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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 the most significant decisions rendered during the last term by the Texas Court of Criminal Appeals and the United States Supreme Court. Both courts continue the trend of deciding the merits of the case if the error has been substantially preserved.

I. PRETRIAL

A. BAIL BONDS

In *Guerra v. Garza*,[1] the court found that the relator was entitled to writs of mandamus and prohibition from the court ordering the county judge to vacate an order changing the status of a bond from surety to personal.[2] In this unique situation, a municipal judge set a surety bond, and subsequently the county judge, on his own motion, conducted bail review hearings to remedy chronic jail overcrowding problems. If an inmate had been incarcerated for ten or more days, the judge would review the nature of the bond. In this instance, no writ of habeas corpus had been filed by the prisoner.

The appellate court, although recognizing the county judge's motives as laudable, found them to be premature and without authority.[3] The court voiced some concerns at the prospect of forum shopping to either reduce or increase bail amounts.[4]

B. SEVERANCE

The court of criminal appeals addressed when a motion to sever under section 3.04(a) of the Penal Code must be filed in order to be considered timely in *Thornton v. State*.[5] The defendant was charged in a two-count indictment with aggravated sexual assault and indecency with a child, and both offenses involved the same victim on or about the same date. After jury selection and immediately before arraignment, the defendant requested the court to require the State to elect on which count the defendant would be prosecuted. The court denied the request.[6] The defendant next asked for a severance of counts, which motion was denied.[7]

The court recognized that section 3.04(a) does not establish the timing of a motion to sever.[8] However, articles 27.02[9] and 28.01[10] of the Texas

1. 987 S.W.2d 593 (Tex. Crim. App. 1999) (en banc).
2. *See id.* at 594.
3. *See id.*
4. *See id.*
5. 986 S.W.2d 615 (Tex. Crim. App. 1999).
6. *See id.* at 616.
7. *See id.*
8. *See id.*
9. TEX. CODE CRIM. PROC. ANN (Vernon 1989).
10. TEX. CODE CRIM. PROC. ANN. (Vernon 1989).

Code of Criminal Procedure do provide for the raising and timing of the defendant's pleadings and motions.[11] In the absence of a pretrial hearing, "logic and reason dictate" that the motion to sever must be raised before trial.[12] The primary motivation for filing such a motion is to limit the State's evidence to one offense. Logically speaking, a defendant would be prejudiced if the State and the defendant questioned prospective jurors as to the elements of each offense and the respective punishment ranges, but the scope of the trial was later limited to one offense. The pretrial presentation of the motion to sever provides both parties with adequate notice in advance of trial as to which witnesses will be needed, which the defenses will apply and what evidence will be presented. Thus, the defendant's motion to sever in this case was untimely because it was not made before trial.[13]

C. VENUE

In *Gutierrez v. State*,[14] the court held that the defendant's motion for change of venue was waived when the defendant "ceased to advocate or advance his position that he wanted a hearing to establish his right to a change of venue as a matter of fact."[15] The record showed that several pretrial hearings were set prior to a rescheduled January 24, 1995 trial date on a murder indictment. On the very date of trial the defendant filed a motion for change of venue which was summarily denied. The trial court later explained to the defendant that this motion had been untimely filed. The trial court, however, granted the continuance and thereafter several pretrial hearings took place. On each occasion, the defendant specifically refused to present the motion or any evidence in support thereof, not withstanding that the State had filed controverting affidavits following the January 24, 1995 pretrial setting. The appellate court essentially found that the defendant had waived his motion for change of venue because of his lack of persistence in presenting same to the court.

The court emphasized that the trial court's decision to hold in abeyance its ruling was perfectly acceptable, that no real final decision was entered regarding the denial of the defendant's motion to change venue. The court distinguished *Gutierrez* from *Revia v. State*.[16] In *Revia*, after a pretrial conference was held where the case was reset for trial on December 5, the defendant filed a motion for change of venue on December 4. The defendant's motion was summarily denied as being untimely. The State

11. Specifically, article 27.02 addresses pleadings, and subsection 8 incorporates any and all motions or pleadings which the law permits to be filed, which would include a motion to sever. Article 28.01 addresses the timeliness of the defendant's pleadings in relationship to a pretrial hearing.

12. *Thornton*, 986 S.W.2d at 618.

13. *See id.*

14. 979 S.W.2d 659 (Tex. Crim. App. 1998) (en banc).

15. *Id.* at 663.

16. 649 S.W.2d 625 (Tex. Crim. App. 1983).

did not controvert the motion and the court did not grant a hearing on the motion. The appellate court held that it was reversible error to overrule a motion for change of venue without a hearing and without the motion being controverted by the State.[17]

D. Venue as an Element of the Offense

In *Jones v. State*,[18] wherein the defendant was convicted of theft by receiving[19] the question presented was whether the proper venue for prosecution was governed by article 13.08[20] or 13.18[21] of the Texas Code of Criminal Procedure. A camera store in College Station, Brazos County, was burglarized and eight cameras stolen. Four of the cameras were recovered from pawn shops in Austin, Travis County. Several individuals approached the defendant at his home in Burleson County, which bordered on Brazos County. Thereafter the defendant, using his drivers license, pawned the property in Travis County at various pawn shops. The defendant moved for an instructed verdict because no evidence was presented to show that the defendant was connected in any way to the burglary in Brazos County. The State argued that article 13.08 applied and that venue was proper in Brazos County because the stolen property traveled from that county to Burleson County where the defendant received it.

The court held that venue for theft by receiving under section 31.03 of the Texas Penal Code is controlled by article 13.08.[22] Venue attached at the time and place the offender took control of the property in Burleson County, and could also attach in any county where the offender removed the property such as Travis County. As the State failed to prove the defendant committed the offense in question in Brazos County, the court held that a judgment of acquittal must be entered.[23]

E. Proper Venue for Aggravated Thefts

In *State v. Weaver*,[24] the defendant was indicted in Harris County for theft of between $20,000 and $100,000 dollars. Pursuant to section 31.09[25] of the Texas Penal Code, the indictment aggregated into a single offense various thefts from thirty-two different complainants occurring over several years in and around Harris County. The State alleged that these thefts were "pursuant to one scheme and continuing course of con-

17. *See id.* at 627. Whether this decision would remain viable today is somewhat questionable in the view of the compelling concurring opinion by Judge Keller in *Guiterrez*. *See Guiterrez*, 979 S.W.2d at 664.
18. 979 S.W.2d 652 (Tex. Crim. App. 1998) (en banc).
19. Texas Pen. Code § 31.03(a)(n)(b)(2) (Vernon Supp. 2000).
20. Tex. Code Crim. Proc. Ann. (Vernon 1977).
21. Tex. Code Crim. Proc. Ann (Vernon 1977).
22. *See Jones*, 979 S.W.2d at 657.
23. *See id.* at 658-59.
24. 982 S.W.2d 892 (Tex. Crim. App. 1998) (en banc).
25. Texas Pen. Code Ann. (Vernon 1994).

duct."[26] The defendant's motion to sever the non-Harris County thefts from the indictment was granted, which resulted in a reduction in the punishment range.

The court held that when a number of thefts are aggregated into a single offense under section 31.09, the proper county for criminal prosecution under article 13.18 is "any county in which the individual thefts or any elements thereof occurred."[27] The court previously held that section 31.09 created one offense for purposes of severance, jurisdiction, punishment, and limitations.[28] In this case, the court holds that this section creates one offense for purposes of venue.[29]

F. Double Jeopardy

The trial court granted the defendant's motion to dismiss based upon double jeopardy grounds in *Vick v. State*.[30] The first indictment for aggravated sexual assault alleged the defendant caused penetration of the female sexual organ of a child by the defendant's sexual organ. The defendant was acquitted. The second indictment for aggravated sexual assault alleged that the defendant caused the female sexual organ of the child to contact the mouth of the defendant. The trial court ruled that the second indictment charged the same offense for which the defendant had been tried and acquitted. The court of appeals affirmed. The Court of Criminal Appeals held that the two indictments alleged violations of separate and distinct statutory provisions and that the two indictments alleged separate and distinct acts.[31] Thus, the court held no double jeopardy violation occurred.[32]

Two separate indictments charging attempted murder were a subject of double jeopardy review in *Manrique v. State*.[33] Each indictment alleged the attempted murder of a person or persons unknown to the grand jury by shooting at them with a deadly weapon and the attempted murder of two named individuals. The facts showed that the defendant and another went to a specific house thought to be occupied by a member of a rival gang, where the defendant fired a rifle multiple times into the house. The named complainants were wounded; other occupants escaped injury.

