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Criminal Procedure: Pretrial, Trial, and Appeal

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CRIMINAL PROCEDURE: PRETRIAL, TRIAL, AND APPEAL

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THIS article will review many of the significant decisions of the Texas Court of Criminal Appeals. There appears to be a trend toward split decisions and a consistent effort by the court to decide the case on the merits if an error has been substantially preserved.

I. BAIL HEARING-CROSS-EXAMINATION OF DEFENDANT

In *Homan v. State*,[1] the court ultimately found improvident its decision to grant review in a case involving the questioning of the defendant during a bail hearing, primarily because while the case was under review, the defendant was actually convicted of capital murder and sentenced to life imprisonment. While the nature of the decision does not afford the case any precedential value, it is interesting to note that the court quoted language in the court of appeals decision to the effect that "[a] defendant may testify in a bail hearing regarding his ability to make bail without subjecting himself to cross-examination on the nature and circumstances of the offense with which he is charged."[2] In other words, a three paragraph opinion clearly telegraphed the court's concern that such an issue be put to rest in future cases.

II. DISMISSAL

In *State v. Terrazas*,[3] the defendant was indicted for tampering with a governmental record, specifically an application for assistance from the Texas Department of Human Services (DHS). The defendant complained of the violation of her due process rights and of her due course of law rights because the District Attorney's Office was compensated by DHS for accepting cases submitted by DHS for prosecution in violation of Texas Government Code section 41.004. Section 41.004 provides that

> [a] district or county attorney, either before or after the case is tried and finally determined, may not take from any person a fee, article of value, compensation, reward, or gift, or a promise of any of these, to prosecute or as consideration or a testimonial for his services in a

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1. 962 S.W.2d 599 (Tex. Crim. App. 1998) (en banc).
2. *Id.* at 600.
3. 962 S.W.2d 38 (Tex. Crim. App. 1998) (en banc).

case that he is required by law to prosecute.[4]

The defendant also contended her statement to a welfare fraud investigator was not voluntarily made. After a hearing, the trial court dismissed the indictment with prejudice and suppressed the defendant's statement. The court of appeals reversed both orders.[5] The evidence at the hearing showed that the District Attorney's Office and DHS entered into a contract by which the D.A.'s office would receive about $433 for each referred case that resulted in deferred adjudication, a conviction or an acquittal, but no money was paid for a dismissal. The case load increased remarkably over the course of the contract.

The Court of Criminal Appeals stated that the court of appeals erred in remedying a trial court's authority to dismiss a charging instrument to four situations.[6] The court also held that a dismissal of the criminal charges may be proper when "a defendant suffers demonstrable prejudice, or a substantial threat thereof, and where the trial court is unable to identify and neutralize the taint by other means."[7] Because the court of appeals held that the trial court was not authorized to dismiss the indictment for a due process violation, it never reached the question of whether the defendant was denied her rights to due process and to due course of law. The court of appeals should have an opportunity to render a decision on the merits. The court emphasized that in the event it is found that the defendant's rights to due process and to due course of law were violated, and dismissal of the indictment was the appropriate means to neutralize the taint of the constitutional violation, the trial court did not abuse its discretion. However, if there was not a constitutional violation or if the defendant's rights were violated, but dismissal of the indictment was not necessary to neutralize the taint of the unconstitutional action, the trial court did abuse its discretion. The case was remanded to the court of appeals for further proceedings.

It is clear from the opinion that the Court of Criminal Appeals was concerned about the imposition of certain restrictions on its powers. The decision laid to rest the notion that the court would be unduly restrained given a compelling set of circumstances.[8]

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4. *Terrazas*, 962 S.W.2d at 38 n.1.

5. *State v. Terrazas*, 933 S.W.2d 263 (Tex. App.—El Paso 1996, pet. granted).

6. "The Court of Appeals . . . observed that a trial court is [only] authorized to dismiss an indictment with prejudice (1) for a defect of form or substance; (2) for the denial of the constitutional right to a speedy trial; (3) under Article 32.01 of the Code of Criminal Procedure when a person is detained and no charging instrument is properly presented; and (4) if prosecutorial misconduct prejudicially violates a defendant's right to counsel, and the exclusion of the evidence will not cure the prejudice." *Terrazas*, 962 S.W.2d at 39.

7. *Id.* at 41.

8. The court stated:

> The judicial power of this State is vested in the courts created by the Texas Constitution. Tex. Const. art. V, § 1. Although we will not explore the boundaries of "judicial power" in this opinion, judicial power certainly includes the power to enforce the constitutions and laws of the United States and the State of Texas. To enforce and protect constitutional rights, courts must have authority to fashion appropriate remedies for violations of constitutional rights. The only questions in such cases are whether there was a

III. COLLATERAL ESTOPPEL

In *State v. Brabson*,[9] the defendant challenged his criminal prosecution for DWI based upon the doctrine of collateral estoppel. At the administrative proceeding to revoke the defendant's license, the administrative judge found no probable cause for the defendant's arrest. Therefore, the defendant argued at the motion to suppress hearing and at the DWI case that the issue of probable cause for arrest had been decided adversely to the State and, thus, the State was precluded from criminally prosecuting the defendant.

The Court of Criminal Appeals recognized that in criminal cases the federal law doctrine of "administrative collateral estoppel" applied.[10] The doctrine stated that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of [ultimate] fact *properly* before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."[11]

Initially, the court found that the parties, which had to be the same in each proceeding, were *not*, because the Texas Department of Public Safety and the Dallas County District Attorney's Office are not the same parties. Therefore, the collateral estoppel principles do not preclude the District Attorney from litigating the issue of probable cause for the defendant's arrest at the suppression hearing in the criminal prosecution. In other contexts, such as *Brady*, challenges claiming non-disclosure to the defendant of exculpatory evidence, the District Attorney and law enforcement agencies have been held to be the same parties for analytical purposes. A different principle applies in the application of a collateral estoppel doctrine because a party should have an opportunity to litigate an ultimate issue of fact.

Even assuming that the Texas Department of Public Safety and the District Attorney were the same parties (*i.e.*, the "State"), the court observed that the administrative judge was only authorized to make three findings[12] and that the applicable law did not authorize the administrative

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> constitutional violation and what is the appropriate remedy. Elected judges must swear or affirm that they will preserve, protect, and defend the United States Constitution and the Texas Constitution. Tex. Const. Art. XVI, § 1. It would make no sense to provide for a constitutional right; require judges to preserve, protect, and defend that constitutional right; but prohibit judges from enforcing that constitutional right and from remedying a violation of that constitutional right.

Id. at 40 n.2. *See also* Weeks v. United States, 232 U.S. 383, 393 (1914) (if a remedy for the violation of a constitutional right is not provided, that right might as well be stricken from the Constitution). Constitutional rights are not simply grandiose, advisory principles. They are the foundation upon which our system of the orderly administration of justice is structured. *See id.*

9. 976 S.W.2d 182 (Tex. Crim. App. 1998) (en banc).

10. *Id.* at 183.

11. *Id.* at 183-84 (emphasis added).

12. (1) [W]hether probable cause existed that such person was driving or in actual physical control of a motor vehicle in a public place while intoxicated, (2) whether the person was placed under arrest by the officer and was offered an opportunity to give a specimen under the provisions of the Act, and

judge to make a finding on the issue of probable cause for arrest and did not place the State on notice that such an issue may be litigated in the administrative hearing. The question of whether probable cause existed that the defendant operated a motor vehicle while intoxicated was a different question from whether probable cause existed for his arrest. Thus, it could not be said that the issue of probable cause for the defendant's arrest was "properly before" the administrative judge or that the State had an adequate opportunity to litigate the issue at the administrative proceeding. In addition, the court emphasized that the exclusionary rule applied only in criminal trials and not at administrative proceedings.[13]

IV. DOUBLE JEOPARDY

In *Ex parte Mitchell*,[14] the defendant was convicted of a capital murder alleged to have been committed on or about December 26, 1979. His conviction was affirmed on direct appeal. The defendant sought post-conviction relief by filing an Application for Writ of Habeas Corpus, alleging that the State had withheld material exculpatory evidence, thereby denying his rights to due process and to due course of law. Relief was granted.[15] After the defendant's case was set for retrial, he filed a Petition for Writ of Habeas Corpus, alleging that the State's prosecution of him for capital murder would violate his double jeopardy rights under both the United States Constitution and the Texas Constitution "due to the intentional [or reckless] prosecutorial misconduct that formed the basis of this Court's reversal of applicant's prior conviction."[16] In *Mitchell I*, the court found that the State suppressed material exculpatory evidence that could have been used to impeach its accomplice witness, and which undermined confidence in the verdict. The suppressed evidence consisted of statements by game warden Ralph East and Smith County Deputy Sheriff Kelly Stroud. East and Stroud, in their statements, said they observed the victim alive[17] sometime around midnight at the fireworks stand where he worked. The indictment alleged that the victim was killed during a robbery of the fireworks stand. Two accomplice witnesses testified that the defendant shot and killed the victim at 8:30 p.m., and this testimony was not corroborated as to the time of the killing. East and Stroud did not speak to the victim but concluded the victim was alive

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(3) whether such person refused to give a specimen upon the request of the officer.

Id. at 184-85.

13. This opinion did not conflict with the court's holding in *Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986) (en banc), a case in which the court held that the parties were the same and that the ultimate fact issue in the probation revocation proceeding and the subsequent criminal prosecution was the same. The ultimate fact issue was decided adversely to the State in the probation revocation proceeding, and that fact issue was properly before the trial court in the probation revocation proceeding.

14. 977 S.W.2d 575 (Tex. Crim. App. 1997) (en banc) [hereinafter *Mitchell II*].

15. Ex parte Mitchell, 853 S.W.2d 1 (Tex. Crim. App. 1993) (en banc) [hereinafter *Mitchell I*].

16. *Mitchell II*, 977 S.W.2d at 577.

17. *See id.* (stating that the victim was alive "as far as they could tell").

based upon their seeing the victim sitting in front of a television at the fireworks stand as they drove by around midnight. At trial, East alone was called as a witness but was never asked anything about this time frame.

