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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. ARREST

In *Dejarnette v. State*, the Court of Criminal Appeals held that the proximity in time between when a crime is committed and the arrest of those responsible, coupled with discovery of pursuit, while not individually dispositive, are relevant factors the court should examine when deter-

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mining whether escape of the perpetrators was imminent.[1] In *Hughes v. State*, police officers staking out a theater where a rash of robberies had occurred noticed two men, hunched over and concealing something, get in a car and drive off at speeds of up to ninety miles per hour.[2] When other officers found two theater patrons shot dead, the officers tailing the suspicious men continued to follow them until the two suspects stopped at a gas station and were arrested without a warrant.[3] The Court of Criminal Appeals upheld the *Dejarnette* standard and allowed an arrest without a warrant, finding that the officers had probable cause to arrest absent a warrant because the appellant was highly mobile and would have most likely escaped without police intervention.[4] Under the totality of the circumstances, there was sufficient proof that the two suspicious men were responsible for the crime.[5] The court stated "[i]t would have been unreasonable to break pursuit, abandon the fresh trail of a recently committed crime, and force police to acquire an arrest warrant in hopes of encountering the car and its occupants at some later time."[6]

B. INDICTMENT

The Texas Constitution gives all defendants the right to indictment by grand jury for all felony offenses.[7] Further, the notice of the offense charged comes from the face of the indictment so that the defendant may prepare an adequate defense in advance of trial.[8] In *Riney v. State*, the Court of Criminal Appeals held that a photocopy of the original indictment, which was interlineated and incorporated into the court clerk's file with the appellant's knowledge and approval, was sufficient to make the amended portion of the indictment the official indictment.[9] The decision overruled the court's previous holdings in *Ward v. State*[10] and *Eastep v. State*,[11] and abrogated *Rent v. State*,[12] to hold that physical interlineation of the original indictment is not the sole means to accomplish an amendment to the indictment.[13]

The Court of Criminal Appeals requires that the State must allege in the indictment for a crime of "abduction" which type of abduction it seeks to prove in order to give the defendant notice. In *Curry v. State*, the court affirmed the El Paso Court of Appeals holding to reverse and remand a case for new trial where the trial court allowed the state to

1. 732 S.W.2d 346, 352 (Tex. Crim. App. 1987).
2. 24 S.W.3d 833, 839 (Tex. Crim. App. 2000).
3. *Id.*
4. *Id.*
5. *Id.* (citing Dejarnette v. State, 732 S.W.2d at 351).
6. *Id.*
7. *See* Cook v. State, 902 S.W.2d 471, 475 (Tex. Crim. App. 1995); TEX. CONST. art. I § 10.
8. *See* Garcia v. State, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998).
9. 28 S.W.3d 561, 565-66 (Tex. Crim. App. 2000).
10. 829 S.W.2d 787 (Tex. Crim. App. 1997).
11. 941 S.W.2d 130, 132 (Tex. Crim. App. 1997).
12. 838 S.W.2d 548, 550 (Tex. Crim. App. 1990).
13. *Riney*, 28 S.W.3d at 566.

delete the phrase "by using and threatening to use deadly force namely, a firearm" from the indictment over defendant's objection.[14] Pursuant to the court's previous ruling in *Gibbon v. State*,[15] the State must allege the type of abduction being proven because it is the manner or means of committing an element of the offense.[16]

C. Voir Dire

In *Garza v. State*, the Court of Criminal Appeals addressed the issue of whether requesting a shuffle after counsel had reviewed jury questionnaires in a non-capital felony offense was improper.[17] Under *Davis v. State*, a motion to shuffle is untimely if presented after voir dire has begun.[18] The court held that while questionnaires were "helpful tools in conducting voir dire," they were not a formal part of the voir dire process.[19] The court held it was within a trial court's discretion whether or not to allow a shuffle after counsel have reviewed jury questionnaires.[20]

In *Wright v. State*, the appellant, who was convicted of capital murder, brought as one of his points of error the fact that the trial court failed to grant appellant's challenges for cause of two different venire members.[21] Under *Green v. State*, to preserve error, the appellant must demonstrate on the record that he asserted clear and specific challenges for cause, that he used a preemptory strike on the complained-of venire member, that all of his preemptory challenges were exhausted, his request for additional strikes was exhausted and the objectionable juror sat on the jury.[22] In *Wright*, the record indicated appellant used all of his preemptory strikes, requested and received two additional ones, used those strikes, and then requested two more.[23] The trial court denied the request for additional strikes. The Court of Criminal Appeals held that "[b]ecause the record reflects that appellant received two extra strikes in addition to the fifteen he was granted by statute, he did not suffer the loss of two strikes."[24] For the appellant to show harm, he would have to show that challenges for cause on at least three venire members were erroneously denied.[25] Because appellant only asserted error as to two venire members, the court found that appellant did not show harm.[26]

In *State v. Ross*, the Court of Criminal Appeals held that when the trial court grants a motion to suppress without findings of fact and based only

14. 30 S.W.3d 394, 397 (Tex. Crim. App. 2000).
15. 652 S.W.2d 413 (Tex. Crim. App. [Panel Op.] 1983).
16. *Curry*, 30 S.W.3d at 403.
17. 7 S.W.3d 164 (Tex. Crim. App. 1999).
18. 782 S.W.2d 211, 214 (Tex. Crim. App. 1989), *cert. denied*, 495 U.S. 940 (1990).
19. *Garza*, 7 S.W.3d at 166.
20. *Id.*
21. 28 S.W.3d 526, 574 (Tex. Crim. App. 2000), *cert. denied*, 121 S. Ct. 885 (2001).
22. 934 S.W.2d 92, 105 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1200 (1997).
23. *Wright*, 28 S.W.3d at 535.
24. *Id.*
25. *Id.*
26. *Id.*

on the testimony of the arresting officer, the standard under which the Court of Criminal Appeals reviews the trial court's ruling is the "almost total deference" standard.[27]