The jury returned a general form of verdict in each case.[34] The court of

26. *Id.* at 893.
27. *Weaver* at 893.
28. *See id.* at 894.
29. *See id.*
30. 991 S.W.2d 830 (Tex. Crim. App. 1999).
31. *See id.* at 833.
32. The court reviewed the applicable statute, article 22.021 of the Texas Penal Code and concluded that the statute was a conduct-oriented statute and utilized the conjunctive in distinguishing different types of conduct. Each subsection specifically defined sexual conduct in a way that required different acts to commit. Clearly, the acts differed from the first to the second indictment. The court held that the legislature intended that each separately described conduct constituted a "separate statutory offense." *Id.*
33. 994 S.W.2d 640 (Tex. Crim. App. 1999) (en banc).
34. The jury found the defendant guilty of attempted murder without specifying which paragraph the jury found to be true.

appeals held that the convictions violated double jeopardy.[35] The Court of Criminal Appeals held that the evidence was more than sufficient to support a finding of guilt under either paragraph of each indictment.[36] Notwithstanding, that the court's charge contained only an abstract instruction on the law of transferred intent without an application paragraph, the evidence may not be held insufficient because of a defect in the court's charge.[37]

In *State v. Sauceda*,[38] the court reviewed the process by which a court should apply the doctrine of collateral estoppel. Two men were shot seconds apart as they sat in a vehicle. Charged as a principal in two murder indictments, the defendant was found not guilty in the first case. The defendant was reindicted in the second case based on the law of parties. The trial court granted the defendant's motion to dismiss and pretrial writ[39] based upon collateral estoppel. The court of appeals reversed,[40] holding that the trial court did not have the authority to grant a motion to dismiss an indictment on the basis of collateral estoppel and that prosecution of the defendant in the second case was not barred by collateral estoppel. The Court of Criminal Appeals emphasized that *Ashe v. Swenson*[41] required an appellate court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters in order to conclude whether a rational jury could have based its verdict upon an issue other than that which the defendant sought to foreclose from consideration. In this case, the court of appeals did not properly follow the *Ashe* procedure as it did not consider the evidence developed at the first trial. Instead it focused only upon the pleadings and the court's charge. The court remanded the case to the court of appeals to adequately address the collateral estoppel issue in accordance with the procedure mandated in *Ashe*.[42]

An issue of first impression in Texas, whether homicide offenses (manslaughter and intoxication manslaughter) which are distinct under *Blockburger v. United States*[43] may nevertheless be considered the "same" for purposes of the "multiple punishment" aspect of the double jeopardy clause, was addressed in *Ervin v. State*.[44] Pursuant to a plea bargain, the

35. The court of appeals assumed that the defendant was convicted under the first paragraph of each indictment. The court concluded that the two convictions of the defendant for identical counts of attempted murder violated the double jeopardy clause and constituted multiple punishment for the same offense.

36. *See Manrique*, 994 S.W.2d at 642.

37. The Court of Criminal Appeals faulted the assumption of the court of appeals, noting that when a general verdict is returned by a jury and the evidence is sufficient to support a finding under any of the paragraphs submitted to the jury, the verdict will be applied to the particular paragraph finding support in the facts. *See id.*

38. 980 S.W.2d 642 (Tex. Crim. App. 1998) (en banc).

39. More commonly referred to as a pretrial application for a writ of habeas corpus.

40. *See Sauceda*, 980 S.W.2d at 643.

41. 397 U.S. 436, 444 (1970).

42. *See Sauceda*, 980 S.W.2d at 647.

43. 284 U.S. 299 (1932).

44. 991 S.W.2d 804 (Tex. Crim. App. 1999).

defendant was convicted of intoxication manslaughter and manslaughter in a two-count indictment arising out of a traffic accident involving a single victim on the same date. The trial court imposed a twenty-five year sentence in each case to run concurrently. In a pro se application for writ of habeas corpus, the defendant argued that permitting both convictions for a single instance of conduct violated the Fifth Amendment's protection against double jeopardy.

Manslaughter and intoxication manslaughter are clearly not the same offense under the *Blockburger* test. Manslaughter requires "recklessness" which is not required for intoxication manslaughter.[45] Intoxication manslaughter requires "intoxication" and "operation of a motor vehicle in a public place," neither of which are required for manslaughter.[46] The question remained as to whether these two offenses be considered the same for double jeopardy purposes.

The Court of Criminal Appeals concluded that *Blockburger* was not the sole test as to whether offenses are the same under the multiple punishment aspect of the double jeopardy clause.[47] The primary inquiry is "whether the legislature intended to permit multiple punishments."[48] After recounting relevant considerations,[49] the court concluded that manslaughter and intoxication manslaughter are the same offense for double jeopardy purposes when they involve the same victim, and imposing convictions for both, therefore, violates the double jeopardy clause.[50]

G. INDICTMENT

In Garcia v. State,[51] the defendant was charged with indecency with a child in three separate indictments, which alleged that "on or about" October 5, 1987, August 15, 1989, and May 15, 1990, certain criminal activity occurred. The defendant complained that each indictment failed to specify a more exact date and thus deprived the defendant of sufficient notice of the time periods involved. The court held that an indictment need not specify the precise date the charged offense occurred as time is not a

45. *See* TEX. PEN. CODE ANN. § 49.08 (Vernon Supp. 2000).
46. *See* TEX. PEN. CODE ANN. § 19.04 (Vernon 1994).
47. *See Ervin*, 991 S.W.2d at 814.
48. *Id.* at 814.
49. Other considerations relevant to determining whether the legislature intended multiple punishments are whether the offenses provisions: "(1) are contained within the same statutory section; (2) are phrased in the alternative; (3) are named similarly; (4) have common punishment ranges; (5) have a common focus (i.e. whether the 'gravamen' of the offense is the same); (6) have a common focus tends to indicate a single instance of conduct. Additional considerations are 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* (i.e. a liberalized *Blockburger* standard utilizing imputed elements), 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." *Ervin* at 814.
50. *See id.* at 817. The court found that the State waived the illegal portion of the judgment, and therefore the court granted the applicant relief insofar as the manslaughter conviction was vacated.
51. 981 S.W.2d 683 (Tex. Crim. App. 1998) (en banc).

material element of the offense. Instead, the primary purpose served by the date is to demonstrate that the prosecution is not barred by the statute of limitations, and on occasions the State may not be able to show precisely when the alleged offense occurred.[52]

In *State v. Mason*,[53] the trial court granted the defendant's motion to quash the indictment which alleged unlawful possession of a firearm by a felon under section 46.04.[54] The trial court granted the motion to quash, ruling that the prosecution was controlled by former section 4.605.[55]

The Court of Criminal Appeals, however, after reviewing the legislative history of the sections, concluded that only the defendant's status as a felon, not the date upon which the prior felony conviction occurred, was an element of section 46.04.[56]

In *Gibson v. State*,[57] involving a third prosecution felony driving while intoxicated , the defendant filed a motion to quash the enhancement count of his indictment, arguing that both prior involuntary manslaughter

52. In those few cases in which a defendant is unfairly surprised at trial, the defendant's appropriate remedy is a continuance. In this case, the defendant did not allege or show unfair surprise or moved for a continuance.

53. 980 S.W.2d 635 (Tex. Crim. App. 1998) (en banc).

54. The indictment alleged in part that the defendant, on or about September 6, 1996, intentionally and knowingly possessed at a location other than the premises where he lived at the time a firearm, and, prior to the possession, the defendant had been finally convicted of a felony, namely burglary of motor vehicle on July 10, 1991 in a specified court and cause number. The defendant argued and the trial court agreed the date of the prior conviction was an essential element of the offense and that date preceded September 1, 1994, the effective date for the application of section 46.04 and, therefore, section 46.05 governed. Therefore, the indictment was defective because it failed to allege the prior felony conviction involved violence or the threat of violence as required under section 46.05. The court of appeals affirmed.

55. Former section 46.05 of the penal code provided that: "the person that had been convicted of a felony involving an act of violence or threatened violence to a person or property commits and offense if he possesses a firearm away from the premises he lives." Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 964, *amended by* Act of May 29, 1993, 73rd Leg., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3688. In 1993, the Texas Legislature amended 46.05, now set forth in section 46.04:

> A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, PAROLE, or mandatory supervision, whichever date is later; or
>
> (2) after the period described by subdivision (1), at any location other than the premises at which the person lives.

TEX. PEN. CODE ANN. § 46.04 (Vernon 1994).

56. *See Mason* at 641. In her concurring opinion, Judge Keller emphasized that review of the legislative history was not necessary and that the statute clearly delineated the elements of the offense with which the defendant was charged. These elements were (1) the defendant was a felon and (2) the defendant possessed a firearm outside his home. *See id.* at 642.

57. In her concurring opinion, Judge Keller emphasized that review of the legislative history was not necessary, that the statue clearly delineated the elements of the offense with which the defendant was charged were (1) the defendant was a felon and (2) the defendant possessed a firearm outside his home.

convictions arose from the same incident[58] and, therefore, the defendant's punishment was unfairly enhanced for a single prior illegal act.

The court observed that there were three grades of the offense of driving while intoxicated. The first grade encompassed a first offender and the offense was a Class B misdemeanor.[59] In the second grade, if the State could prove one prior conviction relating to the operation of a motor vehicle while intoxicated, the driving while intoxicated offense became a Class A misdemeanor.[60] However, if the State could prove that the defendant had previously been convicted twice of an offense relating to operating a motor vehicle while intoxicated, the driving while intoxicated offense became a third offense, a felony of the third degree.[61] Thus, the prior intoxication related offenses were "elements of the offense of driving while intoxicated."[62] Proof thereof is admitted during the guilt innocence stage of the trial, in contrast to prior felony convictions, which are introduced under the enhancement provisions of Texas Penal Code section 12.42(d).[63] The prior intoxication-related convictions served the purpose of only enhancing the offense in section 49.09(b), whereas prior convictions used pursuant to section 12.42(d) served the sole purpose of enhancing punishment. The statute in question, section 49.09(b), did not require that the convictions had to occur in a specified order or that they needed to arise from separate transactions.[64]

H. Notice of Extraneous Offenses

In *Simpson v. State*,[65] the defendant was convicted of indecency with a child. At trial, the State introduced the defendant's prior offenses against the complainant[66] without objection. On appeal, the defendant contended that article 38.37 was not in effect when the indictment was returned and he did not receive notice under rule of evidence 404(b). The Court of Criminal Appeals first determined that the defendant was guilty of procedural default.[67] Second, the defendant did not request notice in a self-executing document but rather styled his "request" as a motion addressed to the trial court. The court held that appellant's document was not a self-executing request, thus it did not trigger the notice requirements under rule 404(b).[68] Further, because he did not obtain a ruling on

58. The facts relating to the prior convictions showed that on December 4, 1989 the defendant was convicted of involuntary manslaughter as a result of killing two persons while operating a motor vehicle while intoxicated. In one conviction punishment was set at imprisonment and then the other at probation which was subsequently revoked and the defendant imprisoned.

