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CRIMINAL LAW

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I. DOUBLE JEOPARDY

THE Court of Criminal Appeals heard a habeas corpus petition raising a double jeopardy during the Survey period. The applicant in *Ervin v. State*[1] was convicted under two homicide statutes that are closely related.[2] Under the test enunciated by the Supreme Court in *Blockburger v. United States*,[3] when a single act is a violation of two distinct statutes, the test for whether there is more than one offense is "whether each [statute] requires proof of a fact which the other does not."[4] When the *Blockburger* test was applied to the facts in *Ervin*, the unavoidable conclusion was that the offenses were not the "same." This meant that the state could convict for *both* offenses without violating double jeopardy even when there is only one transaction and one victim. If the Blockburger test is the only test that can be applied to determine whether a crime is the "same" for double jeopardy purposes, the appellant's search for relief would be disappointed. But the Court of Criminal Appeals held that it is not. Although the Court of Criminal Appeals

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1. 991 S.W.2d 804 (Tex. Crim. App. 1999) (reh'g denied Mar. 17, 1999).

2. *See* TEX. PEN. CODE ANN. § 19.04 (Vernon 1994) (manslaughter); TEX. PEN. CODE ANN. § 49.08 (Vernon Supp. 2000) (intoxication manslaughter).

3. 284 U.S. 299 (1932).

4. *Ervin*, 991 S.W.2d at 806 (citing 284 U.S. at 304).

agrees with the trial court's conclusion, it does so for different reasons.[5]

The Court of Criminal Appeals began its analysis with a review of the Supreme Court's view of multiple punishment. The Double Jeopardy Clause prevents a sentencing court from prescribing greater punishment than that intended by the legislature.[6] "[One] suffers multiple punishments in violation of Double Jeopardy when he is convicted of more [crimes] than the legislature intended."[7] And, the Supreme Court has held that the Blockburger rule is simply a rule of statutory construction and a clearly articulated intent by the legislature cannot be negated by it.[8] This raised for the court the likelihood that there may exist other rules of statutory construction to be employed to determine whether the legislature intended multiple punishments. The Court of Criminal Appeals then identified the issue before it as "[w]hether homicide offenses that are distinct under *Blockburger* may nevertheless be considered the 'same' for purposes of the 'multiple punishments' aspect of the Double Jeopardy Clause . . . ."[9]

Its survey of jurisdictions prompted the court to conclude that with respect to murder prosecutions (rather than other variations of homicides), most jurisdictions hold a trial court cannot impose multiple convictions and sentences for variations of murder when only one person was killed.[10] The minority view, then, is that "different variations of murder can support multiple convictions even though only one person was killed."[11] Although the numbers are not as one-sided, jurisdictions that have addressed the issue hold that a trial court cannot impose multiple convictions for variations of homicides when only one person was killed.

This review led the court to conclude that *Blockburger* is not the single, exclusive test for deciding whether offenses are the same for purposes of multiple punishment under the Double Jeopardy Clause. The court considered other factors that may require the court to hold the offenses are the same for double jeopardy purposes.[12]

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5. *See id.*
6. *See id.* at 807 (citing Missouri v. Hunter, 459 U.S. 359, 366 (1983)).
7. *Id.* (citing Ball v. United States, 470 U.S. 856, 105 S. Ct. 1668, 84 L.Ed.2d 740 (1985)).
8. *See id.* (citing 459 U.S. at 368, 103 S.Ct. 673).
9. *Id.*
10. *See id.* (numerous citations omitted).
11. *Id.* at 811.
12. Other nonexclusive factors included:
> whether the offenses provisions are contained within the same statutory section, whether the offenses are phrased in the alternative, whether the offenses are named similarly, whether the offenses have common punishment ranges, whether the offenses have a common focus . . . and whether that common focus tends to indicate a single instance of conduct, whether the elements that differ between the offenses can be considered the 'same' under an imputed theory of liability which would result in the offenses being considered the same under *Blockburger* . . . and whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes.

Id. at 814.

The court turned to the two statutes in question. Prior to September 1, 1994, manslaughter and intoxication manslaughter were simply two alternative methods of committing involuntary manslaughter.[13] Most jurisdictions hold that variants of murder contained in the same statutory section are the same offense for double jeopardy purposes when the same victim is involved. Because the pre-1994 versions of manslaughter and intoxication manslaughter appear in the same statutory section, because they are alternatives, and because they carry the same punishment ranges, the court concluded that they are the same offense in the pre-1994 statute.

Continuing its examination, the court noted that effective September 1, 1994, the intoxication manslaughter provision was moved to a section containing other intoxication offenses, but, finding no evidence of such intent, the court determined that the legislature did not intend to change intoxication manslaughter into an entirely different offense for double jeopardy purposes. None of the statutory changes made effective September 1, 1995, applies to the appellant's offense; further, evidence of intent to impose multiple punishments is tenuous at best.[14]

Thus, the court concluded that manslaughter and intoxication manslaughter are the same offense for double jeopardy purposes when they involve the same victim. Double jeopardy is violated even when the sentences run concurrently.

The court's unanimity ended when it came to the remedy. The State's recommendation was unusual. It requested neither that the guilty plea be set aside nor that the court try to effectuate the agreement by reforming one of the convictions to a less-included offense. Rather, the State asked the court to vacate the conviction for manslaughter, relying on earlier suggestions by the court that the State may waive an illegal portion of a judgment and maintain the remainder of the plea agreement.[15] The dissenters argued that the appropriate remedy is to withdraw the plea and return the parties to their respective positions.[16]

On balance, this opinion from the highest court on criminal matters bodes well for defendants because it makes possible a double jeopardy claim where the single victim is killed in the same incident even if they are not distinct under *Blockburger*.

II. MENS REA

During the period of this review, the Court of Criminal Appeals considered an interesting set of cases dealing with mens rea in strict liability offenses.

The first of these cases, *Tovar v. State*,[17] involved the former president of a school board who was convicted of violating the Open Meetings Act

13. *See id.* at 815.
14. *See id.* at 817.
15. *See id.*
16. *See id.* (Meyers, J., dissenting and joined by Mansfield and Johnson, JJ).
17. 978 S.W.2d 584 (Tex. Crim. App. 1998).

(the Act).[18] Joseph Tovar was convicted of knowingly participating in a special closed meeting of the school board and knowingly calling and aiding in calling and organizing a special closed meeting of the board in violation of the Act.

The relevant statute in Tovar's case provided:

> (a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
>
> (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
>
> ***
>
> or
>
> (3) participates in the closed meeting whether it is a regular, special, or called meeting.[19]

The Act punishes an offense as a misdemeanor by a fine of not less than $100 and not more than $500 and/or confinement in county jail for not less than one and not more than six months.

The appellant asked the trial judge to instruct the jury that appellant "must know that the closed meeting is not permitted under the Texas Open Meetings Act." The judge denied the request and instructed the jury instead that:

> If you find from the evidence beyond a reasonable doubt that . . . Joe Tovar . . . did knowingly call or aid in calling or organizing a special closed meeting . . . which was not permitted under Chapter 551 of the Government Code . . . in that none of the above exceptions apply . . . then you will find Joe Tovar, [sic] guilty of Violation of [the] Open Meetings Act as charged in the indictment.[20]

The San Antonio Court of Appeals affirmed the conviction, and the Court of Criminal Appeals granted discretionary review. The appellant argued that it is the State's burden to prove that he knew the closed meeting violated the law. The State's view is that there is no mens rea with respect to whether the meeting was lawful.

The Court of Criminal Appeals observed initially that the Act is a conduct-oriented offense and not a circumstance- or result-oriented offense. Next, it examined the structure of the Act. The foundation of the statute is the independent clause,[21] "a member of a government body commits an offense." The subordinating conjunction, "if," connects the dependent clause,[22] "a closed meeting is not permitted under this chapter and the member knowingly . . . ." The word "and" separates this dependent clause into subclauses, the first of which has a subject and predicate ("meeting is . . . permitted") and the second of which has a subject

18. *See* TEX. GOV'T CODE ANN. § 551.144 (Vernon 1994).

