St. Mary's Law Journal

Volume 33 | Number 3 Article 1

1-1-2002

Appeals from Pleas of Guilty and Nolo Contendere: History and Procedural Considerations.

Kevin Yeary

ST. MARY'S LAW JOURNAL

VOLUME 33 2002 NUMBER 3

ARTICLE

APPEALS FROM PLEAS OF GUILTY AND NOLO CONTENDERE: HISTORY AND PROCEDURAL CONSIDERATIONS

KEVIN YEARY*

* Kevin Yeary is an assistant criminal district attorney for Bexar County. He is currently assigned to the appellate section. He has worked in the appellate sections of both the Dallas County District Attorney's office and the Harris County District Attorney's office. He also served as briefing attorney to the Honorable Bill M. White at the Texas Court of Criminal Appeals from 1991 to 1992.

I. Introduction

Non-lawyers are often surprised that criminal defendants are permitted to appeal their convictions after pleading guilty to their crimes. It also seems their surprise is only slightly diminished, if at all, upon learning that such defendants rarely succeed at obtaining

a reversal of their convictions. Perhaps non-lawyers would be gratified to learn that even licensed attorneys sometimes fail to understand the rules for maintaining such appeals.

Lawyers representing defendants or the government in appeals following guilty plea or pleas of nolo contendere owe a duty to their clients to maintain at least a basic understanding of the appropriate substantive and procedural requirements for maintaining an appeal from a guilty plea.[1] To do this, lawyers must begin with at least a basic understanding of the history of the right to appeal from a conviction following a plea of guilty, and then stay abreast of changes affecting such appeals. In doing so, lawyers will be able to do their part, not only to educate their non-lawyer friends, but also to effectively represent their clients, whether they are criminal defendants or the government.

Within the last few years, the Texas Court of Criminal Appeals has handed down a number of opinions drastically reshaping the landscape for appeals following pleas of guilty and nolo contendere. It will certainly take some time to discover the ultimate effect of many of the recent high court decisions. This Article is an attempt to put many of those changes into perspective and, hopefully, to provide some guidance for those who might otherwise have to sort through the changes on their own.

II. HISTORY

A. *The Right to Appeal*

There is no federal constitutional right to appeal state criminal convictions.[2] Furthermore, the right to appeal is not guaranteed by the Texas Constitution.[3] In Texas, criminal defendants are granted the right to appeal only by statute.[4] The right to appeal following a

1. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (stating "[a] lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence").

2. Griffin v. Illinois, 351 U.S. 12, 18 (1956); McKane v. Durston, 153 U.S. 684, 687 (1894); Jones v. State, 630 S.W.2d 353, 355 (Tex. App.—Houston [14th Dist.] 1983, no pet.).

3. *See* TEX. CONST., art. V, § 5 (recognizing the jurisdiction of the Texas Court of Criminal Appeals); TEX. CONST. art. V, § 6 (outlining the jurisdiction of the courts of appeals).

4. Phynes v. State, 828 S.W.2d 1, 2 (Tex. Crim. App. 1992) (en banc); Savage v. State, 237 S.W.2d 315, 317 (Tex. Crim. App. 1951).

criminal conviction was conferred by the Legislature in Texas at least as early as 1911.[5]

The modern version of the Texas Code of Criminal Procedure was first enacted in 1965.[6] When the 1965 Texas Code of Criminal Procedure became effective, the provision granting criminal defendants the general right to appeal remained substantially unchanged from its predecessor statutes.[7] The modern version specifically provided "[a] defendant in any criminal action has the right of appeal under the rules hereinafter prescribed."[8] The right to appeal authorized by this statute included the right to appeal a conviction from a plea of guilty or nolo contendere.[9]

B. *Waiver of Jury*

Before 1931, Texas did not have the modern equivalent of a plea of guilty or nolo contendere before the court because a jury trial was required for every felony offense.[10] Following the decision of the United States Supreme Court in *Patton v. United States*,[11] in which the Court held that the Sixth Amendment was not offended by the waiver of a jury trial, "Texas promptly amended its statute

---

5. *See Ex parte* McLoud, 82 Tex. Crim. 299, 200 S.W. 394, 397 (1917) (referring to former Article 894 of the Texas Code of Criminal Procedure, which provided "[a] defendant in any criminal action, upon conviction, has the right of appeal under the rules hereinafter prescribed"); Taylor County v. Jarvis, 209 S.W. 405, 405 (Tex. Comm'n App. 1919, judgm't adopted) (citing Texas Code of Criminal Procedure Article 894, which "provides that a defendant in any criminal case, upon conviction, has the right of appeal under the rules therein prescribed"); Offield v. State, 61 Tex. Crim. 585, 135 S.W. 566, 566 (1911) (referring to former Article 872 of the Texas Code of Criminal Procedure, which provided "a defendant in any criminal action, upon conviction, has the right to appeal under the rules herein prescribed"). *But cf.* TEX. CODE CRIM. PROC. art. 813 (Vernon 1948) (predecessor to modern Article 44.02 of the Texas Code of Criminal Procedure).

6. Acts 1965, 59th Leg., R.S., ch. 722, p. 317, eff. Jan. 1, 1966.

7. *Id.*

8. Acts 1965, 59th Leg., R.S., ch. 722, p. 317, eff. Jan. 1, 1966, *amended by*, Acts 1977, 65th Leg., R.S., ch. 351, p. 940, eff. Aug. 29, 1977; *see also* Morgan v. State, 688 S.W.2d 504, 507 (Tex. Crim. App. 1985) (en banc) (emphasizing the intent of the Legislature to craft an appellate procedure addressing the merits of individual issues).

9. *See* Navarro v. State, 141 Tex. Crim. 196, 147 S.W.2d 1081, 1084 (1941) (demonstrating that a defendant may appeal after entering a plea of guilty); Eurine v. State, 461 S.W.2d 416, 417 (Tex. Crim. App. 1970) (permitting appeal, but affirming conviction on the grounds of sufficiency of the evidence); Miller v. State, 460 S.W.2d 427, 428 (Tex. Crim. App. 1970) (reversing and remanding for insufficient evidence where defendant pled guilty to the court).

10. Young v. State, 8 S.W.3d 656, 661 (Tex. Crim. App. 2000) (en banc).

11. 281 U.S. 276 (1930).

to permit the waiver of [a] jury trial 'in order to reduce the expense of law enforcement and to hasten the disposition of felony cases wherein pleas of guilty are entered.'"[12] The provision for waiver of jury trials was added principally by the adoption of former Article 10(a) of the Texas Code of Criminal Procedure, and by amending former Article 12 of the Texas Code of Criminal Procedure.[13] These provisions were incorporated into the modern version of the Texas Code of Criminal Procedure in 1965, and renumbered as Articles 1.13 and 1.15.[14]

C. *Pre-trial Rulings*

Prior to 1966, Texas law did not provide an avenue for resolving pretrial questions concerning the admissibility of evidence.[15] The recodification of the Texas Code of Criminal Procedure in 1965 brought with it the enactment of Article 28.01, which was the first statutory authorization for pretrial hearings and motions to suppress evidence.[16] Article 28.01 of the Texas Code of Criminal Procedure became effective in January 1966, and granted courts the authority to hold a pretrial hearing to determine questions concerning the admissibility of evidence.[17] However, Texas courts still did not authorize conditional pleas, which precluded defendants from entering into plea bargains while preserving pre-trial rulings for appeal.[18] That is, a defendant who pled guilty or nolo contendere could not appeal a pre-trial ruling.

---

12. Patton v. U.S., 281 U.S. 276, 276 (1930); *Young*, 8 S.W.3d at 661 (quoting Act of Apr. 9, 1931, 42d Leg., R.S., ch. 43, §§ 1-3, 1931 Tex. Gen. Laws 65-67); *see also* TEX. CODE CRIM. PROC. arts. 10(a), 12 (Vernon 1948) (restricting a defendant's option to waive his right to a jury trial).

13. Act of Apr. 9, 1931, 42d Leg., R.S., ch. 43, §§ 1-3, 1931 Tex. Gen. Laws 65-67.

14. TEX. CODE CRIM. PROC. ANN. arts. 1.13, 1.15 (Vernon Supp. 2001).

15. *See Young*, 8 S.W.3d at 663 (explaining that prior to 1966 "our law did not provide for a pre-trial hearing to resolve such questions as the admissibility of evidence").

16. *Id.*

17. Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.

18. *See* Killebrew v. State, 464 S.W.2d 838, 839 (Tex. Crim. App. 1971) (holding that a trial court was not authorized to accept a plea of nolo contendere while preserving the defendant's right to appeal a pre-trial ruling); Chavarria v. State, 425 S.W.2d 822, 823 (Tex. Crim. App. 1968) (reversing and remanding when the trial court permitted Chavarria to plead nolo contendere with the understanding that the plea would still permit him to retain the right to appeal a pre-trial motion to suppress evidence).

D. *Conditional Pleas and The* Helms *Rule (Before* Young v. State*)*[19]

A conditional plea is a procedure "by which a plea of guilty is 'conditioned on' the right to appeal a pre-trial ruling."[20] The Texas Court of Criminal Appeals recently discussed the history of conditional pleas in *Young v. State*.[21] In *Young*, the court explained that "[b]efore 1966 there was little or no possibility of a conditional appeal in a Texas court because our law did not provide for a pre-trial hearing to resolve such questions as the admissibility of evidence."[22]

The principal barrier to the availability of the conditional plea following the recodification of the Texas Code of Criminal Procedure in 1965 was the adoption by the Court of Criminal Appeals of the Fifth Circuit's holding in *Bee v. Beto*.[23] In *Beto*, the Fifth Circuit stated that a guilty plea entered by a Texas defendant was conclusive of the defendant's guilt, admitted all facts charged in the indictment, "and waived all nonjurisdictional defects."[24] The adoption of the *Bee* holding ultimately led the Court of Criminal Appeals to create what became known as the *Helms* rule.[25]

In 1972, in *Helms v. State*,[26] the Court of Criminal Appeals announced "[w]here a plea of guilty is voluntarily and understandingly made, all nonjurisdictional defects including claimed deprivation of federal due process are waived."[27] Following the

---

19. In *Young*, the Texas Court of Criminal Appeals drastically changed the effect of *Helms*. *Young*, 8 S.W.3d at 665-67. *Young* is discussed in detail later in this Article.

20. *Young*, 8 S.W.3d at 663; *see also* FED. R. CRIM. P. 11(a)(2) (providing "[w]ith the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review the adverse determination of any specified pretrial motion," and "[a] defendant who prevails on appeal shall be allowed to withdraw the plea").

21. *Young*, 8 S.W.3d at 663.

22. *Id.*

23. Bee v. Beto, 384 F.2d 925, 926 (5th Cir. 1967) (per curiam).

24. *Bee*, 384 F.2d at 925; *see also* Hoskins v. State, 425 S.W.2d 825, 827, 829-30 (Tex. Crim. App. 1968) (holding that waiver of trial by jury is analogous to an admission of guilt); Wooten v. State, 612 S.W.2d 561, 562 (Tex. Crim. App. 1981) (stating "a corollary to this holding was the rule, announced in *Chavarria v. State*, 425 S.W.2d 822 (Tex. Crim. App. 1968) that it was error to accept a conditional plea").

25. *See Young*, 8 S.W.3d at 656-70 (discussing the antecedents of the *Helms* Rule and its adoption).

26. 484 S.W.2d 925 (Tex. Crim. App. 1972).

27. Helms v. State, 484 S.W.2d 925, 927 (Tex. Crim. App. 1972).

Texas Court of Criminal Appeals' holding in *Helms*, defendants who entered a guilty plea did so with notice that they waived their right to an appellate determination of all nonjurisdictional defects.[28]

The *Helms* rule did not affect the right of defendants to appeal jurisdictional defects.[29] In addition, *Helms* did not prevent an appellant from contending that his plea was neither knowingly nor voluntarily entered.[30] Again, the rule was limited to pleas "voluntarily and understandingly made."[31] Also, the rule only applied to waivers of nonjurisdictional complaints occurring before the entry of the plea.[32] Consequently, a waiver under *Helms* did not prevent an appellant from complaining of errors occurring at or after the plea.[33]

Nevertheless, many considered *Helms* to have the effect of discouraging pleas of guilty and of encouraging defendants to go to trial to avoid the consequence of waiving appellate complaints.[34] Former presiding Judge Onion of the Texas Court of Criminal Appeals summed up the effect of the *Helms* rule as follows:

> If a pre-trial motion to suppress was overruled and the defendant then entered a plea of guilty or nolo contendere, the preservation of any error based on the ruling was waived in light of the '*Helms* rule.' To preserve a ruling on a pre-trial motion it was necessary for the defendant to plead not guilty.[35]

---

28. *Id.* at 927.

29. *See* Courtney v. State, 904 S.W.2d 907, 910 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (holding that *Helms* considers a claim jurisdictional when the state's ability to bring the defendant to court is hampered).

30. *See* Flowers v. State, 935 S.W.2d 131, 133 (Tex. Crim. App. 1996) (en banc) (per curiam) (explaining "by its very terms the *Helms* rule does not apply to bar appeal in open plea cases in which a defendant claims the plea was involuntary"); *see also* Shallhorn v. State, 732 S.W.2d 636, 637 (Tex. Crim. App. 1987) (en banc) (affirming a decision by the court of appeals to reverse Shallhorn's conviction on the ground that her plea was not knowingly and voluntarily entered).

31. *Helms*, 484 S.W.2d at 927.

32. *Id.*

33. *See* Jack v. State, 871 S.W.2d 741, 744 (Tex. Crim. App. 1994) (en banc) (per curiam) (explaining that the Texas Court of Criminal Appeals has "never extended the *Helms* rule to cover asserted error occurring at or after entry of a nonnegotiated plea").

34. Lyon v. State, 872 S.W.2d 732, 734 (Tex. Crim. App. 1994) (en banc) (stating that *Helms* interpreted guilty pleas as a waiver of "all nonjurisdictional defects in the prior proceedings").