59. *See Gibson*, 995 S.W.2d at 695.

60. *See id.*

61. *Id.* at 697.

62. *Id.* at 697.

63. *See* Tex. Pen. Code Ann. § 12.42d (Vernon 2000).

64. *See Gibson*, 995 S.W.2d at 696-97.

65. 991 S.W.2d 798 (Tex. Crim. App. 1998).

66. *See* Tex. Code Crim. Proc. Ann. art. 38.37 (Vernon Supp. 2000).

67. *See Simpson*, 991 S.W.2d at 800.

68. *See id.* at 801.

his motion, he waived this error.[69]

A year before his trial, the defendant in *Mitchell v. State*[70] filed a motion asking the trial court to order the State to provide notice of extraneous offenses pursuant to article 37.07.[71] The motion also asked the State to provide certification of intent to comply or not comply within thirty days of the date of the filing of the motion. On the day voir dire began, the court granted the motion and the State gave notice of the extraneous offenses but overruled the defendant's objection that the notice was not timely. The court of appeals reversed, holding that the motion was also a request to the State to provide notice of the extraneous offenses. The Court of Criminal Appeals held that this was a motion for discovery addressed to the trial court.[72] The court reaffirmed its holding in *Simpson*[73] that motions for discovery addressed to the trial court are not effective until the trial court rules on them.[74]

I. MOTION TO DISMISS

In *State v. Munoz*,[75] the Court of Criminal Appeals reviewed the application of *Barker v. Wingo*[76] to a defendant's federal constitutional right to a speedy trial.[77] In *Munoz*, the trial court granted the defendant's motion to dismiss the indictment; the court of appeals affirmed. The court of criminal appeals reversed and ordered reinstatement of the indictment.[78]

In making its decision, the court considered the following facts. First, the length of delay from the defendant's arrest to his speedy trial hearing was seventeen months, which is sufficiently long to trigger a speedy trial analysis. Second, the delay was due to ongoing, good-faith plea negotia-

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69. *See id.* at 800-01.

70. 982 S.W.2d 425 (Tex. Crim. App. 1998) (en banc).

71. Section 3(g) of article 37.07 addresses the admissibility of extraneous offense evidence at the punishment phase of trial:

> On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Criminal Evidence . . . . The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon Supp. 2000).

72. *Mitchell*, 982 S.W.2d at 427.

73. *See* Simpson v. State, *supra* notes 42; *see also supra* text accompanying notes 42-45.

74. *See Mitchell*, 982 S.W.2d at 427. The Court also stated "when a document seeks trial court action, it cannot also serve as a request for notice triggering the State's duty under Article 37.07, section 3(g). To hold otherwise would encourage gamesmanship. The opposite rule could encourage defendants to bury requests in voluminous motions, hoping the State would either overlook it or believe the request to be contingent on a court order." *Id,*

75. 991 S.W.2d 818 (Tex. Crim. App. 1999) (en banc).

76. 407 U.S. 514 (1972).

77. Courts analyze speedy trial claims on an ad hoc basis by weighing and then balancing the four *Barker* factors: length of delay, reason for the delay, assertion of right to a speedy trial, and prejudice suffered from the delay.

78. *See Munoz*, 991 S.W.2d at 830.

tions.[79] Third, although the defendant signed a waiver of arraignment form, which contained a pro forma request for a trial date and motion to sever and also requested three separate jury trials, these actions could not be considered assertions of the right to a speedy trial. Finally, the Court rejected the defendant's argument that his case was prejudiced by a seventeen-month delay.[80] The three interests the court considered are (1) preventing oppressive pretrial incarceration, (2) minimizing the accused's anxiety, and (3) limiting the possibility that the defense will be impaired.[81] "[The defendant]'s bare 'assertion of dimming memories' does not constitute 'some showing' of an impairment to the defense . . . *Barker* requires a defendant to show that 'lapses of memory' are in some way 'significant to the outcome' of the case."[82]

J. IMMUNITY

In *Graham v. State*,[83] the defendant's neighbors observed some men carry a body, rolled up in a rug, out of the defendant's house. The neighbors called the Harbin County sheriff's department When the sheriff arrived, the defendant refused to give a statement unless she received immunity from prosecution. When the Sheriff gave her a written guarantee that she would not be prosecuted, she gave a statement.

The body was found in Jefferson County, and the defendant was indicted in Jefferson County for aggravated kidnapping. The defendant asserted her immunity agreement with the Harbin County Sheriff as a plea in bar to her prosecution and filed a motion to suppress asserting that her written statement was a result of the immunity agreement. The Court of Criminal Appeals stated that the power to grant immunity is statutory, not constitutional.[84] Transactional immunity in Texas is a promise by the prosecutor to dismiss the case which requires the approval of the trial court as does a grant of transactional immunity.[85] Since the defendant's immunity agreement was not approved by the trial court, it was not enforceable as against either county prosecutor.[86]

K. BRADY

In *Little v. State*,[87] during the defendant's trial for driving while intoxi-

79. "Delay caused by good faith plea negotiations is not the result of negligence or a 'deliberate attempt to delay the trial.' [D]elay caused by good faith plea negotiations is a valid reason for the delay and should not be weighed against the prosecution." *Id.* at 824.

80. *See id.* at 829-30.

81. *See id.* at 826.

82. *See id.* at 829. The court concluded there was no 'excessive' delay, there was a valid reason for the delay for which the defendant was in part responsible, he did not assert his right to a speedy trial, and any prejudice was minimal. The government did not violate the defendant's right to a speedy trial. *See id.* at 829-30.

83. 994 S.W.2d 651 (Tex. Crim. App. 1999).

84. *See id.* at 653.

85. *See id.* at 654.

86. *See id.* at 656.

87. 991 S.W.2d 864 (Tex. Crim. App. 1999).

cated, a chemist testified that the defendant's blood alcohol concentration was 0.13. After this testimony, but before cross-examination, the State informed the defendant's attorney that the chemist had lost the graph upon which his testimony was based. The court of appeals held the trial court should have granted the defendant's motion for new trial because the trial court "may" have found the witness's testimony was inadmissible without the graph, which would have changed the outcome of the trial.[88] The Court of Criminal Appeals reversed, holding that the fact that the trial court "may" have found the witness's testimony was inadmissible was not sufficient; to reverse, the appeals court must have found "a reasonable probability that, had the evidence been disclosed to the defense earlier, the result of the proceeding would have been different."[89]

L. JUVENILE'S RIGHT TO COUNSEL

Hidalgo v. State[90] involved a juvenile defendant who was tried and convicted as an adult for attempted capital murder and convicted after a jury trial. The juvenile's appointed attorney was not notified of his psychological examination, conducted pursuant to section 54.02(d) of the Juvenile Justice Code,[91] until after the examination occurred. The defendant challenged the use of the report against him at the juvenile transfer hearing, claiming the failure to notify his attorney prior to his examination violated his Sixth Amendment right to the effective assistance of counsel.

The Court of Criminal Appeals did not consider that the psychological examination itself constituted a critical stage triggering Sixth Amendment protection. Although the juvenile is entitled to the assistance of counsel at his transfer hearing, the abuses the Sixth Amendment was designed to protect against are not present in the psychological examination. Further, the juvenile may challenge his examination in the transfer hearing.

M. GUILTY PLEAS, ADMONISHMENTS

The Court of Criminal Appeals held that a trial court satisfies a plea agreement which sets a ceiling on punishment, when the assessed punishment is deferred adjudication probation within the ceiling.[92] If the trial court later adjudicates guilt due to a violation of the conditions, it may impose a higher sentence because it has satisfied the bargain by its previous assessment of deferred adjudication probation. In two cases, defendants Ditto and Ervin, pursuant to nearly identical plea bargains, agreed to plead guilty in exchange for the State's recommendation that punishment not exceed ten years confinement. Both defendants also filed applications for probation. In Ditto's plea bargain, the State expressly declined

88. *See* Little v. State, 971 S.W.2d 729, 731 (Tex. App.—Dallas 1998), *rev'd*, 991 S.W.2d 864 (Tex. Crim. App. 1999).
89. *Little*, 991 S.W.2d at 867.
90. 983 S.W.2d 746 (Tex. Crim. App. 1999).
91. TEX. FAM. CODE ANN. § 54.02(d) (Vernon Supp. 2000).
92. *See* Ditto v. State, 988 S.W.2d 236 (Tex. Crim. App. 1999).

to make a recommendation on the defendant's application for probation and/or deferred adjudication and left the decision to the court. In Ervin's plea bargain, nothing was said about probation. The judge in each case imposed ten years of deferred adjudication probation, warning that a sentence of up to the maximum of twenty years could be imposed upon violation of the terms of the deferred adjudication probation. In each case, the defendant violated the terms of his probation, the State moved to adjudicate guilt, and the judge imposed a twenty year sentence. In each case, the court of appeals held the trial judge violated the plea agreement by imposing the twenty year sentence.

