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CRIMINAL PROCEDURE: PRETRIAL, TRIAL AND APPEAL

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I. PRETRIAL

THE El Paso Court of Appeals in *Jaime v. State* determined whether collateral estoppel barred the defendant's prosecution in a request for pretrial habeas relief.[1] The State sought to prosecute the defendant for aggravated assault with a motor vehicle and the defendant brought a habeas corpus petition, alleging that the finding of "no evidence" that he was driving the vehicle in an earlier probation revocation proceeding based on the same alleged incident collaterally estopped the State from relitigating the issue.[2] The trial court denied the pretrial writ.[3] The court of appeals reversed, finding that the State had failed in the previous proceeding to prove that the defendant was driving the vehicle, and thus, the State was estopped from rearguing that issue.[4]

In *Smith v. State*, the appellant and five others were charged with mur-

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1. Jaime v. State, 81 S.W.3d 920, 922 (Tex. App.—El Paso 2002, pet. ref'd).
2. *Id.*
3. *Id.*
4. *Id.* at 927.

der.[5] The appellant's case was dismissed pursuant to an agreement with the prosecutor and the appellant entered into an immunity agreement with the prosecutor. However, two years later, the appellant's case was re-opened by a new prosecutor, and he was convicted despite his attempt to enforce the immunity agreement. The court of appeals affirmed his conviction, deciding that the immunity agreement was unenforceable because the trial court had not approved the agreement. The court of criminal appeals held that: (1) the fact that the judge did not incorporate the terms of the immunity agreement into the order of dismissal did not render the agreement unenforceable because the trial court need not know the prosecutor's reasons for dismissal; (2) the fact that the order of dismissal did not dismiss the case "with prejudice" did not render the agreement unenforceable; and (3) the trial court need not be aware of the terms of the immunity agreement for the agreement to be enforceable because the prosecutor, not the trial court, retains the power to assign the reasons that would justify a dismissal.[6]

A. INDICTMENT

In *State v. Doe*, the Dallas Court of Appeals held that section 255.001 of the Texas Election Code was unconstitutional in its entirety under the First Amendment.[7] Appellant claimed that the statute was an unconstitutional intrusion into his right to political free speech, and that the indictment thus failed to allege a crime.[8] Under the statute, anyone who contracted to print, publish, or broadcast a political advertisement had to identify himself or the person he represented within the advertisement.[9] The State argued that it had three compelling interests that justified the restraint on free speech: "(1) deterring and punishing political corruption; (2) notifying the public of any allegiance a particular candidate might feel toward the publisher of the communication; and (3) providing a method of detecting those expenditures which appear to be from individuals, but in reality come from political action committees or corporations."[10] In rejecting these justifications, the court of appeals compared the statute at issue to that held unconstitutional by the United States Supreme Court in *McIntyre v. Ohio Elections Commission*.[11] There, "the Supreme Court held that providing voters with additional relevant information did not justify a state requirement that a writer make statements or disclosures he would otherwise omit."[12] The court of appeals similarly held that section 255.001's "broad proscription on anonymous political speech reach[ed]

5. Smith v. State, 70 S.W.3d 848, 849 (Tex. Crim. App. 2002) (en banc).
6. *Id.* at 853, 854-55.
7. State v. Doe, 61 S.W.3d 99, 101 (Tex. App.—Dallas 2001, pet. granted).
8. *Id.*
9. TEX. ELEC. CODE ANN. § 255.001 (Vernon 2003).
10. *Doe*, 61 S.W.3d at 103.
11. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).
12. *Doe*, 61 S.W.3d at 104.

well beyond the conduct targeted by the State."[13] As well, the State could not impinge on free "speech simply to obtain the ancillary benefit of detecting [possible] violations of other laws."[14]

In *Santana v. State*, the defendant appealed his conviction for Class A misdemeanor mischief arising out of his unpaid siphoning of electrical power from a utility line.[15] In rejecting the appellant's first ground of error, the court held that, under section 28.03 of the Texas Penal Code, the State did not need to charge or prove pecuniary loss as an element of Class A misdemeanor criminal mischief because the defendant's conduct was within the class described in section 28.03(b)(3)(B), *i.e.*, tampering with a public utility.[16] The appellant also claimed that there was a "fatal variance between the information and the [evidence presented] at trial."[17] The information charged that the defendant diverted power from a meter and prevented it from being correctly registered, whereas the evidence at trial showed that he could not have diverted power from the meter because it was broken and that he could not have prevented the power from being registered because he never tampered with the meter. The court held that the defendant did not demonstrate the requisite surprise or prejudice because the information informed the defendant of the charge against him to sufficiently prepare for trial and would prevent the appellant from being prosecuted against for diverting the electricity that was the subject of the current prosecution.[18]

In *Hall v. State*, the Dallas Court of Appeals determined whether aggravated assault by threat is a lesser included offense of the charged murder offenses under article 37.09(2) of the Texas Code of Criminal Procedure.[19] A jury found the defendant guilty of aggravated assault by threat although the state had charged him with murder.[20] On appeal, the defendant contended that "the trial court [lacked] jurisdiction to convict him of aggravated assault . . . because that particular crime is not a lesser included offense of murder."[21] The court of appeals vacated the trial court's judgment, holding that "the statutory elements of the offense sought as a lesser included offense included at least one fact not required to be proved as an element of the offense charged."[22] Accordingly, the court concluded "that aggravated assault by threat was not a lesser included offense of the indicted murder offenses under article 37.09(1)."[23]

In *State v. Markovich*, the Court of Criminal Appeals concluded that section 42.05 of the Texas Penal Code is not unconstitutionally vague on