19. *Id.*

20. 978 S.W.2d at 585 (citations omitted).

21. An independent clause is a group of related words that can stand alone as a sentence.

22. A dependent clause is a group of related words that cannot stand alone as a sentence.

("member") and a number of disjunctive predicates "calls," "aids," and "participates." The adverb "knowingly" in the second subclause modifies the disjunctive predicates that follow it and, the court concludes, the two subclauses are independent of each other. Thus, the court held the plain language of the Act and the rules of grammar and common usage indicate that an official can be held criminally liable for involvement in closed meetings not permitted under the Act regardless of whether he knew the meeting violated the law.[23]

Although the plain language of the statute provided the basis for the court's holding, other policies support the result. The holding is consistent with the Act's purpose of protecting the public's interest in the operation of government and with the Penal Code's prohibition of mistake of law defenses. Punishment under the Act is not severe, and it punishes behavior that is malum prohibitum rather than malum in se.[24] Judge Baird concurred, noting specially that it is incumbent upon public officials to be aware of laws relevant to their areas of operation.[25]

The Court of Criminal Appeals considered another strict liability statute in *Zubia v. State*,[26] holding that the offense of injury to a child does not require a culpable mental state regarding to the age of the victim. The appellant, a member of a gang, had retaliated against a rival gang by shooting into a group of people standing in the yard of a rival member's home. He struck a four year old.

The appellant argued that the doctrine of transferred intent could not be used to prove he intended to injure the child, when, in fact, he intended to shoot the child's adult uncle. The court of appeals held that intent to injure a child was not required by the statute.[27]

The dissent engaged in a more rigorous analysis of the appellant's argument than did the majority. The majority merely adopted a verbatim paragraph from the opinion of the court of appeals affirming the conviction. The court of appeals based its determination that intent was not required by the statute on a like holding from a sister court. It observed that other criminal statutes dealing with children victims tend not to require scienter as to age.[28]

The dissent by Judge Meyers argues that the plain language of the statute is unambiguous and the interpretation of the majority reads the spe-

23. *See Tovar*, 978 S.W.2d at 587.
24. *See id.*
25. *See id.* at 588.
26. 998 S.W.2d 226 (Tex. Crim. App. 1999) (en banc).
27. The statute provides:

> (a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:
> (1) serious bodily injury . . . .
> (c) In this section: (1) "Child" means a person 14 years of age or younger."

TEX. PEN. CODE ANN. § 22.04 (Vernon 1994).

28. *See* TEX. PEN. CODE ANN. § 19.03(a)(8) (Vernon 1994). The court noted, however, that murder can become a capital offense if the victim is under the age of six, but there are no cases addressing intent as to the victim's age.

cial status of the victim out of the statute. Moreover, when statutes designate special categories of victims and require mens rea, the special categories are not readily identifiable[29] the way that special victims are under § 22.04.

Within a few months the court again addressed this topic in the context of a statute that was silent as to mens rea. In *Aguirre v. State*,[30] the court held that mental state *is* required in a statute regulating an adult business, although that statute is silent as to mens rea. Employees and managers of a nude live entertainment club, Aldo's Lounge, were convicted under an El Paso city ordinance which prohibits conducting such a business within a thousand feet of a school.[31] The Eighth Court of Appeals reversed and ordered the complaint dismissed for failure to allege a culpable state of mind. The Court of Criminal Appeals agreed in a well-crafted, though not uniformly adopted, opinion by Justice Womack.

The court began by observing that § 6.02 of the Penal Code[32] requires mens rea unless its definition plainly dispenses with any mental element. Since strict liability statutes typically say nothing about mental state,[33] the court looked to the legislative history and determined a court must find a manifest intent to dispense with the culpable state of mind and that silence as to state of mind leaves a presumption that one is required. As a general matter, of course, the legislature is free to dispense with a mens rea requirement, but that intent must be manifest.

Although there was no express intent to dispense with mens rea, the court examined other features of the statute. Among factors considered by the court were whether the statute imposes criminal rather than civil liability, whether the offense was malum in se or malum prohibitum, the subject of the statute, the degree of care required to comply, whether the enactments carry severe punishments, the legislative history of the statute, the seriousness of the harm the legislature seeks to prevent, the actor's opportunity to ascertain accurate facts, the difficulty that proving mental state would present to prosecutors, and the number of prosecutions that might be expected.[34]

After an extensive examination of the other features of the statute, the court concluded that the ordinance did not "manifest an intent to dis-

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29. For example, aggravated assault is a felony of the first degree when the actor knew the victim was a public servant who was lawfully discharging an official duty. *See* TEX. PEN. CODE ANN. § 22.02(b)(2) (Vernon 1994).

30. Aguirre v. State, No. 0580-98 (Tex. Crim. App. 1999) (en banc) (not designated for publication), 1999 WL 767794.

31. El Paso City Code § 20.08.080 provides in relevant part:

> "Adult Businesses
>
> A. No person shall own, operate or conduct any business in . . . [a] nude live entertainment club within one thousand feet of the following:
>
> * * *
>
> 2. A public or private elementary or secondary school . . . ."

32. The Court explained that the state provision applied to municipal ordinances. *See Aguirre*, 1999 WL 767794 at *4.

33. *See id.*

34. *See id.* at *8.

pense with a culpable mental state sufficient to overcome the presumption that one was required."[35] Several dissenting opinions were filed asserting that the State Prosecuting Attorney had no standing to bring the appeal or that review had been improvidently granted.[36]

Taken together, *Tovar*, *Zubia* and *Aguirre* demonstrate the significance of the mens rea requirement in terms of burdens of the parties. The court applies a developed body of factors to arrive at results based on articulated public policies.

III. THE ACCOMPLICE WITNESS RULE

During the Survey period the Court of Criminal Appeals again considered the accomplice witness rule. In *Cathey v. State*[37] the court held that constitutionally mandated legal and factual sufficiency standards do not apply to review of corroboration of testimony by an accomplice witness.

The victim, 20-year old Christina Castillo, disappeared on Sept. 12, 1995. Her body was found twelve days later in a desolate area of Houston. There was a blindfold on the body and duct tape bound the hands and wrists. Three gunshot wounds in the head were the cause of death. There were cartridge cases at the crime scene but no direct evidence to the identity of the murderer.

In January 1996 an informant gave a detailed confession indicating that he, the appellant, and four others had planned to rob the victim and her boyfriend, believed to have money and drugs. To that end, the victim was abducted by the men and taken to a place where she was interrogated and beaten in an unsuccessful attempt to get her to divulge information about drugs or money. The conspirators took her to a desolate area where they decided to abandon her. As some of the members of the group drove away in a vehicle belonging to one of the conspirators, they heard several gunshots and appellant later that evening told one of the men that he had killed the victim.

A conviction cannot stand on accomplice testimony alone; state statute requires corroboration by other evidence tending to connect the defendant with the crime.[38] It is insufficient if the evidence proves merely that a crime has been committed[39] but neither must it directly connect the defendant to the crime nor be sufficient by itself to establish his guilt.[40] If the combined weight of non-accomplice evidence tends to connect the defendant with the crime, then the statute's requirement has been met.[41]

Corroborative non-accomplice evidence in the appellant's case consisted of testimony from a man who purchased from appellant the

35. *Id.* at *9.
36. *See id.* at *9-12.
37. 992 S.W.2d 460 (Tex. Crim. App. 1999) (en banc).
38. *See id.* at 462 (citing TEX. PEN. CODE ANN. art 38.14).
39. *See id.* (citing Colella v. State, 915 S.W.2d 834, 838-839 (Tex. Crim. App. 1995).
40. *See id.* (citing Reed v. State, 744 S.W.2d 112, 126 (Tex. Crim. App. 1988).
41. *See id.* (citing Gosch v. State, 829 S.W.2d 775, 777 (Tex. Crim. App. 1991).

weapon that was used in the murder, a criminologist's testimony that the gun could be matched with the spent casings from the crime scene, a statement from a woman that appellant had said he was "wanted for murdering some Spanish girl," and finally testimony from another non-accomplice that appellant told him he and some of the others were "together when the bitch got shot."[42]