35. Morgan v. State, 688 S.W.2d 504, 513 (Tex. Crim. App. 1985) (en banc).

Consequently, the *Helms* rule essentially "prevented a conditional plea of guilty."[36]

E. *Amendment to Article 44.02 of the Texas Code of Criminal Procedure*

In 1977, the 65th Legislature of Texas expressly "recognized a conditional plea of guilty" and appeals from such pleas when it amended Article 44.02 of the Texas Code of Criminal Procedure.[37] Article 44.02 originally provided, "[a] defendant in any criminal action has the right of appeal under the rules hereinafter prescribed."[38] The 1977 amendment added a proviso after the word *prescribed* that limited the right of a defendant to appeal after being convicted pursuant to a plea bargain, which was honored by the trial court.[39] Specifically, Article 44.02 was amended to read as follows:

> A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial.[40]

The amendment was considered a legislative abrogation of the *Helms* rule of waiver in cases of pleas before the trial court when

---

36. Young v. State, 8 S.W.3d 656, 665 (Tex. Crim. App. 2000) (en banc).

37. *Id.* at 665; *see also Lyon*, 872 S.W.2d at 734-35 (explaining that because *Helms* discouraged guilty pleas, encouraged full trials on the merits, and taxed the state's judicial and financial resources, the Legislature amended Article 44.02); McMann v. Richardson, 397 U.S. 759, 766 n.11 (1970) (recognizing the existence of laws permitting conditional pleas). Despite the fact that *Helms* was generally thought to discourage guilty pleas, it has been opined that the amendment was also added in response to "[c]ries of concern . . . about the number of appeals from convictions resulting from pleas of guilty and nolo contendere, particularly in those cases where the defendants, as a result of a plea bargain, received the agreed upon punishment." *See Morgan*, 688 S.W.2d at 513-14 (Onion, J., dissenting) (describing in detail the original proposed bills and amendments, which ultimately resulted in the amendment's passage).

38. Acts 1965, 59th Leg., R.S., ch. 722, p. 317, eff. Jan. 1, 1966.

39. Act of June 10, 1977, 65th Leg., R.S., ch. 351, § 44.02, 1977 Tex. Gen. Laws 940.

40. *Id.*

there was an agreed punishment recommendation, which the court followed.[41]

The Texas Court of Criminal Appeals explained that the new procedure was designed to encourage guilty pleas provided that certain procedures were followed:

> Such a procedure may be expected to conserve judicial resources by encouraging guilty pleas in cases where the only contested issue between the parties [was] some matter such as the lawfulness of a search, voluntariness of a confession, competency to stand trial, sufficiency of the indictment, or other matter that [might have been] raised by written motion filed prior to trial.[42]

On the other hand, the proviso language also placed clear limitations on the types of complaints raised on appeal following a negotiated plea of guilty where the trial court followed the agreed recommendation for punishment.[43] When the parties negotiated a plea and the trial court sentenced the defendant according to the plea bargain, compliance with the requirements of the proviso to Article 44.02 was required before an appellate court could obtain jurisdiction to address the complaints permitted by the rule.[44] In addition, the Court of Criminal Appeals held that it was incumbent upon the defendant to "make manifest upon the record [the prescribed requisites] in order to invoke the jurisdiction of this Court under the proviso."[45] Specifically, those requisites include:

1) existence of a plea bargaining agreement with the State;

---

41. Ferguson v. State, 571 S.W.2d 908, 909-10 (Tex. Crim. App. 1978) (explaining "[t]he legislature appears to have abrogated this rule regarding the effect of a guilty plea in cases of plea bargains before the court, as is its prerogative").

42. *Id.* at 910.

43. *See* Morris v. State, 749 S.W.2d 772, 774 (Tex. Crim. App. 1986) (en banc) (deciding a defendant's failure to comply with the proviso language of Article 44.02 deprives a court of jurisdiction). The *Morris* Court held that the court of appeals did not have jurisdiction to address Morgan's sufficiency of the evidence claim. *Id.* at 775. Notice of appeal was provided for a pre-trial motion matter, but under Article 44.02 no other matters are appealable because permission was not obtained from the trial court to appeal; i.e., the conditions of the proviso were not met. *Id.* at 774. *See also Morgan*, 688 S.W.2d at 515 (Onion, J., dissenting) (explaining "[i]f a defendant falls within the provisions of the 1977 amendment, he has no right of appeal at all without the permission of the trial court save and except the appeal from rulings on certain pre-trial matters").

44. *Morris*, 749 S.W.2d at 774-75.

45. Galitz v. State, 617 S.W.2d 949, 951 (Tex. Crim. App. 1981) (en banc).

2) punishment assessed by the trial court at or within that recommended by the prosecutor and agreed to personally by the defendant;
3) the basis of the appellate ground of error has been presented in writing, pre-trial, to the trial court for consideration *OR* the trial court has given permission to pursue an appeal in general or upon specific contentions.[46]

Following the adoption of the proviso language, the rules remained the same for defendants who pled guilty without a plea bargain agreement.[47] The Court of Criminal Appeals explained "[u]nless a defendant can bring himself within the amendment to Article 44.02, the 1977 provisions thereof do not apply."[48] A defendant who pled guilty without a plea bargain retained the option to pursue an appeal.[49] Nevertheless, such a defendant still faced the same limitations imposed before the adoption of the proviso language by the *Helms* rule.[50]

F. *Adoption of the Original Rules of Appellate Procedure*

In 1985, the Legislature empowered the Texas Court of Criminal Appeals to promulgate rules of post-trial, appellate, and review procedures in criminal cases.[51] At the same time, the Legislature authorized and provided for the repeal of certain articles of the Texas Code of Criminal Procedure that previously governed post-trial, appellate, and review procedures in criminal cases.[52] The repeal was conditioned upon the promulgation of rules to govern these procedural elements and the filing of a list of the repealed Texas Code of Criminal Procedure articles with the Secretary of State.[53] However, the Legislature limited the court's rulemaking authority by specifically providing that the court's rules could not "abridge, enlarge, or modify the substantive rights of a litigant."[54]

---

46. *Id.*
47. King v. State, 687 S.W.2d 762, 765 (Tex. Crim. App. 1985) (en banc).
48. *Id.*
49. *Id.*
50. *Id.* at 766; Cleveland v. State, 588 S.W.2d 942, 944 (Tex. Crim. App. [Panel Op.] 1979); Prochaska v. State, 587 S.W.2d 726, 729 (Tex. Crim. App. [Panel Op.] 1979).
51. Act of May 26, 1985, 69th Leg., R.S., ch. 685, § 1, 1985 Tex. Gen. Laws 2472.
52. *Id.*
53. *Id.*
54. *Id.*

In response to this grant of rule-making authority, the Court of Criminal Appeals promulgated the original Texas Rules of Appellate Procedure, which included the original Rule of Appellate Procedure 40(b)(1).[55] The original Rule of Appellate Procedure 40(b)(1) provided the following:

> Appeal is perfected in a criminal case by giving timely notice of appeal; except, it is unnecessary to give notice of appeal in death penalty cases. Notice of appeal shall be given in writing filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order; but if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to Article 1.15, Texas Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, in order to prosecute an appeal for a nonjurisdictional defect or 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. The clerk of the trial court shall note on copies of the notice of appeal the number of the cause and the day that notice was filed, and shall immediately send one copy to the clerk of the appropriate court of appeals and one copy to the attorney for the State.[56]

Rule 40(b)(1) was intended to replace the "proviso" to Article 44.02 of the Texas Code of Criminal Procedure.[57] In fact, when the court promulgated Rule 40(b)(1), it "acted on the assumption 'that the body of caselaw construing the proviso [to Article 44.02] would prevail and still control.'"[58]

---

55. Order of the Texas Court of Criminal Appeals Adopting the Texas Rules of Appellate Procedure, Dec. 18, 1985, *amended by*, Order of the Texas Court of Criminal Appeals Adopting Amendments to Rules of Posttrial, Appellate and Review Procedure in Criminal Cases, Apr. 10, 1986, effective Sept. 1, 1986; Texas Cases, 707-08 S.W.2d XXIX-CXX (West 1986).

56. *Texas Cases*, 707-08 S.W.2d LII-LIII (West 1986); Rodriguez v. State, 844 S.W.2d 905, 906 (Tex. App.—San Antonio 1992, pet. ref'd).

57. Lyon v. State, 872 S.W.2d 732, 735 (Tex. Crim. App. 1994) (en banc).

58. *Id.* (quoting Lemmons v. State, 818 S.W.2d 58, 62 (Tex. Crim. App. 1991) (en banc) (per curiam)).

G. *New Rules of Appellate Procedure*

In 1997, the high courts of Texas undertook a comprehensive revision of the original Texas Rules of Appellate Procedure. Specifically, in dual orders dated March 20, 1997, the Texas Supreme Court and the Texas Court of Criminal Appeals amended the Rules of Appellate Procedure. After a period of public comment, on August 15, 1997, the Texas Supreme Court and the Texas Court of Criminal Appeals entered orders approving the new rules of appellate procedure and made them effective as of September 1, 1997.[59] As part of the 1997 revisions, former Rule 40(b)(1) was renumbered and rewritten as Rule 25.2. New Rule 25.2 provides, in pertinent part, the following:

> (a) Perfection of Appeal. In a criminal case, appeal is perfected by timely filing a notice of appeal. In a death-penalty case, however, it is unnecessary to file a notice of appeal.
> (b) Form and Sufficiency of Notice.
> (1) Notice must be given in writing and filed with the trial court clerk.
> (2) Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order, and, if the State is the appellant, the notice complies with Texas Code of Criminal Procedure Article 44.01.
> (3) But if the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under Texas Code of Criminal Procedure Article 1.15, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must:
> (A) specify that the appeal is for a jurisdictional defect;
> (B) specify that the substance of the appeal was raised by written motion and ruled on before trial; or
> (C) state that the trial court granted permission to appeal.[60]

59. Order of the Texas Supreme Court and the Texas Court of Criminal Appeals, Final Approval Of Revisions To The Texas Rules Of Appellate Procedure (Aug. 15, 1997, eff. Sept. 1, 1997); Texas Cases, 948-49 S.W.2d LXI-CLXVII (West 1997).

60. TEX. R. APP. P. 25.2.

III. Specific Issues

A. *Written Notice*

After the adoption of the original Rules of Appellate Procedure in 1985, it was clear that the now former Rule 40(b)(1) changed the rules with regard to the requirements for notice of appeal. The most striking change was the deletion of the right to give notice of appeal orally in open court, and the inclusion of the new requirement of a written notice of appeal filed with the clerk.[61] When called upon to address whether the new rule requiring a written notice of appeal was mandatory, the Texas Court of Criminal Appeals concluded that it was.[62] In fact, the court held that failure to file a timely, written notice of appeal deprived a court of appeals of jurisdiction to entertain that appeal.[63]

Similarly, the adoption of the new Rules of Appellate Procedure in 1997 did not change the rule requiring a written notice of appeal.[64] Like its predecessor, Rule 25.2(b)(1) calls for a written notice of appeal.[65]

B. *"Extra-Notice" Requirement*

In addition to the requirement of a written and filed notice of appeal, Rule 40(b)(1) of the original Rules of Appellate Procedure added another requirement, frequently described as the "extra-no-

---

61. *Compare* Tex. Code Crim. Proc. Ann. art. 44.08 (Vernon 1979) (repealed 1986) (permitting notice of appeal to be given "orally in open court or . . . in writing filed with the clerk"), *with* Tex. R. App. P. 40(b)(1) (1986, repealed 1997) (requiring that notice of appeal "be given in writing filed with the clerk of the trial court").

62. *See* Shute v. State, 744 S.W.2d 96, 97 (Tex. Crim. App. 1988) (en banc) (stating that even where a murder defendant gave oral notice of appeal on the date of sentencing, and where that oral notice was acknowledged by the clerk of the court, the defendant's appeal was properly dismissed because he failed to file a timely written notice of appeal). The First Court of Appeals concluded in *Brunswick v. State* that oral notice was insufficient even where the oral notice was given in open court and the transcript included four documents reflecting that the oral notice was given; namely, the judgment, the docket sheet, and two memorializations that the defendant had given oral notice of appeal—one signed by the trial court and another signed by the deputy clerk. Brunswick v. State, 931 S.W.2d 9, 10 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

63. *See Shute*, 744 S.W.2d at 97 (asserting that even when a murder defendant gave oral notice of appeal on the date of sentencing, and the oral notice was acknowledged by the clerk of the court, the appeal was properly dismissed because of the failure to file a timely written notice of appeal).

64. Tex. R. App. P. 25.2(b)(1).

65. *Id.*

tice" requirement[66] contained in the "but" clause to Rule 40(b)(1).[67] Specifically, following the language of Rule 40(b)(1) requiring a written notice of appeal and that such notice "shall be sufficient if it shows the desire of the defendant to appeal," the rule included the following language:

> [B]ut if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to Article 1.15, Texas Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, in order to prosecute an appeal for a nonjurisdictional defect or error that occurred prior to entry of the plea the notice shall stated that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial.[68]

Pursuant to the "but" clause of Rule 40(b)(1), where a defendant was convicted pursuant to a negotiated plea bargain agreement, which was followed by the court, a defendant could not complain on appeal of a nonjurisdictional defect unless the defendant's notice stated that the trial court granted permission to appeal or that the matters complained about were raised by written motion and ruled upon before trial.[69]

As a result of the adoption of this new procedural requirement in the "but" clause to Rule 40(b)(1), it was no longer sufficient that the record revealed that a pretrial motion to suppress was filed and denied by the trial court.[70] The notice of appeal itself actually had

---

66. *See* Lemmons v. State, 818 S.W.2d 58, 62-63 (Tex. Crim. App. 1991) (en banc) (per curiam) (referring to the new requirement that a notice of appeal from a plea bargained felony conviction the defendant must "state that the trial court granted permission to appeal" or "specify that those matters were raised by written motion and ruled on before trial" as the "particularized extra-notice requirement").

67. *See* Davis v. State, 870 S.W.2d 43, 45 (Tex. Crim. App. 1994) (en banc) (describing the clause as the "but" clause).

68. TEX. R. APP. P. 40(b)(1) (1986, repealed 1997).

69. *See* Lyon v. State, 872 S.W.2d 732, 736 (Tex. Crim. App. 1994) (en banc) (holding "a defendant's notice of appeal has to comply with the applicable provisions of the 'but' clause of Rule 40(b)(1) to confer jurisdiction on a Court of Appeals to address [nonjurisdictional] defects or errors").

