluded because of their race); *see also* Linscomb v. State, 829 S.W.2d 164, 165 n.6 (Tex. Crim. App. 1992) (noting expansion of *Batson* holding).

338. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2358–59 (1993) (holding that purposeful discrimination by criminal defendant in exercise of peremptory challenges is constitutionally prohibited).

339. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994) (declaring that gender-based discrimination in jury selection process jeopardizes integrity of judicial system).

340. *See* TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).

341. Hill v. State, 827 S.W.2d 860, 864 (Tex. Crim. App.), *cert. denied*, 113 S. Ct. 297–98 (1992).

342. Cooper v. State, 791 S.W.2d 80, 83–84 (Tex. Crim. App. 1990).

inference."[343] Stated another way, it is "any relevant evidence with more than a modicum of probative value."[344]

A reviewing court may infer that the trial court found the existence of a prima facie case by the mere fact that a *Batson* hearing was held.[345] The general policy of the Court of Criminal Appeals is not to review a trial court's determination of whether a prima facie showing was made.[346] This policy, however, is subject to exceptions.[347]

Once the defendant has made a prima facie showing, the burden of production shifts to the State to offer a neutral explanation for its peremptory challenges.[348] The State must give "clear and reasonably specific" explanations of "legitimate reasons" for its use of peremptory challenges.[349] The trial court must then establish whether the defendant has proven purposeful discrimination despite the State's explanation.[350] Once the State meets its burden of providing a neutral explanation, the burden to show purposeful discrimination shifts back to the defendant to impeach or refute that explanation or to show that it was merely a pretext for racially motivated strikes.[351] The ultimate burden of persuasion remains at all times with the defendant to prove the existence of purposeful discrimination by a preponderance of the evidence.[352]

The trial court's determination that a strike was not impermissibly discriminatory is entitled to great deference and will not be reversed unless it was "clearly erroneous."[353] The reviewing court

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343. Tompkins v. State, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd*, 490 U.S. 754 (1989); *see Linscomb*, 829 S.W.2d at 166 (noting "minimum quantum" of evidence is not "three pounds or half a bushel or a baker's dozen").

344. *Linscomb*, 829 S.W.2d at 166.

345. *See* Tennard v. State, 802 S.W.2d 678, 681 (Tex. Crim. App. 1990) (concluding that merely holding *Batson* hearing "obviously established a prima facie case"), *cert. denied*, 501 U.S. 1259 (1991).

346. Staley v. State, 887 S.W.2d 885, 891 (Tex. Crim. App. 1994) (citing Dewberry v. State, 776 S.W.2d 589, 591 (Tex. Crim. App. 1989)).

347. *See id.* (reviewing prima facie case and concluding that simply striking member of identifiable racial group does not meet defendant's prima facie burden).

348. *Williams*, 804 S.W.2d at 97; *Tennard*, 802 S.W.2d at 681; Keeton v. State, 749 S.W.2d 861, 862 (Tex. Crim. App. 1988).

349. *Batson*, 476 U.S. at 97: *accord Whitsey*, 796 S.W.2d at 713.

350. *Tennard*, 802 S.W.2d at 680.

351. Salazar v. State, 795 S.W.2d 187, 192 (Tex. Crim. App. 1990).

352. *Williams*, 804 S.W.2d at 97; *Tennard*, 802 S.W.2d at 681.

353. Wheatfall v. State, 882 S.W.2d 829, 835; *see Camacho*, 864 S.W.2d at 528 (explaining appropriate standard of review); *Williams*, 804 S.W.2d at 101 (reiterating applica-

must examine the record in the light most favorable to the trial court's ruling to determine whether the explanations provided by the State are supported by the record, or whether the defendant has rebutted those explanations or brought forth sufficient evidence to establish that the State "expended [its] peremptory challenges in such a manner that it can rationally be inferred that [it] engaged in purposeful racial discrimination."[354] Determinations of the trial court supported by the record are not clearly erroneous.[355] Furthermore, the trial court, as the finder of fact, must weigh the evidence and evaluate the credibility of the witnesses.[356] Its findings are entitled to great deference.[357] A reviewing court may not reverse the finding of the trier of fact merely because it would have reached a different conclusion.[358]

b. Article 35.261

Article 35.261 of the Code of Criminal Procedure contains the Texas codification of the *Batson* rule.[359] By its terms, it is limited to racial discrimination by the State in the exercise of peremptory strikes.[360] Like a *Batson* claim, if the defendant sustains the initial burden of establishing a prima facie case, the burden shifts to the State to provide a racially neutral explanation for the challenge.[361] The burden of persuasion, however, always remains with the defendant.[362]

Because of the expansion of the *Batson* doctrine, "an objection to an impermissible peremptory challenge of a veniremember based on *Batson* and its progeny is no longer coextensive with an

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tion of "clearly erroneous" standard); *Whitsey*, 796 S.W.2d at 721 (clarifying "clearly erroneous" standard).

354. *Williams*, 804 S.W.2d at 101; *see Camacho*, 864 S.W.2d at 528 (stating that appellant bears burden of proof).

355. *Camacho*, 864 S.W.2d at 528; *Williams*, 804 S.W.2d at 101; *Tennard*, 802 S.W.2d at 681; *Whitsey*, 796 S.W.2d at 723.

356. *Keeton*, 724 S.W.2d at 65.

357. Young v. State, 826 S.W.2d 141, 144 (Tex. Crim. App. 1991); *Williams*, 804 S.W.2d at 106; *Keeton*, 724 S.W.2d at 65.

358. *Whitsey*, 796 S.W.2d at 722.

359. TEX. CODE CRIM. PROC. ANN. § 35.261 (Vernon 1989). Article 35.261 does not apply to capital cases. Butler v. State, 872 S.W.2d 227, 232–33 (Tex. Crim. App. 1994); Staley v. State, 887 S.W.2d 885, 890 n.2 (Tex. Crim. App. 1994).

360. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).

361. *Id.*

362. *Id.*

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objection predicated upon Article 35.261."[363] An objection raising a violation of *Batson* will not serve to preserve error under Article 35.261; counsel must make a separate objection alleging a violation of the statute.[364]

c. Remedies

The remedy for a violation of Article 35.261 is to dismiss the array and call a new array.[365] This remedy may be unconstitutionally restrictive because it protects the defendant's rights, but fails to protect the equal protection rights of the excluded juror.[366] The remedy for a *Batson* violation, however, is within the discretion of the trial court.[367] Thus, reinstatement of the excluded juror rather than dismissal of the array may be an appropriate remedy.[368]

B. *Opening Statement*

A party's right to make an opening statement is a statutory right contained in Article 36.01 of the Code of Criminal Procedure.[369] Denial of a timely request to make an opening statement constitutes reversible error, but failure to make a timely request may waive the right.[370]

Article 36.01 gives the defendant the option of making an opening statement immediately after the prosecution's opening statement[371] or after the close of the State's evidence.[372] Article 36.01(b) does not apply, however, when the State waives its opening statement.[373] In those cases, a defendant may only make an opening statement at the close of the State's case in chief.[374]

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363. State *ex rel.* Curry v. Bowman, 885 S.W.2d 421, 425 (Tex. Crim. App. 1993).

364. *Camacho*, 864 S.W.2d at 528.

365. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).

366. *See Bowman*, 885 S.W.2d at 425 (stating that defendant raised objection using equal protection rights of excluded veniremembers).

367. *Butler*, 872 S.W.2d at 233 (citing *Batson*, 476 U.S. at 100 n.24); *Bowman*, 885 S.W.2d at 424.

368. *Bowman*, 885 S.W.2d at 425.

369. Moore v. State, 868 S.W.2d 787, 788–89 (Tex. Crim. App. 1993).

370. *Id.* at 789.

371. TEX. CODE CRIM. PROC. ANN. art. 36.01(b) (Vernon Supp. 1995).

372. *Id.* art. 36.01(a)(5); *Moore*, 868 S.W.2d at 789.

373. *Moore*, 868 S.W.2d at 789–91; *see also* Boston v. State, 871 S.W.2d 752, 752 (Tex. Crim. App. 1994) (asserting that defendant may make opening statement prior to presentation of State's case only when State makes opening statement first).

374. TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(5) (Vernon Supp. 1995).

C. *"The Rule"*

Rule 613 of the Texas Rules of Criminal Evidence states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a defendant which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) the victim, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.[375]

This rule, by its very language, is mandatory.[376] Allowing a witness to remain in the courtroom when none of the enumerated exceptions is met constitutes an abuse of discretion.[377] Nonetheless, this error is subject to harm analysis and is not automatically reversible.[378]

A witness may not be excluded from testifying solely because he has violated the rule.[379] Whether the witness should be excluded under particular circumstances is within the discretion of the trial court.[380] The trial court should consider the interests of the State and the accused, alternative sanctions, and the benefit and harm arising from a disqualification in light of the nature and importance of the testimony to be offered.[381] The court abuses its discretion in excluding a witness if (1) the circumstances show that "neither the defendant nor his counsel . . . consented, procured, connived or had knowledge of a witness or potential witness who is in violation of the sequestration rule" and (2) the witness's testimony is essen-

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375. TEX. R. CRIM. EVID. 613.

376. Moore v. State, 882 S.W.2d 844, 848 (Tex. Crim. App. 1994).

377. *Id.*

378. *See id.* (holding that allowing expert to remain in courtroom during portion of testimony was harmless beyond reasonable doubt).

379. Davis v. State, 872 S.W.2d 743, 745 (Tex. Crim. App. 1994); Webb v. State, 766 S.W.2d 236, 240–41 (Tex. Crim. App. 1989).

380. *Webb*, 766 S.W.2d at 240–41; *see Davis*, 872 S.W.2d at 745 (following rule established in *Holder v. United States*, 150 U.S. 91 (1893)).

381. *Davis*, 872 S.W.2d at 745.

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tial to the defense.[382] Counsel must satisfy both prongs of this test to demonstrate an abuse of discretion.[383]

D. *Competency of Witnesses*

Whether a witness is competent to testify is a matter for the trial court to determine. The trial court's ruling will be upheld on appeal "unless an abuse of discretion is shown by a review of the entire record, including the witness' trial testimony."[384] The trial court also has discretion to allow the State to ask leading questions, particularly to a witness who has difficulty understanding English.[385] Reversal will not result in these circumstances unless the appellant can show undue prejudice.[386]

E. *Evidence*

1. Bench Trial Versus Jury Trial

It was previously presumed that the court, in a bench trial, would disregard any inadmissible evidence presented at trial.[387] The defendant had the burden of establishing that the court relied upon or considered inadmissible evidence in reaching its verdict.[388] The judgment would not be reversed if sustained by sufficient, proper evidence.[389] This is no longer the law, and review of evidentiary

382. *Id.* at 746 (quoting *Webb*, 766 S.W.2d at 244). The excluded testimony need not be the only evidence supporting a particular defensive issue to be crucial. *Id.*

383. *Id.*

384. Hernandez v. State, 643 S.W.2d 397, 400 (Tex. Crim. App. 1982), *cert. denied*, 462 U.S. 1144 (1983); *see* Watson v. State, 596 S.W.2d 867, 871 (Tex. Crim. App. 1980) (finding abuse of discretion in allowing witness to testify); Villarreal v. State, 576 S.W.2d 51, 57 (Tex. Crim. App. 1978) (holding that no abuse of discretion occurred in view of entire record), *cert. denied*, 444 U.S. 885 (1979).

385. *See Hernandez*, 643 S.W.2d at 400 (upholding trial court's allowance of leading questions).

386. *Id.*; *see* Navajar v. State, 496 S.W.2d 61, 64 (Tex. Crim. App. 1973) (finding no undue prejudice in leading questions), *overruled on other grounds by* Rutledge v. State, 749 S.W.2d 50, 53 (Tex. Crim. App. 1988).

387. Miffleton v. State, 777 S.W.2d 76, 82 (Tex. Crim. App. 1989); Tolbert v. State, 743 S.W.2d 631, 633 (Tex. Crim. App. 1988); Keen v. State, 626 S.W.2d 309, 314 (Tex. Crim. App. 1981).

388. *Miffleton*, 777 S.W.2d at 82; *Tolbert*, 743 S.W.2d at 633.

389. *Tolbert*, 743 S.W.2d at 633.

rulings in bench trials are now treated in the same manner as comparable rulings in jury trials.[390]

2. Abuse of Discretion

The trial court has wide discretion in determining the admissibility of evidence.[391] Exclusion of evidence justifies reversal only if the trial court clearly abused its discretion in excluding admissible evidence.[392] Furthermore, error cannot be based upon a trial court's ruling that excludes or admits evidence unless a substantial right of the party is affected.[393] An error in the admission of testimony may generally be cured with an instruction to disregard,[394] except when it appears that the "evidence is clearly calculated to inflame the minds of the jury and is of such character as to suggest the impossibility of withdrawing the impression produced on their minds."[395]

3. Determination of Relevancy

Relevant evidence is evidence that tends to make the existence of any fact which is of consequence to the determination of the action more or less probable than it would be without the evidence.[396] Generally, all relevant evidence is admissible, and evidence that is not relevant is not admissible.[397] The trial court's determination of relevancy is subject to the abuse of discretion standard of review. The Court of Criminal Appeals has articulated the application of this standard as follows:

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390. *See* Gipson v. State, 844 S.W.2d 738, 741 (Tex. Crim. App. 1992) (disavowing presumption in bench trials per Rule 81(b)(2)).

391. Johnson v. State, 698 S.W.2d 154, 160 (Tex. Crim. App. 1985), *cert. denied*, 479 U.S. 239 (1986).

392. *Id.*; Breeding v. State, 809 S.W.2d 661, 663 (Tex. App.—Amarillo 1991, pet. ref'd).

393. TEX. R. CRIM. EVID. 103(a); Ethington v. State, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991).

394. Gardner v. State, 730 S.W.2d 675, 696 (Tex. Crim. App.), *cert. denied*, 484 U.S. 905 (1987); Guzmon v. State, 697 S.W.2d 404, 408 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1090 (1986); Coe v. State, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984).

395. *Campos v. State*, 589 S.W.2d 424, 428 (Tex. Crim. App. 1979); *accord Gardner*, 730 S.W.2d at 696; *Guzmon*, 697 S.W.2d at 408; *Coe*, 683 S.W.2d at 436.

396. TEX. R. CRIM. EVID. 401.

397. TEX. R. CRIM. EVID. 402.

> Where the appellate court can say with confidence that by no reasonable perception of common experience can it be concluded that proffered evidence has a tendency to make the existence of a fact of consequence more or less probable than it would otherwise be, then it can be said that the trial court abused its discretion to admit the evidence. Moreover, when it is clear to the appellate court that what was perceived by the trial court as common experience is really no more than the operation of a common prejudice, not borne out in reason, the trial court has abused its discretion.[398]

4. Balancing of Probative Value and Prejudicial Effect

Rule 403 of the Rules of Criminal Evidence provides a means of excluding otherwise relevant evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.[399]

This rule, however, favors admissibility of relevant evidence and presumes that such evidence will be more probative than prejudicial.[400]

The trial court has wide discretion in determining whether to admit or exclude evidence under Rule 403. As long as the court operates within the bounds of that discretion, an appellate court should not disturb its decision.[401] In ruling on objections under Rule 403, "an appellate court should not reverse a trial judge whose ruling was within the zone of reasonable disagreement."[402] If the ruling was outside that zone, however, a reviewing court should not hesitate to reverse the trial court's determination.[403]

5. Curative Admissibility

When the defendant offers testimony on direct examination that establishes the same facts as those to which he previously objected,

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398. Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

399. TEX. R. CRIM. EVID. 403.

400. *Montgomery*, 810 S.W.2d at 389.