At the 1989 hearing held pursuant to the writ application which resulted in *Mitchell I*, the court stated that it appeared that the existence of East's and Stroud's statements, which were in the possession of the Sheriff's Department, were not known to the Smith County District Attorney's Office. These statements, however, were concealed by the Sheriff's Department according to the court. But at the writ hearing heard pursuant to the present writ application in July of 1996, it was revealed that the lead prosecutor at the defendant's 1981 trial did have knowledge of East's observations at the time of trial. The lead prosecutor's hand written notes referred to East's observations. Thus, both the Sheriff's Department and the District Attorney's Office were aware of the exculpatory statement.

The court initially reviewed the well established rules with regard to a prosecutor's duty to disclose exculpatory evidence.[18]

The court noted that the significant cases in this area consistently found reversal and remanding for further proceedings to be the proper remedy when the first trial was unconstitutionally tainted by prosecutorial misconduct.[19] Generally, a retrial is barred on jeopardy grounds only if there is insufficient evidence to support the conviction. "The Supreme Court has held that where the State has in bad faith destroyed evidence favorable to the [defendant], retrial of the [defendant] may be barred if the [defendant's] due process rights are violated."[20] The Supreme Court, however, left open the question of whether, in any instance, retrial would be jeopardy barred.

The *Mitchell II* court then recognized and distinguished the situation presented in *Oregon v. Kennedy*,[21] wherein the Supreme Court held that "the double jeopardy clause of the Fifth Amendment [was] not offended by a second prosecution for the same offense where the earlier proceeding was terminated as a result of the defendant's motion for mistrial unless the State deliberately set out to provoke the defendant's motion for

18. The State has an affirmative duty to make available to an accused, in a timely manner, exculpatory evidence which is in its possession. Suppression by the State violates due process irrespective of the good faith or bad faith of the prosecution. *See* Brady v. Maryland, 373 U.S. 83 (1963). The *Brady* rule was extended to incorporate the required revelation to a defendant of material exculpatory evidence in the possession of police agencies and other parts of the "prosecutorial team." *See* Kyles v. Whitley, 514 U.S. 419 (1995). "Evidence whose value is limited to that of impeachment must also be divulged to the defendant if the failure to do so by the State undermined confidence in the trial's outcome." United States v. Bagley, 473 U.S. 667 (1985).

19. *See Ex parte* Davis, 957 S.W.2d 9 (Tex. Crim. App. 1997) (en banc); Cook v. State, 940 S.W.2d 623 (Tex. Crim. App. 1996) (en banc); Ex parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989) (en banc); Ex parte Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989) (en banc).

20. *Mitchell II*, 977 S.W.2d at 578 (citing Arizona v. Youngblood, 488 U.S. 51 (1988)).

21. 456 U.S. 667 (1982).

mistrial, thereby violating the defendant's right under the double jeopardy clause to have his trial decided by the first tribunal."[22] The court emphasized that the "granting of the motion for mistrial terminates the proceeding; the defendant's subsequent prosecution is a new proceeding. A retrial following a reversal, in contrast, is one uninterrupted proceeding."[23] The court stated that the defendant's right under the double jeopardy clause to have his trial completed by the first tribunal was "clearly protected where, as in the present case, it proceeded to conclusion, i.e., a verdict."[24] Thus, the court held that the defendant's double jeopardy rights under the United States Constitution were not violated.[25] Further, the court recognized that under the Texas Constitution, a retrial would be jeopardy-barred, not only where the State deliberately provoked the defendant's motion for mistrial (and such motion was granted), but also where the defendant's motion for mistrial was due to reckless behavior on the part of the State.[26]

In *Ex parte Bauder*,[27] the defendant's second DWI trial ended in a mistrial after the prosecutor developed testimony from the arresting officer that, immediately before the defendant's arrest, the defendant was engaged in extraneous misconduct. The defendant filed a pre-trial application for Writ of Habeas Corpus prior to the third trial, arguing that further prosecution violated double jeopardy. The Habeas Court found the prosecutor deliberately elicited evidence from the arresting officer at the second trial for the purpose of prejudicing the defendant unfairly before the jury, but denied relief on the ground that the defendant sought the mistrial and because it did not appear that the prosecutor elicited the objectionable testimony for the purpose of goading the defendant into seeking a mistrial. The fourth court of appeals affirmed.[28]

The Court of Criminal Appeals observed that a subsequent prosecution may be jeopardy barred after declaration of a mistrial if the objectionable conduct of the prosecutor was intended to induce a motion for a mistrial or if the prosecuting attorney "was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request."[29] Trial conditions "must be

22. *Id.* at 579.
23. *Id.*
24. *Id.* at 579-80.
25. *Id.* at 580.
26. *See* Bauder v. State, 921 S.W.2d 696 (Tex. Crim. App. 1996) (en banc). In *Mitchell II*, as in *Ex parte Davis*, 775 S.W.2d 649 (Tex. Crim. App. 1989), the court refused to extend the *Bauder* rule to a situation in which prosecutorial misconduct led to a reversal and subsequent reprosecution. The court also observed that the defendant had not demonstrated the existence of pervasive prosecutorial misconduct or of intentional prosecutorial actions that were designed to deprive him of a fair trial. *See Mitchell II*, 977 S.W.2d at 580-81. *See* State v. Breit, 122 N.M. 655, 930 P.2d 792 (1996); State v. White, 85 N.C. App. 81, 354 S.E.2d 324, 329 (1987), *aff'd*, 322 N.C. 506, 369 S.E.2d 813 (1988); Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992).
27. 974 S.W.2d 729 (Tex. Crim. App. 1998) (en banc).
28. Bauder v. State, 880 S.W.2d 502, 504 (Tex. App.—San Antonio 1994, pet. granted).
29. Bauder v. State, 936 S.W.2d 19 (Tex. App.—San Antonio 1996, pet. granted).

extreme" before a mistrial is warranted under Texas law. A prosecutor will not be accountable, and a subsequent prosecution will not be barred by jeopardy, when the court need not have granted the defendant's motion for mistrial. On remand, the court of appeals concluded that the trial court need not have granted the defendant's motion for mistrial and, thus, the subsequent trial was not jeopardy barred.[30] The Court of Criminal Appeals emphasized that the real question was not the correctness of the trial court's ruling granting the mistrial but, rather, was whether the defendant truly consented to the mistrial. The court noted that most motions for mistrial are with the defendant's consent. The court stated that the real issues were (1) whether the defendant's motion for mistrial was a choice he made in response to ordinary reversible error in order to avoid conviction, appeal, reversal, and retrial; or (2) whether the defendant was required to move for mistrial because the prosecutor deliberately or recklessly crossed the line between "legitimate adversarial gamesmanship and manifestly improper methods that rendered trial before the jury unfair to such a degree that no judicial admonishment could have cured it."[31] The court then remanded the case to the court of appeals.

In *State v. Rocha*,[32] the court issued a per curiam opinion finding that the double jeopardy argument should fail in a case in which the defendant was assessed a controlled substances tax and later prosecuted for possessing a controlled substance, following its prior decision in *Ex parte Ward*.[33]

In *Windom v. State*,[34] the defendant was indicted for aggravated robbery and pursuant to a plea bargain, pled no contest to a reduced charge of robbery. The defendant was sentenced to forty years. On the same date, the trial court granted the defendant's motion for a new trial. The defendant was later tried for aggravated robbery, convicted of a lesser included offense of robbery, and sentenced by the court to life confinement. The defendant complained on appeal that the double jeopardy clauses of the United States and Texas Constitutions barred his prosecution for aggravated robbery, relying upon *Parker v. State*.[35] *Parker* involved an initial guilty plea to robbery, an order permitting the defendant to withdraw his plea of guilty, which had not involved a plea bargain, and the defendant's subsequent prosecution for aggravated robbery and conviction for the same.

The *Parker* court held that this case was premised upon a plea bargain and that when the trial court granted the defendant's motion for mistrial, the agreement was essentially voided and, thus, lacked the negotiated plea. In other words, the remedy was to return the parties to their origi-

30. *See id.* at 22.
31. *Bauder*, 974 S.W.2d at 732.
32. 968 S.W.2d 360 (Tex. Crim. App. 1998) (en banc).
33. 964 S.W.2d 617 (Tex. Crim. App. 1998) (en banc); *see also* Ledford v. State, 970 S.W.2d 17 (Tex. Crim. App. 1998) (en banc) (holding the same under the same facts).
34. 968 S.W.2d 360 (Tex. Crim. App. 1998) (en banc).
35. 626 S.W.2d 738 (Tex. Crim. App. 1981).

nal positions, which distinctly opened up the possibility that the defendant could be prosecuted on the original charge.[36]

In *Ex parte Rhodes*,[37] the court addressed the question of whether the double jeopardy clause prohibited a criminal prosecution for interference with child custody following a criminal contempt conviction for the same conduct. This case involved the defendant's divorce from his wife in which a trial court entered a decree ordering that the child of the parties reside in Harris County and enjoining both parties from changing the child's county of residence without prior court approval. In violation of the order, the defendant took the child out of the country, and, upon his return, the defendant was arrested for interference with child custody. The defendant's former wife instituted proceedings to have the defendant found in contempt of court for violating the custody order. Following a civil hearing, the defendant was fined. Based upon that finding, the defendant argued that criminal prosecution for interference with child custody was jeopardy barred. The trial court agreed with the defendant. The fourteenth court of appeals reversed the trial court's decision to grant relief on the writ of habeas corpus, finding that a criminal contempt action, initiated by a private party, did not prohibit a subsequent criminal prosecution based on the same conduct.

The Texas Court of Criminal Appeals held that although the opinions were "fractured" in *United States v. Dixon*,[38] the *Dixon* case, nonetheless, was precedent and did apply in this case. Tallying the individual votes in *Dixon* and applying the rationale of each of those votes, the court held that, under *Dixon*, since the defendant had already been prosecuted for contempt of court, his subsequent prosecution was barred by the double jeopardy clause for interference with child custody.[39]

In *Landers v. State*,[40] the defendant stole a truck and was indicted on two counts: theft of property valued at $750 or more but less than $20,000 and unauthorized use of a motor vehicle. Both counts related to the same owner and the same occurrence date. Habitual allegations were included in the indictment. The jury convicted the defendant of unauthorized use of a motor vehicle, for which he received a sixty-two year sentence from the jury, and a lesser included offense of theft of property valued at $250 or more but less than $750, for which he received a nine month jail sentence from the jury.