The Court of Criminal Appeals determined that when the trial courts sentenced the defendants to ten years deferred adjudication, the defendants were sentenced within the terms of their plea bargains. When they violated the deferred adjudication probations, the trial courts had no further obligation to comply with the plea bargains because the bargains had already been completed and satisfied.

The court of appeals misread article 42.12, section 5(b) of the Code of Criminal Procedure when it interpreted that section to permit the defendants to withdraw their pleas. The court of appeals analyzed that provision as beginning "*[W]hen a defendant's deferred adjudication probation is revoked*, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred."[93] The statute actually reads, "*After an adjudication of guilt*, all proceedings, . . . continue as if the adjudication of guilt had not been deferred."[94] The correct wording means that only after guilt has been adjudicated do proceedings continue as if there had been no deferred adjudication. That statute lends no authority for the proposition that the defendants were in a position to withdraw their pleas after their deferred adjudication community services were revoked.

During the past year, the Court of Criminal Appeals also considered whether a defendant who is not a United States citizen has a constitutional right to be admonished of the immigration consequences of a misdemeanor guilty plea and whether the plea is rendered involuntary by lack of admonishments about possible immigration consequences.[95] The Legislature required trial courts to admonish persons pleading guilty of felonies after June 13, 1985 that their plea might result in deportation, but did not require such warnings for those pleading guilty to misdemeanors.[96] The court distinguished between direct and collateral consequences of guilty pleas.[97] A guilty plea is voluntary if the defendant was

93. *Id.* at 93 (quoting *Ervin*, 955 S.W.2d at 419) (emphasis added).
94. TEX. CODE CRIM. PROC. Art. 42.12 § 5(b) (Vernon Supp. 2000).
95. *See* State v. Jimenez, 987 S.W.2d 886 (Tex. Crim. App. 1999).
96. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon Supp. 2000).
97. A consequence is "direct" where it is "definite, immediate and largely automatic." United States v. Kikuyama, 109 F.2d 536, 537 (9th Cir. 1997). A consequence is "collateral" where "it lies within the discretion of the court whether to impose it," or where "its

made aware of the direct consequences of the plea.[98] It is not involuntary by lack of admonishment about a collateral consequence. Deportation is a collateral, not a direct, consequence of a guilty plea.[99] Although the better practice might be to admonish all defendants as to possible deportation consequences, such an admonition is not constitutionally required.[100]

In *Carranza v. State*,[101] the Court held that the trial court's failure to admonish an illegal alien of the consequences of a guilty plea on his immigration status was reversible error. The defendant was in the United States on an expired green card. He pleaded guilty to involuntary manslaughter and the trial court included a deadly weapon finding in the judgment. The trial court admonished the defendant as to the range of punishment, but did not admonish him orally or in writing that he could be deported if he pled guilty. On appeal, the State argued that by advising the defendant the range of punishment for his offense, the trial court substantially complied with article 26.13.[102] The Court of Criminal Appeals disagreed: "[T]o claim that a court is in substantial compliance with 26.13, even though a particular admonishment was never given, would be a legal fiction."[103] However, lacking substantial compliance does not end the inquiry; failure to substantially admonish under article 26.13(a)(4) was subject to harmless error analysis under Rule of Appellate Procedure 44.2.[104]

The Court of Criminal Appeals provided guidelines for applying Rule 44.2.[105] First, determine whether the failure to substantially comply under 26.13 is an error of constitutional magnitude or affects a substantial right.[106] In this case the court determined the trial court's failure to admonish the defendant was not a constitutional error.[107] Next, determine

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imposition is controlled by an agency which operates beyond the direct authority of the trial judge." *Id.*

98. *See Jimenez*, 987 S.W.2d at 888.
99. *See id.* at 888-89.
100. *See Jimenez*, 987 S.W.2d at 889.
101. 980 S.W.2d 653 (Tex. Crim. App. 1998).
102. According to this article 26.13:

> (a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:
>
> (1) the range of punishment attached to the offense;
>
> . . .
>
> (4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.
>
> (b) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.

TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 2000).

103. *Carranza*, 980 S.W.2d at 655.
104. *See id.* at 656.
105. *See id.* at 656-68.
106. *See id.* at 656.
107. *See id.*

whether the failure affected a substantial right.[108] When there has been no substantial compliance, the defendant has to show only that he was not aware of the consequences of his plea and was misled or harmed by the court's admonishment.[109] The State argued that defendant was not harmed by the trial court's failure to admonish him because, as an illegal alien, he was already subject to deportation. However, the court determined that an alien who is convicted of a criminal offense is clearly at a greater disadvantage if subject to deportation as a criminal deportee than an alien who possesses expired immigration documents.[110] The court held that defendant was harmed by the failure to admonish and affirmed the court of appeals.[111]

In *Martinez v. State*,[112] the defendant pled guilty to burglary of a vehicle pursuant to a plea bargain. The trial court deferred a finding of guilty and placed him on community supervision for five years. When the State filed a second motion to revoke, the trial court found that the defendant had violated the terms of his community supervision, found him guilty, and assessed punishment at ten years imprisonment. The range of punishment for the defendant's third degree felony offense was two to ten years. He had signed a form containing written admonishments when he pled guilty that contained blanks for the appropriate minimum and maximum length of imprisonment. The form correctly showed two and ten years. However the form also contained language showing the possibility of a life sentence, language only applicable for a first degree felony offense, and the life sentence language was not stricken on the form the defendant signed. The trial court orally inquired whether the defendant was aware of the applicable range of punishment, but did not reiterate the actual range he faced. The court held that although the trial court delivered an incorrect admonishment regarding the range of punishment, the actual sentence fell within both the actual and misstated maximum.[113] Therefore, the trial court substantially complied with the admonishments required.

In *Aguirre-Mata v. State*,[114] the trial court wholly failed to admonish the defendant as to the range of punishment before accepting his guilty plea to possession of a controlled substance with intent to deliver. The court of appeals reversed and remanded the case because there was no affirmative showing the defendant had full knowledge of the range of punishment; therefore holding that failure to admonish was constitutional error under Rule 44.2(a) of Appellate Procedure.[115] Reversing the court

108. *See id.* at 657-58.
109. *See id.* at 658.
110. *See id.*
111. *See id.*
112. 981 S.W.2d 195 (Tex. Crim. App. 1998).
113. *See id.* at 197.
114. 992 S.W.2d 495 (Tex. Crim. App. 1999).
115. Under the Rules of Procedure, "[i]f the appellate record in a criminal case reveals constitutional error that is subject to a harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a rea-

of appeals, the Court of Criminal Appeals held the defendant did not allege his guilty plea was involuntary as a result of the trial court's failure to admonish him in accordance with article 26.13(a)(1).[116] Therefore, consistent with *Carranza*, the error was subject to a harm analysis under Rule 44.2(b) because it is statutory, not constitutional.[117]

N. VOIR DIRE

A jury found the defendant guilty of capital murder and the trial court sentenced him to death in *Jones v. State*.[118] The defendant contended the trial court erred in granting the State's challenge of a venire member for cause. The trial court granted the State's challenge to the venire person under the theory that she would give accomplice witnesses less credibility than other witnesses. The Court clarified its holding in *Hernandez*,[119] where a venire member was found challengeable for cause if the venire member could not impartially judge a witness's credibility.[120] *Hernandez* must not be interpreted to mean that a venire person is challengeable for cause simply because he would be more skeptical of a certain category of witness than of witnesses generally. Litigants are entitled to jurors with no extreme or absolute positions on the credibility of a category of witness. Jurors need not be completely impartial or free of skepticism toward any category of witness. A venire person is not challengeable for cause simply because he is more skeptical of a certain category of witness than of witnesses generally. "Complete impartiality cannot be realized as long as human beings are called upon to be jurors."[121] Thus, the trial court applied the wrong legal standard, and the venire person was not challengeable.[122]

In its harm analysis, the court noted that the constitutional right to trial by an impartial jury is not violated by every error in the selection of a jury.[123] The rejection of allegedly unqualified persons for insufficient cause does not often deprive the defendant of an impartial jury.[124] Only in very limited cases, when a juror is erroneously excused because of a general opposition to the death penalty, does the exclusion of a juror by an unintentional mistake amount to a constitutional violation.[125]The court saw no constitutional dimension to the error. In examining whether the error affected substantial right, the court reasoned that a defendant

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sonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a).

116. *See Aguirre-Mata*, 992 S.W.2d at 499; TEX. CODE CRIM. PROC. ANN. art 26.13(a)(1) (Vernon Supp. 2000). *See supra* note 34.

117. *See Aguirre-Mata*, 992 S.W.2d at 499.

118. 982 S.W.2d 386 (Tex. Crim. App. 1998).

119. 563 S.W.2d 947, 950 (Tex. Crim. App. 1978).

120. *See Jones*, 982 S.W.2d at 389.

121. *Id.*

122. *Id.*

123. *See id.* at 391.