401. *Id.* at 390; *see also* Theus v. State, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992) (affording trial court wide discretion in balancing impeachment value and prejudicial effect of prior convictions).

402. *Montgomery*, 810 S.W.2d at 391.

403. *Theus*, 845 S.W.2d at 881.

the admission of improper evidence cannot be used to reverse a conviction.[404] This is known as the doctrine of curative admissibility.[405] A corollary to this rule is that "the harmful effect of improperly admitted evidence is not cured by the introduction of rebuttal evidence designed to meet, destroy, or explain it."[406]

6. Extraneous Offenses

The admissibility of evidence of extraneous offenses is governed by Rule 404 of the Rules of Criminal Evidence.[407] Evidence of other crimes, wrongs, or acts may be admissible if it has relevance other than to show that the accused acted in conformity with some trait of character.[408] Permissible uses of such evidence include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[409] If the trial court determines the evidence has no relevance apart from character conformity, it is absolutely inadmissible and the trial court has no discretion to admit it.[410] The court retains some discretion, however, in determining whether the evidence serves any legitimate purpose.[411] Although some degree of appellate deference is appropriate, the trial court's discretion is not a license to allow introduction of patently irrelevant evidence.[412]

If the proponent of extraneous offense evidence demonstrates that the evidence has some relevance other than character conformity, the trial court still retains discretion to exclude the evidence under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice."[413] An objection that evidence constitutes proof of an extraneous offense will not

404. Thomas v. State, 572 S.W.2d 507, 512 (Tex. Crim. App. 1976) (op. on reh'g); *see also* Bush v. State, 697 S.W.2d 397, 404 (Tex. Crim. App. 1985) (explaining that error was cured by admission of same facts without objection).

405. *Bush*, 697 S.W.2d at 404; *Thomas*, 572 S.W.2d at 512.

406. *Bush*, 697 S.W.2d at 404; *e.g.*, Rogers v. State, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993); *Thomas*, 572 S.W.2d at 512.

407. *See* TEX. R. CRIM. EVID. 404(b) (delineating circumstances under which "[e]vidence of other crimes, wrongs or acts" may be admissible).

408. *Id.*

409. *Id.*

410. *Montgomery*, 810 S.W.2d at 387; *see also* Gilbert v. State, 808 S.W.2d 467, 472 (Tex. Crim. App. 1991) (holding such evidence absolutely inadmissible).

411. *Montgomery*, 810 S.W.2d at 390.

412. *Gilbert*, 808 S.W.2d at 472.

413. *Id.*

preserve review of the balancing issue presented in Rule 403.[414] Further objection on that ground is required.[415] If a Rule 403 objection is properly lodged, the trial court has no discretion;[416] it must conduct the balancing analysis and, in close cases, the court should favor admissibility.[417]

7. Photographs

Generally, a photograph relevant to a material issue and accurately depicting its subject at a given time is admissible.[418] In other words, a photograph is generally admissible if verbal testimony on matters represented therein is also admissible.[419] Whether a photograph is admissible falls within the trial court's discretion.[420] The court abuses its discretion when it admits a photograph with only slight probative value and great inflammatory potential.[421]

8. Hearsay

Whether evidence falls within an exception to the hearsay rule is a matter to be resolved by the trial court. A trial court's decision is reviewed under the abuse of discretion standard.[422] The appellate courts should not conduct de novo review, but should limit their role to determining whether the record supports the trial court's decision.[423]

F. *The Jury Charge*

The effect of charge error on sufficiency analysis will be discussed in Part VII. Determination of whether charge error is re-

414. *Montgomery*, 810 S.W.2d at 388.
415. *Id.*
416. *Id.* at 389.
417. *Id.*
418. DeLuna v. State, 711 S.W.2d 44, 46 (Tex. Crim. App. 1986); *accord* Roy v. State, 608 S.W.2d 645, 649 (Tex. Crim. App. 1980) (basing admission of motion pictures on standard used for photographs).
419. Ramirez v. State, 815 S.W.2d 636, 647 (Tex. Crim. App. 1991); Wilkerson v. State, 726 S.W.2d 542, 547 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 940 (1987).
420. *Ramirez*, 815 S.W.2d at 646–47.
421. *Id.* at 647; *Wilkerson*, 726 S.W.2d at 547.
422. Coffin v. State, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994); *see also* Cunningham v. State, 877 S.W.2d 310, 313 (Tex. Crim. App. 1994) (establishing standard of review of exclusion of evidence under Rule 803(24) as abuse of discretion).
423. *Coffin*, 885 S.W.2d at 149.

versible was previously addressed in Part III (D). This section discusses four common areas of jury charge error.

1. The Law of Parties

"A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both."[424]

The test on whether an instruction on the law of parties should be given is as follows:

> Where the evidence introduced upon the trial shows the active participation in the offense by two or more persons, the trial court should first remove from consideration the acts and conduct of the non-defendant actor. Then, if the evidence of the conduct of the defendant then on trial would be sufficient in and of itself, to sustain the conviction, no submission of the law of [parties] is required . . . .
>
> On the other hand, if the evidence introduced upon the trial of the cause shows, or raises an issue, that the conduct of the defendant then upon trial is not sufficient, in and of itself, to sustain a conviction, the State's case rests upon the law of [parties] and is dependent, at least in part, upon the conduct of another. In such a case, the law of parties must be submitted and made applicable to the facts of the case.[425]

If the test is met, refusal to submit the law of parties is an abuse of discretion.

In applying the law of parties, the jury charge should specify the mode or modes of conduct that might constitute alternative bases for conviction.[426] Absent an objection to the charge or a request for a more explicit application of the particular method of acting as

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424. TEX. PENAL CODE ANN. § 7.01(a) (Vernon 1994). A person is criminally responsible for an offense committed by the conduct of another if:

> (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense; or
>
> (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

Id. § 7.02(a).

425. Etheridge v. State, No. 71,189, 1994 WL 273325, at *9 (Tex. Crim. App. June 22, 1994).

426. Johnson v. State, 739 S.W.2d 299, 305 n.4 (Tex. Crim. App. 1987).

a party, a general application of the law of parties to the facts—that the defendant committed the offense either acting alone or as a party—is sufficient.[427]

Failure to apply the law of parties to the facts of the case will not necessarily be rendered harmless simply because the evidence is legally sufficient to support conviction of the accused as a primary actor, especially when it appears that the State preferred to proceed under the law of parties.[428] If guilt as a party is the theory of prosecution best supported by the evidence and most fervently advanced by the State in argument, then failure to properly apply the law of parties in the charge results in "some harm" under the standard established in *Almanza v. State*.[429]

2. Defenses

Upon a timely request, a defendant is entitled to an instruction on every defense raised by the evidence, regardless of the strength of the evidence or the trial court's opinion of the testimony's credibility.[430] The trial court should not judge the reasonableness of the alleged defense.[431] In fact, the trial court must grant the defendant an instruction regardless of whether the issue is raised by the defendant's testimony alone or otherwise.[432] Thus, if the issue is raised by any party, refusal to submit the requested instruction is an abuse of discretion.

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427. Chatman v. State, 846 S.W.2d 329, 332 (Tex. Crim. App. 1993).

428. *Johnson*, 739 S.W.2d at 302–03.

429. *Id.* at 305; Teague v. State, 864 S.W.2d 505, 517 (Tex. Crim. App. 1993); *see* discussion *supra* Part III(D)(3).

430. Warren v. State, 565 S.W.2d 931, 933–34 (Tex. Crim. App. 1978); *see also* Miller v. State, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991) (stating that general rule gives accused right to instruction raised by evidence whether or not it is credible); Dyson v. State, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984) (quoting *Warren v. State*'s proposition that defendant is entitled to instruction even if evidence is disbelieved by trial court).

431. *See* Sanders v. State, 707 S.W.2d 78, 80 (Tex. Crim. App. 1986) (indicating that trier of fact determines reasonableness of charge).

432. *See Miller*, 815 S.W.2d at 585 (commenting that once defendant raises evidence along with timely request for jury instruction, trial court must grant jury instruction); Thomas v. State, 678 S.W.2d 82, 84 (Tex. Crim. App. 1984) (contending that testimony which raises defensive theory requires charge); *Warren*, 565 S.W.2d at 934 (concluding that trial court is required to charge on defensive issues when issues are raised by evidence).

Furthermore, when the evidence raises several defenses, the defendant is entitled to a jury instruction on each defense,[433] despite conflicts among the defensive theories. However, a defendant is not entitled to a jury instruction if the alleged defense merely negates an element of the offense.[434]

3. Lesser Included Offenses

Article 37.09 of the Code of Criminal Procedure provides the statutory definition of a lesser included offense:

> An offense is a lesser included offense if:
> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
> (3) it differs from the offense charged in the respect that a less culpable mental state suffices to establish its commission; or
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.[435]

In determining whether a charge encompassing a lesser included offense is required, a two-step test is applied. First, the lesser included offense must be included within the proof necessary to establish the offense charged. Second, some evidence must exist in the record that would permit a jury rationally to find that, if the defendant is guilty, he is guilty only of the lesser offense.[436]

Nonetheless, the Court of Criminal Appeals has recently held that a defendant is entitled to an instruction on a lesser included offense if more than a scintilla of evidence raises the issue.[437] This holding appears to detract from the requirement that the evidence

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433. *See* Montgomery v. State, 588 S.W.2d 950, 953 (Tex. Crim. App. 1979) (finding that every defensive issue raised at trial requires charge by trial court).

434. *Sanders*, 707 S.W.2d at 81.

435. TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1981).

436. Rousseau v. State, 855 S.W.2d 666, 673 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 313 (1993); Bartholomew v. State, 871 S.W.2d 210, 212 (Tex. Crim. App. 1994); *see also* Royster v. State, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981) (op. on reh'g) (stating test prior to its modification by *Rousseau*).

437. *See* Bignall v. State, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994) (stating that lesser included charge is given only when supported by evidence).

raising the issue be such that a rational trier of fact could conclude that the defendant is guilty only of the lesser offense.

Whether an offense is a lesser included offense of the charged offense requires a case-by-case analysis.[438]

> The credibility of evidence and whether it is controverted or conflicts with other evidence in the case may not be considered in determining whether a defensive charge or an instruction on a lesser included offense should be given. When evidence from any source raises a defensive issue that a lesser included offense may have been committed and a jury charge on the issue is properly requested, the issue must be submitted to the jury. It is then the jury's duty, under the proper instructions, to determine whether the evidence is credible and supports the defense or the lesser included offense.[439]

A defendant is entitled to a charge on a lesser included offense even if the evidence supporting it is contradicted.[440] All of the evidence adduced at trial should be considered in determining whether an instruction on a lesser included offense should be given. If the evidence raises a lesser included offense, the trial court lacks discretion to refuse to submit that offense to the jury.

Defense counsel should be aware that a defendant who requests, acquiesces in, or fails to object to the submission of a lesser included offense is estopped from asserting on appeal that the evidence is insufficient to support conviction for the lesser offense.[441]

5. Illegally Obtained Evidence

Article 38.23(a) of the Code of Criminal Procedure provides:

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438. Livingston v. State, 739 S.W.2d 311, 336 (Tex. Crim. App. 1987), *cert. denied*, 487 U.S. 1210 (1988); *see Bartholomew*, 871 S.W.2d at 212 (claiming Court of Criminal Appeals has consistently stated this proposition).

439. Moore v. State, 574 S.W.2d 122, 124 (Tex. Crim. App. 1978); Schoelman v. State, 644 S.W.2d 727, 732–33 (Tex. Crim. App. 1983) (quoting *Moore*, 574 S.W.2d at 124); *see also* Thompson v. State, 521 S.W.2d 621, 624 (Tex. Crim. App. 1974) (recognizing that "a defendant is entitled to an instruction on every issue raised by the evidence, whether produced by the State or the defendant, and whether it be strong, weak, unimpeached, or contradicted").

440. *See* Lugo v. State, 667 S.W.2d 144, 145–46 (Tex. Crim. App. 1984) (claiming that Texas has historically recognized this entitlement).

441. *See* State v. Lee, 818 S.W.2d 778, 781 (Tex. Crim. App. 1991) (reinstating conviction of lesser included offense because defense did not object to its submission to jury and because defense requested that such instruction be included); Bradley v. State, 688 S.W.2d 847, 853 (Tex. Crim. App. 1985) (remanding case to trial court for entry of acquittal since accused had objected to lesser included offense charge).

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.[442]

Under this provision, a trial court must give a jury instruction when a factual dispute exists concerning the manner in which the evidence was obtained.[443] Whether the facts upon which a person acts to effectuate an arrest constitute probable cause is a question for the court.[444] When those facts are controverted, an issue of fact is raised for the jury to decide under proper instruction.[445] If no such issue of fact is raised, the trial court acts properly in refusing to instruct the jury under Article 38.23(a).[446]

If conflicting evidence raises the issue of the legality of a stop, the trial court is "statutorily bound" to give the requested charge under Article 38.23.[447] Failure to do so is error subject to *Almanza* harm analysis. However, in *Stone v. State*,[448] the Court of Criminal Appeals held that failure to give an Article 38.23 instruction constituted reversible error without any mention of harm analysis.[449]

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442. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 1995).

443. Thomas v. State, 723 S.W.2d 696, 707 (Tex. Crim. App. 1986); *see* Stone v. State, 703 S.W.2d 652, 655 (Tex. Crim. App. 1986) (requiring submission of requested charge pursuant to Article 38.23 if issue is raised); *see also* Gaffney v. State, 575 S.W.2d 537, 543 (Tex. Crim. App. 1978) (asserting that instruction is required only if disputed fact issue emerges from evidence regarding existence of probable cause).

444. *See* Jordan v. State, 562 S.W.2d 472, 473 (Tex. Crim. App. 1978) (outlining case law in place before statute was enacted).

445. *Id.*

446. *Id.* at 472; Murphy v. State, 640 S.W.2d 297, 299 (Tex. Crim. App. 1982).

447. Reynolds v. State, 848 S.W.2d 148, 149 (Tex. Crim. App. 1993); *see Stone*, 703 S.W.2d at 655 (holding that trial court erred by failing to submit requested charge to jury when issue was raised).

448. 703 S.W.2d 652 (Tex. Crim. App. 1986).

449. *See Stone*, 703 S.W.2d at 655 (holding that trial court committed reversible error in failing to instruct jury on issue of officer's basis for stopping vehicle).

6. Definition of Mental State

The Texas Penal Code outlines three separate "conduct elements": (1) the nature of the conduct; (2) the result of the conduct; and (3) the circumstances surrounding the conduct.[450] A trial court errs if it does not limit the definition of the culpable mental state in the jury charge to the state involved in the particular offense.[451] Upon a finding of error, the reviewing court must review the entire record to ascertain whether the appellant suffered any actual, rather than theoretical, harm.[452] In assessing harm, the court may consider the extent to which the application portion of the charge limited the culpable mental state.[453]

G. *Jury Argument*

1. Content

Because the court lacks discretion to expand the areas of proper jury argument, any argument must fit within one of four general categories: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) responses to opposing counsel's argument; and (4) pleas for law enforcement.[454] Arguments exceeding these areas constitute error.[455]

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450. Cook v. State, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994); *see also* TEX. PENAL CODE ANN. § 6.03 (Vernon 1994) (defining "culpable mental states").

451. *Cook*, 884 S.W.2d at 491; *accord* Navarro v. State, 891 S.W.2d 648, 648 (Tex. Crim. App. 1994) (holding that trial court erred in refusing to limit definition of culpable mental states).

452. *Cook*, 884 S.W.2d at 491; Hughes v. State, No. 70,504, 1994 WL 124305, at *8 (Tex. Crim. App. Apr. 13, 1994); *see Almanza*, 686 S.W.2d at 174 (holding harm analysis for charge error examines actual harm).