The court of appeals held that the convictions on both offenses violated the Fifth Amendment's Double Jeopardy Clause because the unauthorized use of a motor vehicle conviction was a lesser included offense of theft. The court reformed the judgment to delete the conviction and sentence for theft. In his petition for discretionary review, the defendant

36. *See also* Santobello v. New York, 404 U.S. 257 (1971); Shannon v. State, 708 S.W.2d 850 (Tex. Crim. App. 1986) (en banc).

37. 974 S.W.2d 735 (Tex. Crim. App. 1998) (en banc).

38. *Id.* at 739; *see also* United States v. Dixon, 509 U.S. 688 (1993).

39. *See Rhodes*, 974 S.W.2d at 739.

40. 957 S.W.2d 558 (Tex. Crim. App. 1997) (en banc).

argued that the court of appeals should have dismissed the conviction for unauthorized use of a motor vehicle rather than for the theft offense.

The Court of Criminal Appeals stated that the sole issue was the proper remedy for the double jeopardy violation. The court noted that the federal double jeopardy principles do not dictate which conviction must be set aside.[41] The court adopted the "most serious punishment" test previously utilized in the misjoinder context, particularly because a legislature had not enacted a statute addressing this situation.[42] This test "requires retaining the offense with the most serious punishment and vacating any remaining offenses that are the 'same' for double jeopardy purposes."[43] "The 'most serious punishment' is the longest sentence imposed, with rules of parole eligibility and good time serving as a tie breaker."[44]

V. SEARCH AND SEIZURE

In *State v. Guzman*,[45] the Court of Criminal Appeals overruled long standing precedent[46] and, consistent with decisions of the United States Supreme Court,[47] held that a vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contained contraband. There was no requirement of exigent circumstances to justify such a warrantless search. The decision reversed that of the court of appeals, which found that the search exceeded the consent given and that, while there was probable cause, there were no exigent circumstances.

In *Loesch v. State*,[48] the court examined the methodology utilized by the court of appeals in conducting a deferential review of whether the facts gave rise to reasonable suspicion in a border patrol search. The court criticized the approach used because the court of appeals examined each of the different factors in isolation to determine whether each militates in favor of or against a finding of reasonable suspicion rather than under the totality of the circumstances. In addition, the Court of Appeals utilized the "as consistent with innocent activity as with criminal activity" construct, which was recently disavowed in *Woods v. State*.[49]

In *Woods*, a defendant entered the Travis County Courthouse through the main entrance and passed a sign informing the public that those who enter were subject to a search.[50] When the defendant saw a metal detec-

41. *See* Ball v. United States, 470 U.S. 856 (1985).
42. The greater and lesser included offense rationale has been applied when the greater offense is the only indicted offense in the case. *See Landers*, 974 S.W.2d at 559.
43. *Id.* at 560.
44. *Id.*
45. 959 S.W.2d 631 (Tex. Crim. App. 1998) (en banc).
46. *See* Gauldin v. State, 683 S.W.2d 411 (Tex. Crim. App. 1984) (en banc); Maldonado v. State, 528 S.W.2d 234 (Tex. Crim. App. 1975).
47. *See* Michigan v. Thomas, 458 U.S. 259 (1982); United States v. Johns, 469 U.S. 478 (1985).
48. 958 S.W.2d 830 (Tex. Crim. App. 1997) (en banc).
49. 956 S.W.2d 33 (Tex. Crim. App. 1997) (en banc).
50. *See id.* at 34.

tor and an x-ray machine, she looked surprised and scared, turned toward a justice of the peace courtroom, and then started back out the main entrance. Eventually, she was stopped outside and brought back inside, where her purse was scanned and a pistol discovered.

The court reviewed the applicability of the "as consistent with innocent activity as with criminal activity" construct and held that it was no longer a viable test for determining reasonable suspicion. The court held that

> the reasonableness of a temporary detention must be examined in terms of the totality of the circumstances and [would] be justified when the detaining officer has specific articulable facts, which taken together with rational inferences from those facts, lead him to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity.[51]

In *Williams v. State*,[52] the court held that the legal maxim of "expressio unius est exclusio alterius" was not applicable to require inclusion of the date on which the search warrant was issued in the computation of whether the search warrant was timely executed.[53] The warrant directing that it be returned "within three days, exclusive of the date of its execution" could be executed on the fourth day after its issuance.[54]

VI. CHARGING INSTRUMENT

In *Ex parte Patterson*,[55] the defendant challenged his life sentence for attempted capital murder by attacking one of his two prior felony convictions alleged for enhancement. A prior post conviction writ had successfully attacked the prior burglary conviction as fundamentally defective for failing to allege a required element of burglary, and the conviction was held to be void in an unpublished opinion. The present writ claimed entitlement to a new trial because this void prior felony conviction had been used to enhance the defendant's punishment. The court held that the attempted capital murder indictment contained a cognizable defect when it relied on a void judgment of conviction to enhance. The court also noted that "a cognizable defect is present because the indictment's reliance on the void conviction renders it voidable and subjects the enhancement portion of the indictment to being voided by the trial court."[56]

However, the court also found that the defendant's "failure to object to the error in the enhancement portion of the indictment waived the error by procedural default."[57] An indictment or information containing a defect of substance, which still purports to charge an offense, is not fundamentally defective and, in the absence of a pre-trial objection, will

51. *Id.* at 38.
52. 965 S.W.2d 506 (Tex. Crim. App. 1998) (en banc).
53. *Id.* at 507.
54. *Id.*
55. 969 S.W.2d 16 (Tex. Crim. App. 1998).
56. *Id.* at 19.
57. *Id.* at 20.

support a conviction.[58]

The court nevertheless remanded the cause to the trial court as the applicant had alleged facts that, if true, might entitle him to relief on the basis of a denial of the right to effective assistance of counsel who may have failed to investigate the validity of the prior conviction or objected to its use for enhancement. The trial court was instructed to make appropriate findings of fact and conclusions of law as to trial counsel's effectiveness.

In *Brooks v. State*,[59] the delivery of a controlled substance indictment did not contain an enhancement paragraph. The State filed a motion for leave to amend the indictment to add an allegation that the defendant had previously been convicted of attempted murder. The court's order granting the motion set forth the details of the prior conviction, and granted leave for the State to amend the indictment.

The State did not physically alter the indictment, and, at the punishment hearing, the State read the information about the prior conviction to the jury without objection and the trial court included the enhancement in the punishment charge. On appeal, the defendant claimed that the "State's failure to physically alter the original indictment document to include the amendment violated [his] constitutional right to be apprised of the accusations against him."[60] The court initially noted that Article 27.01 of the Code of Criminal Procedure provides that an indictment is the State's "primary pleading in a criminal action" and Article 21.03 provides that "[e]verything should be stated in an indictment which is necessary to be proved."[61] This provision has been construed to mean that an indictment must include "everything necessary to be proven to sustain a conviction in the guilt/innocence phase" of a trial.[62] The court ultimately held that:

> [a]s with deadly weapon findings, prior convictions used as enhancements must be pled in some form, but they need not be pled in the indictment—although it is permissible and perhaps preferable to do so. In this case, the requisite notice was conveyed by the State's mo-

58. A defect of substance in a charging instrument will not automatically render a judgment void. The Texas Constitution still requires the indictment or information charge a person with the commission of an offense. *See* TEX. CONST. art. V, § 12(b). Article 1.14(b) of the Texas Code of Criminal Procedure was amended to provide:

> [i]f the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post-conviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Article 28.01 of this code.

TEX. CRIM. PROC. CODE ANN. art. 1.14(b) (Vernon 1997).

59. 957 S.W.2d 30 (Tex. Crim. App. 1997) (en banc).

60. *Id.* at 31.

61. *Id.* at 32.

62. Sharp v. State, 707 S.W.2d 611, 624 (Tex. Crim. App. 1986) (en banc); *Brooks*, 957 S.W.2d at 32.

tion and the trial court's order.[63]

In *Duron v. State*,[64] the defendant pled guilty to indecency with a child. He complained on appeal that the charging instrument was not a legal indictment because it did not charge "the commission of an offense." The indictment alleged that the defendant, acting with intent to arouse his own sexual desire, had sexual contact with a child younger than seventeen years of age who was not his spouse. These allegations contained all of the statutory elements of indecency with a child under Texas Penal Code Section 21.11(a)(1). The defendant argued, however, that the indictment contained factual allegations establishing, if true, that appellant was not guilty of indecency with a child, as the indictment alleged. Sexual contact between the defendant and the child occurred when the defendant rubbed his private part between the child's legs. The law defines "sexual contact" only as "any touching of the anus, breast or any part of the genitals of another person," and "because legs are not included, the purported indictment [did] not actually charge the commission of an offense and is not, therefore, an indictment so as to confer jurisdiction on the trial court."[65]

The court reviewed the problematic history of indictments and the obligation of defense counsel to object, commencing with *Studer v. State*.[66] The court also noted that in *Cook v. State*,[67] it held that to comprise an indictment within the meaning of Article V, Section 12, the instrument must charge: (1) a person (2) with the commission of an offense. The written instrument was not a legal indictment in *Cook* because it did not allege the identity of any person. Recognizing the persuasive sources,[68] the court held that "a written instrument is an indictment or information under the Constitution if it accuses someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the instrument is otherwise defective."[69] Thus, notwithstanding the inclusion of factual allegations that may arguably evidence the defendant's innocence in this case, there is no doubt that the State intended to accuse the defendant of indecency with a child.

In *Grant v. State*,[70] the information charging evading arrest alleged that the defendant fled from "Officer Lawson," a peace officer who was attempting to arrest or detain the defendant. The trial evidence identified the peace officer as "Lieutenant Craig Lawson." The defendant argued and the court of appeals agreed that there was a fatal variance because the State pled but failed to prove that Lawson's first name was "Officer."

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63. *Id.* at 34 (citation omitted).
64. 956 S.W.2d 547 (Tex. Crim. App. 1997) (en banc).
65. *Id.* at 551.
66. 799 S.W.2d 263 (Tex. Crim. App. 1990) (en banc).
67. 902 S.W.2d 471 (Tex. Crim. App. 1995) (en banc).
68. *See* George E. Dix, *Texas Charging Instrument Law: The 1985 Revisions and the Continuing Need For Reform*, 38 BAYLOR L. REV. 1, at 39-40, n.137 (1986); *Cook*, 902 S.W.2d at 480 (Clinton, J., concurring).
69. *Duron*, 956 S.W.2d at 550-51.
70. 970 S.W.2d 22 (Tex. Crim. App. 1998) (en banc).