Appellant argued that the evidence was too weak to meet the State's burden of proving the accused's guilt beyond a reasonable doubt. In holding that the legal and factual sufficiency standards do not apply to a review of accomplice testimony under article 38.14, the majority said the accomplice witness rule is derived from state statute and not from state or federal constitutional principles. Likewise, the remedy for failure to meet the burden—acquittal—is a statutory rather than a constitutional requirement.[43]

The majority's holding evoked criticism from dissenter Judge Meyers who argued that the court has, in the past, superimposed on the rule elements derived from federal constitutional principles on legal sufficiency review. For example, the court has reviewed these claims "in the light most favorable to the verdict," a concept derived from constitutional principles articulated in *Jackson v. Virginia*[44] and not from statute.[45] Additionally, the court has considered whether "reasonable" or "rational" jurors could find sufficient corroboration in the evidence.[46] The majority denies that the accomplice witness rule has ever been grounded on federal constitutional principles, noting that none of the cases cited by the dissent actually hold that the sufficiency review must employ that standard. While the tendency to do so may stem from routine application under *Jackson*, it is not constitutionally mandated. The *Jackson* standard, write the majority, is irrelevant to the accomplice witness corroboration requirement itself.[47]

Judge Meyers also argued the remedy of acquittal rather than retrial stems from constitutional principles enunciated in *Burks v. United States*[48] and *Greene v. Massey*[49] as well as from state statute,[50] citing *Ex parte Reynolds*[51] for that proposition. The majority distinguished *Burks* and *Greene* as cases involving the double jeopardy effects of finding evidence insufficient rather than the mechanics of a sufficiency review. The majority also noted that the Fifth Circuit has treated the accomplice witness rule as a requirement of state law with no independent constitutional

42. *Id.*
43. *See* Cathey v. State, 992 S.W.2d 460, 467 (Tex. Crim. App. 1999) (en banc).
44. 443 U.S. 307, 319 (1979).
45. *See Cathey*, 992 S.W.2d at 467 (Meyers, J., dissenting).
46. *Id.* (citing Hernandez v. State, 939 S.W.2d 173 (Tex. Crim. App. 1997) and Gill v. State, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994)).
47. *See Cathey*, 992 S.W.2d at 463.
48. 437 U.S. 1 (1977).
49. 437 U.S. 19 (1997).
50. *See Cathey*, 992 S.W.2d at 467.
51. 588 S.W.2d 900 (Tex. Crim. App. 1979), *cert. denied*, 445 U.S. 920 (1980).

footing.[52] The majority conceded, however, that Judge Meyers' position was understandable given some "loose and confusing language" in past decisions. The court found sufficient non-accomplice evidence that tended to connect the defendant to the murder so that he might be convicted based on accomplice testimony.

In a subsequent case, *Treviño v. State*,[53] the Court of Criminal Appeals illustrated the difference between evidence that shows only that the defendant was present at the crime scene and evidence that he was involved in its perpetration. Appellant challenged the sufficiency of non-accomplice evidence to support a conviction of capital murder committed in the course of a rape. He argued that the non-accomplice evidence only showed that the defendant was at the crime scene and not that he was involved in its perpetration. Regarding the appellant's fingerprints from the crime scene, the court agreed the evidence merely placed the appellant at the scene of the crime, however, the appellant's blood on the victim's panties and the fibers from appellant's pants found on the victim's clothes tended to connect him to the crime itself.[54] This physical evidence shows that the appellant had intimate contact with the victim and might have suffered defensive wounds. The court found the combined strength of the three items of evidence sufficient to support the conviction.[55]

IV. POWER AND AUTHORITY OF THE COURTS—AUTHORITY TO REFORM JUDGMENT

Collier v. State[56] presented the Court of Criminal Appeals with a question regarding the power of an appellate court to reform a judgment. The appellant was indicted by a grand jury for serious bodily injury to a child.[57] At the close of evidence at trial, the district court instructed the jury only on serious bodily injury to a child because neither party requested an instruction on a lesser included offense. The jury found appellant guilty and he was sentenced to 35 years imprisonment and a $10,000 fine as a result of an enhancement for prior convictions.[58]

On direct appeal, the appellant successfully challenged the sufficiency of the evidence. The Austin Court of Appeals reversed and entered a judgment of acquittal. Although the appellate court concluded that the trial evidence was sufficient to sustain a conviction for the lesser included offense of injury to a child,[59] it held that it did not have the authority to reform the judgment to a conviction for the lesser included offense be-

52. *See Cathey*, 992 S.W.2d at 463 (citing Thompson v. Lynaugh, 821 F.2d 1054, 1062 (5th Cir. 1986), *cert. denied*, 483 U.S. 1035 (1987).
53. 991 S.W.2d 849 (Tex. Crim. App. 1999).
54. *See id.* at 852.
55. *See id.*
56. 999 S.W.2d 779 (Tex. Crim. App. 1999) (en banc).
57. *See* TEX. PEN. CODE ANN. § 22.04(a)(1) (Vernon 1994).
58. 999 S.W.2d at 780.
59. *See* TEX. PEN. CODE ANN. § 22.04(a)(3) (Vernon 1994).

cause the jury was not instructed on that offense. The Austin Court of Appeals cited *Thorpe v. State*[60] for the proposition that when evidence is not sufficient to support conviction for a charged offense even though it may be sufficient for a lesser included offense, the reviewing court must enter the only other judgment authorized by the trial court's charge—acquittal.[61] The Court of Criminal Appeals granted discretionary review to determine whether the appellate court erred. The state argued that the lack of a lesser included offense instruction was irrelevant to the appellate court's ability to reform the judgment, because the jury necessarily found the appellant guilty of the lesser included offense when it found him guilty of the greater offense. The defense argued that the State asked the court to give it the benefit of an instruction it did not request.

A plurality of the Court of Criminal Appeals affirmed the appellate court. It began its analysis with an examination of *Bigley v. State*.[62] In *Bigley*, the defendant was convicted by a jury for possession of 400 grams or more of methamphetamine. The appellate court found that the evidence was insufficient to support that conviction, but, since an instruction on the lesser included offense was given, the appellate court reformed the judgment to reflect a conviction for the lesser included offense. Noting that the reasoning of the lower court was sound and the outcome correct, the court distinguished *Bigley* from the instant case because there had been given a lesser included offense instruction in *Bigley*.

After noting that this was a case of first impression, the Texas Court of Criminal Appeals next turned to a case in which Wisconsin resolved the same question. In *State v. Myers*,[63] the Wisconsin defendant was charged with aggravated battery. At trial, he moved to dismiss at the conclusion of the State's case, arguing that there was insufficient evidence of the great bodily harm. The motion was denied and the case went to the jury, who were instructed on aggravated battery only. Neither the state nor the defendant requested an instruction on the lesser included offense. When the conviction was reversed on appeal because there was insufficient evidence of great bodily harm, the appellate court refused to direct the trial court, per the state's request, to enter a judgment of conviction for attempted aggravated battery, a lesser included offense.

The Supreme Court of Wisconsin affirmed the court of appeals. The state supreme court said that whether to request a lesser included offense is a matter of trial strategy for the parties because they are in the best position to assess the question based on the risks and benefits anticipated from an instruction on the lesser included offense. The high court said the trial court

> need not instruct on a lesser included offense unless one of the parties requests the instruction and the evidence under a reasonable

60. 831 S.W.2d 548 (Tex. App.–Austin 1992, no pet.).
61. *See Collier*, 999 S.W.2d at 780 n.2.
62. 865 S.W.2d 26 (Tex. Crim. App. 1993) (en banc).
63. 158 Wis.2d 356, 461 N.W.2d 777 (1990).