13. *Id.* at 106.
14. *Id.* at 105.
15. Santana v. State, 59 S.W.3d 187, 189 (Tex. Crim. App. 2001).
16. *Id.* at 193.
17. *Id.* at 189.
18. *Id.* at 195-96.
19. Hall v. State, 81 S.W.3d 927, 928 (Tex. App.—Dallas 2002, no pet.).
20. *Id.*
21. *Id.*
22. *Id.* at 930.
23. *Id.*

its face.[24] The defendant "was charged with the Class B misdemeanor offense of Disrupting [a] Meeting or Procession" under Texas Penal Code section 42.05.[25] The defendant filed a pre-trial motion to quash the complaint, alleging that the statute was unconstitutional under "the First and Fourteenth Amendments to the Constitution and Article I, Section 8 of the Texas Constitution."[26] The defendant also "argued that the State's information was defective because it failed to include the substantial impairment language . . . provided . . . in *Morehead v. State.*"[27] After "[t]he state made an oral motion to amend the information to add . . . substantial impairment language. The trial court granted both the State's and [defendant's] motions."[28] The state appealed and the court of appeals reversed.[29] The Court of Criminal Appeals affirmed, determining that section 42.05 "communicates its reach in words of common understanding,"[30] and thus "provides guidelines for law enforcement and fair notice to citizens" regarding the type of conduct the statute prohibits.[31]

In *Marable v. State*, the court granted for review the issue: "Whether the appellant had sufficient notice of the theory of culpability by which the State would seek conviction for delivery of a controlled substance?"[32] Appellant asserted "that he did not receive adequate notice to prepare his defense because the State did not allege in the indictment that it would prove actual delivery by the law of parties."[33] The court affirmed the judgment of the court of appeals based on the "well-settled [law] that the law of parties need not be pled in the indictment."[34]

Ex Parte Bailey considered whether a subsequent prosecution alleging a different victim under a second set of indictments is jeopardy barred.[35] The appellants contended "that since a separate offense is not created by merely changing the name of the complainant, prosecution under the second set of indictments [was] a violation of federal double jeopardy principles."[36] The court recognized that "[t]raditionally, courts in Texas have held that an acquittal because of a variance between the pleading and the proof does not bar reprosecution on a new charge alleging that version of the offense which the States evidence proved in the first trial."[37] In this case, the court concluded that the evidence of the appellants stealing money from a named person "would not sustain a conviction under the

24. State v. Markovich, 77 S.W.3d 274, 275 (Tex. Crim. App. 2002).
25. *Id.* at 275.
26. *Id.* at 276.
27. *Id.*
28. *Id.*
29. *Id.* at 277.
30. *Id.* at 280 (quoting Boos v. Barry, 485 U.S. 312, 332 (1988)).
31. *Id.*
32. Marable v. State, 85 S.W.3d 287 (Tex. Crim. App. 2002) (en banc).
33. *Id.* (quoting Marble v. State, 990 S.W.2d 421, 424 (Tex. App.—Texarkana 1999), *aff'd*, 85 S.W.3d 287 (Tex. Crim. App. 2002) (en banc)).
34. *Id.* at 287-88.
35. *Ex Parte Bailey*, 87 S.W.3d 122, 124 (Tex. Crim. App. 2002).
36. *Id.* at 126.
37. *Id.* at 126-27.

indictment alleging the victim to be the City of Houston."[38] Thus, the court held that "the offenses [were] not the same for double jeopardy purposes" since the proof of one will not prove the other and, accordingly, it affirmed the court of appeals.[39]

In *Puente v. State*, the appellant pled guilty to one indictment misjoining two misdemeanor charges with one felony charge.[40] The trial court later severed the misdemeanor charges from the felony charge and ordered that the appellant could not be prosecuted over objection in county court because the two-year statute of limitations had run on the misdemeanor charges. The appellant still claimed that he was entitled to have his entire conviction declared void due to the misjoinder. The Court of Criminal Appeals held that the defendant was only entitled to relief regarding the misdemeanor charges because the district court did not have jurisdiction over those charges.[41] The court noted that "[t]he fact that a portion of an indictment, judgment, or sentence may be invalid does not necessarily mean that the entire indictment, judgment, or sentence is invalid or 'void.'"[42] The court further held that the trial court had jurisdiction over the felony charge and, because the "appellant failed to show that he would not have pled guilty to the felony charges if the misdemeanor charges had been filed separately in county court," and he has not suffered any harm by the misjoinder, the felony conviction was not void.[43]

In *Fuller v. State*, the appellant was charged in his indictment with committing the offense of "injury to an elderly individual" against Olen M. Fuller.[44] After the appellant was convicted based upon evidence that he caused injury to "Mr. Fuller" or "Buddy," the appellant appealed on the basis that the evidence at trial was insufficient for a "conviction because the prosecution failed to prove the victim's name as alleged in the indictment."[45] The court of appeals agreed with the appellant. The Court of Criminal Appeals reversed and remanded the case. The court noted that, under *Jackson v. Virginia*, the proper federal due process inquiry "in the case [was] whether the victim's name [was] a substantive element of the criminal offense as defined by state law."[46] Because state law does not define the victim's name as an element of the offense for which the appellant was charged, the court held that "[t]he prosecution's failure to prove the victim's name exactly as [charged] in the indictment [did] not . . . make the evidence insufficient to support [the] appellant's conviction."[47] Furthermore, the court held that the evidence was sufficient under the

38. *Id.* at 127.
39. *Id.*
40. Puente v. State, 71 S.W.3d 340, 341 (Tex. Crim. App. 2002).
41. *Id.* at 341.
42. *Id.* at 344.
43. *Id.* at 341-42.
44. Fuller v. State, 73 S.W.3d 250, 251 (Tex. Crim. App. 2002).
45. *Id.* at 251-52.
46. *Id.* at 252 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).
47. *Id.* at 253.