D. COMPETENCY

In *Ex Parte Caldwell*, the applicant, who had been convicted of capital murder and sentenced to death, claimed he was incompetent to be executed.[28] Pursuant to Texas Code of Criminal Procedure Article 46.04, the trial court found that the applicant did not make a substantial showing of incompetence and, as a result, the applicant was not entitled to the appointment of experts or a competency hearing.[29] The applicant appealed and the Court of Criminal Appeals held that under Art. 46.04, the court did not have the authority to remand the case for hearing or grant funds for the applicant to hire mental health experts, only review the trial court's finding of incompetence.[30]

E. SEVERANCE

In *Aguilar v. State*, appellant and her stepdaughter were jointly tried and convicted of the murder of Juan Aguilar, appellant's husband.[31] A jury found appellant guilty and sentenced her to 25 years confinement.[32] On appeal, the appellant argued that the trial court erred in failing to grant her motions for severance, urged both before trial and during guilt/innocence.[33] The motions for severance were based on the fact that appellant's stepdaughter's defense was inconsistent with her own and would unfairly prejudice her case.[34] The Court of Criminal Appeals vacated the case and remanded it to the trial court, holding that a motion to sever on the grounds of unfair prejudice under Article 36.09 of the Texas Code of Criminal Procedure[35] is timely if made at the first opportunity or as soon as the grounds for prejudice are or should have become apparent, giving the trial court a basis to rule on the allegedly prejudicial evidence at the

27. 32 S.W.3d 853, 856 (Tex. Crim. App. 2000).
28. No. 25629-04, 2000 WL 1228848, at *1 (Tex. Crim. App. Aug. 28, 2000).
29. *Id.*; TEX. CRIM. PROC. CODE ANN. art. 46.04 (Vernon 1977).
30. *Caldwell* at *2.
31. 26 S.W.3d 901 (Tex. Crim. App. 2000).
32. *Id.* at 903.
33. *Id.*
34. *Id.*
35. Article 36.09 provides that:
Two or more defendants who are jointly or separately indicted or complained against for the same offense or any offense growing out of the same transaction may be, in the discretion of the court, tried jointly or separately as to one or more defendants; provided that in any event either defendant may testify for the other or on behalf of the state; and provided further, that in cases in which, upon timely motion to sever, and evidence introduced thereon, it is made known to the court that there is a previous admissible conviction against one defendant or that a joint trial would be prejudicial to any defendant, the court shall order a severance as to the defendant whose joint trial would prejudice the other defendant or defendants.

time of its introduction.[36] The logic behind the court's decision is when unduly prejudicial evidence is first presented at trial, it does not make sense to mandate that a motion to sever based on prejudicial grounds be presented pre-trial, when the prejudice is neither known nor demonstrable.[37]

II. TRIAL

A. Opening Statements

The Court of Criminal Appeals held that a prosecutor did not intend to induce a mistrial in commenting on a defendant's pre-arrest, pre-Miranda silence in *State v. Lee*.[38] In *Lee*, a prosecutor referred to an incident in her opening where the defendant responded to pre-arrest questioning by a detective regarding indecency with a child by telling the detective to call his attorney.[39] The appellee objected that these statements violated his right to an attorney and the right to remain silent and asked for a mistrial.[40] The trial court granted the mistrial.[41] The state attempted to retry the case pursuant to the same indictment, but the appellee filed a pre-trial application for writ of habeas corpus claiming double jeopardy. The trial court granted relief pursuant to *Bauder v. State*[42] and dismissed the indictment with prejudice.[43] The Court of Criminal Appeals granted the State's petition for discretionary review, finding that the prosecutor's statements were not clearly erroneous because the prosecutor believed the appellee was not under custodial interrogation and thus the statements were admissible.[44] Further, the Fifth Circuit and some federal courts had found such statements admissible.[45] Accordingly, there was no evidence of intent to induce a mistrial or reckless disregard that a mistrial would be reasonably certain to occur, and the order dismissing the indictment was set aside.[46]

B. Evidence

In *Mendiola v. State*, the Court of Criminal Appeals held that the term "relevant" for purposes of Article 37.07 § 3(a) of the Texas Code of Criminal Procedure governing the admission of relevant evidence at the sentencing portion of the trial has not been defined.[47] The court held

36. *Aguilar*, 26 S.W.3d at 910.
37. *Id.*
38. 15 S.W.3d 921 (Tex. Crim. App. 2000).
39. *Id.* at 922.
40. *Id.*
41. *Id.*
42. 921 S.W.2d 696 (Tex. Crim. App. 1996).
43. *Lee*, 15 S.W.3d at 922.
44. *Id.* at 925.
45. *Id.* (citing United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991).
46. *Id.*
47. 21 S.W.3d 282, 284 (Tex. Crim. App. 2000).

that the definition of what is relevant under Article 37.07 § 3(a) should be a question of what would be helpful to the jury in determining the appropriate sentence in a particular case.[48]

1. Hearsay

Pursuant to Texas Rule of Evidence 801(e)(2)(E), a statement by a co-conspirator is not hearsay if the statement is offered against a party and is "a statement by a co-conspirator of a party during the course and in the furtherance of the conspiracy."[49] In *Guidry v. State*, the State argued that statements by appellant, convicted of capital murder, to a co-conspirator's girlfriend about the roles of appellant and co-conspirator in the murder for hire scheme were hearsay but they fell under the Rule 801(e)(2)(E) exception to the hearsay rule.[50] The court disagreed, finding that while these statements were made in the course of the crime, they "did nothing to advance the course of or facilitate the conspiracy" and, as a result, were not admissible under Rule 801.[51] Additionally, because the statements so clearly delineated the witness and the appellant's roles in the crime, the statements were not a statement against the appellant's interest and not admissible under the 803(24) hearsay exception for statements against interest.[52]

During a trial for delivery of cocaine in *Martinez v. State*, the State laid the proper predicate for a supervisor of the Department of Public Safety to testify as an expert as to whether the substance found was cocaine, but the State never offered the supervisor as an expert.[53] The Court of Appeals decided that by admitting the supervisor's testimony, the trial court implicitly qualified him as an expert.[54] The supervisor relied on a report done by a subordinate who conducted the tests and testified that the substance was in fact cocaine.[55] On appeal, the defendant argued that the supervisor's opinion was hearsay and was erroneously admitted since the supervisor did not have personal knowledge of the circumstances surrounding the testing.[56] The El Paso Court of Appeals agreed, but the Court of Criminal Appeals reversed, finding that the supervisor's opinion was not hearsay since the supervisor only testified as to his present expert opinion.[57] Therefore, if an expert witness relies in whole or in part upon information not based on personal knowledge, the admissibility of the opinion will not be affected unless the court finds the expert lacks a sufficient basis for his opinion.[58] Since appellant never challenged the super-