70. *See Shute*, 744 S.W.2d at 97 (affirming the court of appeals' dismissal of Shute's appeal for lack of jurisdiction where Shute gave an oral notice of appeal, despite the fact the court clerk reduced the notice to writing, and acknowledged the receipt of such a notice). The court explained that while an oral notice may have been sufficient under former Article 44.08 of the Texas Code of Criminal Procedure, "the current Rules of Appellate Procedure embody the requirement of written notice." *Id.*

to "state that the trial court granted permission to appeal" or "specify that those matters were raised by written motion and ruled on before trial" before jurisdiction is conferred upon the court of appeals to address the complaints raised on appeal from a plea bargained conviction.[71] Furthermore, this language was substantially adopted in the 1997 Rules of Appellate Procedure.[72]

1. "Extra-Notice" Considered Jurisdictional to Issue Consideration

Compliance with the "extra-notice" requirement is mandatory when a felony defendant wishes to appeal following entering into a negotiated plea when the trial court honors the plea bargain agreement.[73] When any written notice of appeal is filed, which shows the desire of the defendant to appeal generally, there is little doubt a court of appeals obtains jurisdiction over that case.[74] However, a "general" notice of appeal is held "insufficient to confer jurisdiction on a Court of Appeals to review a trial court's ruling" on matters which were required to be specified by the "extra-notice" requirement for appeals from plea bargained convictions.[75]

The Texas Court of Criminal Appeals has held that compliance with the "extra-notice" requirement for notices of appeal from plea bargained convictions is "necessary for a defendant to avoid statu-

---

71. Moreno v. State, 866 S.W.2d 660, 661 (Tex. App.—Houston [1st Dist.] 1993, no pet.); Gatlin v. State, 863 S.W.2d 236, 237 (Tex. App.—Houston [14th Dist.] 1993, no pet.).

72. TEX. R. APP. P. 40(b)(1) (1986, repealed 1997).

73. *See Moreno*, 866 S.W.2d at 661 (holding "[t]he language of rule 40(b)(1) is 'unequivocally mandatory'") (quoting Jones v. State, 796 S.W.2d 183, 186 (Tex. Crim. App. 1990) (en banc)).

74. TEX. R. APP. P. 25.2; *see also* Jones v. State, 796 S.W.2d 183, 186 (Tex. Crim. App. 1990) (en banc) (explaining the courts of appeal recognize "Art. V., § 6, Texas Constitution, confers jurisdiction of all non-death penalty cases on the courts of appeals"). The court stated:

> District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law.

Id.

75. *See* Davis v. State, 870 S.W.2d 43, 46-47 (Tex. Crim. App. 1994) (en banc) (holding the defendant's general notice does not confer jurisdiction to review "a pretrial suppression motion in an appeal from a conviction based on a negotiated plea bargain").

tory restrictions on [the defendant's] right to appeal."[76] In *Jones v. State*,[77] the Texas Court of Criminal Appeals explained the following:

> Rule 40(b)(1) is a restrictive rule. It regulates the extent of the grounds upon which a defendant can appeal. The method of regulation is the nature of the notice filed by a defendant. If he wishes to appeal a matter which is nonjurisdictional in nature or occurred prior to the entry of his plea, then he must conform to the requirements of the statute and include within his notice what the grounds of appeal are and the fact that he has received the permission of the trial court to appeal those matters.[78]

In other words, as former Judge Clinton of the Texas Court of Criminal Appeals explained in his dissenting opinion in *Lyon v. State*,[79] "[r]ule 40(b)(1) does not limit a court of appeals' jurisdiction. It, instead, 'regulates the extent of the grounds upon which a defendant can appeal.'"[80]

This regulation applies even when the conditions would otherwise permit a defendant to appeal. For example, a plea bargaining defendant cannot rely on the fact that a motion to suppress was actually filed and overruled by the trial court. Such a defendant must expressly state in his notice of appeal that the appeal is from the denial of a pretrial motion to suppress.[81] If he does not, his appeal is barred as if no motion to suppress was filed.[82]

2. "Extra-Notice" as a Limitation

The "extra-notice" requirement for appeals from plea bargained convictions does not merely present a potential jurisdictional bar to a court's consideration of appellate issues. Specifically, even when

---

76. *Jones*, 796 S.W.2d at 187.

77. *Id.*

78. *Id.* at 186.

79. 872 S.W.2d 732 (Tex. Crim. App. 1994).

80. Lyon v. State, 872 S.W.2d 732, 737 (Tex. Crim. App. 1994) (Clinton, J., dissenting) (en banc) (quoting Jones v. State, 796 S.W.2d 183, 186 (Tex. Crim. App. 1990) (en banc)).

81. *See* Moshay v. State, 828 S.W.2d 178, 179 (Tex. App.—Houston [14th Dist.] 1992) (holding that the defendant "cannot raise on appeal the denial of his motion to suppress evidence").

82. *See* Berger v. State, 780 S.W.2d 321, 322-23 (Tex. App.—Austin 1989, no pet.) (per curiam) (explaining "[t]he problem . . . is that a defendant who can so state [that he filed a pre-trial motion to suppress evidence and the trial court overruled it], but does not, is also barred from prosecuting the appeal under the express terms of Rule 40(b)(1)").

there is compliance with the requirement on its face, the extent of compliance may act as a limitation on the grounds complained of on appeal.[83] This proposition is further supported by cases holding that not only must a notice of appeal contain the averments called for by the "extra-notice" requirements, but also that those averments are true.[84]

3. Jurisdictional Defects

The ability of a defendant pleading guilty or nolo contendere to raise a jurisdictional complaint on direct appeal remained unchanged with the adoption of the original Rules of Appellate Procedure. By its own terms, *Helms* was limited to "nonjurisdictional defects."[85] The Court of Criminal Appeals similarly concluded, following the adoption of the original Rules of Appellate Procedure, that plea-bargaining defendants can appeal jurisdictional defects even when they do not comply with the "extra-notice" requirement of original Rule 40(b)(1).[86]

With the adoption of the new Rules of Appellate Procedure, a conflict developed among the courts of appeals concerning the proper interpretation of new Rule 25.2(b)(3)(A). Rule 25.2(b)(3)(A) provides that the defendant's notice of appeal must "specify that the appeal is for a jurisdictional defect" before a plea bargaining defendant is permitted to appeal a jurisdictional defect.[87] In spite of the new language in Rule 25.2(b)(3)(A), some

83. *See* Nelson v. State, 827 S.W.2d 52, 54 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (holding that Nelson could not complain on appeal that he did not execute a written jury waiver when his notice of appeal stated only that he wanted to complain about an adverse ruling on a motion to suppress). Interestingly, Nelson's appeal was from a misdemeanor conviction. *Id.* As later discussed, subsequent cases hold that misdemeanors are subject to the "extra-notice" requirements for appeals from plea bargained convictions. Lemmons v. State, 818 S.W.2d 58 (Tex. Crim. App. 1991) (en banc) (per curiam).

84. *See* Hutchins v. State, 887 S.W.2d 207, 210 (Tex. App.—Austin 1995, pet. ref'd) (per curiam) (stating that the recitals required by Rule 40(b)(1) must be true for jurisdiction to confer); Solis v. State, 890 S.W.2d 518, 519 (Tex. App.—Dallas 1994, no pet.) (finding that even though the appellant's notice of appeal facially met all of Rule 40(b)(1)'s requirements, the court must still look to see if the statements are true).

85. *See* Helms v. State, 484 S.W.2d 925, 927 (Tex. Crim. App. 1972) (holding that all jurisdictional defects are waived from a plea of guilty).

86. *See Lyon*, 872 S.W.2d at 736 (holding, even when a defendant is convicted pursuant to a plea bargain agreement, "[a] general notice of appeal confers jurisdiction on a Court of Appeals to address . . . jurisdictional issues").

87. TEX. R. APP. P. 25.2(b)(3)(A).

courts of appeal maintained that a general notice of appeal was sufficient to confer jurisdiction to review alleged jurisdictional defects.[88] Other courts "interpreted Rule 25.2(b)(3)(A) based on its plain language," and "held that a plea bargaining defendant must specifically comply with the enumerated notice requirement."[89]

The Court of Criminal Appeals resolved the conflict concerning Rule 25.2(b)(3)(A) in *White v. State*.[90] The court observed that the Rule "did not eliminate the right of an appellant to challenge the trial court's jurisdiction over a case where an agreed plea was entered; it merely altered the method used to invoke the jurisdiction of an appellate court over such a claim."[91] It concluded that new Rule 25.2(b)(3)(A) is "a procedural requirement that must be followed to properly invoke an appellate court's jurisdiction and is no different than any other procedural requirement that must be followed when perfecting an appeal."[92]

Aside from the question of whether a notice of appeal is required to contain a statement that the appeal is for a jurisdictional defect, defendants raising such complaints must also be aware of which complaints actually are jurisdictional. Jurisdiction is defined as "the power of the court over the 'subject matter' of the case, conveyed by statute or constitutional provision, coupled with 'personal' jurisdiction over the accused."[93] Some of the complaints Texas' courts hold as jurisdictional include: (1) a claim that "the trial judge's relationship to the victim constitutionally and statuto-

88. Rodriguez v. State, 42 S.W.3d 181, 184-85 (Tex. App.—Corpus Christi 2001, no pet.); Johnson v. State, 32 S.W.3d 444, 445-46 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd); Lopez v. State, 25 S.W.3d 926, 928 (Tex. App.—Houston [1st Dist.] 2000, no pet.); Brunson v. State, 995 S.W.2d 709, 712 (Tex. App.—San Antonio 1999, no pet.); *see also* Martinez v. State, 5 S.W.3d 722, 724-25 (Tex. App.—San Antonio 1999, no pet.) (concluding that "a general notice of appeal in cases governed by Rule 25.2(b)(3)(A) does not fail to invoke this court's jurisdiction to consider a claim of jurisdictional defect").

89. White v. State, 61 S.W.3d 424, 427 (Tex. Crim. App. 2001) (citing Villanueva v. State, 977 S.W.2d 693, 695 (Tex. App.—Fort Worth 1998, no pet.); Cash v. State, No. 14-01-00873-CR, slip op. at 2, 2001 WL 1249698, at *1-2 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.) (not designated for publication); Jones v. State, 42 S.W.3d 143, 147 (Tex. App.—Amarillo 2000, no pet.); Hernandez v. State, 986 S.W.2d 817, 819 (Tex. App.—Austin 1999, pet. ref'd).

90. White v. State, 61 S.W.3d 424, 428 (Tex. Crim. App. 2001).

91. *Id.* at 428.

92. *Id.* at 429.

93. *Lyon*, 872 S.W.2d at 736 (citing Fairfield v. State, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981)).

rily disqualified him from sitting in the case;"[94] and (2) a claim that prosecution is barred by double jeopardy.[95] In contrast, some of the complaints Texas' courts hold as nonjurisdictional include: (1) claims of legal insufficiency of the evidence;[96] (2) claims of ineffective assistance of counsel;[97] (3) a claim that a trial judge was biased against a defendant;[98] (4) a complaint concerning a trial court's ruling on a motion to suppress evidence;[99] (5) a claim that the trial court erred by failing to quash an indictment;[100] (6) a claimed violation of the right to due process of law;[101] (7) a claim of error due to an alleged defect in an enhancement paragraph;[102] and, despite the existence of other appellate courts holding double jeopardy complaints as jurisdictional, (8) a complaint that prosecution is barred by double jeopardy.[103]

---

94. *See id.* (holding a judge's alleged constitutional and statutory disqualification is jurisdictional where the record reflected that the judge's daughter was married to the victim's brother); *Ex parte* Vivier, 699 S.W.2d 862, 863 (Tex. Crim. App. 1985) (en banc) (per curiam) (holding the decision of a judge barred by law from rendering a judgment is null and void).

95. Luna v. State, 985 S.W.2d 128, 130 (Tex. App.—San Antonio 1998, pet. ref'd); Jacobs v. State, 823 S.W.2d 749, 750 (Tex. App.—Dallas 1992, no pet.); *see also* Cole v. State, 776 S.W.2d 269, 270 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (finding noncompliance with the rule requiring permission from the court or a written motion, but addressing the complaint because courts have held double jeopardy jurisdictional).

96. *See Lyon*, 872 S.W.2d at 736 (holding that sufficiency of evidence is a nonjurisdictional concern).

97. *See id.* (holding that ineffective assistance of legal counsel is a nonjurisdictional concern).

98. *See* Cantu v. State, 802 S.W.2d 349, 350 (Tex. App.—San Antonio 1990, pet. ref'd) (deciding a trial judge's failure to recuse himself is not a jurisdictional defect).

99. Payne v. State, 931 S.W.2d 56, 57 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *see also* Christal v. State, 692 S.W.2d 656, 658-59 (Tex. Crim. App. 1981) (standing for the proposition that a plea bargain not knowingly and voluntarily entered into may on appeal be jurisdictional); Wilson v. State, 811 S.W.2d 700, 702 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (stating that appellant has a right to appeal a ruling on his pretrial motion to suppress evidence).

100. Jones v. State, 796 S.W.2d 183, 184 (Tex. Crim. App. 1990) (en banc).

101. *See* Sherman v. State, 12 S.W.3d 489, 491 (Tex. App.—Dallas 1999, no pet.) (stating the lower court did not erroneously deny the motion to quash for defects in the enhancement paragraph).

102. *Jones*, 796 S.W.2d at 184-85.

103. *See* Berrios-Torres v. State, 802 S.W.2d 91, 94 (Tex. App.—Austin 1990, no pet.) (holding that double jeopardy is not a jurisdictional complaint).

4. Voluntariness of the Plea

After the adoption of the original Rules of Appellate Procedure, the Court of Criminal Appeals in *Flowers v. State*[104] addressed the question of whether a plea bargaining defendant could challenge the voluntariness of his plea despite a failure to comply with the "extra-notice" requirement of Rule 40(b)(1).[105] The court first noted that to address the appealability of the voluntariness of a plea in the absence of compliance with the "extra-notice" requirements for plea bargained convictions, it had to consider cases involving Code of Criminal Procedure Article 44.02. Article 44.02 is an important consideration, the court explained, because of the requirement that the Rules of Appellate Procedure cannot "abridge, enlarge, or modify the substantive rights of a litigant."[106]

The court observed that its own practices were designed to address claims of involuntariness in cases when it held the proviso language of Article 44.02 of the Code of Criminal Procedure applicable.[107] The court also observed that even the *Helms* rule did not bar appeal in open plea cases when defendants claimed their pleas were involuntary.[108] The court's observations led it to conclude "a defendant's substantive right to appeal under the proviso to Article 44.02 included the right to raise a complaint on appeal that a negotiated plea was unknowing or involuntary."[109] Consequently, the court determined that defendant Flowers was permitted to challenge the voluntariness of his plea despite failing to comply with the "extra-notice" provision from original Rule of Appellate Procedure 40(b)(1).[110]

Shortly after the new Rules of Appellate Procedure were adopted, a division erupted among the Texas courts of appeals on the question of whether plea bargaining defendants could complain on appeal about the voluntariness of their pleas despite their failure to comply with the "extra-notice" requirement in their notices

104. 935 S.W.2d 131 (Tex. Crim. App. 1996) (en banc).