> view . . . is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower . . . .[64]

The Wisconsin court concluded that the state was asking to be rescued "from a trial strategy that went awry."[65] When the state decided not to request instructions on a lesser included offense, it did so with the hope that the jury would convict the defendant of the greater offense rather than let him go scot-free because it believes he is guilty of *some* offense even though it may have some doubt about the evidence. The inclination of the jury to punish one who has done something bad may overpower its misgivings about the state's proving guilt of the greater offense beyond a reasonable doubt. The defendant, on the other hand, adopts a strategy based on a different hope when he declines to request an instruction for a lesser included offense. He hopes that the jury will acquit on the greater offense because the evidence is arguably insufficient. He relies on the jury's adherence to the instruction that the state has the burden of proving guilt beyond a reasonable doubt. Both parties, the Wisconsin court observed, "went for broke."[66]

By granting the state's request, the Wisconsin court would provide the state with all the benefits and none of the risks of its jury instruction strategy while giving the defendant none of the protections and all of the risks. This would create an incentive for the state, even when its evidence is weak, to request only the instruction on the greater offense and then, if the judgment is reversed because of insufficient evidence, the state could obtain a conviction on the lesser included offense from the appellate court.[67]

Adopting the reasoning of the Wisconsin Supreme Court, the Court of Criminal Appeals held:

> [A] court of appeals may reform a judgment of conviction to reflect conviction of a lesser included offense only if (1) the court finds that the evidence is insufficient to support conviction of the charged offense but sufficient to support conviction of the lesser included offense and (2) either the jury was instructed on the lesser included offense (at the request of a party or by the trial court sua sponte) or one of the parties asked for but was denied such an instruction.[68]

A concurring opinion by Judge Keasler was prompted by the view that Texas precedent allowed the same result. Rule 43.2 of the Rules of Appellate Procedure allow a court of appeals to "reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered."[69] Based on the language of the rule Judge

64. *Collier*, 999 S.W.2d at 781 (citing State v. Myers, 158 Wis.2d 356k 364 401 N.W.2d 777, 780-81 (1990)).
65. *Id.* at 782 (citing State v. Myers, 158 Wis.2d 356, 367, 461 N.W.2d 777, 782 (1990)).
66. *Id.* (citing State v. Myers, 158 Wis.2d 356, 367, 461 N.W.2d 777, 782 (1990)).
67. *See id.*
68. *Id.*
69. Rule 43.2 became effective September 1, 1997, but similar language appears in former Rule 80(b).

Keasler concluded that the "judgment that the trial court should have rendered" can only be a judgment that the trial court was capable of rendering, given the instruction to the jury. If a jury is only instructed on one offense, then the trial court can only render judgment on that offense or a judgment of acquittal. Conversely, if a jury is not instructed on a lesser-included offense, a trial court is not able to render judgment on that lesser-included offense. "A court of appeals cannot reform a judgment to reflect a conviction for a lesser-included offense unless that lesser-included offense was submitted in the jury charge."[70]

A dissent, written by Judge Keller and joined by Presiding Judge McCormick and Judges Holland and Womack, argued that the plurality entirely misconstrued the nature of the remedy for insufficient evidence and imposed a procedural default requirement unsupported by caselaw. This, the dissent argued, creates a potential dilemma for the State.

The dissent's analysis began with the observation that the Due Process Clause protects citizens from conviction based on insufficient evidence.[71] It cited *United States v. Morrison*[72] for the proposition that remedies should be tailored to the injury caused by the constitutional violation without unnecessarily infringing on competing interests. The competing interest here is deference to the verdict of the factfinder. Reformation to the lesser included offense would accord the greatest respect possible to the factfinder's determination while fully protecting the defendant's due process right not to be convicted of an offense that is insufficiently supported by the evidence.[73]

The plurality's holding, the dissent continued, amounts to a claim that the State had procedurally defaulted rather than a claim that the appellate court lacked the authority to reform[74] but procedural default concepts are generally divorced from evidence sufficiency.

Perhaps the most persuasive argument marshaled by the dissent is *Malik v. State*,[75] which requires appellate courts to review evidence according to the hypothetically correct charge rather than the charge that was actually given. Straightforward application of the *Malik* rule, the dissent argued, dictates that the legal sufficiency of the evidence must be measured by the lesser included offense requirements rather than those of the charged offense.

Regarding the plurality's assertion that the State would derive an unfair strategic advantage were it to hold otherwise, the dissent retorted that legal sufficiency claims are "not subject to gamesmanship," and it disputed the contention that the state would receive a windfall benefit at all.[76] Finally, Judge Keller argued that under the plurality's rule, prosecu-

70. *Collier*, 999 S.W.2d at 784 (Keasler, J., concurring).
71. *See id.* at 785 (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).
72. 449 U.S. 361, 364 (1981).
73. *See Collier*, 999 S.W.2d at 786.
74. *See id.* at 787.
75. 953 S.W.2d 234 (Tex. Crim. App. 1997) (en banc).
76. *Collier*, 999 S.W.2d at 788.

tors may sometimes be in a position where either requesting or not requesting the lesser included offense instruction might result in reversible error.

On September 29, 1999, the State's motion for a rehearing was denied. Presiding Judge McCormick dissented from the denial because the original case was decided by a fragmented court so there is no "majority" holding, the case was decided contrary to the "overwhelming weight of authority from other jurisdictions," the plurality's opinion is based on a fundamental misunderstanding of federal constitutional double jeopardy principles, and ignores the fact that it is more onerous for the prosecutor to get a lesser included offense than the plurality suggests.[77]

V. APPEAL

During the *Annual Survey* period, the Court of Criminal Appeals heard several cases dealing with various aspects of appellate review, including the sufficiency of evidence after deferred adjudication and the factual and legal sufficiency of evidence. *Manuel v. State*[78] involved an appellant who, pursuant to a plea bargain, pled guilty to indecency with a child. Also, according to the terms of the agreement, the court deferred adjudication without entering a finding of guilt and ordered the appellant do community supervision, i.e., probation. The trial court noted on its docket sheet that it was not giving permission to appeal. The appellant was subsequently adjudicated guilty of violating the terms of his probation, at which time the trial judge found him guilty of the original charge and sentenced him to twenty years' imprisonment. The defendant appealed arguing that the evidence adduced at the original plea proceeding was insufficient to prove his guilt. The intermediate court of appeals never reached the merits of appellant's argument because it held that it lacked jurisdiction to hear the appeal. The Court of Criminal Appeals granted discretionary review and agreed with the appellate court.

The court began its analysis by recalling that the predecessor to the statute in question had been construed in *McDougal v. State*[79] which held that the clear import of the statute was to preclude review of deferred adjudication. The case explained that if the defendant was not satisfied with the deferred adjudication order, the proper remedy is to move for final adjudication as provided by the statute.[80] It was also true at that time that "a defendant whose deferred adjudication probation was revoked could appeal from that revocation and raise a claim of error arising from the original plea proceedings."[81] In 1987, the deferred adjudication law was changed to conform with the legislative intent "to permit defendants to appeal from deferred adjudication community supervision to the

77. *Id.* at 791-794.
78. 994 S.W.2d 658 (Tex. Crim. App. 1999).
79. 610 S.W.2d 509, 509 (Tex. Crim. App. 1981).
80. *See* TEX. CODE P. APP., art. 42.12, § 5a (Vernon 2000).
81. *Manuel*, 994 S.W.2d at 661.

same extent . . . as defendants are permitted to appeal from 'regular' community supervision."[82] The court held that deferred adjudication community supervisees may raise appeals regarding conviction only when deferred adjudication is originally imposed. Thus, such issues may not be raised in an appeal filed after community supervision was revoked.