The court held that this indeed was not a case involving a "variance" of any type. Instead the case involved a missing allegation required by statute to be included in the charging instrument. "Officer" was the complainant's title, not his first name. While his first name should have been in the charging instrument, the error was waived when the defendant failed to object.[71] As "Officer" was not an allegation of Lawson's first name, the State was not required to prove that it was Lawson's first name.

VII. PLEA OF GUILTY

In *High v. State*,[72] the court of appeals reversed a conviction based upon the failure of the trial court to admonish the defendant of the deportation consequences of his guilty plea under Article 26.13(a)(1) of the Texas Code of Criminal Procedure. The Court of Criminal Appeals remanded the case for a harm analysis based upon the premise that "no error" is "categorically immune to a harmless error analysis" other than structural error.[73]

In *Carroll v. State*,[74] the defendant was convicted pursuant to a non-negotiated guilty plea of two counts of delivery of marijuana and sentenced to five years imprisonment and a fine. After the guilty pleas were accepted by the trial court, the court recessed pending a pre-sentence investigation. When court reconvened, the state called the defendant as a witness and indicated to defense counsel if the defendant did not testify it would "reflect very seriously on the court's decisions." Thus, the defendant testified. The court of appeals reversed, holding that the written waiver executed by the defendant, including his waiver of his Fifth Amendment right not to testify, did not extend to the punishment phase of the proceeding. The Court of Criminal Appeals distinguished authorities relied upon by the court of appeals[75] on the ground that those situations presented two separate hearings, one on guilt/innocence and one on punishment, and waiver and actually testifying at the guilt/innocence hearing did not constitute a waiver as to Fifth Amendment rights at the punishment phase. In the instant case, when the defendant plead guilty in a non-negotiated plea bargain situation, the defendant was not entitled to a bifurcated trial and once the guilty plea was entered, the procedure became a "unitary trial" to determine the remaining issue of punishment. There is no per se "punishment phase" when the defendant pleads guilty and, therefore, the defendant's waiver in this case extended to this proceeding.

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71. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon 1997); *Studer*, 799 S.W.2d 263.

72. 964 S.W.2d 637 (Tex. Crim. App. 1998) (en banc).

73. *See* Cain v. State, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (en banc).

74. 975 S.W.2d 630 (Tex. Crim. App. 1998) (en banc).

75. *See generally* Wilkens v. State, 847 S.W.2d 547 (Tex. Crim. App. 1992) (en banc); Beathard v. State, 767 S.W.2d 423 (Tex. Crim. App. 1989) (en banc); Brumfield v. State, 445 S.W.2d 732 (Tex. Crim. App. 1969).

VIII. JURY SHUFFLE

In *Roberts v. State*,[76] the trial court conducted a jury shuffle after the voir dire over the defendant's objection. This resulted in two members of the panel, who previously could not have been reached, moving into the strike zone. The defendant exercised a peremptory strike to remove one of these members. The court of appeals found reversible error by virtue of the jury shuffle. The Court of Criminal Appeals remanded in order that the court of appeals would conduct a harmless error analysis determination in view of *Cain v. State*.[77]

The concurring opinion by Judge Meyers in *Roberts* indicated by footnote that while trial and appellate courts may have less to worry about concerning non-constitutional voir dire error, the defendant's burden has now become greater. The defendant must now show that the error caused him to be deprived of a fair and impartial trial, and the only error which may qualify is an erroneous denial of a challenge for cause against a venire person who ultimately served and who testified during voir dire that he could not be fair and impartial.

In *Johnson v. State*,[78] the Court of Criminal Appeals determined that the defendant asked for a shuffle of the jury panel before the venire was seated. After the venire was seated, sworn, and qualified, the defendant asked that the jury be shuffled again. The judge asked if the panel had been shuffled at the defendant's request and if the defendant was asking for a second shuffle, and the defendant's attorney answered affirmatively. The court held that based upon these facts and the defendant's failure to raise any objections to the reordering or shuffle that was previously done, and the defendant's reason for a second shuffle, the trial judge could have reasonably concluded that the defendant was not entitled to the shuffle he was seeking. Therefore, the court did not err in denying the defendant's request for a shuffle. While the court of appeals properly reviewed the legal principles concerning jury shuffles, it erred in its application. The court of appeals wrote in part:

> A shuffle cannot take place, however, until it first is determined precisely which persons will constitute the jury panel for the case. The parties have the right to view the entire venire in proper sequence and then have the names shuffled. A defendant cannot be deemed to have exercised his right to a jury shuffle without having had the

76. 978 S.W.2d 580 (Tex. Crim. App. 1998) (en banc).

77. *See Cain*, 947 S.W.2d 262. In *Cain*, the court stated:

> Except for certain federal constitutional errors labeled by the United States Supreme Court as 'structural,' no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis. Of course, where the error involved defies analysis by harmless error standards or the data is insufficient to conduct a meaningful harmless error analysis, then the error will not be proven harmless beyond a reasonable doubt under [former] Rule 81(b)(2) [now Rule 44.2].

Id. at 264.

78. 977 S.W.2d 137 (Tex. Crim. App. 1998) (en banc).

> opportunity to present the motion for a shuffle to the judge. . . . [J]ury shuffles will be performed in the courtroom. . . . A defendant has the absolute right to a "reshuffle" if the original shuffle was caused by someone other than the State, such as the trial judge or court personnel.[79]

The Court of Criminal Appeals emphasized the procedural aspects to preserve error by writing: "Complaints about jury shuffle error must be preserved. To prevail on appeal, a defendant must raise a specific objection about the jury shuffle at trial. If Art. 35.11 has not been followed, and a defendant requested the improper procedure, appellate review of the impropriety is precluded."[80]

IX. VOIR DIRE

In *Sadler v. State*,[81] the defendant, during voir dire, asked the panel, "Who would not be able to consider the minimum punishment if you found somebody guilty and there was a child victim (and/or a child) present?" Nine venire persons responded they would not, and the defendant challenged them for cause alleging bias against the law. When the trial court denied the challenges, the defendant used peremptory strikes to remove these venire persons. The defendant requested and was denied additional peremptory strikes. After the court reviewed the notion of "bias" under Article 35.16(c)(2) of the Code of Criminal Procedure, the court approved the issue as framed by the court of appeals as being: "whether, in the proper aggravated robbery case, where the facts justify it and the law allows it, the veniremember can fully and fairly consider the entire range of punishment, including the minimum and [maximum]."[82] The court declined to follow the defendant's argument that jurors must not only be willing to consider the entire range of punishment for a crime but also for the manner in which the defendant committed it. Instead the law requires jurors to use the facts to tailor the punishment to the crime as committed by the guilty defendant and thus it would be "nonsensical to rule that a juror who will use the facts to fit the punishment to the crime is unqualified. . . ."[83] The court ultimately held that a prospective juror would not be challengeable for cause based on his or her inability to consider the full range of punishment as long as he or she can consider the full range of punishment for the offense as defined by law. The court explained that bias against the law was a refusal to consider or apply the relevant law and existed when a venire person's beliefs or opinions "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."[84]

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79. Johnson v. State, 944 S.W.2d 739, 741 (Tex. App.—Corpus Christi 1997) (citations omitted).
80. *Johnson*, 977 S.W.2d at 139 (citations omitted).
81. *Id.* at 140.
82. *Id.* at 142.
83. *Id.* at 143.
84. *Id.* at 142.

In *Anson v. State*,[85] a case involving aggravated sexual assault of a child, a number of prospective jurors responded when asked whether there was anything of a personal nature that they wanted to discuss at the bench. After the judge privately questioned the panelists, defense counsel was prohibited from individually questioning three of them. Defense counsel used peremptory strikes to exclude each of the three and did not request additional peremptory challenges, and none of them served on the jury. The defendant complained on appeal that the trial court erred in prohibiting individual questioning of each of the prospective jurors by defense counsel. The court acknowledged that the harm analysis applied to the erroneous denial of a defendant's challenge for cause likewise applied to the erroneous prohibition of proper questioning of individual prospective jurors. "For the erroneous denial of challenges for cause, a defendant is harmed only if (1) he exhausts all of his peremptory challenges, (2) he requests more challenges, (3) his request is denied, and (4) he identifies an objectionable person seated on the jury on whom he would have exercised a peremptory challenge."[86] As the defendant made no request for additional challenges, the defendant suffered no harm.

X. JURY OF ELEVEN

In *Roberts v. State*,[87] the defendant requested leave of the court to proceed with 11 jurors after learning that one of the jurors had communicated with a potential State's witness. The eleven member jury convicted the defendant. The defendant argued that an accused could not waive the requirement of Article 36.29(a) of the Code of Criminal Procedure that no less than twelve jurors render a verdict in a felony case. The court held that a defendant may waive his statutory right to a jury of twelve members.[88]

XI. DEFENDANT'S STATEMENTS

In *Gassaway v. State*,[89] the defendant, convicted of DWI, claimed on appeal that the jury should not have been allowed to view that portion of the DWI video tape showing the defendant counting and reciting the alphabet during the course of taking field sobriety tests because these tests were testimonial in nature and violated his Fifth Amendment rights. The defendant relied upon state and U.S. Supreme Court authorities.[90] In *Vickers*, the defendant recited the alphabet from "F" to "W" and counted backwards from ninety to seventy-five. In *Muniz*, the defendant was

85. 959 S.W.2d 203 (Tex. Crim. App. 1997) (en banc).
86. *Id.* at 204.
87. 957 S.W.2d 80 (Tex. Crim. App. 1997) (en banc).
88. *See id.* at 81; *see also* Hatch v. State, 958 S.W.2d 813 (Tex. Crim. App. 1997) (en banc); Herrell v. State (Tex. Crim. App. 0382-97-Dec. 2, 1998 (opinion not yet available) (same holding))
89. 957 S.W.2d 48 (Tex. Crim. App. 1997) (en banc).
90. *See generally* Vickers v. State, 878 S.W.2d 329 (Tex. App.—Ft. Worth 1994, pet. ref'd); Pennsylvania v. Muniz, 496 U.S. 582 (1990).

asked seven questions regarding his name, address, weight, eye color, date of birth and current age, and the date of his sixth birthday. He was also asked to perform three field sobriety tests involving counting. The Supreme Court concluded that Muniz's response to the sixth birthday question was testimonial in nature, citing *Doe v. United States*,[91] which held that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[92]

The court, reiterating previous holdings,[93] held that the recitation of the alphabet and counting backwards are not testimonial in nature because these types of communications are physical evidence of the functioning of the defendant's mental and physical faculties and because the defendant's performance shows the condition of his body. Any indication of intoxication comes from a "suspect's demeanor, the manner in which he speaks, and whether he has the mental ability to perform the tests correctly."[94] Further, reciting and counting do not involve an express or implied assertion of fact or belief and, therefore, the defendant was not confronted with the "cruel trilemma" of "truth, falsity, or silence."[95] Thus, the defendant's recitation of the alphabet and counting backwards were not compelled in violation of his right to be free from self-incrimination.