48. *Id.*
49. TEX. R. EVID. 801(e)(2)(E).
50. 9 S.W.3d 133, 147-48 (Tex. Crim. App. 1999), *cert. denied*, 121 S. Ct. 98 (2000).
51. *Id.* at 148.
52. *Id.* at 149; TEX. R. EVID. 803 (24).
53. 22 S.W.3d 504, 507 (Tex. Crim. App. 2000).
54. *Id.* at 507.
55. *Id.*
56. *Id.* at 508.
57. *Id.*
58. *Id.*

visor's qualifications, his present opinion regarding the test results was properly admitted over appellant's objections.[59]

2. Fourth Amendment

In *O'Hara v. State*, a trooper stopped appellant for a traffic violation and allowed appellant to sit in the patrol car while the trooper wrote his report.[60] Prior to letting him sit down, the trooper patted appellant down as was the trooper's standard procedure.[61] Upon patting the appellant down, the trooper found drugs and defendant was convicted of possession.[62] Defendant appealed on Fourth Amendment grounds.[63] The San Antonio Court of Appeals determined that the search violated the Fourth Amendment because the trooper testified that he was not scared of appellant and only searched him as a matter of routine.[64] The Court of Criminal Appeals held that regardless of whether the trooper testified he was scared or not, the validity of a *Terry*[65] search must be based upon analyzing the facts at the time of search and determining whether a reasonable person would believe a search was appropriate.[66] However, a search cannot be justified under the Fourth Amendment simply because a pat-down is part of an officer's routine.[67] Ultimately, the court reversed, finding that because the stop occurred in the middle of the night, and the record indicated the appellant had been wearing a pocket knife, the trooper was objectively justified in patting down appellant for his safety.[68]

The Court of Criminal Appeals held in *Reasor v. State* that the court must look at the totality of the circumstances surrounding a person's statement giving permission for law enforcement to search a house to determine whether or not such a statement was voluntary.[69] The Texas Constitution protects individuals against all unreasonable searches and seizures,[70] and a search made after voluntary consent is not reasonable.[71] In *Reasor*, the appellant was in handcuffs when he allowed officers to search his house, weighing heavily in favor of such consent not being voluntary.[72] However, the Court of Criminal Appeals also pointed out that police had questioned appellant's companion and allowed him to leave, read Miranda warnings to the appellant twice, and the appellant signed

59. *Martinez*, 22 S.W.3d at 508.
60. 27 S.W.3d 548, 549 (Tex. Crim. App. 2000).
61. *Id.* at 549.
62. *Id.*
63. *Id.*
64. *Id.*
65. Terry v. Ohio, 392 U.S. 1, 21 (1968).
66. *O'Hara*, 27 S.W.3d at 551.
67. *Id.* at 551-52.
68. *Id.* at 554.
69. 12 S.W.3d 813 (Tex. Crim. App. 2000).
70. TEX. CONST. art. I, § 9.
71. Kolb v. State, 532 S.W.2d 87 (Tex. Crim. App. 1976). *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Katz v. United States, 389 U.S. 347, 357 (1967).
72. *Id.* at 818.

both Miranda and consent to search forms.[73] Looking at the totality of the circumstances, the court found that the appellant had received numerous warnings and, accordingly, the permission for law enforcement to search the house to be voluntary.[74]

In *Dickerson v. United States*, the United States Supreme Court refused to overrule Miranda warnings, holding that *Miranda's* warning-based approach to determining the admissibility of statements made by accused individuals during custodial interrogations was rooted in the Constitution and could not be overruled by legislative act.[75] Therefore, 18 U.S.C. § 3501, which allowed the admissibility of custodial statements to turn only on whether they were voluntary, could not "be sustained if *Miranda* is to remain the law."[76]

During a traffic stop in *Walter v. State*, the police officer noticed suspicious activity and requested that a dog handler officer be called to the scene.[77] While walking around the truck to ensure there was nothing in the truck that could harm the dog, the officer noticed a clear plastic wrapper with a green, leafy substance inside.[78] The officer then searched the appellant and found a large bag of cocaine in his pocket.[79] On appeal, Walter argued that the detention for the drug dog after a routine traffic stop was in violation of the Fourth Amendment and the Court of Appeals agreed, reversing the conviction.[80] The state filed a petition for discretionary review, asking whether an officer detaining an individual for a traffic stop and warrant check may seize suspected narcotics that the officer sees in plain view in the individual's vehicle.[81] The Court of Criminal Appeals held it is not a violation of the Fourth Amendment when an officer views narcotics in plain sight while a warrant check is pending, even if the officer objectively intended to conduct what was ultimately an unlawful canine sweep.[82]

Pursuant to Texas Parks and Wildlife Code § 31.124,[83] an enforcement officer may stop and board a boat without probable cause or reasonable suspicion to perform a water safety check.[84] The statute promotes the state's interest in promoting water safety with minimal intrusion, namely a brief inspection.[85]

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73. *Id.*
74. *Id.* at 819.
75. 120 S. Ct. 2326 (2000). *See also* Miranda v. Arizona, 384 U.S. 436 (1966).
76. *Dickinson*, 120 S. Ct. at 2336.
77. 28 S.W.3d 538, 539 (Tex. Crim. App. 2000).
78. *Id.* at 539-40.
79. *Id.* at 540.
80. *Id.*
81. *Id.*
82. *Walter*, 28 S.W.3d at 544.
83. TEX. PARKS & WILD. CODE ANN. § 31.124 (Vernon 1991).
84. Schenekl v. State, 30 S.W.3d 412 (Tex. 2000).
85. *Id.* at 416.