Gollihar v. State state law sufficiency standard as well because, in a case where there is a variance between the indictment and the proof offered at trial, the evidence fails only if the variance is material.[48]

B. VOIR DIRE

In *Standefer v. State*, the Court of Criminal Appeals addressed whether asking a juror during voir dire "would you presume someone guilty if he or she refused to take a breath test on their refusal alone?" was an improper attempt to commit the juror.[49] A commitment question, *i.e.*, a question that attempts to bind a juror to a verdict based on a hypothetical set of facts, while usually improper, may be proper if the "law requires a certain type of commitment," *e.g.*, "whether they could follow a law that requires them to disregard illegally obtained evidence."[50] When the answer to the question would not lead to a valid challenge for cause, however, the question is an impermissible commitment question.[51] Applying these principles to the question at issue, the court found the question to be impermissible because a jury may permissibly presume guilt from the refusal to take a breath test, and thus "a challenge for cause based upon the sufficiency implications of an item of evidence would be inappropriate."[52]

In *Guzman v. State*, the Court of Criminal Appeals addressed the "'dual motivation' defense to a *Batson* peremptory strike challenge."[53] During voir dire, the prosecutor exercised his "peremptory strikes against six venirepersons, all of whom were either Hispanic or African-American," and gave reasons for its strikes upon challenge from the defendant.[54] Only the strike of one juror, however, was at issue on appeal and the intermediate court sustained the defendant's challenge to that juror "because the prosecutor's dual motive for striking that juror was not, as a matter of law, gender-neutral."[55] Reaffirming its plurality opinion in *Hill v. State*,[56] the Court of Criminal Appeals reversed and remanded to the trial court, holding that (1) "when the motives behind a challenged peremptory strike are 'mixed,' . . . if the striking party shows that he [or she] would have struck the juror based only on the neutral reasons, then the strike does not violate the juror's Fourteenth Amendment right to equal protection of the law;[57]" and (2) the trial court's failure to explicitly find that the prosecutor offered adequate neutral reasons to meet his burden of proof necessitated remand.[58]

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48. *Id.* at 254.
49. Standefer v. State, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001).
50. *Id.* at 181 n.16.
51. *Id.* at 182.
52. *Id.* at 183.
53. Guzman v. State, 85 S.W.3d 242, 244 (Tex. Crim. App. 2002) (en banc).
54. *Id.* at 244.
55. *Id.* at 245.
56. Hill v. State, 827 S.W.2d 860 (Tex. Crim. App. 1992).
57. *Guzman*, 85 S.W.3d at 244.
58. *Id.* at 255.

In *Hutchinson v. State*,[59] "after *voir dire*, appellant asserted that the state had excused five of seven African-Americans on the panel and objected to the state's discriminatory use of peremptory challenges pursuant to *Batson*. . . ."[60] "After the *Baston* challenge was raised, the prosecutor articulated race-neutral explanations for striking four of the [five] venire members."[61] After appellant's conviction, "[t]he court of appeals abated the appeal and remanded the cause to the trial court with instructions to [conduct] a new *Batson* hearing and to make written findings and conclusions as to whether [any] particular venire member had been struck for racial reasons."[62] "On return from remand, the court of appeals . . . concluded that the trial court's denial of the *Batson* challenge was not error."[63] The Court of Criminal Appeals held "that the court of appeals was authorized to abate the appeal and order the trial court to supplement the record" about the fifth venire member because the "case law leads to the conclusion, that when there has been a prima facie showing of discriminatory use of peremptory strikes but no *Batson* hearing, the supplemented record represents material omitted from the record."[64] Thus, the court affirmed the judgment of the court of appeals.

In *Rivera v. State*, the appellant complained about the exclusion of a question during voir dire, the trial court's decision not to let him introduce the victim's prior conviction, and improper argument by the prosecutor during closing argument.[65] First, the San Antonio Court of Appeals held that, although the appellant was improperly forbidden from asking his proper commitment question at voir dire, the trial court's error was harmless.[66] The appellant was instructed that he could ask his question to the jury in a more general manner. However, he refused to do so. Furthermore, because the appellant continued in voir dire to pose his question to the jury in several different ways, he was "able to intelligently exercise his peremptory challenges." The appellant also argued that, because one of the witnesses testified about the meaning of the victim's nickname ("Psycho"), the witness was a character witness who opened the door to other evidence regarding the victim's peaceable character. However, the court held that the witness was testifying "as an eyewitness, not as a character witness," and testimony regarding the victim's funny personality did not equate to character testimony.[67] Thus, evidence regarding the victim's conviction for family violence was excluded. Finally, the court held that the prosecutor's statements during closing argument were clearly pleas for law enforcement rather than improper appeals to community expectations or the introduction of evidence outside of the

59. Hutchinson v. State, 86 S.W.3d 636 (Tex. Crim. App. 2002) (en banc).
60. *Id.* at 637 (citation omitted).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 639-40.
65. Rivera v. State, 82 S.W.3d 64, 66-68 (Tex. App.—San Antonio 2002, pet. ref'd).
66. *Id.* at 67.
67. *Id.* at 67-68.

record; therefore, the court affirmed the judgment of the trial court.[68]