105. Flowers v. State, 935 S.W.2d 131, 132 (Tex. Crim. App. 1996) (en banc) (per curiam).

106. *Id.* at 132-33.

107. *Id.* at 133.

108. *Id.*

109. *Id.* at 134.

110. *Flowers*, 935 S.W.2d at 132.

of appeal.[111] Some Texas courts of appeals interpreted the adoption of new Rule 25.2 as an abrogation of the rule announced in *Flowers* permitting plea bargaining defendants to appeal the voluntariness of their pleas.[112] A clear majority of Texas courts of appeals, however, continued to hold that the voluntariness of a plea can be challenged on appeal from a plea bargained conviction, even when the defendant does not comply with the "extra-notice" requirement.[113]

In *Cooper v. State*,[114] the Court of Criminal Appeals finally addressed the question dividing the intermediate courts of appeals.[115] In *Cooper*, the Court of Criminal Appeals held unequivocally that

111. *See* Marshall v. State, 28 S.W.3d 634, 636 (Tex. App.—Corpus Christi 2000, no pet.) (explaining "[t]he advent of rule 25.2(b)(3), . . . sparked debate about whether the appellate courts may still consider the voluntariness of a plea when an appellant files only a general notice of appeal and thus, fails to comply with the rule's extra-notice requirements"); Davis v. State, 7 S.W.3d 695, 696 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (taking note of a split of authority in the courts of appeals); *see also* Cooper v. State, 45 S.W.3d 77, 78 (Tex. Crim. App. 2001) (en banc) (discussing whether plea bargaining defendants can appeal a voluntary plea).

112. Long v. State, 980 S.W.2d 878 (Tex. App.—Fort Worth 1998, no pet.); Elizondo v. State, 979 S.W.2d 823 (Tex. App.—Waco 1998, no pet.); Villanueva v. State, 977 S.W.2d 693 (Tex. App.—Fort Worth 1998, no pet.) (per curiam).

113. *See Marshall*, 28 S.W.3d at 637 (finding that the substantive meaning of TEX. R. APP. P. 25.2(b)(3) remained unchanged despite the "extra-notice" requirement); George v. State, 20 S.W.3d 130, 133-34 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (holding that the court's authority only comes from accepting a plea voluntarily made); *Davis*, 7 S.W.3d at 696-97 (agreeing with nine of eleven courts of appeals finding jurisdiction to consider a voluntariness challenge brought on a general notice under Rule 25.2); Minix v. State, 990 S.W.2d 922, 923 (Tex. App.—Beaumont 1999, pet. ref'd) (arguing that the new rule did not overrule *Flowers* either directly or indirectly); Guzman v. State, 993 S.W.2d 232, 234 (Tex. App.—San Antonio 1999, pet. ref'd), *cert. denied*, 528 U.S. 1161 (2000) (following the holding in *Flowers* despite the new rule); Price v. State, 989 S.W.2d 435, 437 (Tex. App.—El Paso 1999, pet. ref'd) (determining that no changes in Rule 25.2(b)(3) would overrule the holding in *Flowers*); Vidaurri v. State, 981 S.W.2d 478, 479 (Tex. App.—Amarillo 1999), *aff'd in part, rev'd in part*, 49 S.W.3d 880 (Tex. Crim. App. 2001) (en banc) (maintaining that under both the new and old rule, omission of one of the rule's statements in the notice of appeal restricts the appeal to jurisdictional defects or voluntariness of the initial plea); Johnson v. State, 978 S.W.2d 744, 746 (Tex. App.—Eastland 1998, no pet.) (disagreeing with analysis that Rule 25.2(b)(3) partially overrules *Flowers*); Session v. State, 978 S.W.2d 289, 291 (Tex. App.—Texarkana 1998, no pet.) (noting that Rule 25.2 alters form but not substance of previous rule and that appealing the voluntariness of a plea is a fundamental right under Texas law).

114. 45 S.W.3d 77 (Tex. Crim. App. 2001) (en banc).

115. *See* Cooper v. State, 45 S.W.3d 77, 78-83 (Tex. Crim. App. 2001) (en banc) (addressing the issue of "whether a plea-bargaining defendant may appeal the voluntariness of the appeal").

"Rule [of Appellate Procedure] 25.2(b) does not permit the voluntariness of the plea to be raised on appeal."[116] Interestingly, the court employed a different reasoning than that employed by the intermediate courts of appeals which had reached the same conclusion. Those intermediate courts of appeals had concluded that the Court of Criminal Appeals itself overruled *Flowers* by the adoption of new Rule of Appellate Procedure 25.2(b).[117] The Court of Criminal Appeals, in contrast, reached the conclusion that voluntariness claims are barred for three reasons: (1) neither Article 44.02 nor new Rule of Appellate Procedure 25.2(b) permits a voluntariness complaint on appeal from a plea bargained conviction absent compliance with their restrictive terms; (2) judicial economy is served by denying the right to appeal voluntariness complaints on direct appeal from plea bargained convictions; and (3) meritorious claims of involuntary pleas can be raised by other procedures, including motions for new trial and habeas corpus.[118]

5. Truth in Notice

Since the adoption of the original Rules of Appellate Procedure, plea bargaining defendants have attempted to fulfill the "extra-notice" requirement by filing a notice of appeal containing a statement meant to comply with the "extra-notice" requirements, even when the record fails to reflect the truth of the statement. The courts addressing these cases, however, have uniformly held that statements in notices of appeal meant to meet the "extra-notice" requirements for plea bargaining defendants must be true.[119] Fur-

116. *Id.* at 83. This holding seems to indicate that the voluntariness of a plea is not appealable under any circumstances. *Id.* The court did not specifically address, however, whether it would permit the voluntariness of a plea to be addressed on appeal where the trial court granted specific permission to appeal the issue. *Id.* A plain reading of both Rule of Appellate Procedure 25.2(b) and the former proviso to Texas Code of Criminal Procedure Article 44.02 seems to permit appeal of voluntariness if the trial court grants permission. TEX. R. APP. P. 25.2(b); TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979).

117. *See Elizondo*, 979 S.W.2d at 824 (stating that the Court of Criminal Appeals did not completely eliminate "the right to challenge voluntariness after a plea bargain" but did partially overrule *Flowers*); *Villanueva*, 977 S.W.2d at 695 (stating that the Court of Appeals in Fort Worth held 25.2(b)(3) overruled *Flowers* and changed "the method used to invoke an appellate court's jurisdiction to consider a voluntariness claim").

118. *Cooper*, 45 S.W.3d at 80-82.

119. *See* Hutchins v. State, 887 S.W.2d 207, 210 (Tex. App.—Austin 1994, pet. ref'd) (per curiam) (holding an appellate court must examine the record to determine if recitals

ther, a notice of appeal does not confer jurisdiction on a court of appeals to address these claims unless the statements made in the notice are true.[120] Even with the adoption of the new Rules of Appellate Procedure in 1997, this rule has not changed.[121]

6. Plea Agreements

The "extra-notice" requirement applies, by its own terms, only to defendants pleading guilty pursuant to a plea bargain agreement.[122] The "extra-notice" requirement does not apply to convictions resulting from "open" pleas of guilty.[123] In some cases, a question arises as to whether there was an honored plea bargain agreement.[124] In one such case, a defendant claimed a document in the transcript of his case demonstrated the existence of a plea bargain that avoided the waiver effect of the *Helms* rule.[125] The document was entitled, "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession."[126] It contained the entry, "I intend to enter a plea of no contest and the prosecutor will recommend that my punishment should be without an agreed recommendation and State reserves right to argue for sentence of no more than 40 years with a cap of 40 years."[127] The court of appeals concluded there was no plea bargain agreement, despite the fact that the State also agreed to dismiss four other felony charges against the defendant.[128]

---

are true); Solis v. State, 890 S.W.2d 518, 520 (Tex. App.—Dallas 1994, no pet.) (asserting the statements in the notice of appeal must be true to confer jurisdiction to consider nonjurisdictional issues).

120. *Solis*, 890 S.W.2d at 520; *Hutchins*, 887 S.W.2d at 210.

121. Mitich v. State, 47 S.W.3d 137, 140 (Tex. App.—Corpus Christi 2001, no pet.) (affirming that a court of appeals cannot unilaterally assume jurisdictional authority in the absence of proper procedure).

122. *See* TEX. R. APP. P. 25.2(b)(3) (limiting the applicability of the "extra-notice" requirements to cases where "the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under [Texas] Code of Criminal Procedure article 1.15").

123. Dorsey v. State, 55 S.W.3d 227, 232 (Tex. App.—Corpus Christi 2001, no pet. h.); Hanson v. State, 11 S.W.3d 285, 287 n.1 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (citing Watson v. State, 924 S.W.2d 711, 714 (Tex. Crim. App. 1996) (en banc)).

124. *See* Eaglin v. State, 843 S.W.2d 153, 154 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (noting there was no agreement between the state and appellant concerning punishment).

125. *Id.* at 154.

126. *Id.*

127. *Id.*

128. *Id.*

In another case of a disputed plea bargain agreement, the record reflected that the defendant entered into an agreement with the prosecutor to plead guilty, help the police as a confidential informant, and abide by the laws of the State of Texas and the United States in return for the prosecutor's recommendation for deferred adjudication or probation and no jail time.[129] The court explained "[a] plea bargain is a contractual arrangement consisting of three parts: a plea of guilty, the consideration for it, and the approval by the court of the agreement."[130] The court further observed "[t]he consideration in the agreement memo does not appear to be appellant's plea of guilty for a lenient recommendation by the prosecutor; instead, the punishment recommendation is in exchange for [the defendant's] cooperation with law enforcement officials."[131] The court then concluded that because the defendant's plea of guilty was not consideration for the agreement, his plea was not entered pursuant to a plea bargain agreement, and the agreement memo was inapplicable.[132]

More recently, in *Taplin v. State*,[133] the Third Court of Appeals addressed a case in which the State agreed with the defendant, before the defendant pled guilty to the court, to drop certain enhancement allegations from the indictment.[134] Specifically, the court observed that the record reflected the existence of a plea bargain agreement, but the agreement did not invoke Rule 25.2(b)(3).[135] The court explained "Rule 25.2(b)(3) does not limit the right to appeal whenever there is a bargained guilty plea, but only when 'the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant.'"[136] Additionally, "[e]ven if the State's agreement to abandon the enhancement paragraphs is construed as a punishment recommendation, the agreement was relevant only to appel-

129. *Dorsey*, 55 S.W.3d at 232.

130. *Id.* (citing Ortiz v. State, 885 S.W.2d 271, 273 (Tex. App.—Corpus Christi 1994), *aff'd*, 933 S.W.2d 102 (Tex. Crim. App. 1996)).

131. *Id.*

132. *Id.* at 233-34.

133. No. 03-01-00306-CR, 2001 WL 1422158 (Tex. App.—Austin Nov. 15, 2001, no pet. h.).

134. Taplin v. State, No. 03-01-00306-CR, slip op. at 2, 2001 WL 1422158, at *2 (Tex. App.—Austin Nov. 15, 2001, no pet. h.).

135. *Id.* at *1-2.

136. *Id.* at *1.

lant's *minimum* punishment while rule 25.2(b)(3) clearly contemplated an agreement limiting the defendant's *maximum* punishment."[137] The court concluded, "[b]ecause there was no agreed punishment recommendation within the meaning of rule 25.2(b)(3), [Taplin's] general notice of appeal was sufficient to invoke [the court's] jurisdiction."[138]

7. Exception to the "Extra-Notice" Requirement

Texas case law appears to reveal one exception to the "extra-notice" requirement for plea bargaining defendants. In the 1992 opinion, *Riley v. State*,[139] the Court of Criminal Appeals held:

> when all the information required by Rule 40(b)(1) is contained in an order by the trial court and the order is in the appellate record along with a timely filed a [sic] notice of appeal, the Court of Appeals has jurisdiction to address jurisdictional and also those nonjurisdictional defects recited in the order.[140]

The Court of Criminal Appeals later characterized the exception to the "extra-notice" requirement as one requiring the existence in the record of an "'Order Limiting Defendant's Appeal' reciting the extra-notice requirements of Rule 40(b)(1)" or "other document which combined with appellant's notice of appeal substantially complies with Rule 40(b)(1)."[141] While *Riley* appears to be "difficult if not impossible to reconcile with the mandatory language of" the "extra-notice" rule as well as the command in *Jones v. State* that a plea bargaining defendant who appeals "must conform to the requirements of the statute and include within his notice what the grounds of appeal are,"[142] the courts of appeals have attempted to give effect to the rule.

---

137. *Id.*

138. *Id.*

139. 825 S.W.2d 699 (Tex. Crim. App. 1992) (en banc).

140. Riley v. State, 825 S.W.2d 699, 701 (Tex. Crim. App. 1992) (en banc).

141. *See* Davis v. State, 870 S.W.2d 43, 47 (Tex. Crim. App. 1994) (en banc) (overruling Davis' complaint that the court of appeals erred by failing to address the trial court's denial of her pre-trial motion to suppress on the ground that she filed only a "general" notice of appeal). Additionally, the court pointed out that the record "contains no 'Order Limiting Defendant's Notice of Appeal' reciting the "extra-notice" requirements of Rule 40(b)(1), or any other document which combined with appellant's notice of appeal substantially complies with Rule 40(b)(1), that would confer jurisdiction on the Court of Appeals to address appellant's suppression issue." *Id.*

142. Jones v. State, 796 S.W.2d 183, 186 (Tex. Crim. App. 1990) (en banc).

Relying on *Riley*, the Fort Worth Court of Appeals held in *Ramirez v. State*[143] that a defendant's notice of appeal substantially complied with the "extra-notice" requirement when the defendant attached a copy of his birth certificate to his notice of appeal showing a date of birth which placed exclusive jurisdiction over his case in the juvenile court.[144] In *Finch v. State*,[145] the same court found that a notice of appeal substantially complied with the "extra-notice" requirement when the written plea admonishments in the clerk's record expressly stated that "[t]he State and the Defense stipulate and agree the Defendant shall have all rights to appeal as taken from the pretrial motions heard before this court, Judge Young presiding," and that "[t]he Defendant does not waive any pretrial motions filed in this case or associated cases."[146] In that same case, the clerk's record also reflected, under a section entitled "Attorney's Approval, Judicial Findings, and Judicial Notices," a hand-written proviso stating "the State and the Defense stipulates and agrees that any and all pretrial motions urged shall not be waived and are expressly preserved for appeal," and the trial court and counsel for the State and the defendant indicated their approval "by affixing their initials immediately beneath" that proviso.[147] The record further reflected a statement on the written plea bargain agreement that "[t]he Defendant shall retain all rights to appeal pre-trial motions," a notation on the trial court's "Certificate of Proceedings" indicating that the defendant had a "RT TO APPEAL PT MOTIONS" and notation in the judgment showing that the terms of the plea agreement included the defendant's "RT TO APPEAL PRETRIAL MOTIONS."[148]

In *Gomes v. State*,[149] the Fourteenth Court of Appeals found substantial compliance with the "extra-notice" requirements when the defendant filed a general notice of appeal bearing a handwritten notation in the upper right-hand corner indicating the appeal

143. 63 S.W.3d 471 (Tex. App.—Fort Worth 2001, no pet.).