The next group of cases brought occasion for the Court of Criminal Appeals to assert the notions that factual sufficiency of the future dangerousness issue, factual sufficiency of mitigation and legal sufficiency of mitigation are not reviewable. In *Brooks v. State*[83] the appellant was convicted of capital murder and sentenced to death based on the jury's responses to the special issues. The appellant argued that the evidence was legally and factually insufficient to support the finding of guilt, as well as the jury's findings of future dangerousness and mitigation. Utilizing the standard articulated in *Jackson v. Virginia*,[84] the court found there was legally sufficient evidence to support the jury's findings of guilt and future dangerousness. It also found factually sufficient evidence to support the jury's finding of guilt, but it refused to consider (1) the *factual sufficiency* of the jury's finding of *future dangerousness*, (2) the *legal sufficiency* of the jury's finding on *mitigation* and (3) the *factual sufficiency* of the jury's finding on *mitigation*.[85] With respect to the first issue, the court declared, "We do not review the factual sufficiency of the evidence to support the jury's answer to this special issue," and cited *McGinn v. State*.[86] The refusal to review the sufficiency, factual or legal, of the evidence of mitigation was based on a citation to *Griffith v. State*[87] and others without further discussion.[88]

Several months later, in another capital case, the Court of Criminal Appeals again asserted these principles but included more discussion than it had otherwise during the Survey period. In *Chamberlain v. State*,[89] the appellant was convicted of capital murder and sentenced to death.

He had once been the neighbor of the victim and her small son. When the child had been taken away for a visit by an adult, the appellant went to the victim's apartment to borrow sugar. He bound her with duct tape and sexually assaulted her. After he killed her, he returned to his apartment and soon thereafter walked his dog. The semi-nude victim was discovered by her brother and her son when they returned.[90] The appellant was not identified as the murderer until six years later, 1997. In the meantime, he spoke of the crime with others.

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82. *Id.*
83. 990 S.W.2d 278 (Tex. Crim. App. 1999) (en banc).
84. 443 U.S. 307 319 (1979).
85. *See Brooks*, 990 S.W.2d at 285.
86. 961 S.W.2d 161 (Tex. Crim. App. 1998) (en banc).
87. 983 S.W.2d 282 (Tex. Crim. App. 1995) (en banc).
88. *See Brooks*, 990 S.W.2d at 284.
89. 998 S.W.2d 230 (Tex. Crim. App. 1999) (en banc).
90. *See id.* at 230.

The appellant challenged the factual sufficiency of the evidence offered to establish that he presented a continuing threat to society.[91] Citing *Clewis v. State*,[92] the court said it had "repeatedly declined to apply [that] review."[93] The Court would not have said more had the appellant not argued that direct appeal to the Court of Criminal Appeals deprived him of due process in violation of article 1, section 19 of the Texas Constitution. The appellant argued that he was being treated disparately because his case would *not* be reviewed by a court of intermediate appeals as are non-capital cases. Were his case to be reviewed by the court of intermediate appeals, the appellant argued, the intermediate appellate court would be "compelled to review the factual sufficiency to the evidence supporting the special issues."[94]

The Court of Criminal Appeals called the argument flawed. It is the "nature of the special issues," i.e., that they are mixed questions of law and fact, and it is not a lack of jurisdiction that prevents the Court from performing a factual sufficiency review of those issues.[95] The court continued: "Such questions evade factual sufficiency reviews because the reviewer has no accurate means of weighing the jury's moral response to the evidence. Thus, even if appeal were to the intermediate appellate courts, the special issues would elude factual sufficiency review."[96]

VI. THE *DEGARMO* DOCTRINE

In *Leday v. State*,[97] the Court of Criminal Appeals reconsidered and overruled the *DeGarmo* doctrine[98] in the case of an appellant who was convicted of aggravated possession of a controlled substance. The defendant unsuccessfully attempted to suppress evidence of cocaine and related testimony on the ground that the search that produced them was illegal.[99] The Beaumont Court of Appeals dismissed appellant's appeal, and the Court of Criminal Appeals granted discretionary review.[100]

Appellant and another were on a "drug run" when they were stopped for speeding. The State and the appellant had different versions of how the cocaine was discovered, but in the end, appellant was found to have 28 grams of cocaine hidden on his person. The cocaine evidence was introduced at trial, and the jury was instructed to disregard evidence produced by the search of appellant if they had reasonable doubt that the vehicle was properly stopped or that there was probable cause to search appellant. The jury found the defendant guilty. At the punishment phase

91. *See id.* at 233.
92. 922 S.W.2d 126 (Tex. Cr. App. 1996).
93. *Chamerlain*, 998 S.W.2d at 233.
94. *Id.* at 234.
95. *Id.*
96. *Id.* (citation omitted).
97. 983 S.W.2d 713 (Tex. Crim. App. 1998) (en banc).
98. *See* DeGarmo v. State, 691 S.W.2d 657 (Tex. Crim. App.) (en banc), *cert. denied*, 474 U.S. 973 (1985).
99. *See Leday*, 983 S.W.2d at 714.
100. *See id.* at 715.

of the trial, the defendant took the stand and testified that he agreed to do the run to pay off a student loan. He was sentenced to twenty years confinement and assessed a fine of $20,000.[101]

On review by the Court of Appeals, it was held that "any error occurring at the guilt/innocence phase of the trial is deemed to be waived if the defendant admits his guilt to the charged offense during the punishment phase of the trial."[102] It cited *McWhorter v. State*[103] as extending the rule to any errors committed during the punishment phase as well.[104]

In its opinion, the Court of Appeals began by noting the confusion caused by its own decisions as well as academicians in terminology used in this area. The term "waiver" has been employed to denote both the doctrines that defeat review of a ruling on a timely, specific objection as well as failure to make such an objection. It is properly applied only to the former, and the Court noted that it is more accurately a doctrine of harmless error.[105]

Also troubling to the court was the misuse of "curative admissibility."[106] Under the common law of evidence, "curative admissibility" refers to the doctrine that allows admission of evidence that might otherwise be excludable to counter an earlier error in receiving evidence. It is a doctrine of admissibility, not harmless error. Unfortunately, the Court of Criminal Appeals misapplied the term in cases where the defendant's evidence, presented in response to improperly admitted evidence, results in harmless error because similar evidence was later admitted without objection. The court traced the erroneous usage to a misread footnote and wrote that it disapproves of application of the term "curative admissibility" to these cases.[107]

Texas adheres to the "futility rule," that is, even though a judge has ruled that evidence is admissible, the party must keep making futile objections or waive it.[108] Thus, the court will overrule an objection to evidence when that evidence is previously admitted without objection,[109] and when a court has overruled a previous objection, it is usually not reversible error when the same evidence is later admitted without objection.[110] Texas' requirement that an objection be made every time the objectionable evidence is offered is a minority rule.[111] The Court summarized the rule by saying that "overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling" regardless of

101. *See id.*
102. *Id.*
103. 911 S.W.2d 538 (Tex. App.–Beaumont 1995, no pet.).
104. *See Leday*, 983 S.W.2d at 715.
105. *See id.*
106. *Id.* at 716.
107. *See id.* at 716-717.
108. *Id.* at 718.
109. *See id.* at 717.
110. *See id.*
111. *See id.* at 717-18.

whether the State or the defendant offer the other evidence.[112] Acknowledging that it is doubtful that the defendant intended to waive an objection in all cases in which he objected to some but not all of the state's evidence,[113] the Court noted that when a defendant offers the other evidence it has made exceptions to the rule.

Two exceptions were found applicable to the appellant's case. First, the defendant's testimony, constituting the other evidence, was impelled by the introduction of State's evidence that was obtained in violation of the law. To make the exception inapplicable, the prosecutor must show that the State's illegal evidence did not impel the defendant's testimony, addressing a number of factors enumerated by the court.[114]

The second relevant exception is that the dilatory effect of improperly admitted evidence is not remedied by the defendant's attempt to rebut the evidence.[115] In analyzing this exception, the court pointed out the "cruel trilemma" that the Court of Appeals created for a defendant, and that doing so was counter to the policies articulated by the enactment of article 38.23 that illegally obtained evidence should not be admitted in criminal trials and that the jury decides not only guilt, but questions of fact about the legality of the evidence presented by the State.[116] Further, it rejected the notion that these exceptions should be subject to a rule requiring waiver of an error in the admission of evidence by the mere fact of rising to rebut the evidence.[117]

The Court of Criminal Appeals turned next to the *DeGarmo* doctrine since the Court of Appeals had held the doctrine means the appellant waived his point of error by his testimony at the punishment phase of a trial in which he admitted guilt.