In *Oulare v. State*, the appellant argued that the trial judge's comments during voir dire required a reversal of the judgment.[69] The court of appeals noted, however, that the appellant did not object and thus, absent a fundamental error, waived his right to appeal issues related to the judge's questions during voir dire. Furthermore, the court noted that the judge's comments encouraging the jurors not to believe someone "just because of their occupation" properly sought to "instruct the juror to have an open, unbiased mind when hearing the evidence."[70] Furthermore, far from being a fundamental error, the judge's comments instructing the jury about "their role in our judicial system" were appropriate and did not, as the appellant claimed, inform the venire that "it was acting on behalf of the prosecution."[71] Thus, because the appellant failed to object to the judge's comments during trial, the appellant failed to preserve these issues for appeal.[72]

In *Smith v. State*, the defendant argued that comments made by prospective jurors during voir dire amounted to testimony and he was not permitted to cross-examine any of the venire members.[73] In this DWI case, the venire members responded to the State's questions with answers that they believed that a person can be intoxicated with a blood-alcohol concentration below 0.08.[74] The court of appeals rejected Smith's argument "that the trial court had an 'affirmative' duty to 'personally intervene'" and that this "testimony" violated his Sixth Amendment right to confrontation.[75]

II. TRIAL

In *Kerr v. State*, the Texarkana Court of Appeals determined whether a defendant's voluntary absence from most parts of his trial "for the misdemeanor offense of simulating legal process" constituted reversible error.[76] Before jury selection began, the defendant appeared and gave "inept and nonresponsive" answers to the court's questions.[77] The defendant "then voluntarily left the courtroom," and neither he "nor his counsel [was] present for jury selection, presentation of evidence, or assessment of punishment."[78] The jury found the defendant guilty and the court assessed punishment.[79] The defendant later moved to set aside

68. *Id.* at 69-71.
69. Oulare v. State, 76 S.W.3d 231 (Tex. App.—Amarillo 2002, no pet.).
70. *Id.* at 232, 234.
71. *Id.* at 234.
72. *Id.*
73. Smith v. State, 65 S.W.3d 332, 348 (Tex. App.—Waco 2001, no pet.).
74. *Id.*
75. *Id.* at 348-49.
76. Kerr v. State, 83 S.W.3d 832, 833 (Tex. App.—Texarkana 2002, no pet.).
77. *Id.* at 833.
78. *Id.*
79. *Id.*

the verdict, but the trial court refused and proceeded to sentence him.[80] On appeal, the defendant argued that "the trial court failed to comply with Article 33.03 of the Texas Code of Criminal Procedure."[81] The State argued that the defendant "had entered a plea before trial began."[82] The court of appeals reversed and remanded, holding that the trial court's error was harmful because the defendant was unable to challenge the State's evidence, cross-examine the State's witnesses, or present his version of the facts or his defenses.[83]

In *Zamorano v. State*, the Texas Court of Criminal Appeals determined whether "the state's negligence caused a delay" in the defendant's trial, entitling the defendant to relief.[84] The trial court denied the defendant's two speedy trial motions despite his case for driving while intoxicated remaining on the docket for nearly four years.[85] The court of appeals affirmed, applying the federal constitutional speedy trial factors in *Barker v. Wingo*.[86] The court of criminal appeals reversed and remanded, holding "that all four [*Barker v. Wingo*] factors weigh[ed] in favor of relief."[87] The length of the nearly three-year initial delay was presumptively prejudicial, "the delay was [due to] the State's negligence," the defendant asserted his right to speedy trial twice, and the defendant presented "evidence of prejudice . . . the state failed to rebut."[88]

A. Evidence

In *Roquemore v. State*, the Court of Criminal Appeals held that it was error to admit evidence that was obtained by taking an arrested juvenile to the location of stolen property instead of first transporting the juvenile to a juvenile office, as required by section 52.02(a) of the Texas Family Code.[89] After being arrested and given his *Miranda* warnings, the appellant, who was a juvenile certified to be tried as an adult, cooperated with the police and gave them the location of stolen property. The "evidence showed that the [police] first took the appellant to recover the stolen property before they transported him to the juvenile division." This violated section 52.02(a), which requires that when a juvenile is taken into custody he must be taken to the juvenile "'division without unnecessary delay and without first taking the child anywhere else.'"[90] The court thus held that, even though "the officers deviated from the proper route at appellant's [request]," the request of a juvenile could not override "the

80. *Id.*
81. *Id.*
82. *Id.* at 834.
83. *Id.*
84. Zamorano v. State, 84 S.W.3d 643 (Tex. Crim. App. 2002) (en banc).
85. *Id.* at 646.
86. *Id.* (citing Barker v. Wingo, 407 U.S. 514 (1972)).
87. *Id.* at 654.
88. *Id.* at 654-55.
89. Roquemore v. State, 60 S.W.3d 862, 872 (Tex. Crim. App.—2001) (en banc).
90. *Id.* at 867 (quoting Comer v. State, 776 S.W.3d 191, 194 (Tex. Crim. App. 1989)).

clear mandate of a statute [intended] to protect him."[91] Because the property "would not have been [recovered] at that time" absent the violation of section 52.02(a), there was a clear causal link "between the recovery of the stolen property and the illegal[ ]" conduct, mandating the suppression of that evidence.[92]

The Court of Criminal Appeals held in *Hayden v. State* that, in certain circumstances, the State's delivery of witness statements that describe extraneous offenses satisfies the notice requirement of Texas Rule of Evidence 404(b).[93] The appellant timely requested that the State provide him with notice of extraneous offenses that it intended to introduce in its case-in-chief, as required by Rule 404(b). In response, the State provided the appellant with two witness statements. The appellant argued that the delivery of these statements "did not inform [him] of whether the State had any intent to introduce such evidence at trial."[94] In holding otherwise, the court held that whether delivery of witnesses statements by the State constituted "reasonable notice" of the State's intent was a factual determination within the discretion of the trial court.[95] A key determinant is the length of time between the defendant's request and the state's delivery, *i.e.*, "[i]f the State [delivers] the statements . . . shortly after receiving the request for notice," counsel should know that the delivery is in response to the notice. In this case, the record did not reflect when the State delivered the witness statements. Absent any objection regarding the timing of the delivery, the court could not "conclude that the trial court abused its discretion on finding that the State had provided reasonable notice."[96]