453. *Cook*, 884 S.W.2d at 492 n.6; *Hughes*, 1994 WL 124305, at *8–9.

454. Borjan v. State, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990); Allridge v. State, 762 S.W.2d 146, 155 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1040 (1989); McKay v. State, 707 S.W.2d 23, 36 (Tex. Crim. App. 1985), *cert. denied*, 479 U.S. 871 (1986); Franklin v. State, 693 S.W.2d 420, 429 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1031 (1986); Alejandro v. State, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973).

455. Coble v. State, 871 S.W.2d 192, 204 (Tex. Crim. App. 1993), *cert. denied*, 115 S. Ct. 101 (1994); Felder v. State, 848 S.W.2d 85, 95 (Tex. Crim. App. 1992), *cert. denied*, 114 S. Ct. 95 (1993).

2. Harm Analysis

Error in jury argument is subject to harm analysis under Rule 81(b)(2) of the Texas Rules of Appellate Procedure.[456] The court must assess the error's probable impact on the jury in light of the entire record.[457] Determining harmfulness only by an examination of whether overwhelming evidence exists to support the conviction is insufficient.[458] Rather, the court must examine the source and nature of the error, whether and to what degree the State emphasized it, and its probable collateral implications.[459] Additionally, the court must consider whether declaring the error harmless will "encourage the State to repeat it with impunity" and whether the error might have prejudiced the decision-making of the jurors.[460]

Failure to object to improper jury argument waives the error unless the argument was so prejudicial that a prompt instruction to disregard could not have cured any detrimental effect.[461] Incurable error only occurs if, in light of the entire record, the argument was extreme, manifestly improper, prejudicial, or violative of a mandatory statute and, as a result, was so inflammatory that a judicial instruction to disregard would not reasonably have cured its prejudicial effect.[462]

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456. TEX. R. APP. P. 81(b)(2); *see* Whiting v. State, 797 S.W.2d 45, 49 (Tex. Crim. App. 1990) (recognizing Rule 81(b)(2) as harmless error standard applied to jury argument error); Orona v. State, 791 S.W.2d 125, 129–30 (Tex. Crim. App. 1990) (analyzing error injury argument using Rule 81(b)(2) standard).

457. *Coble*, 871 S.W.2d at 205; *Orona*, 791 S.W.2d at 130.

458. *Orona*, 791 S.W.2d at 130.

459. *Coble*, 871 S.W.2d at 206; *Orona*, 791 S.W.2d at 130.

460. *Coble*, 871 S.W.2d at 206; *Orona*, 791 S.W.2d at 130.

461. Motley v. State, 773 S.W.2d 283, 293 (Tex. Crim. App. 1989); Briddle v. State, 742 S.W.2d 379, 389 (Tex. Crim. App. 1987), *cert. denied*, 488 U.S. 986 (1988); Green v. State, 682 S.W.2d 271, 295 (Tex. Crim. App. 1984), *cert. denied*, 470 U.S. 1034 (1985).

462. Hernandez v. State, 819 S.W.2d 806, 820 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 2944 (1992); *see also Felder*, 848 S.W.2d at 95 (finding that arguments of prosecution fell within evidence presented and determining that instruction was sufficient to cure any error); Long v. State, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 3042 (1992) (finding no reversible error after reviewing prejudicial effect of prosecutor's arguments).

3. Duration

The trial court has broad discretion to regulate the length of jury argument.[463] However, complete refusal to allow a defendant's attorney to present closing argument denies the defendant effective assistance of counsel and constitutes an abuse of discretion.[464]

H. *Trial Court's Comment on the Evidence*

1. Generally

The trial court is prohibited from making any comment indicating its opinion of the case or the weight of the evidence.[465] A comment constitutes reversible error if it is reasonably calculated to benefit the State or to prejudice the defendant's rights.[466] An objection to a purported comment on the evidence is required to preserve the issue for review.[467] Moreover, a jury instruction to disregard any comments made by a judge is generally sufficient to cure any error.[468]

2. Rereading Testimony to the Jury

Article 36.28 of the Code of Criminal Procedure provides a mechanism for the jury to review testimony in certain circumstances.[469] In evaluating a request to have testimony reread, the trial court must first determine whether the jurors disagree among

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463. *See* Robinson v. State, 415 S.W.2d 180, 182 (Tex. Crim. App. 1967) (holding no reversible error even though court allowed State to argue beyond allotted time).

464. Ruedas v. State, 586 S.W.2d 520, 523–24 (Tex. Crim. App. 1979).

465. TEX. CODE CRIM. PROC. ANN. art. 38.05 (Vernon 1979); Becknell v. State, 720 S.W.2d 526, 531 (Tex. Crim. App. 1986), *cert. denied*, 481 U.S. 1065 (1987); Marks v. State, 617 S.W.2d 250, 251 (Tex. Crim. App. 1981).

466. *Becknell*, 720 S.W.2d at 531; *Marks*, 617 S.W.2d at 252.

467. *Becknell*, 720 S.W.2d at 532.

468. *Marks*, 617 S.W.2d at 252.

469. TEX. CODE CRIM. PROC. ANN. art. 36.28 (Vernon 1981). Article 36.28 states:

> In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial.

Id.

themselves regarding the testimony.[470] The trial court abuses its discretion when it allows testimony to be reread without first ascertaining whether a disagreement exists.[471] However, the manner in which the court makes this determination is also left to the court's sound discretion.[472]

The abuse of discretion standard also governs review of the scope of the reread testimony.[473] Once the court determines that the request is proper under Article 36.28, it must then determine from the communication which testimonial excerpts will clarify the jurors' confusion and limit the rereading to those sections.[474] The court's decision on this matter will not be disturbed absent a clear abuse of discretion and a showing of harm.[475]

I. *Sentencing*

1. Concurrent and Consecutive Sentences

Generally, the trial court has discretion, subject to review for abuse of discretion,[476] to order multiple sentences to be served concurrently or consecutively.[477] The court's discretion is limited,

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470. Robison v. State, 888 S.W.2d 473, 480–81 (Tex. Crim. App. 1994); Moore v. State, 874 S.W.2d 671, 673 (Tex. Crim. App. 1994); Iness v. State, 606 S.W.2d 306, 314 (Tex. Crim. App. 1980).

471. *Moore*, 874 S.W.2d at 674.

472. *Robison*, 888 S.W.2d at 481 (Tex. Crim. App. 1994). In *Moore*, the court abused its discretion by not making any affirmative effort to determine whether the jurors were in disagreement. *Moore*, 874 S.W.2d at 674. In *Robison*, the court properly informed the jury that testimony would be reread only in the event of a dispute. *Robison*, 888 S.W. at 480. The jury in that case sent three separate requests, each narrower in scope than the prior one. *Id.* at 481. The court did not abuse its discretion in inferring a dispute regarding particular testimony. *Id.*

473. *See id.* (holding that trial court properly used its discretion by providing requested information only); Brown v. State, 870 S.W.2d 53, 55 (Tex. Crim. App. 1994) (holding that context of testimony requested was properly given to jury at discretion of court).

474. *Brown*, 870 S.W.2d at 55 (citing Iness v. State, 606 S.W.2d 306, 314 (Tex. Crim. App. 1980)); *see also* TEX. CODE CRIM. PROC. ANN. art. 36.28 (Vernon 1981) (allowing jury to have witness re-examined or testimony from trial read).

475. *Brown*, 870 S.W.2d at 55; *see* Jones v. State, 706 S.W.2d 664, 668 (Tex. Crim. App. 1986) (finding that trial court abused its discretion by failing to realistically interpret jury's request).

476. *See* Banks v. State, 503 S.W.2d 582, 587 (Tex. Crim. App. 1974) (noting that appellant failed to assert abuse of discretion).

477. TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (Vernon Supp. 1995); *Banks*, 503 S.W.2d at 587. The statute contains special provisions for offenses committed by inmates and for cumulation of sentences involving at least one suspended sentence. *See* TEX. CODE

however, by Section 3.03 of the Penal Code.[478] This section mandates that a defendant's sentences run concurrently when the trial court convicts the defendant of two or more offenses arising from one criminal episode prosecuted in a single criminal action.[479] This is an absolute restriction on a trial court's general authority to impose consecutive sentences.[480] If the court improperly orders consecutive sentences, the sentence is void, and the error cannot be waived.[481]

2. Probation

Granting probation in a nonjury trial, when probation is statutorily available, is entirely within the discretion of the trial court.[482] The trial court's discretion in this area is " 'absolute and unreviewable.' "[483]

VI. Post-Trial Proceedings

A. *Motion for New Trial*

1. Generally

Rule 30 of the Texas Rules of Appellate Procedure governs motions for new trial in criminal cases. A motion for new trial is not required to bring a point on appeal unless it is necessary to adduce evidence of matters not otherwise shown on the record.[484] A motion for new trial may be filed prior to or within thirty days after the date sentence is imposed or suspended in open court.[485] The motion may be amended within this period provided that the court

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Crim. Proc. Ann. art. 42.08(b)-(c) (Vernon Supp. 1995) (requiring judge to order commencement of sentence for crime committed by inmate immediately upon completion of sentence for original offense, and disallowing such sentence if defendant was convicted in two or more cases, one of which was suspended).

478. LaPorte v. State, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992).

479. Tex. Penal Code Ann. § 3.03 (Vernon 1994).

480. *Ex parte* Sims, 868 S.W.2d 803, 804 (Tex. Crim. App. 1993).

481. *Id.* (stating that parties cannot agree to illegal sentence); *LaPorte*, 840 S.W.2d at 415 (holding that failure to object to void sentence cannot be waived).

482. Flournoy v. State, 589 S.W.2d 705, 707 (Tex. Crim. App. 1979).

483. *Id.* (quoting Saldana v. State, 493 S.W.2d 778 (Tex. Crim. App. 1973)).

484. Tex. R. App. P. 30(a).

485. Tex. R. App. P. 31(a)(1). A motion to withdraw a guilty or nolo contendere plea after judgment has been pronounced is considered a motion for new trial. State v. Evans, 843 S.W.2d 576, 577 (Tex. Crim. App. 1992).

has not already overruled it.[486] The defendant must present the motion to the trial court within ten days after filing, but the court retains discretion to allow presentment at any time within seventy-five days from the date sentence was imposed or suspended in open court.[487] If the court fails to rule on the motion within seventy-five days after the date sentence was imposed or suspended in open court, the motion is overruled by operation of law.[488]

The decision on the merits of a motion for new trial is within the trial court's sound discretion.[489] Absent an abuse of discretion, the appellate court will not disturb the trial court's decision.[490] This abuse of discretion standard applies whether the trial court grants or denies the motion for new trial.[491]

An exception to the abuse of discretion standard occurs when a new trial is sought on the ground of insufficient evidence. Because sufficiency of the evidence involves a legal question, the trial court must apply the same test as an appellate court: after considering the evidence in the light most favorable to the verdict, whether any rational trier of fact could have found that the State established the essential elements of the offense beyond a reasonable doubt.[492]

The trial court has no discretion to grant a motion for new trial once the applicable time limits have expired.[493] If the court grants a motion for new trial, it cannot rescind that order absent a clerical error.[494]

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486. TEX. R. APP. P. 30(a)(2).

487. TEX. R. APP. P. 31(c)(1).

488. TEX. R. APP. P. 31(e)(1), (3).

489. State v. Gonzales, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993); Etter v. State, 679 S.W.2d 511, 515 (Tex. Crim. App. 1984); Appleman v. State, 531 S.W.2d 806, 810 (Tex. Crim. App. 1976).

490. *Gonzales*, 855 S.W.2d at 696; *Etter*, 679 S.W.2d at 515; *Appleman*, 531 S.W.2d at 810.

491. *Gonzales*, 855 S.W.2d at 696.

492. State v. Macias, 791 S.W.2d 325, 329–30 (Tex. App.—San Antonio 1990, pet. ref'd); State v. Daniels, 761 S.W.2d 42, 46 (Tex. App.—Austin 1988, pet. ref'd).

493. Drew v. State, 743 S.W.2d 207, 223 (Tex. Crim. App. 1987).

494. Moore v. State, 749 S.W.2d 54, 58 (Tex. Crim. App. 1988); *Ex parte* Drewery, 677 S.W.2d 533, 536 (Tex. Crim. App. 1984).

2. Grounds

Rule 30(b) of the Rules of Appellate Procedure lists nine situations that mandate a new trial.[495] That list is not exhaustive, however, and the trial court has discretion to determine whether other circumstances merit a new trial.[496] Thus, ineffective assistance of counsel may be raised in a motion for new trial even though it is not enumerated in Rule 30(b) as a ground for new trial.[497] Similarly, a motion for new trial may be granted "in the interest of justice."[498]

3. Right to a Hearing

To have a motion for new trial considered by the trial court, the appellant must present the motion to the court.[499] If the defendant

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495. TEX. R. APP. P. 30 (b). A new trial shall be granted an accused for the following reasons:

(1) Except in a misdemeanor case when maximum punishment may be by fine only, where the accused is an individual who has been tried in his absence, unless otherwise authorized by law, or has been denied counsel;

(2) Where the court has misdirected the jury as to the law or has committed some other material error calculated to injure the rights of the accused;

(3) Where the verdict has been decided by lot or in any other manner than by a fair expression of opinion by the jurors;

(4) Where a juror has received a bribe to convict or has been guilty of any other corrupt conduct;

(5) Where any material witness of the defendant has by force, threats or fraud been prevented from attending the court, or where any evidence tending to establish the innocence of the accused has been intentionally destroyed or withheld preventing its production at trial;

(6) Where new evidence favorable to the accused has been discovered since trial;

(7) Where after retiring to deliberate the jury has received other evidence; or where a juror has conversed with any other person in regard to the case; or where a juror became so intoxicated as to render it probable that his verdict was influenced thereby;

(8) Where the court finds the jury has engaged in such misconduct that the accused has not received a fair and impartial trial; and

(9) Where the verdict is contrary to the law and evidence.

Id. The legislature has overruled TEX. R. APP. P. 30(b)(6) by enacting § 40.001 of the Code of Criminal Procedure. Section 40.001 requires that, for offenses committed after September 1, 1993, newly discovered evidence must be material to justify the granting of a new trial. TEX. CODE CRIM. PROC. ANN. art. 40.001 (Vernon Supp. 1995).

496. *Gonzales*, 855 S.W.2d at 694; Reyes v. State, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993); *Evans*, 843 S.W.2d at 578–79.

497. *Reyes*, 849 S.W.2d at 815.

498. *Gonzales*, 855 S.W.2d at 694.

499. TEX. R. APP. P. 31(c)(1); *see Reyes*, 849 S.W.2d at 815 (noting that filing motion is insufficient since motion must be presented to trial court); *see also* Green v. State, 754

fails to do so, the court does not abuse its discretion by allowing the motion to be overruled by operation of law without a hearing.[500] Even if the motion is properly presented to the trial court, a court need not conduct a hearing on a motion for new trial when the matters raised may be determined from the record.[501] On the other hand, when a motion for new trial is properly presented, and the motion raises matters not determinable from the record and upon which the accused could be entitled to relief, failure to hold a hearing constitutes an abuse of discretion.[502]

As a prerequisite to obtaining an evidentiary hearing on matters extrinsic to the record, the motion for new trial must be supported by an affidavit showing reasonable grounds upon which the judgment can be attacked.[503] In the absence of a supporting affidavit, the court does not abuse its discretion by denying the motion for new trial without holding an evidentiary hearing.[504] The affidavit need not establish every component legally required to establish relief, but it must suggest that reasonable grounds exist for holding that relief could be granted.[505] If the motion and affidavit are sufficient to assert reasonable grounds for relief that are not determinable from the record, a hearing on the motion is mandatory.[506]

S.W.2d 687, 687 (Tex. Crim. App. 1988) (explaining that presenting motion to trial judge places judge on notice that appellant desires hearing).