124. *See id.*

125. *See id.*

has no right that any particular person serve on his jury. The defendant's only substantial right is that the jurors who do serve be qualified. The court overruled *Peyton v. State*,[126] in which it held that a conviction will be reversed when a juror was erroneously excused and the State used all its peremptory challenges. "[T]he erroneous excusing of a venire member will call for reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury."[127]

During a voir dire examination before an aggravated robbery trial, the State explained the law of parties to the prospective jurors and asked them whether if the evidence warranted it, they could find a defendant guilty of aggravated robbery as a party.[128] Later, defense counsel asked them whether they could consider assessing the minimum legal punishment for a defendant found guilty of aggravated robbery as a principal. Two prospective jurors stated unequivocally that they could not. The trial court denied the defense's challenges for cause. The Court stated that both the defendant and the State have the right to have jurors who believe in the full range of punishment.[129] Prospective jurors must be able to accept that, for the offense in question, the minimum and maximum legal punishment will be appropriate in some circumstances.[130] Furthermore, they must be able to keep an open mind with respect to punishment regardless of whether the defendant is guilty as a principal or as a party.[131] The court concluded the trial court abused its discretion in denying the defendant's challenge of the two jurors for cause and remanded the case to the court of appeals for a harm analysis.

In *Gonzales v. State*,[132] a case regarding aggravated assault and possession of a deadly weapon in a penal institution, the defense counsel attempted to query the prospective jurors about the specific defense of necessity. The trial court refused, over counsel's objection, to allow this line of questioning, permitting only general questions on the broader issue of self-defense. The court of appeals concluded the trial court abused its discretion and held this error was not subject to harm analysis.[133] The Court of Criminal Appeals stated that *Cain v. State*,[134] not *Nunfio v. State*, now determines this issue.[135] *Cain* contains a broad mandate that "except for certain federal constitutional errors labeled by the United States Supreme Court as 'structural,' no error . . . is categorically immune

126. 572 S.W.2d 677, 680 (Tex. Crim. App. 1978).
127. *Jones*, 982 S.W.2d at 394.
128. *See* Johnson v. State, 982 S.W.2d 403 (Tex. Crim. App. 1998).
129. *See id.* at 405.
130. *See id.* at 406.
131. *See id.*
132. 994 S.W.2d 170 (Tex. Crim. App. 1999).
133. The court of appeals relied on Nunfio v. State, 808 S.W.2d 482 (Tex. Crim. App. 1991), where the Court of Criminal Appeals held "error in the denial of a proper question that prevents the intelligent exercise of one's preemptory challenges constitutes an abuse of discretion and is not subject to a harm analysis." *Id.* at 485.
134. 947 S.W.2d 262 (Tex. Crim. App. 1997).
135. *See Gonzales*, 994 S.W.2d at 171.

[from] a harmless error analysis."[136] Erroneously restricting proper questions during voir dire has not been held to be structural error of a federal constitutional nature.[137] Therefore, the appellate court was required to conduct a harm analysis before reversing the conviction.

II. TRIAL

A. OPENING STATEMENT

In *Tucker v. State*,[138] after the state rested its case in chief , the defendant's counsel said, "At this time the defense would like to make an opening statement." The court denied the request. Counsel said, "Okay. In that case we will call [our first witness]." Relying on *Dunn v. State*,[139] the court of appeals concluded that the defendant failed to preserve his complaint. The Court of Criminal Appeals reversed, stating that its holding in *Dunn* was limited to its facts.[140] In *Tucker*, unlike *Dunn*, there was a specific request and an adverse ruling.[141]

B. EVIDENCE

In *Mozon v. State*,[142] a high school girl threw a cup of gasoline on another student while they sat in the high school cafeteria and lit it with a piece of paper, injuring him. The defendant testified that the complainant had repeatedly threatened her, and she believed he meant to injure her as soon as he finished eating. The defendant sought to testify that she knew at the time of the incident of three prior violent incidents involving the complainant. She maintained this testimony went to the reasonableness of her belief that the complainant was about to harm her when she threw the gasoline on him. The trial court ruled the evidence relevant to her claim of self-defense but inadmissible under Texas Rule of Evidence 403.[143] The defendant argued that the Rule 403 balancing test did not apply to the evidence because it supported her self-defense claim. The Court determined that the evidence was admissible under Rule 404(b)[144] to show that the defendant reasonably believed she was in danger and the

136. *Id.*
137. *See Gonzales*, 994 S.W.2d at 171.
138. 990 S.W.2d 261 (Tex. Crim. App. 1999).
139. 819 S.W.2d 510 (Tex. Crim. App. 1991).
140. In *Dunn*, a capital murder defendant represented himself. The trial began shortly after a statutory amendment allowed a defendant the choice of making an opening statement immediately after the State's opening statement, rather than waiting until after the State rested its case-in-chief. After the State made its opening statement, Dunn asked, "Before the State's witness takes the stand, may I make a brief statement to the jury?" When the court told Dunn, "You will be able to do that when it comes your time to put on your evidence," Dunn said, "Thank you." The Court of Criminal Appeals concluded Dunn's interchange was not sufficiently specific to inform the trial court of the basis of the objection and give it the opportunity to cure the problem.
141. Moreover, the Court did not interpret the *Tucker* response "Okay" to mean the defendant acquiesced to the trial court's ruling.
142. 991 S.W.2d 841 (Tex. Crim. App. 1999).
143. TEX. R. EVID. 403.
144. TEX. R. EVID. 404(b).

force she used against the complainant was immediately necessary to protect herself.[145] Regardless, all relevant evidence is subject to the Rule 403 balancing test, with no exception for evidence relevant to a defensive theory.[146] The court of appeals was cited for failing to follow the relevant 403 criteria set out in *Montgomery v. State*[147] in that the court of appeals did not discuss the prejudice that the evidence would cause the State. The Court remanded, instructing the court to address the evidence's prejudice to the State.

In *Butterfield v. State*,[148] a sexual assault case, the State sought custody of the defendant' stepdaughter who was missing. At a hearing to determine her whereabouts, Butterfield was asked questions about the missing stepdaughter and her mother. Butterfield invoked his Fifth Amendment privilege against self-incrimination, but the judge ordered him to respond to the questions. The State subsequently indicted Butterfield for perjury on the basis of the defendant's responses. The trial court granted the defendant's motion to suppress the statements in a subsequent perjury trial based on the privilege against self-incrimination. The State appealed. The court of appeals affirmed the Court of Criminal Appeals held that the trial court violated Butterfield's Fifth Amendment rights by compelling him to answer the questions without granting him immunity. However, the court stressed that the Fifth Amendment gives no protection for perjury. and the statements could be admitted into evidence at his perjury trial.

In *Howland v. State*,[149] the defendant was convicted of two aggravated sexual assaults and two acts of indecency with a child. The court reviewed the case to resolve a split among courts of appeals regarding applicability of article 38.37 of the Code of Criminal Procedure[150] to cases

145. *See Mozon*, 991 S.W.2d at 846.

146. *See id.*

147. "The reviewing court must look at the proponent's need for the evidence in addition to determining the relevance of the evidence." The relevant criteria in determining whether the prejudice of an extraneous offense outweighs its probative value include: (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable; (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way;" (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact; and (5) is this fact related to an issue in dispute. Santellan v. State, 939 S.W.2d 155, 169 (Tex.Crim.App.1997) (*citing Montgomery*, 810 S.W.2d at 389-90).

148. 992 S.W.2d 448 (Tex. Crim. App. 1999).

149. 990 S.W.2d 274 (Tex. Crim. App. 1999).

150. Article 38.37 applied to prosecutions of defendants for sexual and assaultive offenses committed against a child under 17 years of age:

> Sec. 2. Notwithstanding Rules 404 and 405, Texas Rules of Criminal Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:
>
> (1) the state of mind of the defendant and the child; and
>
> (2) the previous and subsequent relationship between the defendant and the child.

where the indictment was returned before the statute's effective date of September 1, 1995. The defendant argued that because he was indicted before the effective date of article 38.37, the article did not apply to any part of his prosecution, even though his trial began after its effective date. The court held that article 38.37 is applicable to any one of many isolated proceedings within a prosecution, so long as the proceeding at issue occurred after September 1, 1995.

In *Maestas v, State*,[151] the defendant was arrested for aggravated assault with a deadly weapon. During the arrest, police advised her she was under arrest and read her the Miranda warnings. The defendant was "Mirandized" again when they arrived at the police station an hour later. The defendant indicated she understood, signed a waiver, and stated she did not want to talk to police. The next morning, the defendant signed another waiver form and reiterated that she did not want to talk to police. That evening, her arresting officer brought her to his office, Mirandized her again, and asked her some questions. She then indicated she wanted to talk to police. The officer Mirandized her again, and she signed a statement that she understood her rights. The defendant then gave a statement. The trial court overruled her motion to suppress the statement and admitted the statement at trial.

The Court applied the *Mosley*[152] factors to determine whether the police "scrupulously honored" the defendant's "right to cut off questioning."[153] Reviewing the case de novo,[154] the court concluded that the police "scrupulously honored" the defendant's right to remain silent.[155]

In *Bingham v. State*, the Court reviewed a statement against interest exception to the hearsay rule.[156] The defendant's home was destroyed by fire. During the police investigation, his wife admitted to the investigating officer that she and her husband planned the fire to collect insurance money, and that her husband lit the fire himself. At the defendant's arson trial, the trial court overruled the defendant's hearsay objection to the officer's testimony about his wife's comments. The Court noted that nowhere in Rule 803(24)[157] does it limit the exception to cases in which

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> Sec. 3. On timely request by the defendant, the state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 2 in the same manner as the state is required to give notice under Rule 404(b), Texas Rules of Criminal Evidence.
>
> Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

TEX. CODE CRIM. PROC. ANN. art. 38.37 (Vernon Supp. 2000).