In *Goodman v. State*, the Court of Criminal Appeals held that the existence of alternative causation theories does not render the evidence factually insufficient to support a conviction.[97] The defendant was convicted of causing bodily injury to a child. The court of appeals reversed the conviction, giving five alternate theories of the cause of the child's injuries that it believed were more plausible than the State's theory, and thus greatly outweighed any evidence in support of the verdict.[98] The Court of Criminal Appeals held that the court of appeals was not allowed to supplant the jury's findings in this regard, *i.e.*, that the jury could have considered but rejected these theories in favor of that proffered by the State.[99] Instead, courts should only sustain insufficient evidence points when either "the evidence is factually insufficient to support a finding of a vital fact, or . . . the finding of a vital fact is so contrary to the great

91. *Id.* at 870.
92. *Id.* at 871-72.
93. Hayden v. State, 66 S.W.3d 269, 270 (Tex. Crim. App. 2001).
94. *Id.* at 270.
95. *Id.* at 272-73.
96. *Id.* at 273.
97. Goodman v. State, 66 S.W.3d 283 (Tex. Crim. App. 2001) (en banc).
98. Goodman v. State, 5 S.W.3d 891, 907 (Tex. App.—Houston [14th Dist.] 1999, pet. granted).
99. *Goodman*, 66 S.W.3d at 287.

weight and preponderance of the evidence as to be clearly wrong."[100]

In *Thomas v. State*, the Court of Criminal Appeals concluded "that a written instrument is required for an 'evidence of indebtedness' under the Texas Securities Act."[101] Appellant was convicted under the Act for soliciting "investments" in a business venture that he instead used to cover personal expenses. There were never any written agreements concerning the so-called investments, no shares, notes, or bonds were issued, and no funds were ever distributed. The court of appeals reversed the trial court's judgment, holding that "'evidence of indebtedness' [was] grouped with written instruments that all acknowledge the owing of money by agreement, [and thus] an 'evidence of indebtedness' must also be in writing."[102]

The court begins its analysis by agreement with the court of appeals' reliance on the *ejusdem generis* doctrine, which "states that when interpreting general words that follow an enumeration of particular or specific things, the meaning of those general words should be confined to things of the same kind."[103] Thus, because "evidence of indebtedness" was part of a list of items that required a writing, it should also require a writing. Further, the Court of Criminal Appeals relied on a federal case, *S.E.C. v. Addison*, which addressed a similar question under the Federal Securities Act of 1933.[104] The court also notes that scholars have interpreted "evidence of indebtedness" to require a writing.[105] The court ends by noting that the form of the writing is not important, and that if "a defendant sells or offers to sell an 'evidence of indebtedness' that does not actually exits or was never actually issued, he is still subject to criminal penalty."[106]

In *Vega v. State*, the Court of Criminal Appeals determined whether a statement that the juvenile defendant gave to Illinois police following her arrest for capital murder on a Texas warrant was admissible under section 51.095 of the Family Code.[107] The defendant claimed that the statement was inadmissible because it did not comply with Texas law.[108] "The state [maintained] that because the defendant was in Illinois when she gave the statement, Illinois law should apply and that the statement was admissible under Illinois law."[109] The court of appeals held the statement was inadmissible, relying on *Davidson v. State*.[110] The Court of Criminal Appeals reversed and remanded, holding that although the statement violated the Family Code, the violation did not determine the issue of ad-

100. *Id.* at 285 (quoting Claver, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 366 (1960)).
101. Thomas v. State, 65 S.W.3d 38, 45 (Tex. Crim. App. 2001).
102. Thomas v. State, 3 S.W.3d 89, 94 (Tex. App.—Dallas 1999, pet. granted).
103. *Thomas*, 65 S.W.3d at 41 (quoting BLACK'S LAW DICTIONARY 464 (6th ed. 1990)).
104. S.E.C. v. Addison, 194 F. Supp. 709 (N.D. Tex. 1961).
105. *Thomas*, 65 S.W.3d at 44.
106. *Id.* at 45.
107. Vega v. State, 84 S.W.3d 613, 615-16 (Tex. Crim. App. 2002) (en banc).
108. *Id.* at 615.
109. *Id.* at 615-16.
110. *Id.* at 616 (citing Davidson v. State, 25 S.W.3d 183 (Tex. Crim. App. 2000)).

missibility.[111] Rather, the court of appeals' "analysis should examine the absence of a magistrate on the admissibility [of] the statement in a context of fairness to the parties."[112]

Zavala v. State dealt with an appeal to determine whether the appellant's extrajudicial statements could be used to support his conviction of driving while intoxicated.[113] At trial, the police officer testified about statements made by appellant both at the scene and at the station concerning the vehicle and the accident.[114] The court recognized that "[w]hile proof of the *corpus delicti* of an offense may not be made by an extrajudicial confession alone, proof of the *corpus delicti* need not be made independent of the extrajudicial confession."[115] Accordingly, the court affirmed the trial court's conviction since there was some evidence corroborating the appellant's confession, which allowed the confession to be used to aid in establishing that he was driving a motor vehicle in a public place while intoxicated.[116]