Although *DeGarmo* was not decided until 1985, its history began in 1966 with the enactment of a rule allowing for bifurcated trials.[118] The separation of criminal trials into guilt and punishment phases creates the scenario in which the *DeGarmo* doctrine operates because the defendant's testimony is given *after* a finding of guilt.[119] Appeals from bifurcated trials gave rise to two lines of cases. One held that the defendant, who admitted his guilt at the punishment phase, could not appeal the sufficiency of evidence, but appeals were allowed for other errors occurring in the guilt phase. The second held that when a defendant admitted guilt at the punishment phase, he could not complain about the lawfulness of searches for and seizures of evidence. While these lines of precedent barred consideration of errors made during the guilt stage, none

112. *Id.* at 718.
113. *See id.*
114. *See id.* at 718-19 (citing Sherlock v. State, 632 S.W.2d 604, 607 (Tex. Ct. App. 1982)).
115. *See id.* at 719.
116. *See id.*
117. *See id.*
118. *See id.* at 720.
119. The Court noted that this is a conceptual difference between the *DeGarmo* doctrine and harmless error (mistakenly referred to as "waiver").

barred consideration of mistakes made during the punishment phase.[120]

The court described as "breathtaking" the statement made in 1985 in *DeGarmo v. State* that testimony by the defendant at the punishment stage in which he admits guilt bars review of "*any error that might have occurred during the guilt stage of the trial.*"[121]

It rejected the *DeGarmo* court's notion that admitting guilt at the punishment phase is the equivalent of a guilty plea for two reasons. First, there are procedures to ensure that a plea is voluntary and knowing. No such procedures are followed prior to the defendant's decision to testify in the punishment phase. Second, and more importantly, the decision to testify under these circumstances is not voluntary. Rather, it is driven by the verdict of guilty that was infected with reversible error. Without the tainted conviction, the defendant would not be faced with the decision of whether to testify. The court concluded that the analogy to a guilty plea did not justify the doctrine.[122]

In *McGlothlin v. State*,[123] another attempt at a "reasoned justification for the *DeGarmo* doctrine was made." This court rejected the *McGlothlin* court's notion that the doctrine serves the trial's function of sifting the truth from contradictory evidence. It began by noting that truth is not the only objective of the trial. During its course, other important values like due process and individual rights sometimes override the search for truth. The court concluded that the *DeGarmo* doctrine could not be justified on the ground that the verdict of guilty was factually correct and ultimately held that the doctrine cannot be invoked to prevent review of the appellant's issues.[124] Thus, the court held that the appellant had not waived her Fourth Amendment objection to evidence by taking the stand during the guilt phase to testify that the drugs in his possession were illegally seized. It held further that the appellant's testimony during the punishment phase did not result in waiver of the Fourth Amendment claim during the guilt phase.[125]

Although the court in *Leyday* held as it did in spite of the futility rule, it made a critical reappearance in *Fuentes v. State*.[126] The evidence in *Fuentes* established that appellant and three others conspired to rob Handi Mart, a convenience store. The store was busy when the appellant and his cohorts arrived. Among the store's customers was Robert Tate, a regular customer and acquaintance of the owners. The robbery was in progress when Tate pursued one of the robbers and detained him. Appellant came running out of the store and, seeing his cohort's situation, he shot Tate twice in the chest. The victim fell into a ditch and died.

120. *See id.* at 722.
121. *Id.*
122. *See id.* at 723.
123. 896 S.W.2d 183 (Tex. Crim. App. 1995) (en banc).
124. *See id.*
125. *See id.*
126. 991 S.W.2d 267 (Tex. Crim. App. 1999).

The appellant was convicted of capital murder and sentenced to death. Appeal to the Court of Criminal Appeals was automatic. One of the arguments appellant raised on appeal is that the trial court erred when it gave its own definition of beyond a reasonable doubt.

The trial court provided the jury with the definition of reasonable doubt required by *Geesa v. State*,[127] but in addition, it volunteered further explanation. The appellant objected that the court had articulated a lesser standard than that required by law. The court overruled the objection and essentially repeated the instruction again. No objection was made to the later comments. In affirming the appellate court, the Court of Criminal Appeals wrote, "In order to preserve error, the objecting party must continue to object each time the objectionable evidence is offered."[128]

Leday and *Fuentes* appear to show the court's faithfulness to the futility rule, even though the court in *Leday* acknowledged that it was a minority rule and ultimately relied on other grounds for its holding.

VII. LESSER INCLUDED OFFENSE

In the Survey period, the Court of Criminal Appeals considered whether the appellant was entitled to lesser included offense instructions for aggravated assault where he was charged with murder, but ultimately convicted of voluntary manslaughter. In *Forest v. State*[129] the appellant and his wife were at a party also attended by the victim and his girlfriend. When the appellant's wife and the victim's girlfriend got into a fight, their partners began quarreling about how to stop the women from fighting. When the apartment manager made them go outside, the fight between the men continued while appellant's wife left and returned with a gun. The appellant put the gun in his pocket and began to escort his wife from the party at which time the victim ran up behind him and struck appellant over the head. The victim then turned and ran. According to witnesses, the appellant chased him and shot him in the back. The appellant testified that he felt threatened by the victim's earlier statement that he intended to make the appellant "leave Dallas tonight," particularly because he knew the victim owned a gun. He asserted further that he tried to shoot the victim "in the butt" but did not intend to kill him. He acknowledged that there was a risk that a person would die if someone shot him.[130]

The jury convicted the appellant of voluntary manslaughter and he was sentenced to 20 years in prison and a $10,000 fine. The trial court entered a finding that the appellant used or exhibited a deadly weapon during the commission of this offense. The appellant appealed and the Dallas Court of Appeals reversed and remanded because it concluded that the trial

127. 820 S.W.2d 154, 162 (Tex. Crim. App. 1991).
128. 991 S.W.2d at 273.
129. 989 S.W.2d 365 (Tex. Crim. App. 1999).
130. *Id.* at 366-67.

court should have granted appellant's request for a jury instruction on the lesser included offense of aggravated assault.[131] The Court of Criminal Appeals granted the State's petition for discretionary review.

The state argued that the trial court correctly denied the appellant's requested instruction. A defendant must be granted an instruction of a lesser included offense if he meets two requirements. First, the proof for the offense charges must include proof necessary to establish the lesser-included offense. Second, there must be some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser included offense.[132] Anything more than a scintilla of evidence will entitle defendant to an instruction on a lesser-included offense.[133] In the abstract, aggravated assault can be a lesser-included offense of murder. A person commits aggravated assault when he commits assault[134] and causes serious bodily injury to another or uses or exhibits a deadly weapon during the commission of the assault.[135] Murder is committed when a person "(1) intentionally or knowingly causes the death of an individual; (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual."[136]

Turning to the facts of the case before it, the court reasoned that appellant's own testimony was that he intended to shoot the victim "in the butt," i.e., he intended to cause serious bodily harm. There is no question that the appellant's conduct resulted in the victim's death and that firing a gun in the direction of someone is clearly dangerous to human life. The evidence, therefore, showed at least that he was guilty of murder under § 19.02(b)(2). There was not, however, any evidence that the appellant was guilty only of some offense less than murder. Thus, the trial court had not erred when it refused appellant's instruction on the lesser-included offense.[137]

VIII. JURY INSTRUCTIONS

In *Prystash v. State*[138] the Court of Criminal Appeals considered a plethora of challenges to the capital murder conviction of the appellant. The appellant had agreed to murder a man's wife for remuneration and employed another to do the shooting. Appellant provided the shooter with a gun and drove him to the victim's home where the killing took place. The appellant was convicted of capital murder and direct appeal to the Court of Criminal Appeals was automatic.