3. Sixth Amendment

In *Cobb v. State*, the Court of Criminal Appeals reversed and remanded a death sentence because the trial court admitted into evidence appellant's statement to police, in violation of his Sixth Amendment right to counsel.[86] In *Cobb*, the appellant was questioned by Walker County investigators regarding a burglary and ultimately confessed.[87] Soon thereafter, Cobb had an attorney appointed to him, and the Walker County investigators sought Cobb's attorney's permission to question his client about the disappearance of two individuals in connection with the burglary to which Cobb confessed.[88] Cobb's attorney gave permission on the condition that Cobb was not a suspect in the disappearances.[89] Cobb denied involvement, but shortly thereafter his father, who lived in Odessa, contacted the Walker County Sheriff's Office and told them his son had confessed to killing the two individuals.[90] The Walker County Sheriff's Office called the Odessa Police to pick up Cobb, who was out on bond, on an arrest warrant for the killings.[91] The Odessa Police picked up Cobb, arrested him, Mirandized him and interrogated him.[92] Cobb gave a written statement admitting to the killings.[93] Cobb brought his appeal on the basis that this interrogation violated his Sixth Amendment right to counsel since he had already been appointed an attorney for the burglary charge.[94] The Court of Criminal Appeals agreed, citing the Sixth Amendment Rule that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged."[95] Under this rule, the government cannot circumvent the defendant's right to counsel by charging him with additional crimes without counsel present, or by charging a defendant with one crime for the purpose of questioning him with a greater offense.[96] Finally, the Sixth Amendment requires the court to impute the State's knowledge from one State actor to another.[97] Because the Walker County Sheriff's office knew Cobb had counsel, such knowledge was imputed to the Odessa Police, rendering their interrogation improper.[98] Since Cobb's attorney's permission for Walker County to talk to his client was conditioned, it was impermissible for the Odessa Police to interrogate

86. No. 72807, 2000 WL 275644, *1 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).
87. *Id.* at *2.
88. *Id.*
89. *Id.*
90. *Id.* at *3.
91. *Cobb*, 2000 WL 275644 at *3.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* (citing State v. Frye, 817 S.W.2d 324, 328-29 (Tex. Crim. App. 1995); *Upton*, 853 S.W.2d at 555-556; United States v. Arnold, 106 F.3d 37, 41 (3d Cir. 1997); 2 W. LaFave, et al., Criminal Procedure § 6.4(f) n.127 (2d Ed. 1999).
96. *Cobb*, 2000 WL 275644 at *3 (citing *Upton*, 853 S.W.2d at 556).
97. *Id. See* Michigan v. Jackson, 475 U.S. 625 (1986).
98. *Cobb*, 2000 WL 275644, at *4.

Cobb regarding the killings.[99]

Shortly thereafter, the United States Supreme Court reversed the holding of the Texas Court of Criminal Appeals by determining that Cobb's Sixth Amendment right to counsel did not bar the police from interrogating Cobb.[100] In an opinion by Chief Justice Rehnquist, the Court held that under the test formulated in *Blockburger v. U.S.*,[101] the murder and the burglary were not the same offense under Texas law and, therefore, the Sixth Amendment did not apply and the confession was admissible. Under *Blockburger*, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.[102] Here, the Court ruled these two offenses were separate and that the Sixth Amendment right to counsel did not apply to both.[103]

In *Wesbrook v. State*, appellant, convicted of capital murder, brought as one of his points of error that the trial court erroneously denied appellant's motion to suppress evidence in violation of the Sixth Amendment.[104] Specifically, the state investigators had enlisted the aid of a jailhouse informant who set up a murder-for-hire solicitation between appellant and law enforcement for the purpose of eliciting incriminating information for the punishment phase of appellant's trial.[105] The Court of Criminal Appeals held that the information obtained by the informant was improper under the Sixth Amendment because the right to counsel had attached and appellant's counsel had not been notified.[106]

C. Juror Issues

In a trial for aggravated sexual assault on a child, the Court of Criminal Appeals held that the good faith of a juror is irrelevant when considering the materiality of information withheld by a juror during voir dire.[107] In *Franklin*, the jurors were asked in voir dire if they knew a child who was the subject of the alleged sexual assault.[108] None of the jurors recognized the name, but after the trial began, one of the jurors realized she had been the child's Girl Scout Troop assistant leader.[109] The trial court judge asked the juror if she could listen to the evidence and base her judgment just on what she heard from the stand.[110] The juror replied that

99. *Id.*
100. 121 S. Ct. 1335 (2001).
101. 284 U.S. 299 (1932).
102. *Id.* at 304.
103. *Cobb*, 121 S. Ct. at 1344.
104. 29 S.W.3d 103, 116 (Tex. Crim. App. 2000), *cert. denied*, No. 00-7587, 2001 WL 285843 (U.S. Mar. 26, 2001).
105. *Id.*
106. *Id.* at 118.
107. Franklin v. State, 12 S.W.3d 473 (Tex. Crim. App. 2000).
108. *Id.* at 475.
109. *Id.* at 476.
110. *Id.*

she could and ultimately the appellant was convicted.[111] On appeal, he argued that it was error to allow the juror to continue to serve.[112] The Court of Criminal Appeals ruled that despite the juror's good faith mistake, the information withheld from the appellant by the juror during voir dire was material and remanded the case to the Court of Appeals for harm analysis.[113]

In *Reyes v. State*, a juror recognized the defendant halfway through a trial and, fearing retribution from the defendant, asked to be disqualified.[114] The trial court found that the juror was "disabled" pursuant to Texas Code of Criminal Procedure Article 36.29.[115] Defendant appealed his conviction of aggravated robbery on the basis of this disqualification.[116] The Court of Criminal Appeals ultimately held that mere knowledge of a defendant cannot, without more, render a juror mentally "disabled," but that the effect of this knowledge or the juror's mental condition or emotional state may result in rendering the juror "disabled" under Texas Code of Criminal Procedure Article 36.29.[117]