144. Ramirez v. State, 63 S.W.3d 471, 474-75 (Tex. App.—Fort Worth 2001, no pet.).

145. No. 02-00-414-CR, 2001 WL 253441 (Tex. App.—Fort Worth Mar. 15, 2001, no pet.).

146. Finch v. State, No. 02-00-414-CR, slip op. at 7, 2001 WL 253441, at *3 (Tex. App.—Fort Worth Mar. 15, 2001, no pet.).

147. *Id.*

148. *Id.*

149. 9 S.W.3d 170 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (en banc).

was limited to the trial court's ruling denying his motion to suppress.[150] In *Miller v. State*,[151] the Fourteenth Court of Appeals again found substantial compliance with the "extra-notice" requirement when the defendant's general notice of appeal contained "a handwritten notation stating 'Motion to Suppress,'" where there was a docket sheet entry stating "Appeal only on Motion to Suppress," and the trial judge stated on the record that he would allow the defendant "to appeal [his] decision on the motion to suppress."[152] In *Flores v. State*,[153] the Fourteenth Court of Appeals found substantial compliance with the "extra-notice" requirement when a docket entry, signed by the trial judge, stated "D[efendant] plead guilty per order D[efendant] gave notice of appeal on *pre-trial* ruling."[154] And in *Johnson v. State*,[155] the same court found substantial compliance with the "extra-notice" requirement when an entry on a docket sheet dated November 16, 1998, stated, "Defendant gave written notice of appeal as to *motion to suppress only*," and beneath the judge's signature on the judgment, located next to a preprinted notation stating "Notice of Appeal" appeared the handwritten notation: "11-16-98 'MTN TO SUPPRESS.'"[156]

In *Brown v. State*,[157] the Fifth Court of Appeals also found substantial compliance with the "extra-notice" requirement when the appellate court record contained a plea bargain agreement signed by the trial court, allowing Brown to appeal her motion to suppress.[158] However, not just any document in the record suffices to meet the burden of substantial compliance with the "extra-notice" requirement for plea bargaining defendants. For example, in *Rodriguez v. State*,[159] the San Antonio Court of Appeals held that an

150. Gomes v. State, 9 S.W.3d 170, 171-72 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (en banc).

151. 11 S.W.3d 345 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

152. Miller v. State, 11 S.W.3d 345, 347 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

153. 888 S.W.2d 193 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

154. Flores v. State, 888 S.W.2d 193, 195 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (alteration in original).

155. 47 S.W.3d 701 (Tex. App.—Houston [14th Dist] 2001, pet. filed).

156. Johnson v. State, 47 S.W.3d 701, 704 (Tex. App.—Houston [14th Dist.] 2001, pet. filed).

157. 830 S.W.2d 171 (Tex. App.—Dallas 1992, pet. ref'd).

158. Brown v. State, 830 S.W.2d 171, 173 (Tex. App.—Dallas 1992, pet. ref'd).

159. 844 S.W.2d 905 (Tex. App.—San Antonio 1992, pet. ref'd).

order found in a clerk's record setting the amount of an appeal bond did not substantially comply with the "extra-notice" requirement.[160] Also, in the recent case of *Lowry v. State*,[161] Lowry argued to the San Antonio Court of Appeals that the record showed substantial compliance because the docket sheet contained a form-stamped statement reciting that "[t]he Court informed the defendant that if the punishment assessed did not exceed that agreed to, the defendant could not appeal without the Court's permission except for those matters raised by written motion prior to trial."[162] The court rejected the argument, holding that a recitation stamped onto the docket sheet did not establish substantial compliance with the "extra-notice" requirement.[163] The court also indicated that to have substantial compliance, the document in an appellate record should evidence either that the trial court gave the appealing defendant permission to appeal a pre-trial ruling, or the appealing defendant indicated an intent to appeal.[164]

8. Permission to Appeal

The "extra-notice" rule for appeals from plea bargained convictions provides a catch-all provision permitting appeal of any matter when the permission of the trial court is first obtained.[165] However, practitioners should be aware that the record's reflection of a trial court's permission might be debatable. Whether the trial court actually granted permission to appeal was addressed in *Rodriguez v. State*.[166] Rodriguez's notice of appeal did not comply with the "extra-notice" requirements for an appeal from a plea bargained conviction. Rodriguez argued that the trial court's order setting an appeal bond reflected the trial court's grant of permission to appeal. Rodriguez used this argument in an attempt to con-

160. Rodriguez v. State, 844 S.W.2d 905, 909 (Tex. App.—San Antonio 1992, pet. ref'd).

161. 48 S.W.3d 309 (Tex. App.—San Antonio 2001, pet. filed) (per curiam).

162. Lowry v. State, 48 S.W.3d 309, 311 (Tex. App.—San Antonio 2001, pet. filed) (per curiam).

163. *Id.*

164. *See id.* (indicating the form-stamped statement merely showed that the court admonished Lowry, and was not evidence of the court's consent to appeal); *Rodriguez*, 844 S.W.2d at 910 (stressing that the court of appeals must also search the record to find documents that might reflect substantial compliance).

165. TEX. R. APP. P. 25.2(b)(3)(C).

166. *Rodriguez*, 844 S.W.2d at 905.

vince the Court of Appeals that he substantially complied with the *Riley* "extra-notice" requirement.[167] The court concluded, however, that a trial court order merely setting the amount of an appeal bond does not grant permission to appeal.[168]

The Austin Court of Appeals addressed the "permission to appeal" issue in *Hutchins v. State*.[169] Hutchins contended that the trial court implicitly granted permission to appeal by appointing substitute counsel. Because the time for filing a motion for new trial expired, Hutchins contended the only purpose for appointing counsel under the circumstances was to assist Hutchins with his appeal.[170] The court concluded, however, that the order appointing substitute counsel does not constitute an implied permission to appeal.[171]

Whether the trial court granted permission to appeal was also addressed by the Texas Court of Criminal Appeals in *Lyon v. State*.[172] Lyon argued that the trial court's order "granting him a free transcript and statement of facts constituted implied permission to appeal the issues set out in his notice of appeal."[173] The Court of Criminal Appeals disagreed, however, noting the record reflected that the trial court refused the appellant permission to appeal the issues presented in his notice of appeal.[174]

9. Before, During, and After the Plea

For a time, some intermediate appellate courts in Texas concluded that a plea bargaining defendant's failure to comply with the "extra-notice" requirement established by Rule 40(b)(1) only applied to bar consideration of claims arising before the entry of a

167. *See id.* at 907 (quoting Riley v. State, 825 S.W.2d 699, 701 (Tex. Crim. App. 1992) (en banc) and creating an exception to the "extra-notice" requirement for notices of appeal from plea bargained convictions when the record reflects "substantial compliance").

168. *See id.* at 909-11 (distinguishing between a trial court's grant of permission to appeal and granting of bail, which still mandates adherence to the requirements).

169. Hutchins v. State, 887 S.W.2d 207 (Tex. App.—Austin 1994, pet. ref'd) (per curiam).

170. *Id.*

171. *Id.* at 210.

172. Lyon v. State, 872 S.W.2d 732 (Tex. Crim. App. 1994) (en banc).

173. *Id.* at 736.

174. *Id.*

plea.[175] These courts understood that if the alleged error arose after the entry of a plea, compliance with the "extra-notice" requirement was not required to vest a court of appeals with jurisdiction to address the claim.[176] Consequently, those appellate courts addressed claims of error occurring after the plea—such as sentencing error—even when a plea bargaining defendant failed to comply with the "extra-notice" requirements in their notices of appeal.[177] In *Davis v. State*,[178] however, the Court of Criminal Appeals explained that a plea bargaining defendant who fails to comply with the "extra-notice" requirement is barred not only from raising claims of alleged error occurring before the entry of his plea, but also from raising claims of nonjurisdictional error whether the error occurred before or after the plea.[179]

10. Lost Records on Appeal

In 1999, the Court of Criminal Appeals delivered an interesting unanimous opinion in *Sankey v. State*[180] concerning the applicability of the "extra-notice" requirement to appeals when the appellate

175. *See* Davis v. State, 773 S.W.2d 404, 406 (Tex. App.—Fort Worth 1989), *rev'd on other grounds*, 870 S.W.2d 43 (Tex. Crim. App. 1994) (en banc) (addressing the defendant's claim that the trial court erred by denying an evidentiary hearing on a motion for new trial); Soto v. State, 837 S.W.2d 401, 404 (Tex. App.—Dallas 1992, no pet.) (holding "the failure to comply with notice requirements precludes appellate review of nonjurisdictional defects or errors that occurred prior to the entry of the plea"); Rosenkrans v. State, 758 S.W.2d 388, 389 (Tex. App.—Austin 1988, pet. ref'd) (per curiam) (concluding that the appeal was properly raised after the entry of defendant's appeal); Lerma v. State, 758 S.W.2d 383, 384 (Tex. App.—Austin 1988, no pet.) (per curiam) (denying the requirement of obtaining the trial court's permission to appeal, since the defendant already entered his plea).

176. *See Davis*, 773 S.W.2d at 406 (holding that the prerequisites do not apply for the appeal because the plea was entered prior to defect); *Rosenkrans*, 758 S.W.2d at 389 (holding the defendant may raise alleged error without the trial court's permission if the error occurred subsequent to the plea's entry); *Lerma*, 758 S.W.2d at 384 (finding the defendant's appeal proper since it occurred after his entry of a plea).

177. *See* Shafer v. State, 842 S.W.2d 734, 736 (Tex. App.—Dallas 1992, pet. ref'd) (denying Shafer's claim that the trial court erred by assessing a fine against him because he failed to comply with Rule 40(b)(1)'s requirements).

178. 773 S.W.2d 404 (Tex. App.—Fort Worth 1989), *rev'd on other grounds*, 870 S.W.2d 43 (Tex. Crim. App. 1994) (en banc).

179. Davis v. State, 870 S.W.2d 43, 46 (Tex. Crim. App. 1994) (en banc); *see also* Lyon v. State, 872 S.W.2d 732, 736 (Tex. Crim. App. 1994) (en banc) (asserting that a defendant must comply with the "but" Clause of Rule 40(b)(1) in order for a Court of Appeals to have authority to address certain nonjurisdictional defects).

180. 3 S.W.3d 43 (Tex. Crim. App. 1999).

records are claimed to be lost or destroyed.[181] In *Sankey*, the court held that a challenge alleging that the appellate record is lost is not subject to the "extra-notice" requirements for appeals from plea bargained convictions.[182] The court noted that the same issue was addressed by the Dallas Court of Appeals in *Smith v. State*,[183] in which that court concluded that the failure of the defendant to comply with "extra-notice" requirement for plea bargained convictions left it without jurisdiction to entertain the appeal.[184] The Court of Criminal Appeals disagreed with the appellate court's conclusion and partially agreed with the dissent, which argued the existence of an appellate record is a condition precedent to an appeal.[185] The court disagreed with the dissenting opinion's suggestion, however, that an appellant must have a copy of the record before filing a notice of appeal.[186] Instead, the Court of Criminal Appeals concluded "[w]hat is essential is that the appellant have a copy of the record before filing his brief."[187]

For a time, it appeared that a court of appeals must always, when a notice of appeal was filed, address a defendant's claim that the appellate record was lost or destroyed. About a year later, however, the Court of Criminal Appeals placed a limitation on the rule announced in *Sankey*. The court determined that a court need not address a lost or destroyed record claim when the claim is "not necessary to [the] appeal's resolution."[188]

---

181. Sankey v. State, 3 S.W.3d 43, 44 (Tex. Crim. App. 1999).

182. *See id.* at 44 (holding "the content of the notice of appeal is irrelevant in considering [a claim that the appellate record has been lost or destroyed]"); Doubrava v. State, 6 S.W.2d 287, 288 (Tex. Crim. App. 1999) (per curiam) (recognizing and applying the rule created in *Sankey*).

183. 957 S.W.2d 571 (Tex. App.—Dallas 1997, no pet.), *overruled on other grounds by* Clark v. State, 997 S.W.2d 365 (Tex. App.—Dallas 1999, no pet.).

184. Smith v. State, 957 S.W.2d 571, 575 (Tex. App.—Dallas 1997, no pet.), *overruled on other grounds by* Clark v. State, 997 S.W.2d 365 (Tex. App.—Dallas 1999, no pet.).

185. *Sankey*, 3 S.W.3d at 44.

186. *Id.*; *see also* Nelson v. State, 6 S.W.3d 722, 726 (Tex. App.—Waco 1999, no pet.) (holding a separate notice of appeal must be filed to challenge the denial of a free record or statement of facts to an alleged indigent defendant).

187. *Sankey*, 3 S.W.3d at 45.

188. *See* Daniels v. State, 30 S.W.3d 407, 408 (Tex. Crim. App. 2000) (en banc) (reinforcing the decision in *Manuel* that "the reporter's record from the original deferred adjudication proceeding is not necessary . . . since appellant cannot . . . appeal any issues relating to the original deferred adjudication proceeding").