XII. EXPERT WITNESS TESTIMONY

In *Weatherred v. State*,[96] the court of criminal appeals reviewed the trial court's decision excluding expert witness evidence. It held that the trial court erred in excluding expert testimony regarding photo bias and eye witness identification, and reversed and remanded the case for a new trial. The State's petition for discretionary review complained that the court of appeals failed to address every issue raised and necessary to the final disposition of the appeal on this point.[97] More specifically, the State argued that the appellate court failed to address its claim that the trial court's exclusion of the expert witness' testimony could be upheld because the probative value of the testimony was substantially outweighed by its prejudicial effect pursuant to Rule 403.[98] In addition, the State claimed that the appellate court did not perform a proper analysis of the admissibility of the expert testimony pursuant to Rule 702.[99]

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91. 487 U.S. 201 (1988).
92. *Id.* at 210.
93. *See* Jones v. State, 795 S.W.2d 171 (Tex. Crim. App. 1990); Chadwick v. State, 766 S.W.2d 819 (Tex. App.—Dallas 1988, pet. granted) *aff'd* 795 S.W.2d 177 (Tex. Crim. App. 1990).
94. *Gassaway*, 957 S.W.2d at 51.
95. *Id.* at 50.
96. 975 S.W.2d 323 (Tex. Crim. App. 1998).
97. TEX. R. APP. P 47.1.
98. TEX. R. CRIM. EVID. 403.
99. TEX. R. CRIM. EVID. 702

The Texas Court of Criminal Appeals pointed to its previous decision that set out the standard for admission of expert testimony in the so-called "'soft'" sciences, that is, "'fields of study aside from the hard sciences, such as the social sciences or fields that are based primarily upon experience and training as opposed to the scientific method.'"[100] The Texas Court of Criminal Appeals recognized that the appellate court did not have the benefit of that decision and remanded the case to the court of appeals for reconsideration of the Rule 702 issue in light of *Nenno* and of the issue relative to Rule 403.[101]

XIII. JURY ARGUMENT

In *Renteria v. State*,[102] the defendant complained of the prosecutor's jury argument, which urged a jury verdict of guilt based upon the law of parties. The trial court instructed the jury on the law of criminal responsibility as a party in the abstract but did not apply the law to the facts in an application paragraph. The court of appeals reversed, holding that the prosecutor's jury argument improperly allowed the State to argue a theory of criminal responsibility not properly included in the jury charge. The Texas Court of Criminal Appeals recognized the legal proposition that "error in jury argument does not lie in going beyond the court's charge, but in stating law contrary to the same."[103] Assuming, therefore, that the prosecutor's argument extended beyond the court's instructions, there was no error because the State properly argued the law of parties to the jury.

XIV. PRESERVATION OF ERROR

In *Warner v. State*,[104] a prosecution for aggravated kidnapping, aggravated assault, and arson, the State filed a motion in limine requesting that the defendant be instructed not to refer to any matter in the presence of the jury to show that he had attended or completed any counseling or other rehabilitation for any stress disorder. At a hearing on the State's motion, the defendant explained that he had once been a veteran of the Vietnam War and suffered from "post-traumatic stress disorder" (PTSD) and that he had received counseling for that disorder.[105] Citing *Cowles v. State*,[106] the defendant argued that the evidence was admissible to prove he did not have the specific intent necessary to commit the offenses.[107] The trial court granted the State's motion in limine and found that the evidence of PTSD was admissible only at the punishment stage. The de-

100. *Weatherred*, 975 S.W.2d at 323-24 (quoting Nenno v. State, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998)).
101. *See id.*
102. 977 S.W.2d 606, 1998 Tex. Crim. App. LEXIS 88 (Tex. Crim. App. 1998).
103. *Id.* at *4.
104. 969 S.W.2d 1 (Tex. Crim. App. 1998).
105. *See id.* at 2.
106. 510 S.W.2d 608 (Tex. Crim. App. 1974).
107. *See Warner*, 969 S.W.2d at 1.

fendant did not offer the evidence at the guilt/innocence stage and the jury convicted him of each offense. The trial court assessed the prison sentences to run concurrently. The court of appeals rejected the defendant's argument that the trial court erred in excluding such evidence. The court of criminal appeals concluded it had granted the defendant's petition improvidently because the defendant had not preserved his complaint for appellate review.

The Texas Court of Criminal Appeals, in its per curiam opinion, stressed that the defendant did not define PTSD for the court or explain how he intended to prove that he suffered from that disorder. Equally important, the defendant did not show how evidence of PTSD would be relevant to the question of specific intent. In essence, the defendant wholly failed to preserve error. The Texas Court of Criminal Appeals emphasized that appellate error may not be predicated upon a ruling excluding evidence unless a substantial right of a party is affected and substance of the evidence was made known to the trial court by an offer of proof by the context within which questions were asked. The offer of proof can assume the form of question and answer or a concise statement by counsel. In the latter case, the statement must include a "reasonably specific summary of the evidence offered and must state the relevance of the evidence unless the relevance is apparent, so that the court can determine whether the evidence is relevant and admissible."[108]

In this case, the defendant did not make an adequate offer of proof before or during the guilt/innocence stage. Actually, in this latter situation, the court noted that a ruling on the State's motion in limine excluding defense evidence was subject to reconsideration throughout the entire trial, however, in order to preserve error, an offer of proof was required to be made at trial. No offer of proof was properly made.

XV. COURT'S CHARGE

In *Moore v. State*,[109] a capital murder prosecution in which the defendant received the death penalty, the State's evidence showed through an eye witness that the defendant fired a rifle multiple times and killed two individuals in a car after an argument in the parking lot of a club during early morning hours. The defense eye witness testified about violent and obnoxious behavior by both decedents in the club and about a nasty confrontation outside the club, followed immediately by efforts of one of the decedents to run down the defendant in the parking lot. When someone in the crowd threw the defendant a rifle, he unloaded it into the vehicle, killing both occupants.

The Texas Court of Criminal Appeals addressed the trial court's action in denying requested instructions on voluntary manslaughter and murder, ultimately holding that the trial court erred in refusing each request. The

108. *Id.* at 4 (citations omitted).
109. 969 S.W.2d 4 (Tex. Crim. App. 1998).

court reiterated the two step test to determine whether a charge on a lesser included offense must be given.[110]

The first inquiry is whether the offense fell within Article 37.09 C.C.P., that is, whether the lesser included offense was included within the proof necessary to establish the offense charged.[111] The second inquiry is whether there is some evidence that would permit a rational jury to find that the defendant is guilty only of the lesser offense. All of the evidence in the record must be evaluated, and there must be some evidence from which a rational jury can acquit the defendant of the greater offense and, at the same time, convict him of the lesser included offense. It is irrelevant as to whether the evidence is credible, controverted, or conflicting.

The court first held that voluntary manslaughter was a lesser included offense of murder based upon the rationale expressed in *Johnson v. State*.[112] In *Johnson*, the Texas Court of Criminal Appeals acknowledged that murder and voluntary manslaughter required proof of the same culpable mental state, "intentional or knowing," but the addition of "sudden passion" to Section 19.04 of the Texas Penal Code tempered the culpability of the mental state that would otherwise turn a person's conduct into murder.[113]

The second inquiry focused on the sort of evidence required to prove "sudden passion." The court rejected any approach that would categorize "sudden passion" as a subjective concept requiring direct evidence. Instead, the court recognized that "sudden passion" was essentially a culpable mental state and, as such, may be inferred from the defendant's acts, words, and conduct. Evidence relevant to proving adequate cause would certainly be relevant to proving sudden passion.

In this light, the court in *Moore* reviewed the facts[114] and found that a jury could have rationally found that the events would commonly pro-

110. *See also* Aguilar v. State, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); Royster v. State, 622 S.W.2d 442, 466 (Tex. Crim. App. 1981).

111. This inquiry paraphrases the language of Article 37.09(1), which describes the kind of lesser included offense most frequently encountered. The court noted that another definition of lesser included offense in subdivisions (2), (3), or (4) of Article 37.09 may apply as well in the first step of any given case. Obviously, the first step applies the relevant definition to the offense charged and the offense in question. *See Moore*, 969 S.W.2d at 8.

112. 815 S.W.2d 707 (Tex. Crim. App. 1991).

113. The holding of the plurality opinion in *Bradley v. State*, 688 S.W.2d 847 (Tex. Crim. App. 1985), was overruled. The statements in part III of the minority opinion in *State v. Lee*, 818 S.W.2d 778, 781-82 (Tex. Crim. App. 1991), were disapproved.

114. *See Moore*, 969 S.W.2d at 11.

> [i]n this case, Tyron Parks testified that the shootings took place in the highly charged atmosphere of a fight. He said that the victims, Boyd and Clark, were acting hostile and intoxicated. At one point during the altercation, Parks thought Boyd was trying to pull a pistol out. Later, Boyd pushed the [defendant], and then tried to grab Parks. Parks considered cutting Boyd's throat, but then decided against it and threw Boyd to the ground. Boyd got up and ran over to the car in the street next to the club, where Clark was revving the engine. Clark tried to run over the appellant and Parks with the car, missed, and then backed up and tried again. It was at this point that the appellant got a rifle and shot Boyd and Clark.

Id.

duce a degree of anger, rage, and the like in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Therefore, the jury could have acquitted the defendant on the charge of capital murder and found him guilty only of voluntary manslaughter. Thus, it was error to refuse the charge on the lesser included offense of voluntary manslaughter.