In *Perez v. State*, the petitioner claimed that a juror convicted of a felony, driving while intoxicated (DWI), who was allowed to sit on the jury violated Article XVI § 2 of the Texas Constitution which prohibits individuals from sitting on juries who have been convicted of "high crimes."[118] The Court of Criminal Appeals held that DWI cannot be reasonably characterized as a "high crime" since the offense does not require a culpable mental state.[119] Accordingly, the juror convicted of DWI would not be constitutionally disqualified from service.[120]

In *Ovalle v. State*, appellant challenged the jury panel of Navarro County as purposefully discriminating against Hispanic jurors.[121] The Court of Criminal Appeals found that appellant did not make a prima facie case of underrepresentation because the discrepancy between the expected number and the actual number of Hispanics serving on Navarro

111. *Id.*
112. *Id.* at 477.
113. *Franklin*, 12 S.W.3d at 478-79.
114. 30 S.W.3d 409, 410 (Tex. Crim. App. 2000) (en banc).
115. *Id.*
116. *Id.*
117. *Id.* at 412; TEX. CODE CRIM. PROC. art. 36.29, which reads, in its relevant part: (a) Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman. Except as provided in subsection (b) of this section, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.
118. 11 S.W.3d 218, 219 (Tex. Crim. App. 2000). TEX. CONST. art. XVI § 2 provides, in its relevant part, that: Laws shall be made to exclude from office, serving on juries, and from the right of sufferage, those who may have seen or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes.
119. *Id.* at 221 (citing TEX. PEN. CODE §§ 49.04 and 49.09(b)).
120. *Id.*
121. 13 S.W.3d 774 (Tex. Crim. App. 2000).

County grand juries was less than three standard deviations.[122] The court held that the degree of underrepresentation is determined by comparing the proportion of the population composed of the allegedly underrepresented group to the proportion of the population called to serve as jurors.[123]

D. JURY CHARGE

In *Enriquez v. State*, the Court of Criminal Appeals addressed the second prong of the test for when a defendant is entitled to a lesser-included offense jury instruction.[124] Under the test set forth in *Skinner v. State*,[125] the second prong of the test requires some evidence permitting a jury to rationally find that if the defendant is guilty, he is only guilty of the lesser offense.[126] The court held that in order to satisfy this second prong, the appellate court "must examine the entire record instead of plucking certain evidence from the record and examining it in a vacuum."[127] The court ultimately held appellant was not entitled to the lesser included offense instruction because he had failed to satisfy the second prong of the test.[128] Namely, the single fact that the chemist witness could not recall testing samples from each of 105 bundles of marijuana appellant was charged with was insufficient evidence that a rational jury might find appellant guilty of a lesser included offense. Examining this one fact "in a vacuum," without looking at the entire record, was not sufficient evidence to warrant the lesser included charge.[129]

In *Dowdle v. State*, appellant was convicted at the trial court level of engaging in organized criminal activity with a deadly weapon finding.[130] The Amarillo Court of Appeals reformed the judgment to remove the deadly weapon finding because the appellant claimed he was unaware of the gun during the crime.[131] The Court of Criminal Appeals reversed, holding that there was sufficient evidence of the appellant's knowledge of a co-conspirator's use of a gun during the course of the criminal activity.[132] The court stressed that while the appellant testified that he was unaware of the gun until his co-conspirator shot the police officer, the fact that the co-conspirator shot the officer repeatedly and the appellant and co-conspirator fled together was sufficient evidence to uphold the deadly weapon finding.[133]

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122. *Id.* at 777-78.
123. *Id.*
124. 21 S.W.3d 277 (Tex. Crim. App. 2000) (en banc).
125. 956 S.W.2d 532, 543 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998).
126. *Enriquez*, 21 S.W.3d at 278.
127. *Id.* (citing Ramos v. State, 865 S.W.2d 463, 465 (Tex. Crim. App. 1993), *aff'd*, 885 S.W.2d 154 (Tex. Crim. App. 1994)).
128. *Id.* at 279.
129. *Id.*
130. 11 S.W.3d 233 (Tex. Crim. App. 2000) (en banc).
131. Dowdle v. State, No. 07-97-0264-CR, 1998 WL 764691 (Tex. App. - Amarillo 1998).
132. *Dowdle*, 11 S.W.3d at 238.
133. *Id.*

In *Dickey v. State*, the Court of Criminal Appeals reversed the 14th District Houston Court of Appeals, holding that the trial court's failure to give a requested instruction on multiple assailants was harmless error.[134] The Court of Criminal Appeals found that appellant failed to meet his burden that he suffered some harm from the denial of his request for a multiple assailants charge in his murder prosecution, even though appellant had testified he believed the victim and the other shooter were teaming up on him.[135] The court ruled that under the Houston Court of Appeals' reasoning that the charge was in error because it did not contemplate the possibility that the victim and co-conspirator were ganging up on appellant, every case involving multiple assailants in which the trial court failed to give a proper instruction would result in harm.[136]

In *Rodriguez v. State*, appellant was convicted of DWI.[137] At trial, evidence showed that appellant was taking cold medication. Appellant's indictment charged him with intoxication "by the reason of the introduction of alcohol into his body," but the trial court judge allowed a charge that included intoxication by "alcohol, a drug, or a combination of both of those substances, into the body."[138] Appellant argued that the charge was impermissible because it allowed the jury to convict on the basis of drugs or a mixture of drugs and alcohol, which was not set forth in the information.[139] The Court of Criminal Appeals agreed and reversed and remanded for harm analysis.[140]

The Court of Criminal Appeals overruled *Geesa v. State*,[141] and held that the "best practice" in jury charges is to give no definition of reasonable doubt to the jury in *Paulson v. State*.[142] The *Geesa* decision required courts to define reasonable doubt for juries, or else it would result in automatic reversible error, making it immune to harm analysis.[143] However, the Court of Criminal Appeals held that the court's decision in *Geesa* was poorly reasoned, found that the reasonable doubt instruction is confusing, and determined such an instruction is neither constitutionally nor statutorily required.[144]

Pursuant to Article 37.07 § 3(c) of the Texas Code of Criminal Procedure, the jury must unanimously agree on "the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty."[145] Accordingly, the Texas Court of Criminal Appeals held