In *State v. Medrano*, the State filed an interlocutory appeal to challenge the trial court's exclusion of hypnotically-enhanced testimony from the only eyewitness in a capital murder case.[117] The state contended that the trial court's application of the test found in *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), was improper because it relied upon the "general acceptance" test, which the Court of Criminal Appeals overruled in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).[118] First, the court discussed the *Zani* test, which instructs that a court should admit evidence if based on the totality of the circumstances: "[T]he trial court finds by clear and convincing evidence that hypnosis neither rendered the witness's posthypnotic memory untrustworthy nor substantially impaired the ability of the opponent to fairly test the witness's recall by cross-examination."[119] The court then disagreed with the state's contention that the *Kelly* decision implicitly overruled *Zani*. Instead the court concluded that *Zani* exists independent of the "general acceptance" test and that the reliance on *Zani* in the *Kelly* decision suggests that *Zani* remains the law.[120] Accordingly, the court affirmed the trial court's application of *Zani* and remanded the case for further proceedings.[121]

In *Hawkins v. State*, a jury found appellant guilty of unlawful possession of a firearm by a felon and assessed punishment at 15 years imprisonment, "[a]fter finding an enhancement paragraph [in the appellant's

111. *Id.* at 619.
112. *Id.*
113. Zavala v. State, 89 S.W.3d 134 (Tex. App.—Corpus Christi 2002, no pet.).
114. *Id.* at 135-36.
115. *Id.* at 137.
116. *Id.*
117. State v. Medrano, 86 S.W.3d 369, 370 (Tex. App.—El Paso 2002, no pet h.)
118. *Id.* at 371.
119. *Id.* at 372.
120. *Id.* at 373.
121. *Id.*

penitentiary packet] alleging a prior felony . . . to be true."[122] First, the court held that the evidence viewed in the light most favorable to the verdict was legally sufficient to support the appellant's conviction.[123] Appellant also argued that the trial court erred by admitting the penitentiary packet because under Article 42.09, section 8(b) of the Texas Code Criminal Procedure only the director of the Texas Department of Criminal Justice can authenticate such a document.[124] Finding no authority for appellant's assertion, the court relied upon *Reed v. State*, 811 S.W.2d 582 (Tex. Crim. App. 1991), for the proposition that a public record can be properly authenticated under Texas Rule of Evidence 901 due to the regularity in governmental affairs and disincentive for public officials to falsify documents.[125] Furthermore, the court found that a self-authenticating document under Texas Rule of Evidence 902 need not satisfy the certification requirements of Article 42.09, section 8(b) of the Texas Code of Criminal Procedure to be properly authenticated.[126] Accordingly, the court affirmed the trial court's judgment.

Lopez v. State[127] dealt with "whether [the appellant] should have been permitted under [Texas Rules of Evidence 613(a)] to introduce evidence that . . . the 12-year-old boy [appellant] was charged with sexually assaulting, had previously accused his mother of physical abuse."[128] The court of appeals agreed with appellant's assertion that the boy's testimony was inconsistent under Rule 613(a) and reversed the conviction.[129] The Court of Criminal Appeals reversed the court of appeals and affirmed the trial court's conviction because the boy's previous accusations were not shown to be sufficiently inconsistent with his testimony at trial as required by Rule 613(a).[130]

In *Robbins v. State*, the Court of Criminal Appeals confronted "whether during the guilt/innocence phase of appellant's trial, the trial court abused its discretion to admit evidence of previous injuries the victim suffered while she was in appellant's care."[131] The court of appeals affirmed the trial court, deciding that the evidence was "'probative of intent and lack of accident under Rule 404(b) and that it was not 'unfairly prejudicial' under Rule 403 because the 'prejudicial effect lies in its probative value rather than an unrelated matter.'"[132] Initially, the court rec-

122. Hawkins v. State, 89 S.W.3d 674, 676 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).
123. *Id.* at 676-77.
124. *Id.* at 678.
125. *Id.* at 679.
126. *Id.*
127. Lopez v. State, 86 S.W.3d 228, 229 (Tex. Crim. App. 2002) (en banc).
128. *Id.* at 229. Incidentally, the Court of Criminal Appeals had previously rejected the appellant's argument that the Confrontation Clause of the United States Constitution compelled its admissibility. *Id.*
129. *Id.* at 230.
130. *Id.*
131. Robbins v. State, 88 S.W.3d 256 (Tex. Crim. App. 2002).
132. *Id.* at 259 (quoting Robbins v. State, 27 S.W.3d 245, 250-51 (Tex. App.—Beaumont 2000, pet. granted)).

ognized that current law created a "Catch 22" because "a simple plea of not guilty does not make issues such as intent relevant issues of consequence for relationship evidence Rule 404(b) purposes while at the same time" the law requires the prosecution to prove these material issues beyond reasonable doubt.[133] The court determined, however, that it was bound by *stare decisis,* making it "'better to be consistent than right' [and that] any changes in the current law should come via amendment to the Texas Rules of Evidence or by legislative enactment."[134] Thus, based on the current law, the court concluded that the court of appeals was correct to affirm the trial court on the admissibility of the relationship evidence because the appellant "went beyond simply pleading not guilty through [his] vigorous cross-examination of the prosecution witnesses suggesting that the victim's death was caused by some means other than an intentional act by appellant."[135] Furthermore, the court could not say "the Court of Appeals wrongly decided that the trial court was within its discretion [under Rule 403] to decide that the probative value of the relationship evidence was not substantially outweighed by the danger of unfair prejudice especially in light of the defensive theories that the appellant presented."[136] Accordingly, the court affirmed the court of appeals judgment.