500. *See* Enard v. State, 764 S.W.2d 574, 575 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (finding that, because appellant did not present his motion to trial judge, motion was overruled by operation of law).

501. *See Reyes*, 849 S.W.2d at 816 (noting that all issues raised in motion were determinable from record such that hearing was unnecessary).

502. *See id.* (discussing nature of appellate review).

503. *See id.* (explaining necessity for affidavits); *Green*, 754 S.W.2d at 688 (holding that reasonable grounds existed); McIntire v. State, 698 S.W.2d 652, 658 (Tex. Crim. App. 1985) (declaring that policy underlying necessity of affidavit is to prevent "fishing expeditions").

504. Coons v. State, 758 S.W.2d 330, 339 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

505. *Reyes*, 849 S.W.2d at 816.

506. Jordan v. State, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994).

4. Out-of-Time Motion for New Trial

a. Rule 2

The time limit in which a motion for new trial must be brought is contained in the Rules of Appellate Procedure.[507] It is thus subject to Rule 2(b).[508] Rule 2(b) allows a court of appeals or the Court of Criminal Appeals to suspend any rule, either on the party's application or sua sponte, to promote judicial economy or for other good cause shown.[509] However, Rule 2(a) expressly states that courts may not construe the Rules of Appellate Procedure as extending or limiting the legally established jurisdiction of the courts of appeals, the Court of Criminal Appeals, or the Texas Supreme Court.[510]

The outcome of a motion to abate for an out-of-time motion for new trial may depend on the issue sought to be raised in the motion for new trial. In *Harris v. State*,[511] the San Antonio Court of Appeals concluded that it had authority under Rule 2(b) to abate an appeal for an out-of-time motion for new trial.[512] It held that allowing an out-of-time motion for new trial did not extend its jurisdiction because the trial court, and not the court of appeals, would determine the merits of the motion for new trial.[513] The San Antonio appellate court recognized its discretion to suspend Rule 31(a)'s time limit upon a showing of good cause and to further the interest of justice.

The *Harris* court held that one factor to consider is whether the issue sought to be raised in the motion for new trial could also be raised in a post-conviction application for writ of habeas corpus.[514] Even so, in a subsequent case, the San Antonio court emphasized that it is not precluded from granting an out-of-time motion for new trial if the subject of inquiry may be raised in a post-conviction

507. *See* TEX. R. APP. P. 31(a) (providing 30 days to file motion for new trial following imposition or suspension of sentence in open court).

508. TEX. R. APP. P. 2(b).

509. *Id.*

510. TEX. R. APP. P. 2(a).

511. 818 S.W.2d 231 (Tex. App.—San Antonio 1991, no pet.).

512. *Harris*, 818 S.W.2d at 232.

513. *Id.* at 233.

514. *Id.* at 233.

writ of habeas corpus.[515] The court found the possibility of post-conviction relief to be only one factor to be considered. The court concluded that Rule 2(b)'s provision for suspension of the requirements of any rule for good cause encompasses the exercise of discretion "in the interest of justice and judicial economy."[516]

The El Paso Court of Appeals has also addressed its power under Rule 2(b). In *Torres v. State*,[517] the appellant requested that the court exercise its discretion under Rule 2(b) to allow an out-of-time motion for new trial so that the appellant could develop a record showing ineffective assistance of counsel. The El Paso court expressed its concern that invoking Rule 2(b) would increase appellate jurisdiction, and thereby violate Rule 2(a), by extending the time limits of a jurisdictional step in the perfection of a direct appeal.[518] The court also determined that allowing such motions might "encourage a practice of disrupting the orderly and prompt flow of direct appeals by what could well become a routine defense practice of seeking such abatement for random trolling of the record for signs of ineffective assistance."[519] In *Torres*, the court concluded that it could not grant the motion to abate for an out-of-time motion for new trial because of the constraints of Rule 2(a).[520]

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515. *See* Tuffiash v. State, 878 S.W.2d 197, 199 (Tex. App.—San Antonio 1994, pet. ref'd) (allowing post-conviction writ of habeas corpus and out-of-time motion for new trial on ground that Fred Zain, forensic serologist subsequently investigated and indicted, perjured himself and tampered with evidence).

516. *Id.* at 201.

517. 804 S.W.2d 918 (Tex. App.—El Paso 1990, pet. ref'd).

518. *Torres*, 804 S.W.2d at 920.

519. *Id.*

520. *Id.* The court offered the following suggestion to allow the appellant to bring forward a full record on the issue of ineffective assistance of counsel without enlarging the appellate jurisdiction of the court of appeals:

> Appellant could proceed with his direct appeal, unabated, raising such points of error as are justified by the record. He may concurrently initiate a writ of habeas corpus action in the trial court (not post-final conviction since the appeal is still pending) to pursue the making of an additional record on the issue of ineffective assistance of counsel. Should he encounter an unfavorable result in the trial court, his recourse is appeal to this Court, accelerated due to the habeas corpus nature of the proceeding. He could at that point move reasonably for a consolidation review of the two appellate matters.

Id.

b. Procedure if Motion is Granted

If the appellate court determines that an out-of-time motion for new trial is warranted, it should abate the appeal, set aside the sentence and notice of appeal, and order the trial court to hold a hearing on the motion for new trial.[521] If the motion for new trial is denied, the trial court must then pronounce sentence, and appellant may thereafter give a timely notice of appeal.[522] The appellate timetable runs from the date sentence is imposed.[523]

The order of a court of appeals abating an appeal and ordering the trial court to hold a hearing on the appellant's motion for new trial is a final, appealable order.[524] Thus, the court should issue a mandate disposing of the appeal.[525]

B. *Motion in Arrest of Judgment*

A motion in arrest of judgment is one of only three ways in which a defendant "may return to his pre-sentence status" once sentence has been imposed.[526]

Under the Rules of Appellate Procedure, the accused must provide the trial court with evidence that the adverse judgment was not rendered in accordance with the applicable law.[527] The grounds in support of a motion to arrest judgment include "a ground provided for an exception to substance of an indictment or information or that in relation to the indictment or information a verdict is defective in substance, or any other reason that renders the judgment invalid."[528] The effect of arresting judgment is to re-

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521. Trevino v. State, 565 S.W.2d 938, 941 (Tex. Crim. App. 1978) (stating that appellant was denied effective assistance of counsel at motion for new trial); *see also* Cox v. State, 797 S.W.2d 958, 959 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (granting out-of-time motion for new trial because counsel on appeal was not appointed until 31 days after sentencing).

522. *Trevino*, 565 S.W.2d at 941; *Cox*, 797 S.W.2d at 959.

523. *Cox*, 797 S.W.2d at 959; *see also* Haight v. State, 772 S.W.2d 159, 161–62 (Tex. App.—Dallas 1989, pet. ref'd) (setting aside imposition of sentence to preserve appellate timetable and right of appeal following motion for new trial hearing); Owens v. State, 763 S.W.2d 489, 492 (Tex. App.—Dallas 1988, pet. ref'd) (setting aside sentence and notice of appeal).

524. Price v. State, 826 S.W.2d 947, 948 (Tex. Crim. App. 1992).

525. *Cox*, 797 S.W.2d at 959.

526. *Evans*, 843 S.W.2d at 578. The other two ways to return to pre-sentence status are by motion for new trial or appeal. *Id.*

527. TEX. R. APP. P. 33(a).

528. TEX. R. APP. P. 33(b).

store the accused to his status prior to the presentation of the indictment or information.[529] However, the trial court may remand the accused to custody or fix bail if it concludes that the accused could be convicted on a proper indictment, information, or verdict.[530] Otherwise, the trial court will discharge the accused.[531] A ruling on a motion to arrest judgment is reviewed on appeal in the same manner as a motion for new trial.

C. *Notice of Appeal*

1. Generally

A timely notice of appeal is necessary to invoke the jurisdiction of the court of appeals.[532] Texas Rule of Appellate Procedure 41(b)(1) requires that a notice of appeal be filed within thirty days[533] from the day the trial court imposed or suspended sentence in open court, or the day the trial court signed an appealable order.[534] If a defendant filed timely a motion for new trial, however, the defendant must file a notice of appeal within ninety days from the imposition or suspension of sentence in open court.[535]

The Court of Criminal Appeals has recently clarified when the period for calculating the timeliness of a notice of appeal begins:

> [D]eciding which of the two starting points for calculating timeliness of the notice of appeal depends upon what is being appealed. In the "ordinary" appellate context, where the defendant appeals a judgment of conviction, the thirty days begin to run on the day sentence is imposed or suspended in open court—unless appellant files a motion for new trial, in which case he is provided ninety days from the day sentence is imposed or suspended in open court to file his notice of appeal. In other appealable criminal cases—appeal by the State under Article 44.01 . . . and appeal from an adverse order after the issuance of a writ of habeas corpus other than a post-conviction application for habeas corpus brought under Article 11.07,

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529. TEX. R. APP. P. 35(a).
530. TEX. R. APP. P. 35(b).
531. *Id.*
532. TEX. R. APP. P. 40(b)(1); Rodarte v. State, 860 S.W.2d 108, 109 (Tex. Crim. App. 1993); Shute v. State, 744 S.W.2d 96, 97 (Tex. Crim. App. 1988); Charles v. State, 809 S.W.2d 574, 576 (Tex. App.—San Antonio 1991, no pet.).
533. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(d) (Vernon Supp. 1995) (noting that appeal was perfected when filed within 15 days by State).
534. TEX. R. APP. P. 41(b)(1).
535. *Id.*

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V.A.C.C.P.—the timetable for notice of appeal begins on the day of the signing of the appealable order, e.g., the order dismissing the indictment, granting a new trial, suppressing evidence, or denying habeas corpus relief.[536]

2. Guilty or Nolo Contendere Plea with Plea Bargain

a. Rule 40(b)(1)

It has long been held that a plea of guilty, voluntarily and understandingly made, waives all nonjurisdictional defects, including claimed deprivation of federal due process.[537] This so-called *Helms*[538] rule applies to pleas of nolo contendere[539] and to pleas of guilty before a jury.[540]

Appellate Rule 40(b)(1) provides defendants who pleaded guilty or nolo contendere pursuant to a plea bargain with a method of appealing certain nonjurisdictional defects. If the punishment assessed does not exceed that recommended by the prosecutor and agreed to by the defendant and his attorney, the defendant may appeal a nonjurisdictional defect or error that preceded entry of the plea by filing a notice of appeal stating that the trial court granted permission to appeal or that the defendant raised the issue by written motion ruled on before trial.[541] Rule 40(b)(1) does not apply to misdemeanor convictions following a negotiated plea.[542]

b. Failure to Comply

Generally, if the defendant who pleads guilty or nolo contendere pursuant to a plea-bargain agreement fails to comply with the terms of Rule 40(b)(1), any appeal is limited in scope to jurisdic-

536. *Rodarte*, 860 S.W.2d at 109–10 (citations omitted).

537. Helms v. State, 484 S.W.2d 925, 927 (Tex. Crim. App. 1972); *accord* Christal v. State, 692 S.W.2d 656, 658–59 (Tex. Crim. App. 1985) (finding guilty plea involuntary if induced by agreement that could not be fulfilled); Galitz v. State, 617 S.W.2d 949, 952 (Tex. Crim. App. 1981) (noting that defendant making informed and voluntary guilty plea waives all nonjurisdictional defects).

538. Helms v. State, 484 S.W.2d 925 (Tex. Crim. App. 1972).

539. Harrelson v. State, 692 S.W.2d 659, 661 (Tex. Crim. App. 1985); *Christal*, 692 S.W.2d at 658–59.

540. Morin v. State, 682 S.W.2d 265, 268 (Tex. Crim. App. 1983); Wheeler v. State, 628 S.W.2d 800, 802 (Tex. Crim. App. 1982).

541. TEX. R. APP. P. 40(b)(1).

542. Lemmons v. State, 818 S.W.2d 58, 63 (Tex. Crim. App. 1991); Barre v. State, 826 S.W.2d 722, 722–23 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd).

tional defects.[543] A defendant who fails to comply with Rule 40(b)(1) may nevertheless be entitled to raise nonjurisdictional defects if the information required by the rule is contained in an order by the trial court that is included in the appellate record along with a timely notice of appeal.[544] In such circumstances, the defendant has substantially complied with Rule 40(b)(1).[545]

The effect of filing a notice of appeal that fails to comply with Rule 40(b)(1) has generated considerable confusion. In *Galitz v. State*,[546] the Court of Criminal Appeals held that compliance with the predecessor of Rule 40(b)(1) was required to invoke the jurisdiction of the appellate courts.[547] In *Jones v. State*,[548] however, the court held that the courts of appeals have jurisdiction to hear a case once a notice of appeal has been filed. The court further stated that Rule 40(b)(1) simply regulates the grounds upon which a defendant may appeal.[549]

In *Lyon v. State*,[550] the Court of Criminal Appeals again addressed the jurisdictional implications of filing a notice of appeal that does not comply with Rule 40(b)(1). The court reasoned that Rule 40(b)(1) requires a defendant to obtain the trial court's permission to appeal any matter that was not raised by written motion and ruled on prior to trial. Therefore, courts of appeals are without jurisdiction to address nonjurisdictional defects or errors occurring before or after entry of the plea based on a "general" notice of appeal. Under a general notice of appeal, courts of appeals only have jurisdiction to address jurisdictional issues.[551] Thus, the jurisdiction of the court depends on the points of error raised in the appellant's brief. When those points raise jurisdictional defects,

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543. *Christal*, 692 S.W.2d at 658–59; King v. State, 687 S.W.2d 762, 765 (Tex. Crim. App. 1985).

544. *See* Riley v. State, 825 S.W.2d 699, 701 (Tex. Crim. App. 1992) (noting that record contained "Order Limiting Defendant's Appeal").

545. *Id.*

546. 617 S.W.2d 949 (Tex. Crim. App. 1981).

547. *Galitz*, 617 S.W.2d at 951–52; Padgett v. State, 764 S.W.2d 239, 240–41 (Tex. Crim. App. 1989).

548. 796 S.W.2d 183 (Tex. Crim. App. 1990).

549. *Jones*, 796 S.W.2d at 186; *see also Lemmons*, 818 S.W.2d at 63 n.6 (asserting that Rule 40(b)(1)'s "but" clause is not jurisdictional prerequisite).

550. 872 S.W.2d 732 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 2684 (1994).

551. *Lyon*, 872 S.W.2d at 736; *see also* Davis v. State, 870 S.W.2d 43, 46–47 (Tex. Crim. App. 1994) (noting limitations of general notice of appeal).

the court has jurisdiction to hear the appeal. However, if the points raise only nonjurisdictional defects, the court must dismiss the appeal for lack of jurisdiction.[552]

c. Errors or Defects Occurring Before or After the Plea

In *Davis v. State*,[553] the Court of Criminal Appeals clarified that a defendant who fails to comply with Rule 40(b)(1) may not raise nonjurisdictional errors that occurred before or *after* the entry of his plea. The court reached its conclusion through a somewhat tortured reading of the rule's language:[554]

> [I]n order to prosecute an appeal for a (1) nonjurisdictional defect [occurring before or after the plea], or (2) error that occurred prior to entry of the plea, the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial.[555]

Thus, a general notice of appeal does not confer jurisdiction upon the courts of appeals to review sufficiency of the evidence because this ground is nonjurisdictional.[556] A defendant appealing from a plea-bargained conviction may raise sufficiency of the evidence on appeal only after obtaining permission of the trial court.[557]

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552. *See Davis*, 870 S.W.2d at 47 (concluding that appropriate disposition on appeal for failure to comply with Rule 40(b)(1) and failure to raise jurisdictional issue is to dismiss appeal for lack of jurisdiction). The court has specifically rejected the remedy of allowing a defendant who has filed a defective notice of appeal to amend that notice out of time. *Id.*

553. 870 S.W.2d 43 (Tex. Crim. App. 1994).