134. 22 S.W.3d 490 (Tex. Crim. App. 1999) (en banc) (reversing 979 S.W.2d 825 (Tex. App. – Houston [14th Dist.] 1998)).
135. *Dickey*, 22 S.W.3d at 492.
136. *Id.* at 492.
137. 18 S.W.3d 228, 229 (Tex. Crim. App. 2000).
138. *Id.* at 229.
139. *Id.* at 230.
140. *Id.* at 232.
141. 820 S.W.2d 154 (Tex. Crim. App. 1991).
142. 28 S.W.3d 570 (Tex. Crim. App. 2000).
143. *See, e.g.*, Reyes v. State, 938 S.W.2d 718 (Tex. Crim. App. 1996, pet. ref'd).
144. *Paulson*, 28 S.W.3d at 573.
145. TEX. CODE CRIM. PROC. art 37.07 § 3(c).

in *Sanchez v. State* that the trial court was in error violating Article 37.07 when its punishment charge allowed the jury to return a non-unanimous decision adverse to the appellant on the issue of sudden passion.[146]

E. PUNISHMENT

In *Jiminez v. State*, appellant was convicted of aggravated assault and sentenced to fifteen years imprisonment.[147] Appellant argued that the trial court's charge of punishment, which stated appellant "may earn time off the period of incarceration imposed through the award of good conduct time" was incorrect under the offense appellant was charged with and violated his due process rights.[148] Appellant failed to object to the instruction at trial.[149] The Court of Appeals found that the instruction was in error but found that the error was harmless.[150] The Court of Criminal Appeals agreed, holding that under Article 36.19 of the Texas Code of Criminal Procedure,[151] a judgment should not be revised where the appellant failed to object to the error in the charge alleged to violate a constitutional provision and it appears from the record that the appellant had a fair and impartial trial.[152]

In *Holberg v. State*, appellant challenged her conviction for capital murder and death sentence, arguing that Texas Penal Code Section 19.03 and Texas Code of Criminal Procedure Article 37.071, which provide for the death penalty, violate the Establishment Clause of the United States Constitution by advancing religion.[153] During floor debate on the bill enacting these two statutes, one representative objected that the bill violated the Ten Commandments' prohibition on killing.[154] In response, the representative sponsoring the bill cited biblical passages they believed supported the death penalty.[155] Citing *Hernandez v. C.I.R.*,[156] the Court of Criminal Appeals held "[t]he primary effect of the statutes is penal in nature, not religious, and the mere fact that the statutes are consistent with the tenents of a particular faith does not render the statutes in violation of the Establishment Clause."[157]

Pursuant to Article 42.12 of the Texas Code of Criminal Procedure, a trial court is required to order a presentence investigation report when the defendant orders one, regardless of whether the defendant is eligible

146. 23 S.W.3d 30, 34 (Tex. Crim. App. 2000).
147. 32 S.W.3d 233, 233-34 (Tex. Crim. App. 2000).
148. *Id.* at 234-35.
149. *Id.* at 234.
150. *Id.* at 275; Jimenez v. State, 992 S.W.2d 633, 638 (Tex. App.—Houston [1st Dist.] 1999).
151. TEX. CODE CRIM. APP. art. 36.19.
152. *Jimenez*, 32 S.W.3d at 238-39.
153. No. 73-127, 2000 LEXIS 103, *2-*3 (Tex. Crim. App. Nov. 29, 2000).
154. *Id.* at *4.
155. *Id.*
156. 490 U.S. 680, 696 (1989).
157. *Holdberg*, 2000 LEXIS 103 at *8.

for community supervision.[158]

In *Black v. Texas*, the defendant was found guilty by a jury and sentenced to die for child-capital murder under Texas Penal Code Section 19.03(a)(8).[159] The child capital murder provision states "[a] person commits capital murder if he intentionally or knowingly causes the death of an individual and . . . the person murders an individual under six years of age."[160] The defendant appealed, arguing that the child capital murder provision violated the Equal Protection Clauses of both the federal and state constitutions.[161] Appellant argued that the statute violates equal protection because it creates a capital murder offense that does not require proof of an aggravating element or the defendant's knowledge of that element, only that the child was under six. The Court of Criminal Appeals affirmed, holding that the statute did not violate the Equal Protection clauses because under the rational basis test,[162] the statute was rationally related to the government's interest in protecting young children.[163] The court noted that one reason the legislature chose six years as the line of demarcation was that children under six are generally still within the home and "uniquely vulnerable to caregivers and that other adults, such as teachers, may not be around to safeguard the children's welfare."[164] Further, designating the child victim's status as a child under six was an aggravating element that did not require proof of specific intent of age.[165]

III. APPEAL

In *Garcia v. State*, appellant was charged with delivery of cocaine and appealed on the basis that his confession was improperly admitted.[166] The Amarillo Court of Appeals abated the appeal and remanded the case to the trial court for findings as to whether appellant's confession was voluntary pursuant to Texas Code of Criminal Procedure Article 38.22 Section 6.[167] Although the trial court had determined that the appellant's statement was made voluntarily, the trial court failed to reduce its findings to a written order.[168] The Amarillo Court of Appeals, aware that the trial judge who the case was being remanded to was not the same trial judge that held the hearing on the motion to suppress, stated "the regular judge of a district court generally has the power to review orders made by

158. Whitelaw v. State, 29 S.W.3d 129, 134 (Tex. Crim. App. 2000).
159. 26 S.W.3d 895 (Tex. Crim. App. 2000).
160. TEX. PENAL CODE ANN. § 19.03(a)(8).
161. *Black*, 26 S.W.3d at 898.
162. *See, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 461-62 (1988).
163. *Black*, 26 S.W.3d at 898.
164. *Id.*
165. *Id.*
166. 15 S.W.3d 533, 534 (Tex. Crim. App. 2000).
167. Garcia v. State, No. 07-97-0008-CR, 1998 WL 175513 (Tex. App. – Amarillo Apr. 14, 1998) (remanding the case for further disposition).
168. *Garcia*, 15 S.W.3d at 534.