In *Wiley v. State*, the appellant claimed that he was denied his constitutional right to present a defense under his Sixth and Fourteenth Amendment rights to due process because the trial court refused to allow him to present "alternative perpetrator" evidence.[137] Appellant, who was charged and convicted with arson, claimed that the judge ruled incorrectly by refusing to allow him to put on evidence regarding a man who he claimed started the fire at his restaurant. The Court of Criminal Appeals noted that the trial court was correct in refusing to allow the appellant to present such evidence under Rule 403 because he could not demonstrate a sufficient "nexus between the crime charged and the alleged 'alternative perpetrator.'"[138] The court noted that the "appellant himself told the grand jury that he did not" believe that the alternative perpetrator (Mr. Thomas) could have set the fire. Furthermore, Mr. Thomas was mentally incompetent and there was meager evidence provided regarding how he could set such a sophisticated fire. Also, the State was prepared to present evidence that Mr. Thomas's mother was with him at the time he allegedly set the fire. Thus, because the evidence regarding Mr. Thomas's involvement in the fire would have done nothing more than confuse the issues at trial, the court held that the trial judge's ruling in excluding the evidence was not clearly erroneous and did not

133. *Id.* at 261.
134. *Id.* (quoting Awaldelkariem v. State, 974 S.W.2d 721, 725 (Tex. Crim. App. 1998)).
135. *Id.*
136. *Id.* at 263 (emphasis in original).
137. Wiley v. State, 74 S.W.3d 399, 401 (Tex. Crim. App. 2002).
138. *Id.* at 406.

violate the appellant's constitutional rights.[139]

In *Torres v. State*,[140] the trial court excluded evidence of the victim's prior bad acts on the grounds that they were directed towards a third party and not the defendant. The judgment of the trial court was affirmed by the court of appeals. The judgment was reversed by the Court of Criminal Appeals because evidence of the victim's previous violent acts cannot be excluded merely because they were directed at a third party and not the defendant. The court noted that the victim's previous bad acts were admissible to show that he was the first aggressor if the acts were not offered to show character conformity. Because the defendant was the new boyfriend of the victim's ex-girlfriend and the evidence demonstrated that the victim had "a mind set of violence against those [that] might stand between him and [his ex-girlfriend]," the court found that the proffered testimony was probative of the deceased's state of mind, intent, and motive.[141] Thus, the court reversed the judgment of the court of appeals and remanded the case to the court of appeals.

In *Keeter v. State*, the trial court convicted appellant of indecency with a child after the victim testified about his bad acts.[142] However, the victim, an eight year old girl, "recanted shortly after the trial."[143] Therefore, the appellant moved for a new trial, which was denied. The court of appeals held that the trial court abused its discretion in refusing to grant a new trial and the Court of Criminal Appeals reversed. Applying the four-part test for newly discovered evidence,[144] the court held that the trial court did not abuse its discretion in disbelieving the victim's recantation. Although a trial court must have "some basis in the record" to disbelieve a recantation, the trial court has such a basis if, among other things: "the recanting witness was subject to pressure [from] family members or to threats from co-conspirators, [the victim recants] after moving in with family members of the defendant" and other questionable circumstances.[145] The court held that the trial court did not abuse its discretion because the victim: recanted after she moved in with persons friendly to the defendant, testified that her father pressured her into recanting the allegations, gave a non-convincing story about how she formed the idea

139. *Id.* at 408.
140. Torres v. State, 71 S.W.3d 758, 761 (Tex. Crim. App. 2002).
141. *Id.* at 761-62.
142. Keeter v. State, 74 S.W.3d 31, 33-34 (Tex. Crim. App. 2002).
143. *Id.* at 46.
144. The four-part test is as follows:
(1) the newly-discovered evidence was unknown to the movant at the time of trial;
(2) the movant's failure to discover the evidence was not due to his want of diligence;
(3) the evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and
(4) the evidence is probably true and would probably bring about a different result in another trial.
Id. at 35.
145. *Id.* at 38.

to accuse the appellant from her three year old stepsister, and stated that she recanted because her mother needed the defendant financially and emotionally.[146] Thus, there was sufficient evidence in the record providing some basis for the trial court to disbelieve the victim's recantation.

In *Billy v. State*, the "appellant contend[ed that] the trial court erred in . . . denying his motion for instructed verdict" and that the trial court's actions deprived him of the effective assistance of counsel.[147] On appellant's first point of error, the Dallas Court of Appeals noted that the jury did not engage in the impermissible stacking of inferences to find that he had the intent to commit the act of indecency with a child because of the victim's testimony at trial. On appellant's second point of error, the court held that the appellant failed to object to the trial court's allegedly improper actions during voir dire and, thus, failed to preserve error. The court further noted that the appellant failed to comply with the rules of appellate procedure by inadequately briefing his allegations for appeal. Thus, the court found that the only remaining issue that was properly briefed and presented for appeal was "whether the trial court erred in sustaining the State's objection to appellant's closing argument."[148] In his closing argument, appellant made a comparison between the reasonable doubt standard and a parent's hesitation when deciding whether his or her child should endure a dangerous operation to get well. The court held that this argument was improper because "the 'hesitation' definition of reasonable doubt places too great a burden on the State [and is] inaccurate and misleading."[149] Therefore, the court held that "the trial court [did not err] in sustaining the State's objection to [appellant's closing] argument."[150]

In *Hines v. State*,[151] the Court of Criminal Appeals addressed two issues: "1) whether the phrase 'interfere substantially' as it appears in section 20.01 of the Texas Penal Code is ambiguous; and 2) whether the kidnapping statute can be applied to situations where slight confinement or movement is part of the commission of another offense."[152] The court of appeals held that the defendant "did not interfere substantially with [the victim's] liberty" in this case because there was no more than a temporary confinement or slight movement that was part and parcel of another crime. Thus, the court of appeals held that there was no abduction and, hence, no kidnapping within the meaning of section 20.01 of the Texas Penal Code.[153] The Court of Criminal Appeals held that the phrase "interfere substantially" in the context of the kidnapping statute