554. *Davis*, 870 S.W.2d at 45–46. This reading was required to harmonize Rule 40(b)(1) with its predecessor, Article 44.02 of the Code of Criminal Procedure. Article 44.02 did not contain the language "nonjurisdictional defect or error that occurred prior to entry of the plea." Rather, it generally required permission of the trial court to prosecute an appeal, except on matters raised by pretrial written motion. When the court repealed the proviso of Article 44.02 and enacted Rule 40(b)(1), it lacked the power to "abridge, enlarge, or modify the substantive rights of a litigant." *Id.* Thus, Rule 40(b)(1) cannot be construed to afford any greater or lesser right to appeal than did Article 44.02. *Id.*

555. *Davis*, 870 S.W.2d at 46 (alteration in original).

556. *See* Rhem v. State, 873 S.W.2d 383, 384–85 (Tex. Crim. App. 1994) (overruling grounds for review because appellant's notice did not specify matter raised by written motion and ruled on before trial, nor did it state whether trial court gave permission to appeal); *Davis*, 870 S.W.2d at 46 (holding that court of appeals could not rule on trial court's decision on pretrial suppression motion and sufficiency of evidence because of general notice of appeal).

557. *Davis*, 870 S.W.2d at 46 (citing Morris v. State, 749 S.W.2d 772, 774 (Tex. Crim. App. 1986)).

d. Voluntariness of the Plea

Following *Davis* and *Lyon*, it remains to be decided whether a defendant may raise the voluntariness of the plea itself—a defect or error occurring neither before nor after the plea—without obtaining permission of the trial court.

3. Guilty or Nolo Contendere Plea Without Plea Bargain

Appeals from pleas of guilty or nolo contendere without a plea-bargain agreement are not governed by Rule 40(b)(1).[558] Therefore, the holdings of *Davis* and *Lyon* do not apply to these types of appeals. A non-negotiated guilty plea waives only nonjurisdictional defects occurring *prior* to entry of the plea. There is no jurisdictional bar to appeal because no statute limits the jurisdiction of the courts of appeals in these circumstances.[559] However, appellant will not prevail on the waived issues.[560]

D. *Appeal Bond*

1. Pending Appeal in Court of Appeals

Article 44.04 of the Code of Criminal Procedure governs bail pending appeal. A defendant convicted of a misdemeanor is entitled to be released on reasonable bail pending determination of a motion for new trial or an appeal.[561] The trial court may release a defendant convicted of a felony on reasonable bail pending appeal unless the defendant was sentenced to a term of confinement in excess of fifteen years.[562] Moreover, if good cause exists to believe that the defendant would fail to appear once his conviction becomes final or would commit another offense while on bail, the trial court may deny bail pending appeal.[563]

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558. *See* Jack v. State, 871 S.W.2d 741, 744 (Tex. Crim. App. 1994) (noting that no jurisdictional bars exist in appealing non-negotiated guilty pleas).

559. *Id.*

560. *Id.*

561. TEX. CODE CRIM. PROC. ANN. art. 44.04(a) (Vernon Supp. 1995).

562. *Id.* art. 44.04(b)-(c).

563. *Id.* art. 44.04(c).

Article 44.04 expressly provides a right to appeal to the courts of appeals regarding the amount or the denial of bail.[564] Such appeals are to be given preference by the appellate court.[565]

The Court of Criminal Appeals has outlined the factors courts should consider when reviewing bail pending appeal.[566] The primary purpose of an appeal bond is to ensure the appellant's apprehension if his conviction is subsequently affirmed. In light of this goal, the length of the sentence and the nature of the offense constitute primary considerations. In addition, the court considers the employment record, family ties, length of residency, previous criminal record, ability to make the bond, compliance with previous bond conditions, other outstanding bonds, and any aggravating factors involved in the offense.[567]

2. After Reversal by Court of Appeals

Article 44.04 further provides that, following the reversal of a conviction by a court of appeals, a defendant is entitled to release on reasonable bail, regardless of the length of his sentence, pending the outcome of the State's or the defendant's petition for discretionary review.[568] If bail is requested before a petition for discretionary review is filed, the court of appeals will determine the amount.[569] If it is requested after the filing of a petition for discretionary review, the Court of Criminal Appeals will determine the amount of bail.[570] These two provisions are mutually exclusive.[571] Thus, if the court of appeals has already set bail, the defendant is not thereafter entitled to have the Court of Criminal Appeals consider a bail request.[572]

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564. *Ex parte* Borgen, 646 S.W.2d 450, 451 (Tex. Crim. App. 1983); *see* TEX. CODE CRIM. PROC. ANN. art. 44.04(g) (Vernon Supp. 1995) (according defendant right to appeal for review of any judgment or order).

565. TEX. CODE CRIM. PROC. ANN. art. 44.04(g) (Vernon Supp. 1995).

566. *Ex parte* Rubac, 611 S.W.2d 848, 849–50 (Tex. Crim. App. 1981).

567. *Id.*

568. TEX. CODE CRIM. PROC. ANN. art. 44.04(h) (Vernon Supp. 1995).

569. *Id.*

570. *Id.*

571. *See* Murdock v. State, 870 S.W.2d 41, 42–43 (Tex. Crim. App. 1993) (stating that defendant must choose whether to immediately apply for bail or wait to apply after petition is filed).

572. *Id.* at 43.

E. *The State's Appeal*

Pursuant to Article 44.01(a) of the Code of Criminal Procedure, the State may appeal a trial court's order that

> (1) dismisses an indictment, information or complaint or any portion of an indictment, information or complaint; (2) arrests or modifies a judgment; (3) grants a new trial; (4) sustains a claim of former jeopardy; or (5) grants a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case.[573]

The State may also appeal a sentence on the ground that it is illegal.[574] Furthermore, if the defendant appeals the judgment following a conviction, the State may appeal a ruling on a matter of law.[575] When the State brings an interlocutory appeal pursuant to Article 44.01, however, the defendant has no right to an interlocutory cross-appeal.[576]

VII. SUFFICIENCY OF THE EVIDENCE

A. *Legal Sufficiency*

1. General Standard

In reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must determine, while considering the evidence in the light most favorable to the verdict, whether any rational trier of fact could have found the essential elements of the

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573. TEX. CODE CRIM. PROC. ANN. art. 44.01(a) (Vernon Supp. 1995). The statute simply requires a certification that the evidence suppressed is of substantial importance in the case. Johnson v. State, 871 S.W.2d 744, 749 (Tex. Crim. App. 1994). It does not require any showing of the underlying basis for that assertion. *Id.* The statute does not provide a means for a defendant to challenge the verity of the State's certification. *Id.*

574. TEX. CODE CRIM. PROC. ANN. art. 44.01(b) (Vernon Supp. 1995).

575. *Id.* at (c).

576. *See* State v. Vogel, 852 S.W.2d 567, 570 (Tex. App.—Dallas 1992, pet. ref'd) (stating that Article 44.01 does not entitle defendant to cross-appeal when State appeals from granted motion to suppress); State v. Garcia, 823 S.W.2d 793, 799 (Tex. App.—San Antonio 1992, pet. ref'd) (holding that defendant is not conferred right to interlocutory appeal when State appeals from dismissal of complaint and information); State v. Kost, 785 S.W.2d 936, 940 (Tex. App.—San Antonio 1990, pet. ref'd) (asserting that defendant is not entitled to interlocutory appeal when State appeals from partially granted motion to suppress).

crime beyond a reasonable doubt.[577] Known as the *Jackson v. Virginia*[578] standard, this standard is not a "no evidence" standard of review comparable to the legal sufficiency standard employed in civil appeals.[579] Rather, a reviewing court, pursuant to *Jackson*, must review the entire record to determine whether the State has proven every element of the alleged crime beyond a reasonable doubt and not just provided a plausible explanation of the crime.[580]

In assessing the sufficiency of the evidence, the reviewing court must evaluate all the evidence that the jury was allowed to consider, regardless of whether it was properly admitted.[581] All evidence ruled admissible may be considered by the jury; therefore, the appellate court must also consider any inadmissable evidence presented to the jury.[582] Thus, with respect to sufficiency, inadmissible hearsay admitted without objection is treated the same as all other evidence.[583]

Appellate courts must review the sufficiency of the evidence by comparing the evidence with the indictment as incorporated into the charge.[584] If the charging instrument contains more than one

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577. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Little v. State, 758 S.W.2d 551, 562 (Tex. Crim. App.), *cert. denied*, 488 U.S. 934 (1988).

578. 443 U.S. 307 (1979).

579. *See* Butler v. State, 769 S.W.2d 234, 239 (Tex. Crim. App. 1989) (questioning why Texas Court of Criminal Appeals continued to use "no evidence" standard after *Jackson*), *overruled in part by* Geesa v. State, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991).

580. *Id.*

581. Johnson v. State, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1579 (1994); *see* Rodriguez v. State, 819 S.W.2d 871, 872 (Tex. Crim. App. 1991) (realizing that inadmissible evidence must be reviewed on sufficiency-of-evidence appeal); Deason v. State, 786 S.W.2d 711, 716 (Tex. Crim. App. 1990) (holding that review of improperly admitted videotape was proper under insufficiency-of-evidence standard); Thomas v. State, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988) (noting that complaining party must complain of erroneously admitted evidence); Beltran v. State, 728 S.W.2d 382, 389 (Tex. Crim. App. 1987) (explaining that "admission of illegal evidence is trial error and therefore the proper remedy is to reverse the conviction and remand the cause for a new trial").

582. *Thomas*, 753 S.W.2d at 695; *see also Johnson*, 871 S.W.2d at 186 (stating that Court of Criminal Appeals would consider all evidence regardless of legality of search).

583. *See* Chambers v. State, 711 S.W.2d 240, 247 (Tex. Crim. App. 1986) (deciding to follow majority rule since prior rule lacked any rational underpinnings).

584. Benson v. State, 661 S.W.2d 708, 715 (Tex. Crim. App. 1982) (op. on reh'g), *cert. denied*, 467 U.S. 1219 (1984); Garrett v. State, 749 S.W.2d 784, 788 (Tex. Crim. App. 1986). The State is bound by the allegations as set out in the charging instrument and must prove those allegations beyond a reasonable doubt. Taylor v. State, 637 S.W.2d 929, 930 (Tex. Crim. App. 1982).

count, a general verdict—such as "guilty as charged in the indictment"—may be upheld if the evidence is sufficient to support any of the counts submitted to the jury.[585]

The jury charge's application paragraph authorizes conviction.[586] An abstract charge on a theory of law that the prosecution fails to apply to the facts is insufficient to bring that theory before the jury.[587] Thus, while an appellate court views sufficiency of the evidence in light of the entire charge, if the charge fails to apply a theory of law to the facts of the case, conviction cannot be authorized on that theory even when the theory of law is abstractly defined in the charge.[588] For example, before the jury can convict a defendant as a party, the law of parties must be incorporated within the jury charge's application paragraph.[589] If the law of parties is not included in the application paragraph, the appellate court must determine whether the evidence is sufficient to find the appellant guilty by his own conduct.[590]

It is important to note that an appellate court does not sit as a thirteenth juror, nor may it substitute its judgment for that of the jury. Rather, the jury is the sole judge of the credibility of the witnesses and the weight given to the testimony.[591] It has sole discretion to accept or reject all or part of any witness's testimony.[592] These principles apply with equal force when the trial court sits as the trier of fact.[593]

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585. Bailey v. State, 532 S.W.2d 316, 323 (Tex. Crim. App. 1975).

586. Jones v. State, 815 S.W.2d 667, 669 (Tex. Crim. App. 1991).

587. *Id.*

588. *Id.* at 670.

589. Biggins v. State, 824 S.W.2d 179, 180 (Tex. Crim. App. 1992); Walker v. State, 823 S.W.2d 247, 248 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 1481 (1992).

590. *Walker*, 823 S.W.2d at 248.

591. TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); Vanderbilt v. State, 629 S.W.2d 709, 716 (Tex. Crim. App. 1981), *cert. denied*, 456 U.S. 910 (1982); Bowden v. State, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982); Penagraph v. State, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981).

592. *Penagraph*, 623 S.W.2d at 343; Thompson v. State, 521 S.W.2d 621, 624 (Tex. Crim. App. 1974); *see also* Limuel v. State, 568 S.W.2d 309, 311 (Tex. Crim. App. 1978); (holding that in bench trial, court is free to believe testimony of witness).

593. Mattias v. State, 731 S.W.2d 936, 940 (Tex. Crim. App. 1987), *cert. denied*, 488 U.S. 831 (1988); *Limuel*, 568 S.W.2d at 311; Aldridge v. State, 482 S.W.2d 171, 174 (Tex. Crim. App. 1972).

2. Circumstantial Evidence Cases

a. Generally

Circumstantial evidence is tested under the same standard applicable to the review of direct evidence:[594] "whether, considering the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[595]

b. Pre-*Geesa v. State*

In reviewing the sufficiency of the evidence in circumstantial evidence cases tried before November 6, 1991, appellate courts apply a special "analytical construct" as a method of analyzing sufficiency.[596] This construct requires that a conviction supported by circumstantial evidence exclude every other reasonable hypothesis except the accused's guilt.[597] If the evidence supports a reasonable inference other than finding the essential elements of the crime, no trier of fact could rationally find the accused guilty beyond a reasonable doubt.[598] Proof that amounts to only a strong suspicion or mere probability of guilt is insufficient to support a conviction.[599] However, the circumstances need not exclude every other feasible hypothesis to a moral certainty.[600] Evidence is not insufficient merely because the appellant presents a different version of the events.[601]

The Court of Criminal Appeals has stressed that the reasonable hypothesis construct is not a separate standard of review; it is a

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594. *Johnson*, 871 S.W.2d at 186.

595. Jackson v. Virginia, 443 U.S. 307, 319 (1979); *Butler*, 769 S.W.2d at 238; Dickey v. State, 693 S.W.2d 386, 387 (Tex. Crim. App. 1984).

596. Turro v. State, 867 S.W.2d 43, 46 (Tex. Crim. App. 1993).

597. *Id.* at 46–47; *Butler*, 769 S.W.2d at 238 n.1; Humason v. State, 728 S.W.2d 363, 366 (Tex. Crim. App. 1987). *But see* Carlsen v. State, 654 S.W.2d 444, 447 (Tex. Crim. App. 1983) (distinguishing review standard for circumstantial-evidence conviction from direct-evidence conviction), *overruled by* Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991).

598. *Carlsen*, 654 S.W.2d at 449–50; Freeman v. State, 654 S.W.2d 450, 456–57 (Tex. Crim. App. 1983) (op. on reh'g), *overruled by* Geesa v. State, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991); Denby v. State, 654 S.W.2d 457, 464 (Tex. Crim. App. 1983) (op. on reh'g), *overruled by* Geesa v. State, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991).

599. *Humason*, 728 S.W.2d at 366; Moore v. State, 640 S.W.2d 300, 302 (Tex. Crim. App. 1982).

600. *Turro*, 867 S.W.2d at 47; *Carlsen*, 654 S.W.2d at 447.