151. 987 S.W.2d 59 (Tex. Crim. App. 1999).

152. Michigan v. Mosley, 423 U.S. 96.

153. (1) whether the suspect was informed of his right to remain silent prior to the initial questioning; (2) whether the suspect was informed of his right to remain silent prior to the subsequent questioning; (3) the length of time between initial questioning an subsequent questioning; (4) whether the subsequent questioning focused on a different crime; and (5) whether police honored the suspect's initial invocation of the right to remain silent.

154. *See* Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

155. *See Maestas*, 987 S.W.2d at 61-64.

156. Bingham v. State, 987 S.W.2d 54 (Tex. Crim. App. 1999).

157. TEX. R. EVID. 803(24).

the defendant is the declarant, and held such statements are admissible, regardless of whether the criminal defendant is the declarant of the statement.[158]

The defendant in *Marx*[159] was indicted for aggravated sexual assault of a thirteen year old child. Evidence showed that complainant and a six year old witness were afraid of testifying in the defendant's presence and would suffer emotionally and perhaps physically if they were forced to do so. Over the defendant's objections, the trial court permitted the two girls to testify via two-way closed circuit television outside the defendant's presence. The Court of Criminal Appeals stated that the Confrontation Clause's preference for face-to-face confrontation at trial must occasionally give way to considerations of public policy and the necessities of the case. The trial court acted in accordance with *Maryland v. Craig*[160] in finding that the device was necessary to protect both children from the trauma of having to testify in the defendant's physical presence, and the record supported that fact finding. In response to the defendant's complaint that admitting the closed circuit television testimony impaired his presumption of innocence, the court suggested that the jury would probably interpret the closed circuit testimony as protecting children from the intimidating courtroom environment rather than being necessary because of the defendant's guilt. Finally, the court reviewed whether the trial court violated article 38.071 of the Code of Criminal Procedure[161] because the complainant was thirteen years old at the time of the offense and at trial.[162] The court determined that the legislature did not intend to exclude the use of special testimonial procedures in circumstances not specified in section one, if the procedures are constitutional. Therefore, article 38.071 did not prohibit the use of the closed circuit television testimony of the thirteen year old.

158. Admissibility of a statement against interest under rule 803(24) requires a two-step inquiry: determination whether the statement tends to expose the declarant to criminal liability and determination of whether there are corroborating circumstances to clearly indicate the trustworthiness of the statement. In reversing the trial court, the court of appeals did not consider all of the "corroborative circumstances" evidence available to the trial court for considering the trustworthiness of the statement, but only considered the circumstances at the time the wife made her statement to the officer. Citing *Davis v. State*, 872 S.W.2d 743 (Tex. Crim. App. 1994). the court stated that all evidence must be considered.

159. Marx v. State, 987 S.W.2d 577 (Tex. Crim. App. 1999).

160. 497 U.S. 836 (1990).

161. TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 2000).

162. Article 38.071 provides that, in certain circumstances, a child witness's testimony may be taken via videotape or closed circuit television, outside the defendant's presence:

> This article applies only to a proceeding in the prosecution of an offense defined by any of the following sections of the Penal Code [including aggravated sexual assault of a child] if the offense is alleged to have been committed against a child 12 years of age or younger and if the trial court finds that the child is unavailable to testify at the trial of the offense, and applies only to the statements or testimony of that child.

C. DEFENSES

In *Giesberg v. State*,[163] a murder prosecution, several witnesses testified that they saw the defendant standing over the victim's body. The defendant presented evidence that he was elsewhere at the time of the murder. At the close of the evidence, the trial court denied the defendant's request for a jury instruction on alibi.

The Court of Criminal Appeals that the defendant was not entitled to an instruction on alibi because this theory "constitutes no more than a negation of an essential element of the State's case; specifically, that [the defendant] committed the offense at the alleged time and location."[164] The Court, in *Wright v. State*,[165] recently recognized that a defense to prosecution for possession of a controlled substance is available if the controlled substance was (1) obtained abroad for personal individual use pursuant to a valid foreign prescription from a physician permitted in his jurisdiction to dispense controlled substances and (2) the substance was brought into this country in accordance with federal law. However, because the jury was not instructed on this defense, the court held the court of appeals improperly assumed the role of a fact-finder by determining the defense was established by the evidence.

In *Floyd v. State*,[166] the defendant was indicted for violations of the Texas Securities Act. The defendant entered into a plea bargain agreement in which he agreed to plead nolo contendere in exchange for a ten-year probated sentence and a $300 fine. The trial court followed the plea bargain, deferred adjudication of the defendant's guilt, and assessed the agreed sentence. In a motion for new trial, the defendant complained for the first time that the evidence was insufficient to support his conviction because the prosecution was barred by the statute of limitations. Following *Lemell v. State*[167] the court of appeals concluded the prosecution was barred because limitations had run.[168] The Court of Criminal Appeals noted that it had overruled *Lemell* in *Proctor v. State*[169] which held that a statute of limitations claim is a defense which a defendant will forfeit if he does not assert it at or before the guilt or innocence phase of trial.[170] As the defendant failed to raise this defense before trial or during the presentation of evidence on his nolo contendere pleas, he forfeited it under *Proctor*.[171]

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163. 984 S.W.2d 245 (Tex. Crim. App. 1998) (en banc).

164. The court further noted that an instruction on the issue of alibi would also constitute an improper comment on the weight of the evidence by drawing unwarranted attention to evidence that the defendant was at another place when the crime was committed. In addition, the legislature has not made alibi a defense or an affirmative defense.

165. 981 S.W.2d 197 (Tex. Crim. App. 1998) (en banc).

166. 983 S.W.2d 273 (Tex. Crim. App. 1998) (en banc).

167. 915 S.W.2d 486 (Tex. Crim. App. 1995) (en banc).

168. *See* Floyd v. State, 914 S.W.2d 656, 658 (Tex. App.—Texarkana 1996, pet. granted).

169. 967 S.W.2d 840 (Tex. Crim. App. 1998) (en banc).

170. *Id.* at 844.

171. *Floyd*, 983 S.W.2d at 274.

In *Jones v. State*,[172] a robbery prosecution, the State's evidence showed the defendant fought with several loss prevention officers as he attempted to leave a grocery store without paying. Jones denied attempting to steal or assaulting the loss prevention officers but on cross-examination, the defendant stated that he "did self defense." At the close of the evidence, the trial court denied the defense request that the jury be instructed on the lesser-included offenses of misdemeanor assault and misdemeanor theft. He asserted these offenses were raised by his testimony that he did not commit robbery. On appeal, the court concluded that the evidence that the defendant was seen taking several items combined with the defendant's testimony that he did not commit an assault raised the issue of misdemeanor theft.[173] Likewise, the State's evidence that the defendant assaulted the loss prevention officers and the defendant's testimony that he did not take any items from the store raised the issue of misdemeanor assault.[174]

The Court of Criminal Appeals held that if there is evidence within a defendant's testimony that raises the lesser-included offense, it is not dispositive that this evidence does not fit in with the larger theme of the defendant's testimony.[175] The controlling question is whether there is *any* evidence that raises the lesser-included offense, because the trier of fact is always free to selectively believe all or part of the testimony proffered by either side.

In *Ochoa v. State*,[176] the Court of Criminal Appeals held that evidence of a single act of sexual touching did not support convictions for both aggravated sexual assault and indecency with a child. The evidence showed the defendant committed only one offense against the complainant on a particular date. Therefore, the trial court should have either (1) required the State to elect which offense upon which it would proceed, or (2) submitted the offense of indecency with a child as a lesser-included offense of aggravated sexual assault.

In *Barrera v. State*,[177] the Court considered the proper standard of review when, in the absence of an objection, a jury charge includes an instruction on the law of self defense but fails to apply self defense in the application paragraph. The trial court has no duty to *sua sponte* charge the jury on unrequested defensive issues raised by the evidence. But by including the instruction in the abstract portion of the charge, the trial court signaled that the law of self defense applied in this case. Therefore,

172. 984 S.W.2d 254 (Tex. Crim. App. 1998) (en banc).

173. Jones v. State, 962 S.W.2d 96, 98 (Tex. App.—Houston [1st Dist.] 1997, pet. granted).

174. *Id.*

175. On petition for discretionary review, the State asserted the court of appeals erred by combining parts of the State's evidence and combining it with parts of the defendant's evidence to find the lesser-included offenses were raised. When the defendant's testimony was taken as a whole, it indicated he committed no crime at all, and therefore his testimony does not show that if he is indeed guilty, he is guilty only of the lesser-included offenses.

176. 982 S.W.2d 904 (Tex. Crim. App. 1998) (en banc).

177. 982 S.W.2d 415 (Tex. Crim. App. 1998).

by failing to apply self defense to the facts of the case, the trial court committed charge error. The court further concluded that this error did not implicate the defendant's federal constitutional rights because it was only a technical violation of a state law rule. Thus, the error was subject to the "egregious harm" analysis applicable to charge errors generally when the defendant neither requested the charge or objected to the charge given.[178]

D. PUNISHMENT

In *Dickens v. State*,[179] the court considered when the elements of an aggregated offense occur for the purpose of determining the effective date of an amended sentencing statute. The defendant committed forty-four thefts pursuant to a continuing scheme between August 20, 1993 and September 14, 1994. The aggregate amount stolen was $96,786.16. The State charged the defendant with a single count of aggregated theft of more than $20,000 but less than $100,000. The defendant pleaded guilty, and the trial court assessed a twenty-year sentence and a $1000 fine. On appeal, the defendant asserted the trial court erred in assessing a twenty-year sentence because, effective September 1, 1994, the legislature reduced the maximum sentence for her offense from twenty years to ten years; because some of her thefts were committed after September 1, 1994, the aggregated offense occurred after the effective date of the sentencing statute and therefore her sentence exceeded the statutory maximum sentence allowed.