In *Daniels v. State*,[189] after the revocation of the defendant's deferred adjudication community supervision and the adjudication of his guilt, the defendant claimed the reporter's record from his original plea proceeding was lost and "prevented him from 'examining or challenging the voluntariness of his original plea or any rulings on pretrial motions.'"[190] The Court of Appeals decided it had no jurisdiction to address the claim, however, because the defendant failed to appeal when he was placed on deferred adjudication community supervision, and his appeal of any issues relating to that proceeding was out of time.[191] The Court of Criminal Appeals then agreed with the court of appeals observing that, because the defendant could not "now appeal any issues relating to the original deferred adjudication proceeding," the reporter's record from that proceeding was "not necessary to [the] appeal's resolution."[192]

11. Amendment of Notice

The original Texas Rules of Appellate Procedure included no specific provision permitting or preventing amendments to a notice of appeal.[193] In *Jones v. State*,[194] however, the Austin Court of Appeals concluded that when an amendment to a notice of appeal is not made within the time for filing notice of appeal in the first instance, a defendant may be permitted to correct a defect in his notice of appeal.[195] Accordingly, a defendant could then be permitted to bring his notice into compliance with the "extra-notice" requirements for appeals from plea bargained convictions beyond the time from when he was required to give his notice of

189. 30 S.W.3d 407 (Tex. Crim. App. 2000) (en banc).

190. *See* Daniels v. State, 30 S.W.3d 407, 408 (Tex. Crim. App. 2000) (en banc) (deciding the court did not have jurisdiction over defendant's claim).

191. Specifically, "out of time" refers to the defendant's procedural inadequacy. Rather than appealing at the time of deferred adjudication, the defendant did not appeal until he was adjudicated guilty.

192. *See Daniels*, 30 S.W.3d at 408 (pointing out that in *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999), the court "decided that a defendant placed on deferred adjudication has to appeal issues relating to the original deferred adjudication proceeding when the deferred adjudication is first imposed").

193. TEX. R. APP. P. 1-243.

194. 762 S.W.2d 330 (Tex. App.—Austin 1988), *aff'd*, 796 S.W.2d 183 (Tex. Crim. App. 1990) (en banc).

195. Jones v. State, 762 S.W.2d 330, 331 (Tex. App.—Austin 1988), *aff'd in part, rev'd in part*, 796 S.W.2d 183 (Tex. Crim. App. 1990) (en banc) (relying upon original Rule of Appellate Procedure 83).

appeal.[196] Original Rule of Appellate Procedure 83 provided in pertinent part that "[a] judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities."[197] The Court of Criminal Appeals reversed the Austin court, however, observing, without explicitly stating, that Jones's amended notice of appeal was filed late.[198] The Court of Criminal Appeals explained that the lower court "should not have entertained [Jones's] appeal of a nonjurisdictional matter" and that original Rule of Appellate Procedure 83 did not "cure [the] defect."[199]

The result in *Jones* is not surprising given the well-settled principle that a timely notice of appeal is necessary to invoke an appellate court's jurisdiction.[200] During the time the original Rules of Appellate Procedure were effective, it was clear that a motion to extend the time to file a notice of appeal also required a timely filing. A failure to meet the time requirement constituted a jurisdictional bar.[201]

Unlike the original Rules of Appellate Procedure, the new Rules of Appellate Procedure contain a specific rule permitting amendment to a notice of appeal.[202] New Rule 25.2(d) provides that "[a]n amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time

196. *Id.* Although neither the Court of Appeals nor the Court of Criminal Appeals in *Jones* opinion expressly describes the amended notice of appeal, the Court of Criminal Appeals observes that Jones pled guilty and was sentenced on September 8, 1988. Jones' original notice of appeal was filed on September 13, 1988, and his amended notice of appeal was filed "on October 28, 1988, fifty-one days after he was sentenced and forty-six days after filing his invalid notice of appeal . . . ." *Id.* at 185. The Texas Court of Criminal Appeals also noted that Jones "filed no request with the Court of Appeals to file an amended notice of appeal, and that he did not request an extension of time." *Id.* at 186.

197. TEX. R. APP. P. 83 (1986, repealed 1997).

198. *See Jones*, 796 S.W.2d at 187 (Tex. Crim. App. 1990) (en banc) (holding that the court of appeals should not have considered an "appeal of a nonjurisdictional matter").

199. *Id.* at 187.

200. *See* Rodarte v. State, 860 S.W.2d 108, 110 (Tex. Crim. App. 1993) (en banc) (holding that the court of appeals correctly recognized the lack of jurisdiction when the notice was untimely).

201. *See* Olivo v. State, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996) (en banc) (holding that a late filed notice of appeal is considered timely, thus invoking the court of appeals' jurisdiction, only if it is filed with a timely motion to extend the time to file the notice of appeal and the trial court grants the motion).

202. TEX. R. APP. P. 25.2(d).

before the appellant's brief is filed."[203] At least two intermediate courts of appeals originally concluded that new Rule of Appellate Procedure 25.2(d) permitted an out-of-time amendment to a notice of appeal to cure a jurisdictional defect in the notice, such as when the only timely filed notice of appeal fails to comply with the "extra-notice" requirement for appeals from plea-bargained convictions.[204] The Texas Court of Criminal Appeals in *Riewe v. State*,[205] however, concluded "[a]ny amendments made [to a notice of appeal] pursuant to Rule 25.2(d) cannot be jurisdictional amendments."[206] *Riewe* has implicitly overruled the decisions of intermediate courts of appeals in cases such as *Perez*, when the lower courts conclude that an amended notice of appeal can be filed at any time before an appellant's brief is filed and still confer jurisdiction.[207]

12. Misdemeanors v. Felonies

Noticeably, both the original Rule of Appellate Procedure 40(b)(1) and the current Rule of Appellate Procedure 25.2(b) limit their applicability to pleas of guilty or nolo contendere entered pursuant to Article 1.15 of the Texas Code of Criminal Procedure, while Article 44.02 of the Texas Code of Criminal Procedure does not. Article 1.15 of the Texas Code of Criminal Procedure provides in pertinent part:

> No person can be convicted of a *felony* except upon the verdict of a jury duly rendered and recorded, unless . . . the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; *provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment* and in no

---

203. *Id.*

204. Perez v. State, 4 S.W.3d 305, 306-07 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (per curiam); Rodriguez v. State, 988 S.W.2d 351, 352 (Tex. App.—El Paso 1999, no pet.) (per curiam); Glenn v. State, 991 S.W.2d 285, 289 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (per curiam).

205. 13 S.W.3d 408 (Tex. Crim. App. 2000).

206. *See* State v. Riewe, 13 S.W.3d 408, 413-14 (Tex. Crim. App. 2000) (holding that out-of-time amendment to State's notice of appeal does not retroactively provide jurisdiction to the court of appeals to address the state's claim).

207. *Perez*, 4 S.W.3d at 306-07.

event shall a person charged be convicted upon his plea without sufficient evidence to support the same.[208]

Only pleas in felony cases are subject to "the particularized 'extra-notice' requirement" for appeals from plea bargained convictions.[209] Misdemeanor defendants convicted pursuant to plea agreements are not required to provide "extra-notice" in their notices of appeal to invoke the jurisdiction of a court of appeals.[210] In misdemeanor cases, the "customary written notice of appeal is sufficient to invoke appellate jurisdiction."[211]

In *Isam v. State*,[212] the Court of Criminal Appeals recognized the distinction between pleas in misdemeanor and felony cases.[213] Isam was a defendant who pled guilty to misdemeanor possession of marijuana following the denial of his motion to suppress. If the ordinary rules regarding pleas in misdemeanor cases applied in Isam's case, the former *Helms* rule would have prevented him from appealing the trial court's rulings on his pre-trial motion.[214] Nevertheless, despite the distinction between misdemeanor and felony pleas, the *Isam* court decided that Isam could appeal the denial of his pre-trial motion to suppress pursuant to the requirements of the then existing Code of Criminal Procedure Article 44.02. The court explained that to hold otherwise would frustrate the purposes of Article 44.02, one of which "is to encourage guilty pleas where a search and seizure (or other pretrial motion) is the only matter that the defendant wishes to pursue."[215]

While the "extra-notice" requirements for appeals from plea bargained felony convictions do not apply to appeals from plea

208. TEX. CRIM. PROC. CODE ANN. art. 1.15 (Vernon Supp. 2001) (emphasis added).

209. Lemmons v. State, 818 S.W.2d 58, 63 (Tex. Crim. App. 1991) (en banc) (per curiam); *see also* TEX. R. APP. P. 25.2(b)(3) (limiting the applicability of the "extra-notice" requirement for appeals from plea bargained convictions to those convictions "rendered on the defendant's plea of guilty or nolo contendere under [Texas] Code of Criminal Procedure article 1.15," which provides for waiver of a jury in *felony* cases).

210. *Lemmons*, 818 S.W.2d at 63.

211. *Id.*

212. 582 S.W.2d 441 (Tex. Crim. App. 1979).

213. Isam v. State, 582 S.W.2d 441, 443 (Tex. Crim. App. 1979).

214. *Id.* The *Helms* rule holds that all nonjurisdictional defects are waived when a plea is voluntarily and knowingly made. *Id.* at 442-43.

215. *Id.* at 443-44; *see also* Salazar v. State, 773 S.W.2d 34, 35 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (permitting appeal from misdemeanor conviction for DWI where defendant filed a general notice of appeal).

bargained misdemeanor convictions, the former proviso of Article 44.02 still applies.[216] Thus, in appeals from misdemeanor convictions following the entry of a negotiated plea in which the agreed punishment is assessed, the defendant is required to "have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial."[217] In other words, it is only when a misdemeanor defendant satisfies the provisions of the former proviso to Article 44.02 that he can complain on appeal of rulings on pretrial motions.[218]

In addition, a plea bargaining misdemeanor defendant cannot simply enter his plea and then remain silent. Because the former proviso language from Article 44.02 still applies, it is incumbent upon the misdemeanor defendant to "make manifest on the record [the prescribed prerequisites] in order to invoke the jurisdiction of this Court under the proviso."[219] Thus, to invoke the appellate jurisdiction of the court, a misdemeanor defendant must make manifest on the record the following:

1. [E]xistence of a plea bargaining agreement with the State;
2. [P]unishment assessed by the trial court at or within that recommended by the prosecutor and agreed to personally by the defendant; [and]
3. [T]he basis of the appellate ground of error has been presented in writing, pre-trial, to the trial court for consideration OR the trial court has given permission to pursue an appeal in general or upon specific contentions.[220]

C. *The New* Helms *Rule a/k/a the* "Young" *Rule*

As stated, *Helms* provided that "[w]here a plea of guilty is voluntarily and understandingly made, all nonjurisdictional defects including claimed deprivation of federal due process are waived."[221] The *Helms* rule was first limited by the Legislature in 1977, when

---

216. Taylor v. State, 916 S.W.2d 680, 684-85 (Tex. App.—Waco 1996, pet. ref'd).

217. TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979).

218. *See Isam*, 582 S.W.2d at 443 (distinguishing procedural requirements of appealing misdemeanor plea bargained convictions from felony plea bargained convictions).

219. Galitz v. State, 617 S.W.2d 949, 951-52 (Tex. Crim. App. 1981) (en banc) (per curiam).

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

221. Helms v. State, 484 S.W.2d 925, 927 (Tex. Crim. App. 1972).

Article 44.02 of the Code of Criminal Procedure was amended to add the former proviso to that Article.[222] The addition of the proviso was considered a legislative abrogation of the *Helms* rule of waiver in cases of pleas before the court when the trial court followed the agreed punishment recommendation of the parties.[223]

Recently, in 2000, *Helms* was further limited. In *Young v. State*,[224] the Court of Criminal Appeals found *Helms* "not justified by its premises or its precedents."[225] The court further held that it "shall no longer be enforced in the terms in which it was stated in 1972."[226] However, a modified version of the *Helms* rule still applies.[227] The modified *Helms* rule, which could now be called the *Young* rule, is stated in *Young* as follows: "Whether entered with or without an agreed recommendation of punishment by the State, a valid plea of guilty or nolo contendere waives or forfeits the right to appeal a claim of error only when the judgment of guilt was rendered independent of, and is not supported by, the error."[228] Now, unless a court of appeals can determine that a defendant's conviction is independent of and is not supported by the error he raises on appeal, the court will not find the error waived by his voluntary plea.[229] In contrast, when a defendant pleads guilty and appeals without a plea bargain agreement, and the court of appeals finds that the defendant's conviction is not supported by the alleged error and is independent of the appeal the defendant raises, the court of appeals will find the alleged error waived.[230]

---

222. *See* Act of Aug. 29, 1977, 65th Leg., R.S., ch. 351, § 1, 1977 Tex. Gen. Laws 940, 941 (amending Article 44.02).

223. Ferguson v. State, 571 S.W.2d 908, 910 (Tex. Crim. App. [Panel Op.] 1978).

224. 8 S.W.3d 656 (Tex. Crim. App. 2000) (en banc).

225. Young v. State, 8 S.W.3d 656, 666 (Tex. Crim. App. 2000) (en banc).

226. *Id.*

227. *See id.* at 666-67 (modifying *Helms*).

228. *Id.*

229. *See* Bradshaw v. State, 40 S.W.3d 655, 659 (Tex. App.—San Antonio 2001, no pet.) (finding the defendant's complaints not preserved for review because they were not asserted at the hearing); Guerrero v. State, 64 S.W.3d 436, 444-45 (Tex. App.—Waco 2001, no pet.) (holding that comments in the defendant's pro se brief outside the record are not grounds for a direct attack on the judgment).

230. *See* McCain v. State, 24 S.W.3d 565, 568 (Tex. App.—Waco 2000, no pet.) (finding the defendant's conviction is independent of the error alleged in connection with the waiver of trial by jury, which occurred prior to his guilty plea).

D. *Transmission of Notice to Court of Appeals*

Some courts occasionally question whether it is necessary to transmit a defendant's notice of appeal to the court of appeals when the court determines that a defendant cannot appeal because: (1) the defendant pled guilty pursuant to a plea bargain agreement that was followed by the trial court; (2) the trial court denied permission to appeal; and (3) the trial court did not rule on any pre-trial motions.[231] A trial court, however, cannot refuse to transmit the notice of appeal to the court of appeals, as such an act is ministerial in nature.[232] Thus, when a trial court refuses to transmit a notice of appeal, thereby denying a defendant the right to appeal, the trial court is subject to mandamus.[233]

E. *Waiver of the Right to Appeal*

In 1977, the Court of Criminal Appeals held that a defendant could not be bound by a waiver of the right to appeal "made after judgment of conviction, but before the pronouncement of sentence."[234] The court also reaffirmed its prior holding that any "waiver of the right of appeal made prior to trial, as a matter of law, cannot be knowingly and intelligently made and such a waiver is not binding on [the] defendant."[235] However, the court ex-

---

231. *See In re* Swarthout, 982 S.W.2d 92, 94 (Tex. App.—Houston [1st Dist.] 1998, orig. proceeding) (per curiam) (Taft, J., concurring & dissenting) (explaining "[b]ecause of the *proviso's* language, 'before the defendant . . . may prosecute an appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial,' some trial courts began denying notices of appeals as though they were requests for permission to appeal").