601. *Little*, 758 S.W.2d at 562–63.

guideline for evaluating whether the trier of fact could have found the elements of the offense beyond a reasonable doubt.[602] An appellate court may not second-guess the jury so long as a rational trier of fact could conclude that any remaining doubts are unreasonable.[603]

The Court of Criminal Appeals disavowed the "reasonable hypothesis" construct in *Geesa v. State*.[604] That holding applies prospectively to cases tried after November 6, 1991, the date of the opinion.

c. Weak Circumstantial Evidence

Prior to 1986, Texas courts had recognized a " 'weak circumstantial evidence' " standard of review.[605] This standard applied when the prosecution's circumstantial evidence was obviously weak and when the record on appeal demonstrated that, although the prosecution had other evidence capable of further explaining the facts, the prosecution failed to introduce this evidence or to satisfactorily account for its omission. In such a case, the appellate court would conclude that the record showed reasonable doubt of the sufficiency of the evidence to support the conviction.

In *Chambers v. State*,[606] the Court of Criminal Appeals determined that this test "fails for lack of logic" because it rests on the unreasoned assumption that the production of the available testimony would have created a reasonable doubt.[607] The court concluded that, in reviewing the sufficiency of the evidence, the appellate court must focus on the evidence introduced at trial; evidence not introduced at trial is irrelevant to a determination of the sufficiency of the evidence.[608]

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602. *See Turro*, 867 S.W.2d at 47 (explaining that all evidence should be considered in most favorable light to determine if it excludes all reasonable hypotheses except that of defendant's guilt).

603. *Id.*

604. 820 S.W.2d 154 (Tex. Crim. App. 1991).

605. *See Chambers*, 711 S.W.2d at 244, 247 (quoting Cruz v. State, 482 S.W.2d 264 (Tex. Crim. App. 1972) (overruling *Cruz*).

606. 711 S.W.2d 240 (Tex. Crim. App. 1986).

607. *Chambers*, 711 S.W.2d at 245.

608. *Id.*

3. Remedy for Legally Insufficient Evidence

a. Not Guilty Plea

The Fifth Amendment's Double Jeopardy Clause precludes a second trial after the reviewing court finds the evidence legally insufficient to support the conviction.[609] If the appellant entered a "not guilty" plea and was thereafter convicted, a finding of legally insufficient evidence requires reversal of the judgment and entry of an order of acquittal.[610]

The Double Jeopardy Clause does not preclude retrial for a lesser included offense, however, if the first trial was before the court and sufficient evidence existed to convict on the lesser offense.[611] Similarly, double jeopardy does not prevent retrial for a lesser included offense if the first trial was to a jury, the lesser included offense was submitted to the jury, and sufficient evidence existed to support a conviction for the lesser offense.[612]

b. Guilty or Nolo Contendere Plea

In *Bender v. State*,[613] the Court of Criminal Appeals held that insufficiency of the evidence does not require an order of acquittal when the appellant knowingly and voluntarily entered a plea of guilty or nolo contendere.[614] The court based its holding on the fact that no federal constitutional provision exists requiring that evidence of guilt be offered to support a guilty plea in a state criminal prosecution.[615]

Texas has a rather unique statute that requires the State to introduce evidence of guilt to support a defendant's guilty plea in non-

609. Bender v. State, 758 S.W.2d 278, 280 (Tex. Crim. App. 1988); *see also* Burks v. United States, 437 U.S. 1, 17 (1978) (holding that only just remedy was judgment of acquittal in case in which evidence leading to conviction was legally insufficient); Greene v. Massey, 437 U.S. 19, 24 (1978) (noting that constitutional prohibition against double jeopardy applies to state criminal proceedings).

610. *See Burks*, 437 U.S. at 18 (basing ruling upon Double Jeopardy Clause).

611. Shute v. State, 877 S.W.2d 314, 315 (Tex. Crim. App. 1994).

612. *See Ex parte* Granger, 850 S.W.2d 513, 519-20 (Tex. Crim. App. 1993) (limiting double jeopardy bar on retrial of lesser included offense to instances in which jury was not instructed on lesser included offense at original trial).

613. 758 S.W.2d 278 (Tex. Crim. App. 1988).

614. *Bender*, 758 S.W.2d at 280-81; *see Ex parte* Martin, 747 S.W.2d 789, 792-93 (Tex. Crim. App. 1988) (ruling on motion for rehearing).

615. *Martin*, 747 S.W.2d at 791.

capital felony cases.[616] The State's failure to comply with this statute, however, does not violate the federal constitution. It further does not implicate either the *Burks v. United States*[617] or *Greene v. Massey*[618] opinions such that the defendant who voluntarily enters a guilty plea upon insufficient evidence is entitled to acquittal.[619]

Furthermore, reversal for trial error does not create a double jeopardy bar to retrial.[620] If a trial court accepts less than sufficient evidence as the basis for its judgment following a plea of guilty or nolo contendere, it has committed trial error in light of Article 1.15 of the Code of Criminal Procedure.[621] *Burks* and *Greene* have no application in these circumstances.[622]

The proper relief when a plea of guilty or nolo contendere is not supported by sufficient evidence is to reverse the judgment and remand the cause to the trial court.[623]

c. Reformation of Judgment

If the evidence is insufficient to support conviction of a greater offense, but sufficient to support conviction of a lesser included offense, the court of appeals may reform the judgment to reflect conviction of the lesser offense.[624] The cause should then be remanded for a new assessment of punishment.[625] The Court of Criminal Appeals, however, does not have the power to reform a judgment to reflect conviction of a lesser offense.[626]

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616. TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 1995); *Martin*, 747 S.W.2d at 792-93.

617. 437 U.S. 1 (1978).

618. 437 U.S. 19 (1978).

619. *Martin*, 747 S.W.2d at 793.

620. *Burks*, 437 U.S. at 14; *see also Martin*, 747 S.W.2d at 790 (analyzing *Burks* and applying rationale to state case).

621. *Martin*, 747 S.W.2d at 793.

622. *Id.*

623. *Bender*, 758 S.W.2d at 281.

624. Bigley v. State, 865 S.W.2d 26 (Tex. Crim. App. 1993) (citing TEX. R. APP. P. 80); *see* Holder v. State, 837 S.W.2d 802 (Tex. App.—Austin 1992, pet. ref'd) (reforming judgment of lower court to reflect robbery conviction as opposed to aggravated robbery).

625. *See Holder*, 837 S.W.2d at 809 (remanding portion of judgment concerning punishment).

626. *Bigley*, 865 S.W.2d at 27 (clarifying that Court of Criminal Appeals, unlike courts of appeals, does not have authority to reform judgment to lesser included offense); Urbano v. State, 837 S.W.2d 114, 117 (Tex. Crim. App. 1992) (justifying reversal of capital murder conviction by noting lack of authority to reform conviction to murder); Stephens v. State, 806 S.W.2d 812, 818 n.8 (Tex. Crim. App. 1990) (distinguishing Texas Court of Criminal

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B. *Factual Sufficiency*

1. Application to Elements of the Offense

The Court of Criminal Appeals recognized in *Meraz v. State*[627] that, under Article V, Section 6 of the Texas Constitution, the courts of appeals have conclusive jurisdiction to resolve questions concerning the weight and preponderance of the evidence to prove issues upon which the defendant had the burden of proof.[628] The court expressed no opinion concerning the courts of appeals' authority to review factual sufficiency of the evidence to support the elements of the offense.[629] In *Ex parte Schuessler*,[630] the court clarified its position by reiterating that no determination had been made regarding whether the courts of appeals may review the factual sufficiency of an offense beyond those issues upon which the defendant had the burden of proof.[631]

The Court of Criminal Appeals recently revisited the Texas Constitution's Conclusivity Clause in *Bigby v. State*.[632] In *Bigby*, the court concluded that the Conclusivity Clause does not grant jurisdiction to the courts of appeals, but instead restricts the general grant of jurisdiction to the appellate courts so that factual review is limited to direct appellate courts.[633] The court concluded that "as a direct appellate court in capital cases in which the defendant receives a sentence of death," the Court of Criminal Appeals has the "ability to factually review a criminal cause."[634] Despite this broad pronouncement, *Bigby*, like *Meraz*, encompassed only factual suffi-

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Appeals from Ohio Supreme Court on basis that Texas court had no ability to reform conviction to lesser included offense), *cert. denied*, 112 S. Ct. 350 (1991).

627. 785 S.W.2d 146 (Tex. Crim. App. 1990).

628. *Meraz*, 785 S.W.2d at 154.

629. *See id.* at 156 (prohibiting retrial in those cases in which evidence is legally insufficient to support conviction).

630. 846 S.W.2d 850 (Tex. Crim. App. 1993).

631. *Schuessler*, 846 S.W.2d at 852–53 & n.5; *see also* Hughes v. State, No. 70,504, 1994 WL 124305, at *3 (Tex. Crim. App. Apr. 13, 1994) (finding no need to decide whether court should adopt factual sufficiency review as verdict not against overwhelming weight of evidence). The Court of Criminal Appeals has recently granted petition for discretionary review on a point asserting that the court of appeals erred in failing to conduct a proper factual sufficiency review of the evidence to support the conviction. Clewis v. State, No. 94-0450 (Tex. Crim. App. Sept. 21, 1994).

632. 892 S.W.2d 864 (Tex. Crim. App. 1994).

633. *Id.* at 875.

634. *Id.*

ciency review of a defensive issue upon which the defendant bore the burden of proof by a preponderance of the evidence.

The majority of the courts of appeals that have addressed the issue have adopted the position that, absent an instruction by the Court of Criminal Appeals to the contrary, the courts of appeals have no jurisdiction to conduct a factual sufficiency review of the elements of the offense. These courts have reasoned that the holding in *Meraz* was specifically limited to review of evidence pertaining to those issues upon which the defendant bore the burden of proof by a preponderance of the evidence. The courts of appeals, therefore, have generally refused to extend the *Meraz* holding.[635]

The first post-*Meraz* court to assert general factual sufficiency jurisdiction was the Austin Court of Appeals in *Stone v. State*.[636] In *Stone*, the court held that courts of appeals have the power to determine whether a jury's finding relative to the elements of the offense is against the great weight and preponderance of the evidence.[637] In a subsequent opinion, the court reiterated its test for factual sufficiency and stressed that factual sufficiency review does not affect the State's burden of proof.[638] To reach a factual sufficiency point of error, the reviewing court must presume that

635. *See, e.g.*, Metoyer v. State, 860 S.W.2d 673, 679 (Tex. App.—Fort Worth 1993, pet. ref'd) (imploring court to apply *Meraz* standard of review); Blackmon v. State, 830 S.W.2d 711, 713 n.1 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (explaining appellant's argument that evidence was insufficient to demonstrate that substance shown to police officer was cocaine admitted into evidence); Moody v. State, 830 S.W.2d 698, 704 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (concluding that *Meraz* standard of review is inapplicable because State bears burden of proof on issue of self-defense); Richard v. State, 830 S.W.2d 208, 213 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (limiting *Meraz* standard to situations in which defendant has affirmative defense or to other fact issues on which defendant has burden of proof); Jones v. State, 817 S.W.2d 854, 855-56 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (refusing to apply *Meraz* because defendant had no burden of proof on any issue); Brown v. State, 804 S.W.2d 566, 571 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (noting that whether sufficient evidence exists to support conviction is question for State and *Meraz* is inapplicable); Allen v. State, 803 S.W.2d 492, 494 (Tex. App.—Fort Worth 1991, no pet.) (reviewing sufficiency of evidence and concluding that conviction was supported); Randall v. State, 803 S.W.2d 489, 491 (Tex. App.—Fort Worth 1991, pet. ref'd) (concluding that evidence was sufficient to support conviction beyond reasonable doubt); Hunter v. State, 799 S.W.2d 356, 358-59 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (finding no affirmative defense or any other issue on which defendant had burden of proof).

636. 823 S.W.2d 375 (Tex. App.—Austin 1992, pet. ref'd).

637. *Stone*, 823 S.W.2d at 377.

638. Orona v. State, 836 S.W.2d 319, 321–22 (Tex. App.—Austin 1992, no pet.). *But cf.* Mukes v. State, 828 S.W.2d 571 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (declin-

the evidence is constitutionally sufficient for purposes of federal due process.[639] Factual sufficiency review does not incorporate the preponderance of the evidence burden of proof.[640] It simply removes the "prism" of viewing the record in the light most favorable to the verdict to set aside a verdict that is clearly wrong and unjust.[641] The court concluded by asking how factual sufficiency review could be "fair" for civil defendants, but "unfair" for criminal defendants when a verdict is constitutionally adequate, yet is clearly erroneous or unjust.[642]

Although a majority of the courts that have addressed this issue have rejected factual sufficiency review until further notice from the Court of Criminal Appeals, the Texarkana Court of Appeals has also applied the Austin court's standard. Indeed, the Texarkana court extended the standard even further, holding that the state constitution not only permits the courts of appeals to review factual sufficiency of the evidence, but requires such review.[643]

The Dallas Court of Appeals has recently articulated a novel position on the issue of factual sufficiency review in criminal cases. In *Clewis v. State*,[644] the court reasoned that Texas appellate courts must abide by the constitution. The court acknowledged that the Texas Constitution gives the courts of appeals jurisdiction to review fact questions in both civil and criminal cases.[645] The court noted a distinction, however, between appellate fact jurisdiction and the appellate standard of review required to exercise that jurisdiction.[646] Rejecting the standard set forth in *Stone*, the court concluded that the *Jackson* standard encompasses a factual sufficiency

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ing to apply *Meraz* standard in light of "unfair relief" it provides to State's burden of proof).

639. *Orona*, 836 S.W.2d at 321–22.

640. *Id.*

641. *Id.*

642. *Id.*

643. Williams v. State, 848 S.W.2d 915, 916 (Tex. App.—Texarkana 1993, no pet.) (citation omitted); *accord* Lewis v. State, 856 S.W.2d 271, 273 n.1 (Tex. App.—Texarkana 1993, no pet.) (stating that court is constitutionally required to review factual sufficiency of evidence when sufficiency of evidence is challenged); Harvey v. State, 847 S.W.2d 365, 366 n.2 (Tex. App.—Texarkana 1993, no pet.) (noting that, when factual sufficiency of evidence is challenged, court is constitutionally compelled to conduct review).

644. 876 S.W.2d 428 (Tex. App.—Dallas 1994, pet. granted).

645. *Clewis*, 876 S.W.2d at 430.

646. *Id.* at 431.

review[647] and that *Jackson* remains the only appropriate standard of review.[648] On September 21, 1994, the Court of Criminal Appeals granted petition for discretionary review in *Clewis* to determine whether the Dallas Court of Appeals conflicted with *Stone* when it failed to conduct factual review of the evidence under the *Stone* standard.[649]

2. Remedy

If an appellate court finds the evidence factually insufficient to prove the elements of the offense, there is no federal double jeopardy bar to retrial.[650] Thus, the proper remedy is to reverse the judgment and remand the cause for a new trial.[651] The Dallas court, however, consistent with its holding in *Clewis* and its determination to apply only the *Jackson* standard of review, would hold that the appropriate remedy is acquittal.[652]

C. *Specific Applications of Sufficiency Analysis*

1. Issues on Which the Defendant Bears the Burden of Proof

As noted previously, the Court of Criminal Appeals recognized in *Meraz* that the courts of appeals have conclusive jurisdiction to resolve questions regarding the weight and preponderance of the evidence to prove issues upon which the defendant bears the burden of proof.[653] In examining whether an appellant has proven by a preponderance of the evidence an issue upon which he has the burden, a court must determine whether, after considering all relevant evidence, "the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust."[654]

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647. *Id.* at 438.

648. *Id.* at 438–39.

649. Clewis v. State, No. 94-0450 (Tex. Crim. App. Sept. 21, 1994).

650. *See* Tibbs v. Florida, 457 U.S. 31, 47 (1982) (stating that, when reversal of conviction is based upon conclusion that conviction was against great weight of evidence, Double Jeopardy Clause does not prevent retrial).