In addition, the court's charge on self defense authorized an acquittal based upon self defense as against either of the decedents, Clark or Boyd. The court concluded that a requested instruction as to murder was required because if the defendant was justified in killing Clark in self defense, then he did not murder Clark, in which event the murder of Boyd was not capital murder since the defendant did not murder more than one person. Thus, the trial court erred a second time in refusing the lesser included instruction on murder.

In *Blake v. State*,[115] the defendant argued that the trial court erred by not submitting the factual issue of the juvenile's accomplice status to the jury. The court of appeals held that the accomplice witness rule did not apply to juveniles who could not be prosecuted under the Penal Code. The Texas Court of Criminal Appeals reviewed ample precedent holding that, while the testimony of an adult accomplice offered by the prosecution must be corroborated in order to support a conviction, the testimony of an identically situated child did not require corroboration. After an extensive discussion of the rule, the court held that the juvenile exception to the accomplice witness rule was abolished and that the testimony of juveniles who could potentially be subject to State sanctioned punishment was now subject to the accomplice witness rule in the same manner as the testimony of an adult. The determination of whether a particular juvenile is an accomplice for purposes of the accomplice witness rule must be made in the same manner as the determination of whether a particular adult is an accomplice for purposes of the rule.[116]

In *Arevalo v. State*,[117] the defendant was convicted of sexual assault and aggravated sexual assault. When the defendant's petition for discretionary review was first granted, the court held that the State was bound by the second prong of the *Royster/Aguilar* test and remanded the case to the court of appeals to address the State's claims that the record included evidence that the defendant was guilty only of sexual assault.[118]

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115. 971 S.W.2d 451 (Tex. Crim. App. 1998).

116. The Texas Court of Criminal Appeals stated that:

> Juveniles against whom criminal proceedings or juvenile adjudications have been instituted for the same offense as the defendant or a lesser included offense are accomplices as a matter of law. If no proceedings have been instituted, the juvenile is an accomplice as a matter of fact if the jury finds the record contains sufficient evidence linking the juvenile to the criminal offense as a blameworthy participant. Each case must be considered on its own facts.

Id. at 461.

117. 970 S.W.2d 547 (Tex. Crim. App. 1998).

118. *See id.*; *Aguilar*, 682 S.W.2d 556; *Royster*, 622 S.W.2d 442.

The court of appeals next held that because the defendant agreed there was conflicting evidence on one of three aggravating factors, the trial court did not err by submitting aggravated sexual assault. The Texas Court of Criminal Appeals noted that the State presented evidence on all three theories of aggravation and that the jury charge required the jury to find only one of the three to convict the defendant of aggravated sexual assault. If the evidence was disputed on only one of those theories and the evidence on the remaining two was uncontested, then the jury could not rationally find the defendant guilty only of the lesser included offense. Thus, the court held that if sufficient evidence of more than one theory of the greater offense is presented to allow the jury to be charged on alternate theories, then the second prong of the *Royster/Aguilar* test is satisfied only if there is evidence which, if believed, refutes or negates every theory which elevates the offense from the lesser to the greater. Therefore, only if every theory properly submitted was challenged would the jury be permitted to find the defendant guilty only of the lesser offense.

In *Mann v. State*,[119] an aggravated assault prosecution, the parties conceded that the jury instructions contained one paragraph which inaccurately set forth the State's burden of proof as being less than beyond a reasonable doubt. The court of appeals found the error harmless. The Texas Court of Criminal Appeals cited *Abdnor v. State*,[120] as the authority setting forth the appropriate method for analyzing errors in a jury charge: (1) the reviewing court must determine whether the jury charge contained error; and (2) the court must determine whether sufficient harm resulted from the error to require reversal.[121] Because there was no objection involved in this case, the court must determine whether the defendant suffered egregious harm as a result of the error. In determining if the defendant suffered egregious harm, the error must be "assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of the probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole."[122]

After reviewing both state and federal authorities in which the instructions on reasonable doubt were entirely omitted,[123] the court held that where an error in the jury charge on reasonable doubt or burden of proof

119. 964 S.W.2d 639 (Tex. Crim. App. 1998).

120. 871 S.W.2d 726 (Tex. Crim. App. 1994).

121. The Texas Court of Criminal Appeals wrote in part:

> The standard to determine whether sufficient harm resulted from the charging error to require reversal depends upon whether appellant objected. Where there has been a timely objection made at trial, an appellate court will search for only "some harm." By contrast, where the error is urged for the first time on appeal, a reviewing court will search for "egregious harm."

Mann, *supra* note 118, at 641.

122. *Abdnor*, 871 S.W.2d at 733.

123. *See* Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991); *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

was isolated to one portion thereof and the remainder of the jury charge contained language negating that erroneous portion, the effect of the error is analyzed by employment of the standards set forth by the Texas Court of Criminal Appeals in *Abdnor* and *Almanza,* which are based on Article 36.19 C.C.P. It was held that the court of appeals incorrectly applied the harmless error rule.[124]

In *Posey v. State*,[125] the defendant complained for the first time on appeal that the trial court reversibly erred by not sua sponte instructing the jury on the defense of mistake of fact. The court of appeals agreed that the defendant was "egregiously harmed." The Texas Court of Criminal Appeals noted the "harm" standard set forth in Article 36.19 C.C.P., as construed by *Almanza v. State*,[126] but emphasized that neither had any application in determining whether there was "error" in the jury charge, which was the first inquiry.

The Texas Court of Criminal Appeals noted that Article 36.14 C.C.P mandates that a trial court submit a charge setting forth the law "applicable to the case" and observed that the question presented in this case was whether this provision imposed a duty on the trial court to sua sponte instruct the jury on unrequested defensive issues. The court held that no such duty was imposed by Article 36.14 C.C.P., a holding consistent with the general rules of procedural default and the policies they promote. A defensive issue is not "applicable to the case" for purposes of Article 36.14 C.C.P. unless the defendant timely requests the issue or objects to the omission of the issue in the jury charge. The court emphasized that when the *Almanza* decision spoke of "erroneous" omissions of issues in the court's charge, it spoke of omissions of issues upon which a trial judge had a duty to instruct without a request from either party or issues that have been timely brought to the trial court's attention.

In *Smith v. State*,[127] wherein the defendant was convicted of voluntary manslaughter, the trial court charged the jury on the law of murder as well as the lesser included offenses of voluntary manslaughter and involuntary manslaughter. The trial court also charged the jury on the law of self defense, including provocation. The defendant argued that the court of appeals erroneously held that the provocation instruction was properly given because there was insufficient evidence to raise the issue. An instruction on provocation should only be given when there is evidence from which a rational jury could find every element of provocation beyond a reasonable doubt.[128]

> A charge on provocation is required when there is sufficient evidence (1) that the defendant did some act or used some words which

124. Under Rule 81(b)(2), the Texas Court of Criminal Appeals vacated the judgment of the court of appeals and remanded to that court for further proceedings. *See Mann*, 964 S.W.2d at 642.

125. 966 S.W.2d 57 (Tex. Crim. App. 1998).

126. 686 S.W.2d 157 (Tex. Crim. App. 1985).

127. 965 S.W.2d 509 (Tex. Crim. App. 1998).

128. *See id.* at 514.

> provoked the attack on him, (2) that such act or words were reasonably calculated to provoke the attack, and (3) that the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other.[129]

After reviewing the facts, the court held that the provocation instruction was properly submitted.

XVI. JURY NOTE

In *DeGraff v. State*,[130] an assault case, the jury sent the judge a note that read, "Did Officer Keener testify that Mr. DeGraff told him that he hit Ms. Royer[?]"[131] Over the defendant's objection, the trial court first told the jury that the court took from the note that the jury was in disagreement over a portion of the testimony and then had the court reporter read back the testimony in question. The court of appeals reversed, finding that the trial court abused its discretion in reading the testimony of the officer without determining if a disagreement existed. The Texas Court of Criminal Appeals remanded for a harmless error analysis. On remand, the court of appeals found that the trial court's error was not harmless beyond a reasonable doubt.[132] The Court of Criminal Appeals granted the State's second petition for discretionary review to determine whether the court of appeals had erred in its holding that the trial court had abused its discretion.

The Texas Court of Criminal Appeals observed regarding jury notes and the concerns underlying Article 36.28 C.C.P. in responding to them, that, on the one hand, the trial court cannot comment on the weight of the evidence and, on the other hand, jurors should have the means of resolving any factual disputes they might have. The court held that the jury's request in this case in no way suggested the existence of a disagreement and none could be inferred, and, thus, held that the trial court abused its discretion in finding a disagreement among the jurors. The court affirmed the judgment of the court of appeals.

XVII. SUFFICIENCY OF THE EVIDENCE

In *Curry v. State*,[133] the Texas Court of Criminal Appeals reiterated the new rule that no longer shall the sufficiency of the evidence be measured by the jury charge actually given. Instead, the sufficiency of the evidence must be measured "by the elements of the offense as defined by the hypothetically correct jury charge for the case."[134]

In *Weightman v. State*,[135] the Texas Court of Criminal Appeals revisited

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129. *Id.* at 513.
130. 962 S.W.2d 596 (Tex. Crim. App. 1998).
131. *Id.* at 597.
132. *See* DeGraff v. State, 944 S.W.2d 504, 508 (Tex. App.—Houston [14th Dist.] 1997, pet. granted), *aff'd* 962 S.W.2d 596 (Tex. Crim. App. 1998).
133. 975 S.W.2d 629 (Tex. Crim. App. 1998).
134. *Id.* at 630 (citing Malik v. State, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).
135. 975 S.W.2d 621 (Tex. Crim. App. 1998).

the sufficiency of the evidence quandary presented in a case involving "trade secrets," a field with sparse authority. The appellant attacked the sufficiency of the evidence on a number of fronts, especially on the ground that the State failed to prove beyond a reasonable doubt that three drawings and the information contained in these drawings were not "secret." The court noted that the core element of a trade secret must be that it remain a secret, but also emphasized that "absolute secrecy is not required."[136]

The court found the evidence legally sufficient, relying upon the *Schalk* criteria. In *Schalk*, the trade secret inquiry revolved around custom-made computer programs. The court enumerated specific security measures which had been taken to protect the trade secret status of the computer programs.[137]

In *Blanco v. State*,[138] the defendant was convicted of burglary of a habitation and was sentenced to probation. On appeal, the defendant challenged the sufficiency of the evidence. The court of appeals reversed and ordered the entry of a judgment of acquittal, holding that "because the application paragraph of the court's charge did not refer to the law of parties, the sufficiency of the evidence, when measured against the application paragraph, entitled appellant to an acquittal on appeal because he was guilty only as a party."[139] The Texas Court of Criminal Appeals granted the state's petition for discretionary review to reexamine the *Benson/Boozer* line of cases.[140]

While the petition was pending, the Texas Court of Criminal Appeals overruled the *Benson/Boozer* line of cases in *Malik v. State*.[141] The dissent in *Blanco* emphasized that the holding in *Malik* was "dicta" and not binding precedent and that all arguments were misguided and clearly erroneous. The majority, however, stated that while the court may have decided *Malik* "on broader grounds than those presented in the State's petition for discretionary review," *Malik*'s decision "is the law and it is binding precedent."[142] Thus, the Court vacated the judgment of the court of appeals and remanded the cause for reconsideration in light of *Malik*.