The court of criminal appeals noted that the amending legislation contained a savings clause, which provided that an aggregated offense is committed "on or before the effective date of this article if any element of the offense is committed before the effective date."[180] Under the aggregation statute, multiple theft offenses may be combined into a single offense. Each subsidiary theft is a component or element of the single aggregated offense. Therefore, because the defendant committed some elements, *i.e.*, thefts, before the effective date of the amendment reducing the maximum sentence, the trial court correctly applied the former law in sentencing the defendant.

In *Coffey v. State*,[181] the defendant pleaded guilty and was placed on probation for five years and fined $750. The trial court subsequently revoked the defendant's probation and orally assessed a five-year sentence. The written judgment, however, also included a $750 fine that the trial court did not orally pronounce at the revocation hearing. The court of appeals affirmed the trial court's judgment but reformed the sentence to

178. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981); Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984).

179. 981 S.W.2d 186 (Tex. Crim. App. 1998) (en banc).

180. *Id.* at 188.

181. 979 S.W.2d 326 (Tex. Crim. App. 1998) (en banc).

delete the $750 fine because it was not orally pronounced.[182] The State argued that the court of appeals erred in reforming the judgment to delete the fine.

The Court of Criminal Appeals held that, when there is a variation between the oral pronouncement of sentence and the written memorialization of sentence, the oral pronouncement controls. The court of appeals erred in deleting the fine because the record showed that fine was not probated. Because the $750 fine was imposed when punishment was assessed at the original plea hearing, it was appropriately included in the judgment revoking the defendant's probation.[183]

In *Rogers v. State*,[184] the defendant was convicted of attempted capital murder and sentenced to life in prison. During the punishment phase, the State offered three penitentiary packets which contained the length of the sentence assessed in each case. The defendant objected[185] and requested that the sentences be redacted. The Court held that the sentences assessed for prior convictions are relevant in the context of the jury's decision on punishment because they help the jury tailor the sentence to the particular defendant.[186]

In *Yvanez v. State*,[187] the defendant pleaded guilty to four counts of intoxication manslaughter and one count of intoxication assault, and the jury assessed a forty-year sentence and a fine in each conviction for intoxication manslaughter and a ten-year sentence and a fine in the conviction for intoxication assault. The trial court ordered the sentences to run concurrently except for the sentence in the second count of intoxication manslaughter, which the trial court ordered to run consecutively. The court of appeals affirmed the defendant's convictions, but determined *sua sponte* that the trial court erred in ordering the sentence in the second intoxication manslaughter case to run consecutively.

The Court of Criminal Appeals determined that the court of appeals erred in concluding that no exception to the "concurrent sentences" rule contained in section 3.03 of the Texas Penal Code applied in the instant case. When the defendant committed his offenses, section 3.03 of the penal code provided that, if the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction for in-

182. Coffey v. State, No. 05-96-00181-CR (Tex. App.—Dallas July 8, 1997) (not designated for publication).

183. Coffey v. State, 979 S.W.2d 326, 329 (Tex. Crim. App. 1998) (en banc).

184. 991 S.W.2d 263 (Tex. Crim. App. 1999) (en banc).

185. The length of the sentences was irrelevant and any probative value was substantially outweighed by the danger of unfair prejudice.

186. The court noted that article 37.07, section 3 of the code of criminal procedure also governs the admissibility of evidence during the punishment stage of trial. This section provides that evidence may be offered by the State and the defendant on any matter the court deems relevant to sentencing, "including but not limited to the prior criminal record of the defendant." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2000).

187. 991 S.W.2d 280 (Tex. Crim. App. 1999) (en banc).

toxication manslaughter.[188] The court concluded that the defendant's second count of intoxication manslaughter was within the exception created by the legislature; therefore, the trial court acted within its discretion in sentencing the defendant consecutively in any of the intoxication manslaughter cases. However, the trial court could not order sentence for the intoxication manslaughter conviction to run consecutively to the conviction for intoxication assault because intoxication assault is not encompassed by the statutory exception.

In *Bell v. State*,[189] the defendant was convicted for retaliation committed against a jailer while the defendant was an inmate at the penitentiary serving a sentence for burglary of a habitation. Under the authority of article 42.08(b) of the Code of Criminal Procedure, the trial court ordered the sentence in the retaliation case to run consecutively to the sentence in the burglary case. Relying on *Resanovich v. State*[190] and *Turner v. State*,[191] the court of appeals held that the trial court erred in stacking the sentences because there was no record evidence of the prior burglary conviction and that the defendant was the person convicted.[192]

The Court of Criminal Appeals reversed, holding that nothing in the plain language of article 42.08(b) required such proof.[193] In addition, the court of appeals erred in reforming the trial court's judgment to delete the cumulation order on the grounds that allowing the State a second chance to present its proof of the prior burglary conviction would violate the double jeopardy provisions of the state and federal constitutions in view of the *Monge v. California*[194] holding that double jeopardy principles are generally not applicable to noncapital sentencing proceedings was dispositive of this issue. Any case to the contrary was overruled.[195]

III. PROBATION REVOCATION: NOTICE OF APPEAL

In *Rodriguez v. State*[196] the defendant pled nolo contendere to voluntary manslaughter in 1982 and the trial court placed him on ten years deferred adjudication. In 1988 the State moved to adjudicate on the basis of probation violations. The defendant was arrested in 1996. In 1997, the trial court adjudicated the defendant guilty of the offense and sentenced him to twenty years confinement. The defendant appealed, claiming the

188. *See* TEX. PENAL CODE ANN. § 3.03(b) (Vernon Supp. 2000).
189. 994 S.W.2d 173 (Tex. Crim. App. 1999) (en banc).
190. 906 S.W.2d 40, 42-43 (Tex. Crim. App. 1995).
191. 733 S.W.2d 218, 223 (Tex. Crim. App. 1987).
192. *See* Bell v. State, No. 14-96-00388-CR, slip op. at 3, 1999 WL 418766 (Tex. App.—Houston [14th Dist.] July 23, 1998, pet. granted) (not designated for publication).
193. The reasons for requiring specificity in a cumulation order under article 42.08(a) do not exist under article 42.08(b), which provides that cumulation is mandatory.
194. 524 U.S. 721 (1998).
195. *See, e.g.*, Cooper v. State, 631 S.W.2d 508 (Tex. Crim. App. 1982); *Ex parte* Augusta, 639 S.W.2d 481 (Tex. Crim. App. 1982); Carter v. State, 676 S.W.2d 353 (Tex. Crim. App. 1984); Washington v. State, 677 S.W.2d 524 (Tex. Crim. App. 1984); *Ex parte* Gonzales, 707 S.W.2d 570 (Tex. Crim. App. 1986); *Ex parte* Quirke,710 S.W.2d 582 (Tex. Crim. App. 1986).
196. 992 S.W.2d 483 (Tex. Crim. App. 1999).

State failed to use due diligence in apprehending him and bringing him in for a hearing. The court of appeals dismissed the appeal for lack of jurisdiction because the defendant filed a general notice of appeal. The Court of Criminal Appeals agreed that the court of appeals lacked jurisdiction under *Connolly v. State*.[197]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In *Hernandez v. State*,[198] the Court of Criminal Appeals announced that the *Strickland*[199] two-prong standard[200] applies to ineffective assistance of counsel claims at the punishment as well as the guilt/innocence phase of trial. The court overruled *Ex parte Duffy*[201] as modified by *Ex parte Cruz*.[202]

In *Kober v. State*,[203] the defendant strangled the deceased while a witness was present. The witness gave police statements that she saw the defendant commit the offense. The defendant's attorney related this information to the defendant who decided to plead nolo contendere and hope to get deferred adjudication. The defendant did so and received deferred adjudication. A year later, the trial court adjudicated him guilty.