651. *See Stone*, 823 S.W.2d at 381 n.9 (noting that appropriate remedy was reversal, despite finding evidence sufficient in that case).

652. *See Clewis*, 876 S.W.2d at 435 (declaring that remand for new trial "is not constitutionally permissible under federal law").

653. Meraz v. State, 785 S.W.2d 146, 154 (Tex. Crim. App. 1990).

654. *Id.* at 155.

2. Defenses, Affirmative Defenses, and Exceptions

Defenses, affirmative defenses, and exceptions must be distinguished. Each is specifically labeled in the Penal Code.[655] When a ground of defense is not plainly labeled according to the Penal Code, it has the procedural and evidentiary effect of a defense.[656]

The distinction between defenses, affirmative defenses, and exceptions is significant in the context of sufficiency review. The State bears the burden of proving beyond a reasonable doubt that the defendant's conduct does not fall within an exception.[657] The State also has the burden to disprove a defense beyond a reasonable doubt once evidence is admitted raising the issue.[658] The defendant, however, has the burden to prove an affirmative defense by a preponderance of evidence.[659] Thus, under *Meraz*, the Court of Criminal Appeals would recognize factual sufficiency review of an affirmative defense in the courts of appeals, but might not recognize similar review of a defense or exception.

3. Probation Revocation

In a probation revocation hearing, the State must prove by a preponderance of the evidence that a condition of probation was violated.[660] This burden is satisfied when the greater weight of the credible evidence before the court creates a reasonable belief that

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655. *See* TEX. PENAL CODE ANN. § 2.03(a) (Vernon 1994) (defense); *id.* § 2.04(a) (affirmative defense); *id.* § 2.02(a) (exception). Under the Texas Penal Code, only four affirmative defenses are available: (1) defense to criminal responsibility of corporation or association (§ 7.24); (2) insanity (§ 8.01); (3) mistake of law (§ 8.03); and (4) duress (§ 8.05). TEX. PENAL CODE ANN. §§ 7.24, 8.01, 8.03, 8.05 (Vernon 1994); *see Meraz*, 785 S.W.2d at 153 (listing recognized affirmative defenses).

656. *Id.* § 2.03(e).

657. *Id.* § 2.02(b).

658. *Id.* § 2.03(d); *see also* Luck v. State, 588 S.W.2d 371, 375 (Tex. Crim. App. 1979) (noting that defendant has burden of producing evidence raising defense, but State has burden of persuasion in disproving defense), *cert. denied*, 446 U.S. 944 (1980).

659. TEX. PENAL CODE ANN. § 2.04(d) (Vernon 1994). The defendant generally has the burden to prove insanity, an affirmative defense, by a preponderance of the evidence. Riley v. State, 830 S.W.2d 584, 585 (Tex. Crim. App. 1992). However, if a court has previously adjudicated the defendant insane and that adjudication has not been vacated, insanity is presumed and the State bears the burden to prove, beyond a reasonable doubt, that the defendant was sane at the time of the offense. *Id.*

660. Cobb v. State, 851 S.W.2d 871, 874 (Tex. Crim. App. 1993); Jackson v. State, 645 S.W.2d 303, 305 (Tex. Crim. App. 1983); Martin v. State, 623 S.W.2d 391, 393 n.5 (Tex. Crim. App. 1981).

a condition of probation has been violated as alleged.[661] A plea of true, standing alone, is sufficient to support revocation of probation.[662]

When reviewing an order revoking probation, the only question before an appellate court is whether the court below abused its discretion.[663] The appellate court must view the evidence in the light most favorable to the trial court's order.[664] The trial court determines facts, the credibility of witnesses, and the weight of witness testimony.[665]

If the State sustains its burden of proving by a preponderance of the evidence that the probationer violated a condition of probation as alleged, the decision of whether to revoke probation is within the sound discretion of the trial court.[666] If the State does not meet its burden, the trial court abuses its discretion if it revokes probation.[667]

Formal proof is not necessary at the revocation hearing to establish the terms and conditions of probation.[668] The trial court may take judicial notice of the order of probation, but such notice is not required.[669] However, it is essential that the judgment and order of probation appear in the record on appeal.[670] When the judgment

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661. *See Martin*, 623 S.W.2d at 393 n.5 (allowing use of preponderance-of-evidence standard in probation revocation proceeding); Battle v. State, 571 S.W.2d 20, 22 (Tex. Crim. App. 1978) (concluding that burden of proof requirement within probation revocation proceeding is by preponderance of evidence).

662. Cole v. State, 578 S.W.2d 127, 128 (Tex. Crim. App. 1979).

663. *See Jackson*, 645 S.W.2d at 305 (asserting that standard of appellate review is whether lower court committed abuse of discretion); Friedl v. State, 773 S.W.2d 72, 73 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (limiting appellate review in probation revocation proceeding to abuse of discretion).

664. *See* Jones v. State, 589 S.W.2d 419, 421 (Tex. Crim. App. 1979) (commenting that review will favor court's order); *Friedl*, 773 S.W.2d at 73 (deciding that evidence presented at probation hearing should be viewed to support lower court's order).

665. *See Battle*, 571 S.W.2d at 21 (stating that in probation revocation proceeding, there is no jury); *see also* Kelley v. State, 744 S.W.2d 345, 347 (Tex. App.—Beaumont 1988, pet. ref'd) (determining that trial judge is not required to believe testimony of interested witness).

666. *See* Flournoy v. State, 589 S.W.2d 705, 707, 708 (Tex. Crim. App. 1979) (concluding that trial court has absolute discretion to revoke probation once violation is proved).

667. Cardona v. State, 665 S.W.2d 492, 493-94 (Tex. Crim. App. 1984).

668. *See Cobb*, 851 S.W.2d at 873-74 (noting that formal proof is not necessary at revocation hearing provided documents appear in record).

669. *See id.* (recognizing conflict inherent in requesting judicial notice and not requiring formal proof of probation order).

670. *Id.* at 873-74.

and order of probation do not appear in the record, the probation revocation will be reversed.[671]

4. Adjudication of Guilt

A defendant has no right to appeal the court's determination to proceed with an adjudication of guilt on the original charge following a violation of a condition of deferred adjudication probation.[672] Thus, an appellate court will not review the sufficiency of the evidence to support the decision to adjudicate guilt.[673]

5. Corroboration of a Confession

A judicial confession alone is sufficient to support a conviction on a guilty plea.[674] An extrajudicial confession, however, requires corroboration to support the conviction. The State must present independent proof of the corpus delicti.[675] The independent proof must provide some evidence rendering the corpus delicti probable than it would be without the evidence.[676] Furthermore, the evidence need only show that a crime was committed; it need not con-

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671. *Id.* at 874.

672. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 1995); *see* Phynes v. State, 828 S.W.2d 1, 2 (Tex. Crim. App. 1992) (stating that decision of trial court to adjudicate may not be appealed); Olowosuko v. State, 826 S.W.2d 940, 942 (Tex. Crim. App. 1992) (relying on Article 42.12 in affirming lower court's dismissal of appeal).

673. This is not to say that a defendant has no right to appeal following an adjudication of guilt. Article 42.12 of the Code of Criminal Procedure specifically provides that all proceedings, including appeal, proceed as if adjudication had not been deferred. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 1995). Thus, a defendant may appeal from the original plea proceeding after the State has moved for adjudication of guilt. David v. State, 704 S.W.2d 766, 767 (Tex. Crim. App. 1985). Furthermore, after adjudication of guilt, the defendant is entitled to a hearing on punishment and may appeal from the denial of such a hearing. *See* Issa v. State, 826 S.W.2d 159, 160-61 (Tex. Crim. App. 1992) (reasoning that defendant must be afforded opportunity to present evidence in mitigation of punishment).

674. *See* Morgan v. State, 688 S.W.2d 504, 507 (Tex. Crim. App. 1985) (suggesting that judicial confession is essential to entire ritual of guilty plea); Cevalles v. State, 513 S.W.2d 865, 866 (Tex. Crim. App. 1974) (declaring that judicial confession alone will sustain conviction based on guilty plea).

675. Emery v. State, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994); Gribble v. State, 808 S.W.2d 65, 70 (Tex. Crim. App. 1990), *cert. denied*, 111 S. Ct. 2856 (1991). The corpus delicti is "harm brought about by the criminal conduct of some person." *Gribble*, 808 S.W.2d at 70.

676. *Emery*, 881 S.W.2d at 705.

nect the defendant with the crime.[677] An extrajudicial confession is sufficient to prove the identity of the perpetrator of a crime.[678]

6. Corroboration of Accomplice-Witness Testimony

The Code of Criminal Procedure requires that a defendant cannot be convicted on an accomplice's testimony unless there is other evidence tending to connect the defendant with the offense. It is not sufficient if such corroborating evidence merely shows the commission of the offense.[679] The corroborating evidence need not be sufficient by itself to establish guilt beyond a reasonable doubt, nor must it directly link the accused to the crime.[680] There need only be some evidence that tends to connect the accused with the crime.[681] When other suspicious circumstances are present, corroborating evidence may be sufficient if it proves the defendant was in proximity to the crime scene near the time of the crime's commission.[682]

In gauging the sufficiency of corroborating evidence, the reviewing court will eliminate accomplice testimony from consideration and determine whether other inculpatory evidence tends to connect the defendant with the offense.[683] Each case must be considered on its own facts, and all the relevant evidence presented may be considered for the necessary corroboration.[684]

Although evidence merely showing commission of the offense is insufficient corroboration, it is a factor to be considered.[685] Similarly, evidence that merely demonstrates the motive or opportunity of the accused is insufficient to corroborate an accomplice witness, but it may be considered in connection with other evidence tending to connect the accused with the crime.[686]

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677. *Id.*

678. *Id.* at 706; *Gribble*, 808 S.W.2d at 70.

679. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979).

680. Gill v. State, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994); Burks v. State, 876 S.W.2d 877, 888 (Tex. Crim. App. 1994); Richardson v. State, 879 S.W.2d 874, 880 (Tex. Crim. App. 1993).

681. *Gill*, 873 S.W.2d at 48; *Burks*, 876 S.W.2d at 888.

682. *Richardson*, 879 S.W.2d at 880.

683. *Burks*, 876 S.W.2d at 887; Reed v. State, 744 S.W.2d 112, 125 (Tex. Crim. App. 1988); Paulus v. State, 633 S.W.2d 827, 843 (Tex. Crim. App. 1981).

684. *Reed*, 744 S.W.2d at 126; *Paulus*, 633 S.W.2d at 843.

685. *Reed*, 744 S.W.2d at 126.

686. *Id.*

VIII. Ineffective Assistance of Counsel

A. *Standards of Review*

The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution contain the right to effective assistance of counsel. The effectiveness of retained and appointed counsel are both judged by the same standard.[687]

1. The *Strickland v. Washington* Standard

The Court of Criminal Appeals has adopted the test for ineffective assistance of counsel first enunciated by the United States Supreme Court in *Strickland v. Washington*.[688] Under this two-pronged test, a convicted defendant must show that (1) his trial counsel's performance was deficient, and (2) the deficient performance prejudiced the defense to such a degree that he was deprived of a fair trial.[689] Whether counsel rendered effective assistance is to be judged as of the time of trial, not through hindsight.[690]

The *Strickland* standard applies to allegations of ineffective assistance of counsel under both the federal and state constitutions.[691] It is the proper test to be applied to gauge the effectiveness of counsel at the guilt-innocence stage of a non-capital trial and the guilt-innocence and punishment stages of a capital trial.[692] *Strickland* is also the proper standard regarding challenges to guilty pleas based on ineffective assistance of counsel.[693]

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687. Johnson v. State, 614 S.W.2d 148, 149 (Tex. Crim. App. 1981); *Ex parte* Duffy, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980).

688. 466 U.S. 668, 698–99 (1984); *see* Holland v. State, 761 S.W.2d 307, 314 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1091 (1989); Hernandez v. State, 726 S.W.2d 53, 55-57 (Tex. Crim. App. 1986).

689. *Holland*, 761 S.W.2d at 314; Wilkerson v. State, 726 S.W.2d 542, 548 & n.3 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 940 (1987).

690. Stafford v. State, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991); Butler v. State, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986).

691. *See Hernandez*, 726 S.W.2d at 56-57 (holding that Texas Constitution does not provide greater protection for defendant afforded ineffective assistance of counsel).

692. Craig v. State, 825 S.W.2d 128, 129 (Tex. Crim. App. 1992).

693. *Ex parte* Adams, 707 S.W.2d 646, 649 (Tex. Crim. App. 1986) (citing Hill v. Lockhart, 474 U.S. 52 (1985)).

a. Deficient Performance

The convicted defendant has the burden of proving ineffective assistance of counsel by a preponderance of the evidence.[694] The issue is to be judged by the totality of the representation rather than by isolated acts or omissions of trial counsel.[695] The court presumes the attorney is competent; a defendant must rebut this presumption with proof that his attorney's representation was unreasonable and that the action in question was unsound strategy.[696] The defendant bears the burden of showing that the challenged action was not trial strategy, and the State has no burden to demonstrate that the action was a valid strategy.[697]

Courts have not interpreted the *Strickland* standard as a guarantee that an accused will have errorless or perfect counsel.[698] On appeal, the court will not find incompetency simply because a different course of action was available at trial.[699] The court will inquire into the attorney's strategy only if no reasonable basis exists to support the attorney's strategy or tactics.[700]

Also important is the defendant's influence in determining the trial strategy employed. If the defendant insists on another defense, thus preempting his attorney's strategy, he cannot subsequently claim ineffectiveness of counsel.[701]

b. Prejudice

Assessment of prejudice under the second prong of *Strickland* historically has required the defendant to demonstrate a reason-

694. Jackson v. State, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); Moore v. State, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985).

695. *Wilkerson*, 726 S.W.2d at 548 (quoting *Ex parte* Raborn, 658 S.W.2d 602, 605 (Tex. Crim. App. 1983)).

696. Miniel v. State, 831 S.W.2d 310, 323 (Tex. Crim. App.), *cert. denied*, 113 S. Ct. 245 (1992); *see also Stafford*, 813 S.W.2d at 506 (noting presumption of effective assistance); Duncan v. State, 717 S.W.2d 345, 347 (Tex. Crim. App. 1986) (finding presumption of effective assistance to be inherent in *Strickland* opinion).

697. *See Jackson*, 877 S.W.2d at 771 (reasserting *Strickland*'s finding that defendant must overcome presumption that action in question was sound trial strategy).

698. Bridge v. State, 726 S.W.2d 558, 571 (Tex. Crim. App. 1986).

699. Passmore v. State, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981), *overruled on other grounds by* Reed v. State, 744 S.W.2d 112, 125 n.10 (Tex. Crim. App. 1988); *accord* Walston v. State, 697 S.W.2d 517, 519 (Tex. App.—San Antonio 1985, pet. ref'd).

700. *Ex parte* Burns, 601 S.W.2d 370, 372 (Tex. Crim. App. 1980).

701. *Duncan*, 717 S.W.2d at 348.

able probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[702] Even so, demonstrating that the errors might have had some conceivable effect on the outcome is insufficient to show prejudice.[703]

In *Lockhart v. Fretwell*,[704] the United States Supreme Court stressed that the prejudice prong of *Strickland* analysis must focus on whether the result of the proceeding was fundamentally unfair or unreliable rather than solely on mere outcome determination.[705] Unreliability or unfairness attributable to ineffective counsel ensues when a defendant is deprived of a substantive or procedural right guaranteed by law.[706]

Fretwell presented an unusual case in which counsel failed to make an objection at the sentencing phase of a capital trial.[707] Had counsel made the objection, the court probably would have sustained the objection based on Eighth Circuit law in effect at the time of trial.[708] As a result, the accused would have likely avoided the death penalty.[709] However, the Eighth Circuit reversed its position on this particular issue four years later.[710] Thus, at the time of habeas review, the objection was no longer good and would not have aided the accused.[711]

The Supreme Court held that the deficient performance aspect of *Strickland* must be viewed as of the time of trial, but the prejudice component may be viewed in light of subsequent developments.[712] Thus, defense counsel's performance may have been deficient because the objection he failed to make was valid at the time of trial. The defendant in *Fretwell* was not prejudiced, however, because the objection was no longer valid at the time of review.[713] The Court of Criminal Appeals recently adopted the

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702. *Holland*, 761 S.W.2d at 314; *Wilkerson*, 726 S.W.2d at 548 n.3.