In *Cain v. State*,[143] the Texas Court of Criminal Appeals granted the State's petition for discretionary review to determine whether the court of appeals applied the correct legal standard for reviewing the factual

136. Schalk v. State, 823 S.W.2d 633 (Tex. Crim. App. 1991).

137. The security measures taken included: (1) employment agreement; (2) strict plant scrutiny; (3) restricted computer access; (4) nonauthorization of disclosure of subject programs; and (5) general nondisclosure of the programs by the company and its employees. *See Weightman, supra* note 134, at 624. Reviewing a combination of these measures, the court ultimately held the evidence to be sufficient to support the judgment of conviction for theft of trade secrets (machinery drawings). *See id.*

138. 962 S.W.2d 46.

139. *Id.*

140. *See* Boozer v. State, 717 S.W.2d 608 (Tex. Crim. App. 1984); Benson v. State, 661 S.W.2d 708 (Tex. Crim. App. 1983).

141. 953 S.W.2d 234 (Tex. Crim. App. 1997).

142. *Blanco, supra* note 138, at 47.

143. 958 S.W.2d 404 (Tex. Crim. App. 1997).

sufficiency of the evidence. Initially, the court noted that Article 5, Section 6 of the Texas Constitution operated as a jurisdictional limitation on the Texas Court of Criminal Appeals, with the consequence that the court did not have jurisdiction to "pass upon the weight and preponderance of the evidence or 'unfind' a vital fact."[144] But the inability to decide a question of fact and, thus, review de novo a court of appeals factual decision did not preclude entirely any review of the court of appeals' decision. Whether or not the correct rule of law was applied was a purely legal question within the jurisdiction of the Texas Court of Criminal Appeals, although a limited one.

The court observed that three major principles were enunciated in *Clewis v. State*:[145] (1) the principle of deference to jury findings; (2) the court of appeals must support a finding of factual insufficiency by providing a detailed explanation of that finding so that the Texas Court of Criminal Appeals can ensure that the appellate court accorded the proper deference to the jury findings; and (3) the standard of review for factual insufficiency states that courts of appeals must review "all [of] the evidence."[146]

In *Cain*, the court held that, while the court of appeals recited the proper standard of review, it was not deferential to the jury's determination of witness credibility, it ignored the evidence supporting the jury's guilty verdict in the case, and it considered only the evidence that could be interpreted as favoring the defense theory of the case. Thus, the court remanded the case to the court of appeals.

XVIII. MOTION FOR NEW TRIAL

In *Awadelkariem v. State*,[147] the Texas Court of Criminal Appeals addressed whether a trial court has the power to rescind an order granting a new trial in view of ample case law disavowing such authority. After a trial before the court, the defendant was found guilty. Following a sentencing hearing, the trial court assessed a probated sentence. On the same day, the court granted the defendant's motion for new trial and later rescinded the order. At a hearing, the court made it clear that it had granted the motion for new trial pursuant to an agreement from the defendant that he would plead guilty and receive deferred adjudication. The court later rescinded the order when it discovered the defendant had reneged on the agreement.

After reviewing and dispatching the worth of various Texas authorities, and recognizing its own recent decision in *Rodriguez v. State*,[148] (in which the court held that the trial court had the authority to rescind an order granting a mistrial) the court adopted the same stance as the majority of

144. *Id.* at 408.
145. 922 S.W.2d 126 (Tex. Crim. App. 1996).
146. *See Cain*, 958 S.W.2d at 407-08 (citing *Clewis*, 922 S.W.2d at 129).
147. 974 S.W.2d 721 (Tex. Crim. App. 1998).
148. 852 S.W.2d 516 (Tex. Crim. App. 1993).

other jurisdictions, holding that the trial court has the authority and may freely rescind an order granting or denying a motion for new trial as long as this action occurs within the seventy-five day time period provided by the appellate rules.[149] After the seventy-five day period expires, any order granting or denying a new trial becomes "final."

In *Oldham v. State*,[150] the court reviewed the decision of the court of appeals permitting Texas Rule of Appellate Procedure 2(b) to be used to suspend Rule 31(a)(1), which required that a motion for new trial be filed within thirty days after sentencing. The defendant, represented by retained counsel at trial, was convicted of forgery and sentenced by the court to three years imprisonment. The defendant filed a pro se notice of appeal and indigency application twenty-eight days after sentencing. There was a notation in the letter of assignment that the attorney of record on the appeal was to be determined, and appellate counsel was appointed sixty-two days after sentencing. The defendant argued in the court of appeals that her trial attorney was released on the day of sentencing and that she was without counsel during the time period for filing a motion for new trial. The court initially recognized that it had previously held that the defendant was entitled to counsel at a hearing on a motion for new trial, but the court had not yet addressed the issue of whether a defendant was entitled to counsel during the time limit for filing a motion for new trial to assist the defendant in preparing the motion.[151]

The court reviewed case authority requiring "continuity of representation" from the trial proceeding through the appeal.[152] The court emphasized that its painstaking review of the trial record for evidence that trial counsel thought his duties were completed at the end of the trial and, thereafter, had abandoned the defendant, wrought no such evidence. The court held that the scant evidence in the trial record did not rebut the presumption that the defendant was represented by counsel and that counsel acted effectively. The court used the fact that the defendant filed a pro se notice of appeal as evidence that the defendant had been informed of at least some of the appellate remedies by counsel. The court ultimately held that the record showed the defendant was officially represented by counsel at all times in the litigation and that the defendant had failed to overcome the presumption that counsel was acting effectively at all times.

The court in *Oldham* also emphasized the deficiencies in the trial court record.

> The appellant in this case did not file a motion for a new trial. She has never indicated any grounds she would have raised in a motion for a new trial. She has never claimed that if she were to file a mo-

149. TEX. R. APP. P. 21.8(a), (c).
150. 977 S.W.2d 354, 1998 Tex. Crim. App. LEXIS 122 (Tex. Crim. App. 1998).
151. *See id.* at *60.
152. *See generally Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim. App. 1988); Ward v. State, 740 S.W.2d 794 (Tex. Crim. App. 1987).

> tion for a new trial that she would be entitled to a new trial, or even a hearing on her motion. The appellant has not claimed that her appeal or other rights were injured in any way due to her failure to file a motion for a new trial, or that she was not able to raise certain grounds because she did not first file a motion for a new trial. She does not claim that her trial counsel was ineffective for failing to file a motion for new trial. The appellant does not assert that she was not informed by her trial counsel of the opportunity and grounds for filing a motion for new trial. In fact, she has not even claimed that if given the opportunity to do so, that she would have filed, or would now in fact file, a motion for a new trial. She does claim, instead, simply that she was without counsel during the time limit for filing the motion for a new trial.[153]

Thus, the facts in this trial record were not particularly compelling, such as to justify the invocation of Rule 2(b).

In *Musgrove v. State*[154] and *Carranza v. State*,[155] the Texas Court of Criminal Appeals dealt with the question concerning the presentation of the motion for new trial to the trial court.

In *Musgrove*, the defendant filed a motion for new trial alleging jury misconduct, and it was denied. On appeal, the defendant argued that the trial court erred by failing to conduct a hearing on the motion. The court of appeals held that the record failed to show the motion was presented to the trial court within ten days of its filing as required by Texas Rule of Appellate Procedure 31(c)(1).

The defendant argued that the order denying the motion sufficiently established that the motion was "presented" to the trial court. The State replied that the motion did not contain a proposed order setting a date for a hearing and, therefore, the motion was not properly presented. The court observed that a motion for new trial does not need an attached proposed order setting a hearing date to establish that the motion was presented proper to the trial court.

The court acknowledged the decision in *Martinez v. State*,[156] which examined the term "present" as defined by Webster's to mean "to offer for consideration." In *Martinez*, the court found that the defendant timely presented his motion to the trial court as evidenced by the trial court's consideration of the motion and by its order overruling it. The Texas Court of Criminal Appeals agreed with this rationale, emphasizing that the motion was not overruled by operation of law, and held that the trial court's ruling by written order denying the motion was evidence that the court was offered the motion and considered its merits. Thus, this action by the trial court was sufficient to show the motion was presented to it on a timely basis.

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153. Oldham, 977 S.W.2d at *22-28.
154. 960 S.W.2d 74 (Tex. Crim. App. 1998).
155. 960 S.W.2d 76 (Tex. Crim. App. 1998).
156. 846 S.W.2d 345 (Tex. App.—Corpus Christi 1992, no writ).

In *Carranza*, the defendant timely filed a motion for new trial premised on newly discovered evidence. The motion contained a "fiat" and a proposed order, but all of the spaces remained blank. There was no hearing on the motion, which was ultimately overruled by operation of the law pursuant to Texas Rule of Appellate Procedure 31(e)(3). The record did not contain any evidence that the trial court actually knew the defendant had filed a motion for new trial and desired a hearing on it. On direct appeal to the court of appeals, the defendant claimed the trial court erred in failing to conduct a hearing on his motion for new trial. The appellate court found that appellant did not properly present the motion to the trial court as required by Texas Rule of Appellate Procedure 31(c)(1).