a predecessor judge."[169] Upon return from remand, the Court of Appeals affirmed the conviction.[170] On a motion for rehearing, the Court of Appeals ruled "that a second judge could make his determination of the voluntariness of appellant's confession based upon the evidence presented at the earlier hearing."[171] However, the Court of Criminal Appeals granted discretionary review and held that it was inappropriate for a second judge to make findings of fact based on a review of the transcript from the earlier hearing by a different judge, since there was no order containing the previous judge's findings of fact and conclusions of law.[172] As a result, appellant was entitled to a new hearing on the voluntariness of his confession.[173]

In *Tong v. State*, the Court of Criminal Appeals held that to make a novel argument for which there is no authority directly on point, the appellant must ground his contention in analogous case law or provide the court with the relevant jurisprudential framework for evaluating appellant's claim.[174]

In *Daniels v. State*, the appellant's deferred adjudication probation for a felony offense was revoked.[175] On appeal, appellant claimed he was entitled to a reversal of his aggravated robbery conviction and a new trial on the basis that the court reporter's record from the original deferred adjudication proceeding was lost.[176] The Dallas Court of Appeals held it lacked jurisdiction over the appeal because the appellant would have had to appeal any issues relating to the original sentence at the time he was placed on probation.[177] Pursuant to Texas Rule of Appellate Procedure 34.6(f)(3), a defendant is entitled to a reversal of conviction and a new trial if the lost record is "necessary to the appeal's resolution."[178] The Court of Criminal Appeals affirmed the Dallas Court of Appeals, stating that the reporter's record was not necessary to the appeal's resolution because the appellant could not challenge any issues relating to the original deferred adjudication proceeding, since he failed to appeal deferred adjudication when it was first imposed.[179]

In *State v. Riewe*, the Court of Criminal Appeals held that when the State files a notice of appeal pursuant to Article 44.01 of the Texas Code of Criminal Procedure, that notice cannot be amended to correct jurisdictional defects pursuant to Texas Rule of Appellate Procedure 25.2(d).[180]

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169. *Garcia*, 1998 WL 175513 at *1.
170. Garcia v. State, No. 07-97-0008-CR, 1998 WL 675869 (Tex. App.—Amarillo, Dec. 8, 1998), *rev'd*, 15 S.W.3d 533 (Tex. Crim App. 2000).
171. *Garcia*, 1998 WL 842290 at *1.
172. *Garcia*, 15 S.W.3d at 536.
173. *Id.*
174. 25 S.W.3d 707, 710 (Tex. Crim. App. 2000).
175. 30 S.W.3d 407, 408 (Tex. Crim. App. 2000) (en banc).
176. *Id.*
177. *Id.*
178. *Id.* (citing Manuel v. State, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999)).
179. *Id.*
180. 13 S.W.3d 408, 412 (Tex. Crim. App. 2000); TEX. R. APP. P. 25.2(d); TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon 1977).

Further, the court held that failure to properly comply with the certification requirements of Article 44.01 is a substantive defect which deprives the court of appeals of jurisdiction.[181]

In a unanimous decision, the Court of Criminal Appeals held in *Llamas v. State* that when courts judge the likelihood of harm that occurred from an error of the trial court, the courts should examine the entire record, including all the evidence admitted at trial, the closing arguments and the jurors' comments during voir dire to determine if the error was harmless.[182]

Pursuant to Texas Rule of Appellate Procedure 43.2, a court of appeals may only remand a case on punishment.[183] Therefore, in *Lopez v. State*, the Court of Criminal Appeals held that "when a court of appeals remands a case to the trial court on punishment only, the trial court's jurisdiction on remand is limited to punishment issues."[184] Accordingly, the trial court lacks jurisdiction to entertain a motion for new trial which complains of error during the guilt/innocence phase of the trial on remand.[185]

The Court of Criminal Appeals adopted the standard for appellant inquiry for assessing evidentiary sufficiency from the United States Supreme Court in *Lacour v. State*.[186] Citing *Jackson v. Virginia*,[187] the court held the appropriate standard is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[188]

In *Barton v. State*, the appellant was convicted by a jury of misdemeanor criminal trespass of a habitation.[189] Appellant was sentenced to one year community supervision, a $4,000 fine and $10,000 in restitution.[190] Appellant appealed the amount of restitution, arguing there was no factual basis in the record to support the amount of restitution awarded by the trial court.[191] The State argued that pursuant to *Cartwright v. State*,[192] the proper remedy would be to remand the case back to the trial court for a new hearing on restitution.[193] The Houston Court of Appeals disagreed, announcing that the *Cartwright* remedy had been superceded by statute in 1987 by Texas Code of Criminal Procedure Arti-

181. *Riewe*, 13 S.W.3d at 411.
182. 12 S.W.3d 469, 471 (Tex. Crim. App. 2000).
183. TEX. R. APP. P. 43.2.
184. 18 S.W.3d 637, 640 (Tex. Crim. App. 2000).
185. *Id.*
186. 8 S.W.3d 670 (Tex. Crim. App. 2000).
187. 443 U.S. 307 (1979).
188. *Lacour*, 8 S.W.3d at 671.
189. 21 S.W.3d 287 (Tex. Crim. App. 2000).
190. *Id.* at 288.
191. *Id.*
192. 605 S.W.2d 287 (Tex. Crim. App. 1980).
193. *Barton*, 21 S.W.3d at 288.

cle 44.29(b).[194] The Court of Criminal Appeals disagreed, however, stating that Article 44.29(b) did not supercede the *Cartwright* remedy. Rather than holding a new punishment hearing or deleting the restitution altogether, the court held that the proper procedure when there was a support in the record for the amount of restitution is to abate the appeal, set aside the amount of restitution ordered as a condition of community supervision, and remand the case for a new hearing to determine a just amount of restitution.[195]

In *Fischer v. United States*, petitioner was convicted of thirteen counts including a charge under 18 U.S.C. § 666(a)(1)(a) for defrauding an organization which receives benefits under a federal assistance program.[196] On appeal, petitioner claimed that the government failed to prove that the defrauded organization, West Volusia Hospital Authority, received benefits in excess of $10,000 pursuant to a federal program as is required under § 666(b).[197] The Court of Appeals affirmed the convictions. The question petitioner brought to the Supreme Court was whether 18 U.S.C. § 666(b) covered fraud perpetrated on organizations benefiting from Medicare.[198] The Court affirmed the judgment of the Court of Appeals, holding that Medicare qualified as a benefit under a federal assistance program under the statute and that the government has a legitimate and significant interest in stopping financial fraud and bribery being perpetuated on Medicare providers.[199]