703. Garcia v. State, 887 S.W.2d 862, 880 (Tex. Crim. App. 1994), *cert. denied*, 1995 U.S. LEXIS 2081 (Mar. 20, 1995).

704. 113 S. Ct. 838 (1993).

705. *Lockhart*, 113 S. Ct. at 843.

706. *Id.* at 844.

707. *Id.* at 841.

708. *Id.* at 842.

709. *Lockhart*, 113 S. Ct. at 842.

710. *Id.* at 843.

711. *Id.* at 843.

712. *Id.* at 842, 844.

713. *Id.* at 844.

holding of *Fretwell* for application to claims of ineffective assistance under the state constitution.[714]

2. Ineffective Assistance in the Punishment Phase

In reviewing a complaint of ineffective assistance of counsel relating solely to the punishment phase of a non-capital trial, the two-pronged *Strickland* analysis does not apply.[715] In this situation, the test for effectiveness of counsel is whether counsel was reasonably likely to render effective assistance, and whether counsel reasonably rendered such assistance.[716] In applying this *Ex parte Duffy*[717] standard, the reviewing court considers the totality of the circumstances to judge both the competency of counsel and the assistance actually rendered.[718]

B. *Period of Representation*

In accordance with the Texas Code of Criminal Procedure, an appointed attorney "shall represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of his duties by the court or replaced by other counsel."[719] The Court of Criminal Appeals has held that an appointed attorney's legal responsibilities do not automatically end with the trial's conclusion.[720] However, appointed counsel need not perpetually represent the defendant. Counsel may be permitted to withdraw so long as the defendant's appellate rights are protected, the attorney gives appellant notice of withdrawal, and the record contains the trial court's signed order permitting the with-

714. *Ex parte* Butler, 884 S.W.2d 782, 783-84 (Tex. Crim. App. 1994).

715. *See Ex parte* Walker, 777 S.W.2d 427, 430-31 (Tex. Crim. App. 1989) (noting that second prong of *Strickland* test does not apply to claim of ineffective assistance of counsel involving only punishment stage of non-capital trial); *Ex parte* Cruz, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987) (asserting that, because appellant's ineffective assistance of counsel claim dealt solely with sentencing phase of non-capital trial, *Strickland*'s two-pronged test did not apply).

716. Craig v. State, 825 S.W.2d 128, 130 (Tex. Crim. App. 1992); *see also Ex parte* Duffy, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980) (stating that test for adequacy of representation during punishment phase is "reasonably effective assistance of counsel").

717. 607 S.W.2d 507 (Tex. Crim. App. 1980).

718. *See Ex parte* Felton, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991) (explaining that *Duffy* standard requires court to examine all aspects of representation).

719. TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (Vernon 1989).

720. Ward v. State, 740 S.W.2d 794, 796 (Tex. Crim. App. 1987).

drawal. Moreover, if the defendant remains indigent, substitute counsel must be appointed.[721] Appointed trial counsel will remain the defendant's counsel unless a court expressly permits withdrawal, regardless of whether the appointment was limited to the trial.[722]

Similarly, retained counsel, even if retained only for trial purposes, cannot simply abandon the client at the conclusion of the trial. Whether retained or appointed, the trial attorney is obligated to fully advise a client of the judgment's meaning and effect, the right to appeal, the requirement of filing a notice of appeal, and any other steps required to pursue an appeal.[723] Counsel must also give a professional opinion on the possible grounds for appeal and their merits.[724] Furthermore, retained counsel who fails to file a motion to withdraw remains the defendant's counsel on appeal.[725]

Because discretionary review in the Court of Criminal Appeals is not an appeal of right, counsel need not assist in preparing a petition for discretionary review unless appointed or retained to do so. Nevertheless, counsel does have a responsibility to inform the defendant of the outcome of the appeal in the court of appeals and of the right to file a petition for discretionary review.[726]

C. *Frivolous Appeals*

Appointed counsel is required to file a brief on the client's behalf despite counsel's belief, after a conscientious examination of the case, that an appeal from the client's conviction would be frivolous.[727] The brief, commonly known as an *Anders* brief, should refer to anything in the record that could arguably support the appeal and should provide references to the record and legal authori-

721. *Id.* at 797.
722. *Id.* at 798.
723. *Ex parte* Axel, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988).
724. *Id.*
725. *Id.*
726. *See* Jarrett v. State, 891 S.W.2d 935, 940 (Tex. Crim. App. 1994) (explaining counsel's duties, such as expressing professional judgment).
727. Anders v. California, 386 U.S. 738, 744 (1967); *see* High v. State, 573 S.W.2d 807, 809 (Tex. Crim. App. 1978) (noting that primary duty of trial court is to assure that requirements of *Anders* are met); *see also* Gainous v. State, 436 S.W.2d 137, 137 n.2 (Tex. Crim. App. 1969) (demonstrating adequate compliance with *Anders*). The *Anders* brief should be accompanied by a motion to withdraw as counsel. Stafford v. State, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991).

ties.[728] The appellate court will not accept a frivolous appeal or an *Anders* brief unless the brief includes a discussion of the trial evidence, references to pertinent testimony, references to the location and nature of objections, and the trial court's ruling.[729] Finally, the attorney should discuss either the reasoning in support of the trial court's ruling or the grounds for concluding that the ruling did not harm the appellant.[730]

A copy of the brief must be furnished to the client, and he should be informed of his right to a copy of the record and his right to file a pro se brief if he so wishes.[731] The attorney should certify in his *Anders* brief that these actions have been taken. The attorney should also inform the appellate court, so far as is practical, of whether the client wishes to file a pro se brief.

Upon receipt of an inadequate *Anders* brief, the reviewing court will order counsel to rebrief the appeal.[732] Upon receipt of a proper *Anders* brief, the reviewing court will carefully examine the record to determine whether the appeal is in fact frivolous.[733] If the court finds that there are arguable grounds for appeal, the court must guarantee that another attorney is appointed to represent the appellant on appeal.[734] The court must abate the appeal and remand the case to the trial court with orders that other counsel be appointed to present the appeal.[735] The original counsel will then be allowed to withdraw.[736]

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728. *High*, 573 S.W.2d at 811; *see also Stafford*, 813 S.W.2d at 509 (noting that brief should refer to anything in record that might arguably support appeal).

729. *High*, 573 S.W.2d at 813.

730. *Id.*

731. *Anders*, 386 U.S. at 744; *High*, 573 S.W.2d at 811; Jackson v. State, 485 S.W.2d 553, 553 (Tex. Crim. App. 1972).

732. *See Stafford*, 813 S.W.2d at 510 (holding that order by Court of Appeals to rebrief inadequate *Anders* brief was correct).

733. *See Stafford*, 813 S.W.2d at 511 (detailing *Anders* procedure when court determines whether arguable grounds for appeal exist); *Jackson*, 485 S.W.2d at 553 (applying *Anders* requirements in determining that record reflected no points of error and that appeal was frivolous).

734. *Stafford*, 813 S.W.2d at 511.

735. *Id.*

736. *Id.*

IX. Writs of Habeas Corpus

A. *Pretrial Writs of Habeas Corpus*

The courts of appeals have no original habeas corpus jurisdiction in criminal matters; their jurisdiction is strictly appellate.[737] Whether the trial court issues a writ of habeas corpus[738] is a matter within that court's discretion.[739] The accused has no right to appeal a refusal to issue or grant a writ of habeas corpus, even after a hearing to determine whether sufficient cause exists to issue the writ.[740] If the court refuses to issue the writ or denies a hearing on the merits, the applicant's remedies may include presenting the application to another district judge having jurisdiction or pursuing a writ of mandamus.[741]

A losing party may appeal from a court's ruling on the merits of an applicant's claim.[742] In *Ex parte Hargett*,[743] the trial court did not issue the writ of habeas corpus, but decided to rule on the merits of the claim anyway.[744] Under these circumstances, the court of appeals has jurisdiction to hear the applicant's appeal.[745] A hearing on the merits is to be distinguished, however, from a hearing to determine whether there is sufficient cause to issue the writ.[746] Appeal lies from the former, but not the latter.

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737. Norris v. State, 630 S.W.2d 362, 364 (Tex. App.—Houston [1st Dist.] 1982, no pet.); Denby v. State, 627 S.W.2d 435, 435 (Tex. App.—Houston [1st Dist.] 1981, no pet.), *cert. denied*, 462 U.S. 1110 (1983); *see also* Tex. Code Crim. Proc. Ann. art. 11.05 (Vernon 1977) (listing courts given original habeas corpus jurisdiction, which does not include courts of appeals).

738. A writ of habeas corpus is "an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint." State *ex rel.* Holmes v. Third Court of Appeals, 885 S.W.2d 389, 399 (Tex. Crim. App. 1994).

739. *Ex parte* Carter, 849 S.W.2d 410, 412 (Tex. App.—San Antonio 1993, pet. ref'd); Williams v. Harmon, 788 S.W.2d 192, 193 (Tex. App.—Houston [1st Dist.] 1990) (orig. proceeding); *Ex parte* Spaulding, 612 S.W.2d 509, 510 (Tex. Crim. App. 1981); *Ex parte* Fowler, 573 S.W.2d 241, 244 (Tex. Crim. App. 1978).

740. *Ex parte* Hargett, 819 S.W.2d 866, 868 (Tex. Crim. App. 1991); *Ex parte* Noe, 646 S.W.2d 230, 231 (Tex. Crim. App. 1983).

741. *Hargett*, 819 S.W.2d at 868.

742. *Id.*

743. 819 S.W.2d 866 (Tex. Crim. App. 1991).

744. *Hargett*, 819 S.W.2d at 869.

745. *Id.*

746. *Id.* at 868.

B. *Post-Conviction Writs of Habeas Corpus*

1. Generally

The exclusive post-conviction remedy in final felony convictions is through a writ of habeas corpus returnable to the Court of Criminal Appeals.[747] The writ is traditionally limited to instances in which the trial court's judgment is void.[748] Thus, the remedy is restricted to the review of jurisdictional defects or the denial of constitutional or fundamental rights.[749] Furthermore, to obtain relief on a writ of habeas corpus, the defendant must plead and prove that the error actually contributed to the conviction or punishment.[750]

2. Specific Applications

No bright line rule determines which errors are cognizable on writ of habeas corpus.[751] For example, a challenge to the sufficiency of the evidence is not cognizable on review of a post-conviction writ of habeas corpus.[752] However, ineffective assistance of counsel is a cognizable post-conviction claim.[753]

Furthermore, an Article 11.07 writ returnable to the Court of Criminal Appeals has been held to be the appropriate vehicle for obtaining an out-of-time appeal.[754]

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747. TEX. CODE CRIM. PROC. ANN. art. 11.07, § 2(a) (Vernon Supp. 1995); Ater v. Eighth Court of Appeals, 802 S.W.2d 241, 243 (Tex. Crim. App. 1991).

748. *Ex parte* Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993).

749. *Ex parte* McLain, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994); *Ex parte* Sadberry, 864 S.W.2d at 542-43; *Holmes*, 885 S.W.2d at 397–98; *see Ex parte* McKay, 819 S.W.2d 478, 481 (Tex. Crim. App. 1990) (holding that habeas corpus is limited to exceptional or fundamental constitutional error which renders judgment void).

750. *Ex parte* Barber, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994).

751. *McKay*, 819 S.W.2d at 481-82 (listing examples of errors of violations of due process).

752. *McLain*, 869 S.W.2d at 350; *Ex parte* McWilliams, 634 S.W.2d 815, 818 (Tex. Crim. App.), *cert. denied*, 459 U.S. 1036 (1982); *Ex parte* Ash, 514 S.W.2d 762, 763 (Tex. Crim. App. 1974).

753. Bowler v. State, 822 S.W.2d 334, 335 (Tex. App.—San Antonio 1992, pet. ref'd). *See Ex parte* Walker, 777 S.W.2d 427, 428–32 (Tex. Crim. App. 1989) (granting writ of habeas corpus when assistance of counsel was ineffective in punishment phase).

754. Charles v. State, 809 S.W.2d 574, 576 (Tex. App.—San Antonio 1991, no pet.); *see also Ater*, 802 S.W.2d at 243 (noting that Court of Criminal Appeals has exclusive post-conviction jurisdiction).

A claim of newly discovered evidence may or may not be cognizable. In *Ex parte Binder*,[755] the Court of Criminal Appeals held that a claim of newly discovered evidence is not cognizable in a post-conviction writ of habeas corpus.[756] However, in *State ex rel. Holmes v. Third Court of Appeals*, the court overruled *Binder*[757] to the extent that, in certain circumstances, it forecloses habeas review of claims of factual innocence.[758] In *Holmes*, a death-row inmate claimed that his execution would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because newly discovered evidence demonstrated his innocence. In declaring his claim cognizable on habeas review, the court set forth an " 'extraordinarily high' " threshold showing of innocence.[759] Meeting the threshold showing to obtain review does not, however, end the analysis. The burden of proof in obtaining relief is also very high.[760] The court held that the defendant must show that, based on both the newly discovered evidence and the trial record, "no rational trier of fact could find proof of guilt beyond a reasonable doubt."[761] The court justified this elevated burden of proof because the applicant, having been convicted, is no longer presumed innocent.[762] The presumption gone, it is fair to burden the applicant with proving his innocence rather than raising doubt of his guilt.[763]

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755. 660 S.W.2d 103 (Tex. Crim. App. 1983).

756. *Binder*, 660 S.W.2d at 106.

757. 885 S.W.2d 389 (Tex. Crim. App. 1994).

758. *See Holmes*, 885 S.W.2d at 398 (holding that habeas review is appropriate for newly discovered evidence because denial would violate due process).

759. *Id.* at 398 (citing Herrera v. Collins, 113 S. Ct. 853, 869 (1993)). The court stated:

> [W]e hold an applicant seeking habeas relief based on a claim of factual innocence must, as a threshold, demonstrate that the newly discovered evidence, if true, creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different. Once that threshold has been met the habeas court must afford the applicant a forum and opportunity to present his evidence.

Id.

760. *Id.* at 399.

761. *Id.*

762. *Holmes*, 885 S.W.2d at 399.

763. *Id.* at 398.

X. Conclusion

Presentation of an effective appeal begins long before the brief is filed. Preservation of error at trial is crucial, as is determining to what forum the matter should be addressed and in what form the issue should be presented. Equally important is the determination of the issues that offer the greatest possibility of relief. This decision requires an understanding of the various standards of review the appellate courts employ to decide whether error occurred and whether the error is reversible. Recognizing and concentrating on those issues that (1) are preserved, (2) demonstrate error under the appropriate standard, and (3) demonstrate harm will not only save counsel the time and effort of briefing meritless points of error, but will also increase the client's chance of obtaining the requested relief by focusing the attention and energy of the reviewing court on those issues with merit. The practitioner who grasps the legal concepts set forth in this Article and applies them to the facts of each particular case will be well-equipped to guide and persuade the appellate court in its own application of the law to reach the desired result. In this way, more criminal appeals may become instruments of justice rather than exercises in futility.