In a motion for new trial, the defendant argued ineffective assistance of counsel because his attorney did not interview the witness. At the hearing, the defendant presented the witness's affidavit that she was high on cocaine when she spoke to the police and that the police threatened her to obtain her statement. The witness said in the affidavit that she did not witness the murder and that she would not have testified if the defendant had a trial because she feared retaliation. However, when called to testify at the hearing, the witness invoked her Fifth Amendment privilege against self-incrimination. The prosecutor testified he interviewed the witness and she was not intimidated by the police. The defendant's attorney stated that he assumed the witness was high on cocaine when witnessing the crime. The court of appeals reversed on the prejudice prong of *Strickland* because "he [the defense attorney] might have discovered that [the witness] might possibly have had a credibility problem because she was under the influence of cocaine or that she was reluctant to testify against appellant."[204]

The Court of Criminal Appeals reversed the court of appeals because "might have discovered" the credibility problem and unwillingness to tes-

197. *Id.* at 484 (citing Connolly v. State, 983 S.W.2d 738, 741 (Tex. Crim. App. 1999).
198. 988 S.W.2d 770 (Tex. Crim. App. 1999)).
199. Strickland v. Washington, 466 U.S. 668 (1984).
200. The two-prong Strickland test is (1) whether counsel's conduct was deficient and (2) whether counsel's deficient performance prejudiced the defendant; that is, whether, but for the counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687.
201. 607 S.W.2d 507 (Tex. Crim. App. 1980).
202. 739 S.W.2d 53 (Tex. Crim. App. 1987).
203. 988 S.W.2d 230 (Tex. Crim. App. 1999).
204. Kober v. State, No. 14-95-00864-CR, slip op. at 8, 1997 WL 590783 (Tex. App.—Houston [14th Dist.] September 25, 1997) (unpublished).

tify is the wrong standard.[205] To satisfy the prejudice prong of *Strickland*, the defendant must show "a reasonable probability that, but for counsel's [failure to discover these facts]" the defendant would not have pleaded nolo contendere.[206] The trial court determined the facts showed the defendant's counsel knew of the witness's cocaine use and credibility problems. Citing the *Guzman* standard,[207] the court stated the issue of the witness's willingness to testify was a credibility issue for the trial court and that the evidence supported a finding that the witness had not been unwilling to testify. If the defendant and his counsel were aware of the cocaine credibility issue from other sources, an interview with the witness would have revealed nothing new affecting the defendant's decision to plead nolo contendere.[208]

In *Ex parte Moody*,[209] the Court of Criminal Appeals held that defense counsel's incorrect advice that after pleading to a State possession offense, the defendant would be returned to federal custody to serve his federal and state sentences concurrently, constituted ineffective assistance of counsel.[210] In *Moody*, the defendant was arrested for possession of a controlled substance. While on bond, he was also arrested for a federal offense, for which he was sentenced to a term in federal prison. Prior to serving his federal sentence, the defendant was transferred to state district court to resolve his possession case. The prosecutor offered a plea bargain of fifteen years confinement. Defense counsel, after consulting the defendant's federal public defender, repeatedly assured the defendant that, after pleading guilty, he would be returned to federal custody to serve both terms concurrently. Relying on this information, the defendant opted to plead guilty. After being transferred to the Texas Department of Criminal Justice and learning his federal sentence would not begin until his release from state custody, the defendant contended his plea was involuntary, due to ineffective assistance of counsel, because he relied on his counsel's erroneous advice.

The Court of Criminal Appeals agreed. When assessing the defense counsel's competence, the court holds counsel accountable for knowledge of relevant legal matters that are neither novel nor unsettled.[211] Whether the defendant would serve his sentences concurrently or consecutively was a matter of law and ascertainable. The court determined that the counsel's mistake was not within the range of competence for a criminal

205. *Kober*, 988 S.W.2d at 233.

206. *Id.*

207. Appellate courts must "afford almost total deference" to a trial court's determination of the historical facts and of mixed questions of law and fact that "[turn] on an evaluation of credibility and demeanor." Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

208. Meyers, J., joined by Holland, Price, and Johnson, JJ., concurred in the decision to reverse the appeals court but would have remanded to the court of appeals to re-perform the *Strickland* analysis instead of the Court of Criminal Appeals performing the analysis.

209. 991 S.W.2d 856 (Tex. Crim. App. 1999).

210. *Id.* at 859.

211. *Moody*, 991 S.W.2d at 858, *citing Ex parte Welch*, 981 S.W.2d 183 (Tex. Crim. App. 1998).

attorney. Second, the court concluded the defendant showed a reasonable probability that, but for his counsel's erroneous advice, he would not have pled guilty. The court distinguished this case from a case in which a defendant relies on erroneous parole eligibility information, which is speculative by nature.[212] The court set aside the judgment and remanded the case.

In *Young v. State*,[213] the Court of Criminal Appeals held that the defense attorney's failure to request a jury instruction on necessity did not deprive him of the effective assistance of counsel.[214] In *Young*, the defendant did not present the defense of necessity at his attempted murder trial. To raise necessity, a defendant must admit he committed the offense, then offer necessity as a justification.[215] The defendant did not admit to attempted murder, but rather argued he did not commit attempted murder because he lacked the requisite intent and he did not perform the actions the State alleged. Therefore, he was not entitled to a jury instruction on the defense of necessity. Consequently, his counsel was not deficient in failing to request an instruction.[216]

In *Ex parte Patterson*,[217] the defendant was convicted of attempted capital murder. The Court of Criminal Appeals had remanded the defendant's writ application for the trial court to determine whether his trial counsel was ineffective for failing to object to a prior conviction being included in the enhancement paragraphs because the prior conviction was void due to a fundamental defect. The trial court entered findings of fact and conclusions of law, and found that the counsel's affidavit showed he was not ineffective. Although the affidavit indicated the counsel did not investigate the validity of the prior convictions because appellant instructed him "not to concern [him]self with punishment issues or evidence," the Court of Criminal Appeals did not find sufficient evidence in the record to determine whether the trial court adequately advised the defendant on this matter.

The Court of Criminal Appeals remanded the writ application for a hearing. The court spelled out to the trial court what it expected, the trial court should determine what the defendant's trial counsel told him concerning (1) what challenges, if any, the defendant could make against the prior convictions; (2) the likelihood of the trial court setting them aside on those grounds; (3) the defendant's ability to appeal the trial court's refusal to set the prior convictions aside; and (4) the consequences of the defendant's failure to make these challenges at trial. If the trial court determines trial counsel advised the defendant of the matters it should also determine why the defendant chose not to pursue the challenges.

212. *Moody*, 991 S.W.2d at 858.
213. 991 S.W.2d 835 (Tex. Crim. App. 1999).
214. *Id.* at 839.
215. *Id.*
216. *Id.*
217. 993 S.W.2d 114 (Tex. Crim. App. 1999).

In *Phillips v. State*,[218] the defendant was convicted of felony driving while intoxicated (DWI).[219] The indictment alleged four prior DWI convictions. The State also sought to prove the defendant was a habitual felony offender, that is, a person who has previously been convicted of two felony offenses, with the second previous felony conviction for an offense that occurred after the first previous conviction became final.[220] The indictment showed four previous DWIs from 1986, 1987, 1990, and 1991. The indictment also alleged that before committing the felony DWI the defendant had been convicted of four felony offenses: DWI in 1991, DWI in 1990, burglary of a building in 1984, and burglary of a vehicle in 1983. The two burglaries were insufficient to show that the defendant was a habitual felony offender because the 1984 offense did not occur after the 1983 offense became final. Therefore, the State had to show at least one of the DWI convictions it alleged to enhance his DWI to a third degree felony, also to show the defendant was a habitual felony offender.

The Court of Criminal Appeals determined that the penal code clearly allows the convictions to be used either to enhance the DWI offense to a felony, or to enhance the punishment as a habitual offender, but not both.[221] However, it did not necessarily follow that, by not objecting to the indictment, the defendant's assistance was rendered ineffective.[222] The court applied the second prong of the *Strickland* test and determined that, if the defendant had objected to the State's use of the 1990 and 1991 DWI convictions to enhance the DWI to a felony, the State could have amended the indictment to eliminate these allegations and the other two DWI convictions would still be adequate to enhance the DWI to a felony.[223] Likewise, if the defendant had objected to the use of the 1990 and 1991 DWI convictions to show that he was a habitual felony offender, the State could have amended the indictment to eliminate either of the allegations. Either of the burglaries with either of the DWIs would have been sufficient to show defendant to be a habitual felony offender. Therefore, the defendant could not show a reasonable probability his sentence would have been different if his counsel had objected to the double use of the prior offenses and the defendant's ineffective assistance of counsel argument failed on the second prong of the *Strickland* test.[224]

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218. 992 S.W.2d 491 (Tex. Crim. App. 1999).

219. DWI is a felony only if it is shown that the person has two previous DWI convictions. TEX. PENAL CODE ANN. § 49.09(b) (Vernon Supp. 2000).

220. If a person who is guilty of a third degree felony such as felony DWI is shown to be a habitual felony offender, that person may be punished by imprisonment for life or for any term of 25 to 99 years. TEX. PENAL CODE ANN. § 12.42(d) (Vernon 2000).

221. Section 49.09(f) provides:

> A conviction may be used for the purposes of enhancement under this section which provides for enhanced offences for DWI or enhancement under Subchapter D, Chapter 12 which provides for enhanced penalties for habitual felony offenders, but not under both this section and Subchapter D.

TEX. PENAL CODE ANN. § 49.09(f) (Vernon Supp. 2000).

222. *Phillips*, 992 S.W.2d at 494.

223. *Id.* at 495.

224. *Id.*

In *Ex parte Carrio*,[225] a post-conviction application for habeas corpus, the defendant's convictions of murder and attempted murder were affirmed on appeal. Applying fourteen years later for a writ of habeas corpus, the defendant contended he received ineffective assistance of counsel and his convictions should be set aside. The trial court recommended relief be denied under the doctrine of laches. The Court of Criminal Appeals had never denied relief on a valid claim due to a defendant's delay in bringing the claim.[226] However, federal courts recognize the doctrine of laches in evaluating post-conviction writs of habeas corpus and have codified the doctrine in Rule 9(a) of the Rules Governing § 2254 Cases.[227] Reviewing the federal courts' rationale for employing the doctrine of laches, the court determined that it could and should consider laches when deciding whether to grant habeas relief.[228] The court then sent the matter back to the trial court to resolve the question of whether the defendant's request should be denied on the basis of laches.

225. 992 S.W.2d 486 (Tex. Crim. App. 1999).
226. *Id.* at 487.
227. Rule 9(a) provides as follows:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

28 U.S.C. § 2254.
228. *Carrio*, 992 S.W.2d at 488.