232. *See* Campos v. State, 818 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1991), *pet. ref'd*, 821 S.W.2d 162 (Tex. Crim. App. 1992) (holding the trial court is without authority to determine if the defendant waived appeal rights).

233. *See* Broggi v. Curry, 571 S.W.2d 940, 941 (Tex. Crim. App. 1978) (en banc) (finding a writ of mandamus appropriate when the trial judge denied the defendant the right to appeal four felony convictions); Smith v. State, 957 S.W.2d 571, 575 (Tex. App.—Dallas 1997, no pet.) (finding the defendant may file a writ of mandamus when the trial court denies the appeal, even though the defendant did not exercise the right).

234. *Ex parte* Thomas, 545 S.W.2d 469, 470 (Tex. Crim. App. 1977).

235. *Id.*; *see also Ex parte* Townsend, 538 S.W.2d 419, 420 (Tex. Crim. App. 1976) (holding that as a matter of law, where Townsend waived his right to appeal in writing before pleading guilty, his waiver could not be knowing and voluntary because it was made before trial).

plained "a knowing and intelligent waiver of the right of appeal made after a defendant has been sentenced is binding."[236]

In May 2000, the Court of Criminal Appeals revisited these issues in *Blanco v. State*.[237] After a jury found the defendant guilty, but prior to sentencing, Blanco reached an agreement with the State.[238] In exchange for Blanco's waiver of his rights to file a motion for new trial, to file a notice of appeal, and to prosecute an appeal, the State agreed to recommend a specified sentence.[239] Blanco nevertheless appealed and complained that his waiver of the right to appeal was invalid.[240] The court of appeals noted that since the Court of Criminal Appeals decided *Ex parte Thomas*, several courts of appeals distinguished cases from *Thomas* and held that "a waiver entered after conviction, but before pronouncement of sentence, is valid."[241] The court found Blanco's waiver of appeal valid and dismissed his appeal.[242] The Court of Criminal Appeals then granted review to consider the propriety of the dismissal of Blanco's appeal.[243]

The Court of Criminal Appeals began its discussion in *Blanco* by reminding "a defendant in noncapital cases 'may waive any rights secured him by law.'"[244] The court noted its prior decisions holding that a waiver of the right to appeal was not binding when made before trial or after conviction but before the pronouncement of sentence.[245] The court went on to explain that its prior decisions rested "primarily on the rationale that" such waivers were not

236. *Ex parte* Thomas, 545 S.W.2d at 470; *see also Ex parte* Dickey, 543 S.W.2d 99, 104 (Tex. Crim. App. 1976) (denying Dickey's request for leave to appeal his conviction, where Dickey waived his right to appeal both before trial and after he was sentenced, and where the trial court made findings of fact indicating that Dickey's waiver of appeal was knowingly and voluntarily made).

237. 996 S.W.2d 345 (Tex. App.—Texarkana 1999), *aff'd*, 18 S.W.3d 218 (Tex. Crim. App. 2000).

238. Blanco v. State, 18 S.W.3d 218, 219 (Tex. Crim. App. 2000).

239. *Id.*

240. *Id.*

241. *Blanco*, 996 S.W.2d at 346 (citing Bushnell v. State, 975 S.W.2d 641 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd); Delatorre v. State, 957 S.W.2d 145, 149 (Tex. App.—Austin 1997, pet. ref'd); Doyle v. State, 888 S.W.2d 514, 518 (Tex. App.—El Paso 1994, pet. ref'd) (per curiam)).

242. *Blanco*, 996 S.W.2d at 348.

243. *Blanco*, 18 S.W.3d at 219.

244. *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon 1981)).

245. *Id.* (referring to *Ex parte* Thomas, 545 S.W.2d 469 (Tex. Crim. App. 1977), *and Ex parte* Townsend, 538 S.W.2d 419 (Tex. Crim. App. 1976)).

"knowingly and intelligently made" because a defendant in those situations "has no way of knowing with certainty the punishment that [would] be assessed and [could not] anticipate the errors that may occur during trial."[246] The Court of Criminal Appeals agreed with the court of appeals, however, that prior decisions are "less compelling in cases like this at least where the trial court follows the prosecution's sentencing recommendation."[247]

The *Blanco* opinion notes that the decision to permit waiver of appeal advanced "valid and important public policy concerns of moving cases through the system with benefits to both defendants and the general public."[248] The court observed that defendants are entitled to insist on the benefit of their bargains and explained "where . . . there has been no unfairness 'in securing agreement between an accused and a prosecutor,' there is no reason why" the State should not be entitled to insist on the benefit of its bargain against a defendant.[249] The Court of Criminal Appeals did not address the part of the decision of the intermediate court of appeals', which stated that Article 26.13 of the Texas Code of Criminal Procedure "'provides safeguards for a defendant'" if a trial court declines to follow the prosecution's sentencing recommendation.[250] However, it did observe that because Blanco "was 'fully aware of the likely consequences' when he waived his right to appeal, . . . it is 'not unfair to expect him to live with those consequences now.'"[251]

Although not expressly considered by the Court of Criminal Appeals in *Blanco*, the court of appeals determined that the primary rationale for the Court of Criminal Appeals' prior decisions finding waivers of appeal invalid was "no longer viable in plea bargained

246. *Id.*

247. *Id.* at 219-20 (citing *Blanco*, 996 S.W.2d at 348).

248. *Blanco*, 18 S.W.3d at 220 (citing Mabry v. Johnson, 467 U.S. 504 (1984), and Santobello v. New York, 404 U.S. 257 (1971)).

249. *Id.* (quoting *Mabry*, 467 U.S. at 509).

250. *Id.* (citing *Blanco*, 996 S.W.2d at 346). Article 26.13 of the Texas Code of Criminal Procedure provides in pertinent part that "should the court reject [a plea agreement], the defendant shall be permitted to withdraw his plea of guilty or nolo contendere." TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (Vernon Supp. 2001).

251. *Blanco*, 18 S.W.3d at 220 (quoting *Mabry*, 467 U.S. at 511).

cases involving a plea of guilty or no contest."[252] Another court of appeals observed, however, that the Court of Criminal Appeals disapproved of pretrial waivers of the right to appeal for three reasons: "(1) the right to appeal had not yet matured; (2) the defendant had no way of knowing with certainty the punishment that would be assessed; and (3) [the defendant] could not anticipate the errors that might occur during the plea proceeding."[253] The court then explained:

> [I]n August of 1977, the law changed with respect to negotiated pleas. Article 26.13 of the Texas Code of Criminal Procedure was amended to require the trial court to 'inquire as to the existence of any plea bargain agreements . . . inform the defendant whether it will follow or reject such agreement . . . [and should] the court reject any such agreement, *the defendant shall be permitted to withdraw his plea.*'"[254]

Applying the same reasoning, the First Court of Appeals and the Fourth Court of Appeals held that a written waiver of appeal is valid even when made before a defendant enters a plea of guilty.[255] The Sixth Court of Appeals reached the same result, but without direct consideration of the effect of the amendment to Code of Criminal Procedure Article 26.13.[256]

F. *Community Supervision (Probation) and Deferred Adjudication*

The phrases "probation" and "community supervision" have the same meaning "and are used interchangeably."[257] Frequently, de-

---

252. Hilyard v. State, 43 S.W.3d 574, 576 (Tex. App.—Houston [1st Dist.] 2001); *accord* Bushnell v. State, 975 S.W.2d 641, 643-44 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

253. *Bushnell*, 975 S.W.2d at 643.

254. *Id.* at 644 (quoting Tex. S.B. 937, 65th Leg., R.S., 1977 Tex. Gen. Laws 748).

255. Buck v. State, 45 S.W.3d 275, 278 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see also* Williams v. State, 37 S.W.3d 137, 139-40 (Tex. App.—San Antonio 2001, pet. ref'd) (interpreting the Texas Court of Criminal Appeals holding in *Blanco* to mean "when a defendant enters into a plea agreement that includes a waiver of appeal, and the trial court accepts the plea agreement, the defendant waives his right to appeal if (1) the right to appeal has not yet matured, (2) he knew with certainty the punishment that would be assessed, and (3) he could anticipate the errors that might occur during the plea proceeding").

256. Littleton v. State, 33 S.W.3d 41, 43-44 (Tex. App.—Texarkana 2000, pet. ref'd).

257. Rodriguez v. State, 939 S.W.2d 211, 220 (Tex. App.—Austin 1997, no pet.); *see also* Acts 1993, 73rd Leg., R.S., ch. 900, § 4.04(a), 1993 Tex. Gen. Laws 3743 (providing

fendants plead guilty in return for a prosecutor's agreement to recommend community supervision or deferred adjudication.[258] These situations add a new dimension to appeals following pleas of guilty or nolo contendere. When a defendant is granted community supervision or deferred adjudication, the possibility arises that further court proceedings will be necessary.[259] Accordingly, special consideration is given to appeals following the granting of both community supervision and deferred adjudication, as well as the right to appeal any subsequent proceeding revoking community supervision or adjudicating guilt.

1. Community Supervision

a. The Right to Appeal

In *Gossett v. State*,[260] the Court of Criminal Appeals recognized the right to appeal from a judgment granting community supervision.[261] Although the court noted "no appeal has been provided in other convictions until the judgment has become final which, in felony cases, includes pronouncement of the sentence," it observed that Article 781b(5) of the Code of Criminal Procedure provided defendants the right to appeal from a judgment granting community supervision.[262] Currently, the right to appeal from a judgment granting community supervision is derived from Article 42.12,

---

"[o]n and after September 1, 1993, a reference in the law to 'probation' . . . means 'community supervision,' as that term is defined in Section 2, Article 42.12, Code of Criminal Procedure, as amended by Section 4.01 of this article").

258. *See* Watson v. State, 924 S.W.2d 711, 713 (Tex. Crim. App. 1996) (en banc) (recognizing that deferred adjudication is regularly the subject of Texas plea bargains). Prosecutors and defense lawyers find they can consistently settle more cases without a trial when they condition a defendant's plea bargain on a recommendation of probation without adjudicating guilt. *Id.*

259. TEX. CODE CRIM. PROC. ANN. arts. 42.12 §§ 5(b) & 21(b) (Vernon Supp. 2001) (authorizing adjudication of guilt and/or revocation of community supervision for violations of court imposed conditions).

260. 282 S.W.2d 59 (Tex. Crim. App. 1955).

261. Gossett v. State, 282 S.W.2d 59, 61 (Tex. Crim. App. 1955); *see also* John H. Derrick, *Appealability Of Order Suspending Imposition Or Execution Of Sentence*, 51 A.L.R.4th 939 § 3 (1987) (illustrating that "an order suspending the imposition of [a] sentence is appealable").

262. *Gossett*, 282 S.W.2d at 61; *see also* TEX. CODE CRIM. PROC. art. 781b § 5 (Vernon 1948) (providing "[t]he right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law shall be accorded the probationer at the time he is placed on probation").

§ 23(b) of the Code of Criminal Procedure.[263] Like its predecessor statute, Article 42.12, § 23(b) provides that an appeal may be taken both from an order permitting community supervision, or from an order revoking community supervision.[264]

b. Appeal of Conviction v. Appeal of Revocation

Since *Gossett*, Texas courts have consistently held that for a defendant to appeal errors occurring in an original proceeding—where community supervision was originally granted—a defendant must appeal "when community supervision is *originally* imposed."[265] In other words, in appeals following revocation of regular community supervision, "issues relating to the conviction, such as evidentiary sufficiency . . . may not be raised."[266] Furthermore, despite the passage of nearly fifty years since *Gossett*, issues relating to the underlying conviction "may not be raised in appeals filed after 'regular' community supervision is revoked."[267]

There are two exceptions to the rule that issues relating to the underlying conviction cannot be raised in appeals filed after revocation of community supervision. The first is the "void judgment" exception, and the second is the "habeas corpus" exception.[268] The court explained in *Nix* that "[t]he void judgment exception recog-

---

263. Rodriguez v. State, 20 S.W.3d 857, 858 (Tex. App.—El Paso 2000, pet. filed); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 23(b) (Vernon Supp. 2001) (providing "[t]he right of the defendant to appeal for a review of the conviction and punishment, as provided by law, shall be accorded the defendant at the time he is placed on community supervision").

264. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 23(b) (Vernon Supp. 2001). The section provides in pertinent part:

> The right of the defendant to appeal for a review of the conviction and punishment, as provided by law, shall be accorded the defendant at the time he is placed on community supervision. When he is notified that his community supervision is revoked for violation of the conditions of community supervision and he is called on to serve a sentence in a jail or in the institutional division of the Texas Department of Criminal Justice, he may appeal his revocation.

Id.

265. Manuel v. State, 994 S.W.2d 658, 661 (Tex. Crim. App. 1999) (citing Whetstone v. State, 786 S.W.2d 361, 363 (Tex. Crim. App. 1990) (en banc)); Traylor v. State, 561 S.W.2d 492, 494 (Tex. Crim. App. 1978); Patterson v. State, 487 S.W.2d 736, 737 (Tex. Crim. App. 1972); Pitts v. State, 442 S.W.2d 389, 390 (Tex. Crim. App. 1969); *Gossett*, 282 S.W.2d at 62.

266. *Manuel*, 994 S.W.2d at 661.

267. *Id.*

268. Nix v. State, No. 793-00, slip op. at 4, 2001 WL 717453, at *6-8 (Tex. Crim. App. June 27, 2001).

nizes that there are some rare situations in which a trial court's judgment is accorded no respect due to a complete lack of power to render the judgment in question."[269] Similarly, "[t]he habeas corpus exception essentially involves the litigation of a writ of habeas corpus at the probation revocation proceedings."[270] The court further explained "[t]o invoke the habeas corpus exception on appeal, the defendant must show: (a) that the claim is cognizable on a writ of habeas corpus and (b) that the defendant attempted to litigate the claim at the revocation proceeding."[271] Finally, the defendant need not actually file a separate writ application.[272]

c. "Extra-Notice" Requirement

Because community supervision is frequently granted pursuant to a plea agreement, consideration must be given to the applicability of the "extra-notice" requirement for notices of appeal from plea bargained convictions which result in an order granting community supervision. In *Feagin v. State*,[273] the Court of Criminal Appeals clarified that the "extra-notice" requirements are applicable to appeals from plea bargained convictions when community supervision is granted.[274] The court explained that, although the "extra-notice" requirement applies in appeals attacking the propriety of a defendant's conviction, the "extra-notice" requirements are inapplicable "to appeals attacking the propriety of orders revoking probation."[275]

---

269. *Id.* at *5.