In *Castillo v. United States*, the Supreme Court held that 18 U.S.C. § 924(c)(1), which states, in its relevant part, "[w]hoever, during and in relation to any crime of violence . . .—uses or carries a firearm, shall, in addition to the punishment provided for such crime . . .—be sentenced to imprisonment for five years, . . . and if the firearm is a machinegun . . .—to imprisonment for thirty years,"[200] uses the word "machinegun" to state an element of a separate, aggravated crime.[201] The Court reasoned that the statute's literal language appears neutral and its overall structure strongly favors the "new crime" interpretation,[202] plus courts have not typically or traditionally used firearm types as sentencing factors where the use or carrying of the firearm is itself the substantive crime.[203] Also, asking a jury instead of a judge to "decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfair-

194. Barton v. State, No. 14-97-00193-CR, 1999 WL 548218 (Tex. App. – Houston [14th Dist.] July 29, 1999, pet. granted, judgm't vacated w.r.m., 21 S.W.3d 287 (Tex. Crim. App. 2000)).

195. *Barton*, 21 S.W.3d at 290.

196. 120 S. Ct. 1780, 1783 (2000).

197. *Id.* at 1783.

198. *Id.*

199. *Id.* at 1788.

200. 120 S. Ct. 2090, 2091-92 (2000).

201. *Id.* at 2096.

202. *Id.* at 2093.

203. *Id.*

ness,"[204] and the legislative history favored this interpretation.[205] Finally, the length and severity of an added mandatory sentence that turns on the presence or absence of a "machinegun" weighs in favor of treating such offense-related words as referring to an element in this context.[206]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Failure to comply with Texas Rule of Appellate Procedure 33.1(a) will not automatically act as a bar to raising a claim of ineffective assistance of counsel when there is "no meaningful or realistic opportunity for appellant to present [an] ineffective assistance of counsel claim to the trial court either at trial or in a motion for new trial."[207]

In *Ex parte Potter*, the Court of Criminal Appeals held on an issue of first impression that in the context of an extradition hearing, due process requires that an alleged fugitive have sufficient mental competency to consult with and assist an attorney on issues with identity related to extradition.[208]

V. HABEAS CORPUS

In *Martin v. Hamlin*, petitioner filed an application for habeas corpus pursuant to Article 11.07 of the Texas Code of Criminal Procedure.[209] Pursuant to Article 11.07 § 3(b), once the State receives an application, it has 15 days to respond.[210] When the time allotted for the State to respond expires, the trial court is given 20 days under the statute to determine "whether the application contains allegations of controverted, previously unresolved facts material to the legality of the applicant's confinement."[211] In *Martin*, the trial court's order was "untimely and interfered with the clerk's duty to transmit the application to [the] Court."[212] Therefore, without a timely order designating issues pursuant to Art. 11.07, the clerk of the trial court has a duty to immediately transmit to the Court of Criminal Appeals the record from the application for writ of habeas corpus, deeming the trial court's inaction a finding that no issues of fact require further resolution.[213]

In *Ex parte Lemke*, the Court of Criminal Appeals reviewed petitioner's second application for writ of habeas corpus on the grounds that he was denied effective assistance of counsel because his attorney did not communicate plea bargain offers from the State to petitioner.[214] While

204. *Id.* at 2094.
205. *Id.* at 2095.
206. *Castillo*, 120 S. Ct. at 2096.
207. Robinson v. State, 16 S.W.3d 808, 813 (Tex. Crim. App. 2000).
208. 21 S.W.3d 290, 297 (Tex. Crim. App. 2000).
209. 25 S.W.3d 718 (Tex. Crim. App. 2000).
210. *Id.* at 719.
211. *Id.*; TEX. CODE CRIM. PROC. ANN. art. 11.07, § 3(c) (Vernon 1977).
212. *Martin*, 25 S.W.3d at 719.
213. *Id.*
214. 13 S.W.3d 791, 793 (Tex. Crim. App. 2000).

petitioner's previous application for writ of habeas corpus dealt with a similar subject matter, namely the fact that his attorney was disbarred, the Court held that the second application should not be barred as a "subsequent application" under Texas Code of Criminal Procedure Article 11.07 Section 4[215] because the applicant did not become aware of the plea offers until after the initial application for habeas corpus was denied.[216]

In *Ex parte Johnson*, appellant filed a post-conviction application of writ of habeas corpus pursuant to Article 11.07 § 3(a) of the Texas Code of Criminal Procedure.[217] Appellant claimed he was denied his right to appeal, because his counsel failed to file timely notice of appeal.[218] The applicant filed the application of writ of habeas corpus during the pendency of the direct appeal. In *per curium* opinion, the Court of Criminal Appeals dismissed, holding that it lacked jurisdiction to consider an application for writ of habeas corpus pursuant to Article 11.07 until the felony judgment from which relief is sought becomes final.[219]

Under Texas Code of Criminal Procedure Article 11.07 Section 4, a convicted individual may only make one application for habeas corpus challenging the conviction unless it meets one of the two conditions set forth in § 4(a)(1) and (2).[220] In *Ex parte Whiteside*, petitioner filed a second habeas corpus motion which did not "challenge the conviction," but also did not qualify under one of the two statutory exemptions.[221] The Court of Criminal Appeals held that an applicant may not surpass the bar to subsequent applications under Article 11.07 § 4 simply by claiming the application does not "challenge the conviction."[222]

215. TEX. CODE CRIM. PROC. art. 11.07 (Vernon 1977).
216. *Lemke*, 13 S.W.3d at 794-795.
217. 12 S.W.3d 472, 473 (Tex. Crim. App. 2000).
218. *Id.*
219. *Id.*
220. TEX. CODE CRIM. PROC. art 11.07 § 4 (Vernon 1977).
221. 12 S.W.3d 819, 821 (Tex. Crim. App. 2000).
222. *Id.* at 821.