131. *See id.* at 366.
132. *Id.* at 367.
133. *See Bignal*, 887 S.W.2d at 23.
134. *See* TEX. PEN. CODE ANN. § 22.01 (Vernon 1994).
135. *See* TEX. PEN. CODE ANN. § 22.02(a) (West 1994).
136. *See* TEX. PEN. CODE ANN. § 19.02(b) (West 1994).
137. *See Forest*, 989 S.W.2d at 368.
138. 3 S.W.3d 522 (Tex. Crim. App. 1999) (en banc)

The most important argument raised by the appellant was based on the jury instructions in the penalty phase. Article 37.071, section 2(b)(2) requires the trial court to submit to the jury a number of special issues, one of which is termed the "anti-parties" issue, the question of "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."[139] The appellant requested and the trial court agreed that this issue could be omitted. Appellant now complains that the trial court erred in failing to submit that issue.

In his argument, appellant relies on *Powell v. State*[140] which held that reversible error had occurred when the trial court agreed to defendant's request to substitute an issue for cases tried on the law of parties for the deliberateness issue called for by the statute at the time.[141] Noting that *Powell*'s analysis was done in terms of preservation of error, the majority wrote that *Powell* was wrongly decided insofar as it allowed the defendant to raise as error an action that he sought. Rejecting the *Powell* court's analysis based on whether one could waive statutory requirements, the court held that rule of invited error estopped the appellant in this case from asserting his claim.

In the dissenting opinion, in which Judges Meyers and Price joined, Judge Holland argued that because there was no jury finding on the anti-parties special issue, the trial court was without authority to impose death at all.[142] The dissenters asserted that the effective dates of a statute are "absolute requirements which are independent of the litigant's wishes."[143] By doing this, the majority effectively eliminated an element the jury was statutorily required to find before a death sentence could be imposed. The vital role played by the anti-parties special issue—preventing a defendant, found guilty as party, from being sentences to death for the conduct of another rather than upon the defendant's own conduct—is undercut by the majority opinion.[144] The court rejected the points of error and affirmed his conviction.[145]

IX. EXPERT TESTIMONY

The Court of Criminal Appeals reviewed a trial court's refusal to order payment of a polygraph examiner for an examination and testimony to be given on appellant's behalf. In *Jackson v. State*[146] the appellant was charged with capital murder for killing Mario Stubblefield. It was alleged

139. *Id.* at 529. The issue was added to the statute by the Act of June 16, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, 2899.
140. 897 S.W.2d 307 (Tex. Crim. App. 1994).
141. 3 S.W.3d at 530.
142. *Id.* at 542.
143. *Id.*
144. *Id.* at 546.
145. *Id.* at 537.
146. 992 S.W.2d 469 (Tex. Crim. App. 1999).

that appellant killed the victim because the victim had given testimony before the grand jury implicating appellant's friend, Smith, in a prior offense. A witness saw Smith, appellant and the victim talking together in and around a car that was parked in front of the victim's home moments before the shooting. When Smith was confronted by the police, he gave a statement indicating that he had no prior knowledge that appellant intended to shoot Stubblefield. Upon learning of his friend's statement from the police, appellant said that Smith had paid him $200 to do it and executed a statement to that effect.

At trial, the appellant changed his story. In his testimony he denied any talk of payment by Smith and said he merely wished to frighten the victim out of testifying against Smith. Appellant was convicted by a jury and sentenced to death. Appeal to the Court of Criminal Appeals was automatic.[147]

Among appellant's points of error was the contention that the trial court erred in refusing to pay for an expert witness, a polygraph examiner, to conduct an examination and testify in his behalf. Appellant wished to show that the statement he gave regarding being hired to commit the murder was false. He asserted that he was misled into making the false statement by the police officer who questioned him. The officer denies misleading the appellant. In support of his petition requesting funds for the polygraph examiner the appellant attached a letter from the expert saying that he could administer an examination and render an opinion regarding whether the appellant had given false information in his statement to the police.

In support of the argument that he was entitled to access to a state-paid expert witness the appellant cited *Ake v. Oklahoma*,[148] where the Supreme Court found that an indigent who relied on an insanity defense in a capital case was entitled to the assistance of a state-provided psychiatric expert. In doing so, it considered the defendant's interest, the State's interest and the "probable value of the . . . procedural safeguards that are sought, and the risk of the erroneous deprivation of the affected interest if those safeguards are not provided."[149] The Court held that

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.[150]

The Court of Criminal Appeals cited a number of cases in which experts were provided, noting that it had followed the same reasoning as that applied in *Ake*. In each of the cases cited the court notes that the defendant had made a preliminary showing that there was a significant

147. 992 S.W.2d at 472.
148. 470 U.S. 68 (1985).
149. *Id.* at 77.
150. *Id.* at 83.

issue of fact on which the State would offer expert testimony and which the lay jury's knowledge would not be expected to encompass. Turning to the appellant's request for a state-funded expert, the court distinguished his situation from those cases where state funding was provided. First, the appellant had not made an initial showing of a significant factual issue on which the State would provide expert evidence. Neither had the appellant shown the existence of a significant factual issue which the lay jury's knowledge would not likely encompass.

The issue in appellant's case was the credibility of two witnesses—the appellant and a police officer. This, the court says, is precisely the kind of question resolved by juries. Additionally, the United States Supreme Court has recently held that exclusion of polygraph evidence did not unconstitutionally abridge a defendant's right to present a defense noting that there is no consensus that polygraph evidence is reliable.[151] The court held that appellant was not entitled to a state-funded polygraph examiner.

X. CAPITAL PUNISHMENT—INEFFECTIVE COUNSEL

In *Hernandez v. State*,[152] the Court of Criminal Appeals granted discretionary review to reconsider the standard to be applied in ineffective counsel claims in noncapital cases. The appellant had been convicted of aggravated sexual assault of a child and sentenced to life imprisonment. The court held that both prongs of the *Strickland* test—deficiency and prejudice—are applicable to ineffective assistance of counsel claims at non-capital sentencing proceedings.[153]

Chronologically, the caselaw that led the *Hernandez* court to overrule *Ex parte Duffy*[154] and *Ex parte Cruz*[155] developed in the following way. In 1980, the highest criminal appeals court in the Texas system held, "as a matter of federal and state constitutional law, that the 'reasonably effective assistance of counsel' standard was the sole test in all cases alleging a deficiency in attorney performance."[156] Four years later, the United States Supreme Court in *Strickland v. Washington*[157] rejected the standard as the only one to be applied to claims of deficient attorney performance in a state capital case.[158] The Court instead established the two-pronged test: (1) whether counsel's conduct was deficient, and (2) whether, but for counsel's deficient performance, the result of the proceeding would have been different.[159]

151. *See Jackson*, 992 S.W.2d at 474 (citing United States v. Scheffer, 523 U.S. 303. 317 (1998).
152. 988 S.W.2d 770 (Tex. Crim. App. 1999) (en banc).
153. *Id. See* Strickland v. Washington, 466 U.S. 668 (1984).
154. 607 S.W.2d 507 (Tex. Crim. App. 1980).
155. 739 S.W.2d 53 (Tex. Crim. App. 1987).
156. 988 S.W.2d at 771.
157. 466 U.S. 668 (1984).
158. 988 S.W.2d at 771.
159. *Id.* at 770, n.3.

Having adopted the two-part test of performance and prejudice by which effectiveness of counsel is measured, the *Strickland* Court, nevertheless, left unanswered the question of whether a different approach was necessary to define effective assistance of counsel as a constitutional matter in noncapital cases. That question was taken up by the Texas Court of Criminal Appeals in *Ex parte Cruz*. There the court held, "as a matter of federal constitutional law, that the *Duffy* standard applies only to noncapital sentencing proceedings."[160]

The *Strickland* standard had a requirement not contained in the *Duffy* standard, i.e., proof that the outcome of the proceeding would have been different but for counsel's deficient performance. Thus, *Strickland* requires a showing of prejudice while *Duffy* does not.[161] The *Hernandez* court said the *Cruz* court's erroneous conclusion that the defendant in a noncapital sentencing proceeding does not have to show prejudice from deficient attorney performance was based on a misreading of *Strickland*.[162] For that reason and others, the *Hernandez* court decided that as a matter of federal constitution law *Duffy* and *Cruz* must be overruled.