270. *See id.* at *6 (explaining "[b]ecause probation is not considered to be a 'final' conviction, an application for writ of habeas corpus filed during the pendency of revocation proceedings would be returnable to the trial court, whose ruling would be reviewable by a court of appeals and, ultimately, subject to a petition for discretionary review from this Court").

271. *Id.*

272. *Id.*

273. 967 S.W.2d 417 (Tex. Crim. App. 1998).

274. *See* Feagin v. State, 967 S.W.2d 417, 419 (Tex. Crim. App. 1998) (holding that the trial court properly exercised jurisdiction over Feagin's appeal despite the failure to comply with former Texas Rule of Appellate Procedure 40(b)(1), where Feagin's "appeal was limited to a single issue which was unrelated to her conviction").

275. *See id.* (citing the *Whetstone* finding that Article 44.02 was inapplicable to an appeal taken after revocation of community supervision); Corley v. State, 782 S.W.2d 859, 860-61 (Tex. Crim. App. 1989) (pointing out that the time for giving notice of appeal from a revocation order is counted from the day of the revocation, not from the day of the

2. Deferred Adjudication

a. The Right to Appeal

The Texas statute providing for deferred adjudication was enacted in 1975.[276] The statute distinguishes an order deferring adjudication of guilt and placing a defendant on community supervision from a judgment adjudicating guilt, suspending the imposition of sentence, and placing a defendant on community supervision.[277] When adjudication of guilt is deferred, the defendant is not found guilty of the charged offense.[278]

When the Legislature first gave the courts authority to grant deferred adjudication and community supervision, it did not provide that such an order is appealable.[279] In fact, "[b]ecause a deferred adjudication order was, by its very terms, not a conviction, it could not be appealed under the authority of [the] general statute [Arti-

---

original plea); Rojas v. State, 943 S.W.2d 507, 509 (Tex. App.—Dallas 1997, no pet.) (holding that the restrictions of former Rule 40(b)(1) do not apply to an appeal from a revocation of community supervision).

276. *See* Act of May 20, 1975, 64th Leg., R.S., ch. 231 § 1, eff. Sept. 1, 1975, 1975 Tex. Gen. Laws 572 (permitting deferred adjudication in felony cases); *Manuel*, 994 S.W.2d at 661 (reinforcing that the purpose of the 1975 statute was "to preclude appellate review of an order deferring adjudication").

277. *Compare* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3 (Vernon Supp. 2001) (authorizing "[a] judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or nolo contendere," to "suspend the imposition of the sentence and place the defendant on community supervision"), *with* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 4 (Vernon Supp. 2001) (authorizing a jury, under certain circumstances, to "recommend to the judge that the judge suspend the imposition of the sentence and place the defendant on community supervision" and requiring the judge to do so "if the jury makes that recommendation in the verdict"). *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5 (Vernon Supp. 2001) (authorizing a judge, except in certain circumstances, "when in the judge's opinion the best interest of society and the defendant will be served . . . after receiving a plea of guilty or a plea of nolo contendere, hearing evidence, and finding that it substantiates the defendant's guilt," to "defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision").

278. *See* Price v. State, 866 S.W.2d 606, 611 (Tex. Crim. App. 1993) (explaining "[a]n order deferring adjudication of guilt and placing defendant on 'probation' under § 5(a) does not constitute a 'conviction'").

279. *See* Watson v. State, 924 S.W.2d 711, 713 (Tex. Crim. App. 1996) (en banc) (providing "[w]hen the Legislature first implemented deferred adjudication it did not expressly authorize the appeal of orders placing defendants on probation without an adjudication of guilt. This was a significant omission, since the right to appeal does not exist at all unless authorized by statute"); *see also Ex parte* Paprskar, 573 S.W.2d 525, 528 (Tex. Crim. App. 1978) (explaining "[i]t is well settled in this State that the right to appeal generally is a statutory right").

cle 44.02 of the Code of Criminal Procedure]."[280] In 1981, the Court of Criminal Appeals concluded in *McDougal v. State*[281] that "the clear import" of the statutory provisions permitting deferred adjudication was "to preclude appellate review of an order deferring adjudication of guilt."[282] The court explained:

> If a defendant [was] dissatisfied with the decision to defer adjudication or with the terms and conditions of the order, his proper remedy [was] to move for final adjudication as provided in [former] Art. 42.12, Sec. 3d(a) and [former] Art. 42.13, Sec. 3d(a). After adjudication of guilt, a defendant's normal appellate remedies are available to him.[283]

Despite the fact that appeal was not permitted from an order deferring adjudication of guilt, upon revocation of probation and adjudication of guilt a defendant is permitted to raise claims of error "arising from the original plea proceeding."[284]

During a post-adjudication appeal, defendants can raise claims of error concerning the original plea proceeding, but are prohibited from raising claims of error concerning "the adjudication of guilt process."[285] In fact, defendants are still prohibited from raising claims of error concerning the adjudication of guilt process.[286] However, this prohibition does not preclude a defendant from rais-

---

280. *Watson*, 924 S.W.2d at 713.

281. 610 S.W.2d 509 (Tex. Crim. App. 1981).

282. McDougal v. State, 610 S.W.2d 509 (Tex. Crim. App. 1981).

283. *Id.* at 509. Former Article 42.12, § 3d permitted deferred adjudication in felony cases. Act of May 20, 1975, 64th Leg., R.S., ch. 231, § 1, 1975 Tex. Gen. Laws 572. Furthermore, former Article 42.13 § 3d permitted deferred adjudication in misdemeanor cases. Act of June 13, 1979, 66th Leg., R.S., ch. 654, § 1, 1979 Tex. Gen. Laws 1516. Both of those former articles provided in pertinent part, at § 3d(a), "[h]owever, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases." Act of May 20, 1975, 64th Leg., R.S., ch. 231, § 1, 1975 Tex. Gen. Laws 572; Act of June 13, 1979, 66th Leg., R.S., ch. 654, § 1, 1979 Tex. Gen. Laws 1516. The final sentence of current Article 42.12 § 5(a) is substantially similar. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(a) (Vernon Supp. 2001).

284. *Manuel*, 994 S.W.2d at 661 (citing David v. State, 704 S.W.2d 766, 767 (Tex. Crim. App. 1985)); Wright v. State, 592 S.W.2d 604, 605 (Tex. Crim. App. 1980).

285. Act of May 20, 1975, 64th Leg., R.S., ch. 231, § 1, 1975 Tex. Gen. Laws 572; Act of June 13, 1979, 66th Leg., R.S., ch. 654, § 1, 1979 Tex. Gen. Laws 1516.

286. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (Vernon Supp. 2001) (providing with regard to the determination to adjudicate guilt *"[n]o appeal may be taken from this determination"*) (emphasis added); Connolly v. State, 983 S.W.2d 738, 743 (Tex. Crim. App. 1999).

ing claims occurring at or about the same time as the adjudication of guilt, but which do not relate to the adjudication of guilt itself—such as a claim that the defendant was not permitted a punishment hearing following adjudication of guilt.[287]

In *Dillehey v. State*,[288] the Court of Criminal Appeals recognized the right of a defendant to appeal from an order deferring adjudication of guilt.[289] The court explained the rule precluding appeal from an order deferring adjudication of guilt changed in 1987 with the enactment of Article 44.01(j).[290] Specifically, "the legislative intent in enacting Article 44.01(j) was to permit defendants to appeal from deferred adjudication community supervision to the same extent (i.e., with the same rights and restrictions) as defendants are permitted to appeal from 'regular' community supervision."[291]

b. Appeal of Order Deferring Adjudication v. Appeal of Adjudication/Revocation

Building on *Dillehey*, the Court of Criminal Appeals concluded in *Manuel v. State*[292] that, like a defendant who appeals following the entry of a judgment granting regular community supervision, "a defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding, such as evidentiary sufficiency, only in appeals taken when deferred ad-

287. *See* Pearson v. State, 994 S.W.2d 176, 177 (Tex. Crim. App. 1999) (addressing Pearson's claim that he was denied a punishment hearing following adjudication of guilt).

288. 815 S.W.2d 623 (Tex. Crim. App. 1991).

289. *See* Dillehey v. State, 815 S.W.2d 623, 626 (Tex. Crim. App. 1991) (reversing the court of appeals' judgment dismissing the appeal for lack of jurisdiction and remanding to the court of appeals for consideration of Dillehey's appeal where Dillehey obtained the trial court's permission to appeal and gave notice of appeal from the order deferring adjudication of guilt).

290. *Id.* at 624-26. Article 44.01(j) provides "[t]he defendant's right to appeal under Article 44.02 may be prosecuted by the defendant where the punishment assessed is in accordance with Subsection (a), Section 3(d), Article 42.12 of this code, as well as any other punishment assessed in compliance with Article 44.02 of this code." TEX. CODE CRIM. PROC. ANN. art. 44.01(j) (Vernon Supp. 2001). The reference in Article 44.01(j) to Subsection (a), Section 3d, Article 42.12 of the code is to § 3d(a) as that provision existed in 1987. Act of June 11, 1985, 69th Leg., R.S., ch. 427, § 1, 1985 Tex. Gen. Laws 1533-34. The current version is found at Article 42.12, Section 5(a), of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(a) (Vernon Supp. 2001).

291. *Manuel*, 994 S.W.2d at 661.

292. 994 S.W.2d 658 (Tex. Crim. App. 1996).

judication is first imposed."[293] The court explained "[c]ertainly, it was not the Legislature's intent, in enacting Article 44.01(j), to permit *two* reviews of the legality of a deferred adjudication order, one time at the time deferred adjudication community supervision is first imposed and another when, and if, it is later revoked."[294]

As in cases in which appeals are taken from revocation of regular community supervision, there are exceptions to the rule that a defendant can raise issues relating to the original plea only in an appeal taken when deferred adjudication is first imposed. In *Nix*, the Court of Criminal Appeals explained "[t]o the extent that 'regular' probation cases recognized exceptions, these exceptions . . . logically carry over to the deferred adjudication context."[295] The court determined that the "void judgment" and "habeas corpus" exceptions apply equally to claims raised by defendants after adjudication of their guilt.[296]

c. "Extra-Notice" Requirement

When deferred adjudication is granted pursuant to a plea bargain, a defendant is required to comply with the "extra-notice" requirements for appeals from plea bargained convictions.[297] In *Watson*, the Court of Criminal Appeals determined that, as a result of the addition by the Legislature of Article 44.01(j) to the Code of Criminal Procedure, appeals from deferred adjudication orders are restricted as prescribed by former Texas Rule of Appellate Procedure 40(b)(1).[298] More recently, the court reiterated that it is the

293. Manuel v. State, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1996).

294. *Id.* at 662.

295. Nix v. State, No. 793-00, slip op. at 3, 2001 WL 717453, at *5 (Tex. Crim. App. June 27, 2001).

296. *Id.* at *5-6.

297. *See* Watson v. State, 924 S.W.2d 711, 712-15 (Tex. Crim. App. 1996) (en banc) (holding that the court of appeals failed to reach the merits of Watson's appeal because she failed to comply with the requirements for such appeals provided in the Rules of Appellate Procedure); *see also* Vidaurri v. State, 49 S.W.3d 880, 882 (Tex. Crim. App. 2001) (en banc) (explaining "when a defendant pleads guilty in exchange for deferred adjudication, that initial plea triggers the application of Rule 40(b)(1), now Rule 25.2(b)(3), limitations to his appeal").

298. *See Watson*, 924 S.W.2d at 714 (providing "an order of deferred adjudication may henceforth be regarded as punishment for purposes of plea negotiations," and thus bringing an order of deferred adjudication within the definition of "punishment" as that term was used in former Rule of Appellate Procedure 40(b)(1)). The former rule restricted the right to appeal only "if the judgment was rendered upon a plea of guilty or nolo con-

initial plea that "triggers the application of Rule 40(b)(1), now Rule 25.2(b)(3), limitations to his appeal."[299]

Interestingly, although *Watson* was important because the Court of Criminal Appeals decided that appeals from deferred adjudication orders are restricted "as prescribed by [former Texas] Rule [of Appellate Procedure] 40(b)(1)," *Watson* actually involved an appeal following adjudication of guilt.[300] Subsequently, in *Manuel*, the Court of Criminal Appeals observed that a plea bargaining defendant's obligation to comply with the "extra-notice" requirements should apply even when the defendant appeals following adjudication of guilt.[301] In *Vidaurri*, however, the Court of Criminal Appeals clarified that the "extra-notice" requirements of Texas Rule of Appellate Procedure 25.2(b) do not apply to appeals following adjudication of guilt so long as the complaints raised on appeal are unrelated to the conviction.[302] Specifically, the court held that the "extra-notice" requirements did not apply to an appeal following adjudication of guilt when the defendant's claim relates only to the process by which he was sentenced.[303] The court further disavowed *Watson* to the extent it conflicted with *Vidaurri*.[304]

IV. CONCLUSION

Clearly, there are a number of important historical and procedural considerations to be aware of when conducting appeals from pleas of guilty and nolo contendere. In addition, the most recent changes—a majority of which have been made by decisional interpretation at the Court of Criminal Appeals—highlight the importance of remaining current on the interpretations of the various procedural and substantive rules. Perhaps, if lawyers who practice criminal law make an effort at keeping current in this very important area of criminal appellate practice, a side effect will be that the public will come to a better understanding of the role that such appeals play in the criminal justice system.

---

tendere . . . and the *punishment* assessed [did] not exceed the *punishment* recommended by the prosecutor and agreed to by the defendant and his attorney[.]" *Id.*

299. *Vidaurri*, 49 S.W.3d at 882.

300. *Watson*, 924 S.W.2d at 711.

301. *Manuel*, 994 S.W.2d at 662.

302. *Vidaurri*, 49 S.W.3d at 885.

303. *Id.*

304. *Id.* at 884-85.

This Article is a snapshot of the rules as they exist at the time of this writing. Therefore, lawyers who practice criminal law should keep in mind the recent pace at which the changes have come. In addition, they should be prepared to adapt their practices when changes come again to achieve the end of effective representation of their clients, whether they be criminal defendants or the government.