The Texas Court of Criminal Appeals noted that the object of the rule is to put the trial court on actual notice that a defendant desires the trial court to take some action on the motion for new trial such as a ruling or a hearing on it, and that the very filing alone of the motion in this case was not sufficient to show "presentment."[157] The court again reviewed the term "present" under Rule 31(c)(1) and held that the term meant that the record "must show the movant for a new trial sustained the burden of actually delivering the motion for new trial to the trial court or otherwise (brought) the motion to the attention or actual notice of the trial court."[158] As nothing in the trial record showed the defendant delivered the motion to the trial court or otherwise brought it to the attention or actual notice of the trial court, the court of appeals did not err in holding that the defendant failed to properly present the motion.

XIX. NOTICE OF APPEAL

In *Feagin v. State*,[159] the State challenged the defendant's notice of appeal as not complying with Texas Rule of Appellate Procedure 40(b)(1). Originally, the defendant had pled guilty pursuant to a plea agreement and received probation. A subsequent motion to revoke probation alleged that the defendant failed to report and failed to make monthly payments. The defendant filed a motion to dismiss the State's motion to revoke, arguing that the State failed to use due diligence in arresting her. Following a hearing on the motion, the trial court denied the motion and revoked the defendant's probation and sentenced her to imprisonment. The defendant filed a general notice of appeal, and contended in the court of appeals that her motion to dismiss was erroneously overruled. The court of appeals agreed.

The State filed its petition for discretionary review, arguing that the court of appeals incorrectly exercised jurisdiction over the defendant's appeal because the defendant had failed to comply with Rule 40(b)(1) requirements. The Texas Court of Criminal Appeals held that the restrictions of Rule 40(b)(1) applied to appeals attacking the propriety of the

157. *Carranza*, 960 S.W.2d at 78.
158. *Id.* at 79.
159. 967 S.W.2d 417 (Tex. Crim. App. 1998).

defendant's conviction and to the defendant's appeal of an order deferring adjudication of guilt.[160] However, Rule 40(b)(1) did not apply to appeals attacking the propriety of orders revoking probation, and, thus, the court of appeals properly exercised jurisdiction over the defendant's appeal based upon the defendant's general notice of appeal.

XX. APPEAL

In *Gomez v. State*,[161] the defendant argued that the inadvertent destruction of trial exhibits entitled him to a new trial under Rule 50(e). The exhibits included food wrappers, soft drink cans, and a cigarette butt which could not be reproduced. Expert testimony showed the defendant's fingerprints on these exhibits. This evidence was uncontroverted. The defendant's letter to the court reporter requested a statement of fact in question-and-answer form and the exhibits. The defendant's designation of transcript to the clerk listed sixteen items but did not refer to the exhibits. The court readdressed the problem previously discussed in *Melendez v. State*,[162] and emphasized that the original exhibits are only part of the transcript and must be designated, or complaint is waived on appeal. The court recognized that copies of exhibits and summary descriptions of physical exhibits are only part of the statement of facts. As the defendant failed to request the inclusion of the exhibits in the designation filed with the clerk, the defendant could not complain that the actual exhibits were missing from the record. In any event, the error was harmless because the testimony concerning the recovery of the exhibits and the defendant's fingerprints on the exhibits was not contested, and the inclusion of these exhibits with the "latent fingerprints" would be of no assistance to the Texas Court of Criminal Appeals in resolving the grounds for review raised in the case because the court was not qualified to interpret or compare the latent fingerprints.

In *Hernandez v. State*[163] the defendant complained that the court of appeals failed to review de novo whether his oral and written confessions were involuntary. Citing *Guzman v. State*,[164] for the proposition that an appellate court may review de novo "mixed questions of law and fact" under certain circumstances, the court remanded the case to the court of appeals for reconsideration in light of *Guzman*.[165]

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160. *See* Dillehey v. State, 815 S.W.2d 623 (Tex. Crim. App. 1991); Whetstone v. State, 786 S.W.2d 361 (Tex. Crim. App. 1990).

161. 962 S.W.2d 572 (Tex. Crim. App. 1998).

162. 936 S.W.2d 287 (Tex. Crim. App. 1996).

163. 957 S.W.2d 851 (Tex. Crim. App. 1998).

164. 955 S.W.2d 85 (Tex. Crim. App. 1997).

165. In *Gutzman*, the court stated:

> (A)ppellate Courts, including this Court, should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial courts fact findings are based on an evaluation of credibility and demeanor. The appellate court's, including this Court, should afford the same amount of deference to trial courts' rulings on "applications of law to fact questions," also known as "mixed questions of law and

In *Bell v. State*,[166] the defendant complained that when the court of criminal appeals remanded the case to the court of appeals to address the defendant's factual sufficiency claim, not previously addressed by the court of appeals, that the court of appeals erred in failing to afford the defendant an opportunity to file a brief after remand, relying upon *Theus v. State*.[167] The court distinguished *Theus* by observing that the defendant had an opportunity and did, in fact, brief the factual sufficiency issue in the initial brief on direct appeal, therefore no prejudice was visited upon the defendant who would only have filed a carbon copy of the original brief advancing the same arguments and addressing the same issues.

In *State v. Mercado*,[168] the defendant filed a motion to suppress evidence and initially established that he had standing in the premises to be searched and that the search was conducted without a warrant. The burden shifted to the State to establish an exception to the warrant requirement, and it only argued and presented facts to show that the search was a proper inventory. The trial court granted the motion to suppress. On appeal, the State for the first time argued the theory of search incident to arrest and the court of appeals agreed.

The court ultimately held that the ordinary notions of procedural default should apply equally to the defendant and the State, and that in cases in which the State is the party appealing, the basic principle of appellate jurisprudence "that points not argued at trial are deemed to be waived applies equally to the State and the Defense." Thus, the judgment of the court of appeals was reversed and the cause remanded.

In *Wilson v. State*,[169] the defendant argued for the first time on appeal that the trial judge lacked legal authority to preside at the trial because his assignment had expired three days before the trial commenced. The court observed that the statutory remedy of quo warranto was not available to a defendant, but only to the Attorney General or the County or District Attorney; therefore, a defendant must object pre-trial and if he fails to do so, he may not object subsequently or for the first time on appeal.

XXI. POST-CONVICTION APPLICATION FOR WRIT OF HABEAS CORPUS

In *Ex parte Kerr*,[170] the court dismissed an Application for Writ of

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fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. The appellate courts may review de novo "mixed questions of law and fact" not falling within this category.

Id. at 89.

166. 956 S.W.2d 560 (Tex. Crim. App. 1997).

167. 863 S.W.2d 489, 491 (Tex. Crim. App. 1993) (holding that, as a general rule, on remand of a case from the court of criminal appeals to the court of appeals for harm analysis, the court of appeals is required to afford the defendant an opportunity to file a brief).

168. 972 S.W.2d 75 (Tex. Crim. App. 1998).

169. 977 S.W.2d 379 (Tex. Crim. App. 1998).

170. 977 S.W.2d 585, 1998 Tex. Crim. App. LEXIS 26 (Tex. Crim. App. 1998).

Habeas Corpus filed under Article 11.071 of the Texas Code of Criminal Procedure. Judge Overstreet, in a dissenting opinion, expressed deep concern that if the applicant was "executed as scheduled, this Court is going to have blood on its hands for allowing it to go forward without applicant being permitted to raise claims by Texas state habeas corpus application."[171]

Judge Overstreet severely criticized the counsel appointed by the court of criminal appeals for the "perfunctory writ application" filed in this cause which challenged the constitutionality of Article 11.071 without challenging any other matter which occurred at trial, an approach which certainly wrought a competency of counsel question as to the habeas attorney's assistance. Judge Overstreet observed that the habeas attorney had filed an affidavit admitting that the application itself was filed in its form because counsel "erroneously thought he was precluded from challenging the conviction/sentence trial proceedings while the direct appeal was pending."[172] Judge Overstreet concluded that the entire proceeding was a charade which punished the applicant, rewarded the state, and quite possibly encouraged other counsel to file such "perfunctory 'non-applications.'"[173]

In *Ex parte Martinez*,[174] the court of criminal appeals again denied an Application for Writ of Habeas Corpus filed pursuant to Article 11.071 C.C.P. Judge Baird, in his dissenting opinion, opined that the merits of the application should not be reached but, instead, the application should be remanded to the trial court to address the issue of whether applicant had received the effective assistance of counsel. Judge Baird wrote that the application itself was only five-and-a-half pages long, raised four challenges to the conviction but did not quote the trial record, and only referred to three cases in four of the challenges. Apparently two of the challenges comprised seventeen lines, or less than a page.

In *Ex parte Wolfe*,[175] a majority of the court denied the Application for Writ of Habeas Corpus filed pursuant to Article 11.071.[176] The dissent filed by Judge Baird observed that the applicant was represented by counsel appointed by the court of criminal appeals and that the application itself appeared "to allege ineffective assistance of trial counsel, but also includes a wish list of discovery, research, and hearings necessary to represent applicant."[177] Judge Baird noted that no case authority was cited. Judge Baird complained that the matter was not remanded to determine whether the applicant had been afforded the effective assistance of counsel on the habeas application as required by Article 11.071, Section 2, which provides in part that every "applicant shall be represented

171. *Id.* at *4.
172. *Id.* at *2.
173. *Id.* at *3.
174. 977 S.W.2d 589 (Tex. Crim. App. 1998).
175. 977 S.W.2d 603 (Tex. Crim. App. 1998).
176. The death penalty habeas corpus provision.
177. *Wolfe*, 977 S.W.2d 603

by competent counsel" unless the applicant makes the election to do so pro se.

In *Ex parte Sowell*,[178] the defendant was convicted on his plea of guilty of possession of cocaine and sentenced to 20 years incarceration. He did not appeal this conviction. In this, his second habeas corpus attack on his conviction filed pursuant to Article 11.07 C.C.P., he claimed that he was not informed of his right to appeal from a pre-trial motion to suppress evidence that had been ruled on prior to his entry of guilty plea. His application tracked the statutory language of Article 11.07, Section 4 C.C.P., relevant to subsequent applications for Writ of Habeas Corpus. The court held it did not have jurisdiction to consider this second application because the application itself did not include sufficient specific facts establishing an exception as required by the statutory provision.[179]

In addition, the court emphasized that allegations made in the first application certainly indicated to the court the availability of this claim for use at the time the first application was filed.

178. 956 S.W.2d 39 (Tex. Crim. App. 1997).

179. TEX. CODE CRIM. PROC. ANN. art. 11.07, § 4 (Vernon Supp. 1997) in part reads:

> (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or . . .
>
> [2] (b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.
>
> (c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Id.