The majority in *Hernandez* was criticized for ignoring stare decisis. It replied to dissenting opinions' objections by pointing out that "[p]rinciples of stare decisis have no application in this context since we have no choice but to follow United States Supreme Court precedent on matters of federal constitutional law."[163]

Finally, the *Hernandez* court considered whether the *Duffy* standard should be considered as a matter of state law. It decided against doing so because *Duffy* was only "a three-judge plurality with no precedential value."[164] It further eliminates the likelihood of independent state grounds supporting the Duffy standard with the observation that the Court of Criminal Appeals has never squarely decided the scope of the right to counsel under state constitutional provisions but it has consistently held the state right "is no more protective than its federal counterpart."[165] It observed further that

> [a]pparently the intent of Texas' right to counsel constitutional provision does not affirmatively guarantee lawyers to those who cannot afford them and it does not affirmatively guarantee the effective assistance of lawyers to those who can afford them. Texas' right to counsel constitutional provision, like the original intent of its federal counterpart, apparently is only intended to prohibit the government from interfering with the right to a criminal defendant "to employ a lawyer to assist in his defense."[166]

160. *Id.* at 771.
161. 988 S.W.2d at 770, n.3.
162. *See id.* at 771.
163. *Id.* at 772.
164. *Id.*
165. *Id.*
166. *Id.* at 773 (citations omitted).

In his dissent, Judge Mansfield expressed the belief that overruling *Duffy* does violence to stare decisis because the reasons for doing so are not sufficiently compelling. Dissenting Judges Price, Meyers and Johnson complained that neither of the grounds given for granting discretionary review is the actually the focus of the majority's opinion. They view as "purely gratuitous dicta" the majority's "novel proposition" that the state constitution provides less protection than does the U.S. Constitution.[167]

The majority asserted that inconsistency between Duffy and Strickland requires that Duffy be overruled because we must follow United States Supreme Court precedent on matters of federal constitution law.[168] This is correct, according to the dissent, which added that it is well established that a state may provide greater protection to its citizens than does the federal constitution. It seems evident that Duffy could be harmonized with Strickland based on independent state grounds. Nevertheless, the majority dismissed Duffy as a three-judge plurality without precedential worth. It is the majority's refusal to acknowledge its inconsistency that caused the dissent to write:

> [T]he section of the majority opinion on state constitutional law [citations omitted], which is actually there to criticize contemporary Supreme Court jurisprudence on the Sixth Amendment's guarantee of a right to counsel, reads less like a judicial decision than a political polemic. However, since the job of courts is to decide concrete controversies of law, such statements have no place in a court opinion.[169]

Finally, the dissenters derided the majority's inability to acknowledge that the court should adhere to its opinions for some minimal amount of time.[170]

XI. ADMISSION OF EVIDENCE

The appellant in *Mozon v. State*[171] was convicted of aggravated assault and sentenced to five years' imprisonment and community supervision. Her conviction was based on an incident at her high school in which the appellant, in response to what she characterized as threats from the victim, poured gasoline on him and set him afire. The appellant was pregnant at the time and among the threats she reported was the threat to "beat the baby" out of her. The appellant testified that she was afraid of the victim but that she told no one in authority because she did not believe they would protect her. She considered using a gun or knife but chose instead to set his shirt on fire because she "didn't want to hurt him."[172]

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167. *Henandez*, 988 S.W.2d at 775.
168. *Id.* at 771.
169. *Id.* at 775.
170. *Id.* at 776 (Price, J., dissenting, joined by Meyers and Johson, JJ.)
171. 991 S.W.2d 841 (Tex. Crim. App. 1999).
172. 991 S.W.2d at 843.

The appellant tried unsuccessfully to enter testimony about prior violent incidents of which she was aware at the time of the incident. She wanted to show that she reasonably believed she was in danger when the victim pushed his tray away. The trial court determined that the evidence was relevant to her claim of self-defense but found it was inadmissible under Rule 403. The Tenth Court of Appeals agreed and the Court of Criminal Appeals granted discretionary certiorari to determine "whether evidence which supports a relevant defensive theory is subject to Rule 403, and, if so, whether the trial court's balancing test determination is to be reviewed by the standard set out in *Montgomery v. State*."[173] The appellant argued that Rule 403's balancing test does not apply to this evidence of prior violence because it supports her theory of self-defense, and so, if there is prejudice to the state it is not unfair.

The court began by examining the appellant's view that a balancing determination is not needed because Rule 403's concept of prejudice is incorporated by the common law and Rule 404(a)(2). The common law includes the *Dempsey* cases which held the defense could admit evidence of the decedent's character for violence if there was some aggressive act by the decedent that raised an issue as to whether the defendant's conduct was justified as self-defense.[174] Those cases were superseded by Rule 404(a) of the Texas Rules of Criminal Evidence which provides that evidence of other crimes, wrongs, or acts are inadmissible to prove character conformity but a defendant may offer evidence of a victim's character to show the victim was the initial aggressor and to show the victim's state of mind.[175] Further, the Court of Appeals and the Court of Criminal Appeals agreed that the trial court's ruling must be measured against the relevant criteria by which a Rule 403 decision is made per factors appearing in *Montgomery* and its progeny. Factors include (1) how compellingly the evidence makes a fact more or less probable, (2) the potential the evidence will impress the jury in some irrational, indelible way, (3) the time needed to develop the evidence, distracting the jury from consideration of the indicted offense, and (4) the force of the defendant's need for this evidence to establish this fact.[176]

The Court of Criminal Appeals also found the trial court erred when it failed to engage in a discussion of the unfair prejudice to the state that would be caused by the admission of appellant's evidence. Such a discussion is necessary because Rule 403 presumes admissibility of all relevant evidence and the judge is authorized to exclude it only when there's a "clear disparity between the degree of prejudice of the offered evidence and its probative value."[177] The dissenters complained that the prejudice

173. *Id.* at 844. *See* Montgomery v. State, 810 S.W.2d 372 (Tex. Crim. App. 1991), op. on reh'g.

174. 991 S.W.2d at 845.

175. *See id.*

176. 991 S.W.2d at 847.

177. *Id.*

to the state was obvious and that remand was unnecessary.[178]

Smith v. State[179] considered how and to what extent a trial court must balance permission under Article 38.36(a) to offer extraneous offense evidence involving the relation between a murderer and his victim against the judge's obligation to not admit evidence if its probative value is outweighed by its prejudicial value and to ensure against admission of evidence for the sole purpose of showing the defendant acted in conformity with his past bad character toward the victim, and thus, that he murdered her.

In *Smith* the appellant had a violent relationship with his girlfriend, the victim. She disappeared without explanation and her body was never found. Appellant was indicted for her murder and at trial he tried to keep the jury from hearing evidence regarding his former physical abuse of the victim and others and an incident in which he killed the victim's dog. The trial court admitted the evidence over the appellant's 404(b) and 403 objections. He was convicted of murder and sentenced to life imprisonment. The Amarillo Court of Appeals held that the evidence was admissible under Article 38.36(a) so the trial court did not have to observe rules 404(b) and 403. Relying on Criminal Rule of Evidence 101(c), the court of appeals said that Article 38.36(a) excuses the state from having to satisfy rules 404(b) and 403. The Court of Criminal Appeals held that

> evidence admissible under Article 38.36(a) may be nevertheless excluded under Rule 404(b) or 403. Consequently, if a defendant makes timely 404(b) or 403 objections, before a trial court can properly admit the evidence under Article 38.36(a), it must first find the non-character conformity purpose for which it is proffered is relevant to a material issue. If relevant to a material issue, the trial court must then determine whether the evidence should nevertheless be excluded because its probative value is substantially outweighed by the factors in Rule 403.[180]

The opinion of the majority was met with a dissent by Judge Keller who was joined by Presiding Judge McCormick and Judge Keasler, concurring in the majority's decision to remand to the Court of Appeals for an analysis under Rule 403 but dissenting from its decision to remand for analysis under Rule 404(b).

178. *Id.* at 848.
179. 5 S.W.3d 673 (Tex. Crim. App. 1999).
180. *Id.* at 679.