146. *Id.* at 39.
147. Billy v. State, 77 S.W.3d 427, 428 (Tex. App.—Dallas 2002, pet. ref'd).
148. *Id.* at 430.
149. *Id.* at 430-31.
150. *Id.* at 431.
151. Hines v. State, 75 S.W.3d 444, 445 (Tex. Crim. App. 2002).
152. *Id.* at 445.
153. *Id.* at 446-47. Texas Penal Code section 20.04(b) provides: "A person commits the offense of aggravated kidnapping if he intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense."

was not ambiguous and that courts have consistently held that there is not specific time requirement for determining whether a restraint has taken place. Furthermore, there is "no per se bar to a kidnapping prosecution for conduct that occurs during the commission of another offense."[154] Because the court found that, looking at all of the evidence in a light favorable to the prosecution, "a rational juror could have found that [the victim] was abducted by [the defendant]," the court reversed the judgment of the court of appeals.[155]

In *Powell v. State*, the Court of Criminal Appeals determined that by cross-examining a complainant on the theory that the defendant lacked opportunity to commit the crime, opens the door for unconvicted offenses to come in to rebut the theory.[156] The defendant was being charged with indecency with a child and used the argument that the fact that there were other individuals in the room when the crime was to have taken place demonstrated that he lacked opportunity to commit the crime of which he was accused.[157] The prosecution rebutted this theory by introducing other witnesses that testified the defendant did the same acts with them while other people were in the same room.[158] The court determined that this was proper rebuttal testimony.[159] The trickier issue for the court, which led to a disagreement among the justices, is whether raising this defense in opening statements "opens the door" for the prosecution. The majority found that it did,[160] but there were two concurrences, one which declined to resolve the issue,[161] and the other that found it was not appropriate because opening statements are not evidence.[162]

In another "lack of opportunity" defense to a sexual assault charge, the Court of Criminal Appeals found that the defendant opened the door to the State's rebuttal of similar instances of conduct.[163] The defendant called a CPS worker to the stand to testify that she had determined that he was safe around his own children.[164] The court determined that it was permissible for the State to cross-examine this witness on an alleged sexual assault of his niece because, as an expert witness, she can be cross-examined "concerning the facts and data upon which [she] relied [upon and questioned] about information of which she was aware, but upon which she did not rely."[165]

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154. *Id.* at 448.
155. *Id.*
156. Powell v. State, 63 S.W.3d 435, 440 (Tex. Crim. App. 2001).
157. *Id.* at 436-37.
158. *Id.* at 437.
159. *Id.* at 438.
160. *Id.* at 439.
161. *Id.* at 440 (finding that "the majority need not decide whether an opening statement would permit the same refutation of the appellant's defensive theory").
162. *Id.* at 440-41 (stating that "because an opening statement is not evidence, it should not open the door to admission of extraneous offenses.").
163. Wheeler v. State, 67 S.W.3d 879, 883, 887 (Tex. Crim. App. 2002) (en banc).
164. *Id.* at 881.
165. *Id.* at 883 (emphasis in original).

In addition to its cross-examination of this witness, the State introduced testimony of the defendant's niece, who claimed she had been molested by the defendant.[166] The court found this testimony permissible, since the defendant's entire defense was lack of opportunity to molest the complainant.[167] This witness's testimony was relevant to rebut the defendant's lack of opportunity defense because she testified that her assault occurred with family members in the immediate vicinity and the defendant's son only a few feet away.[168]

In *Smith v. State*, the court of appeals ruled that expert testimony that the defense tried to put forward was properly denied because no showing that the witness was an expert was made.[169] In this DWI case, "Smith did not offer evidence of [the witness's] special knowledge of how the intoxilyzer works [nor did he] demonstrate that the [witness] was educated in a field of science or math such that he could assist the trier of fact to understand why there would be a variance in the intoxilyzer's measurements."[170] "Also, [the witness] was not shown to be trained or certified in evaluating an individual's performance on the intoxilyzer."[171]

On the other side, the expert testimony that the trial court permitted the State to use in *Smith* was determined to be impermissible as well.[172] The arresting officer improperly correlated Smith's performance on the sobriety test to a particular blood-alcohol level.[173] Additionally, the officer correlated Smith's performance on the walk-and-turn test to a precise blood-alcohol content, which was impermissible.[174] Despite the improperly admitted evidence, the court of appeals determined that each was harmless error.[175]

In *Shpikula v. State*, the court of appeals determined that there was a proper evidentiary foundation for intoxilyzer test slips.[176] First, "intoxilyzer maintenance records are generally admissible as business records."[177] Second, the officer was not required to wait 15 minutes to retest the defendant.[178]

In *Cooper v. State*, the Court of Criminal Appeals reaffirmed "that a theft occurring immediately after an assault will support an inference that the assault was intended to facilitate the theft."[179] The court chose not to determine under what circumstances an inference would be negated by

166. *Id.* at 886.
167. *Id.* at 889.
168. *Id.* at 887.
169. Smith v. State, 65 S.W.3d 332, 341 (Tex. App.—Waco 2001, no pet.).
170. *Id.*
171. *Id.*
172. *Id.* at 345, 348.
173. *Id.* at 345.
174. *Id.* at 348.
175. *Id.* at 345, 348.
176. Shpikula v. State, 68 S.W.3d 212, 222-23 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).
177. *Id.* at 222.
178. *Id.* at 223.
179. Cooper v. State, 67 S.W.3d 221, 224 (Tex. Crim. App. 2002).

evidence of an alternative motive.[180] The court did determine, however, that an "inference will not be negated by evidence of an alternative motive that the jury could rationally disregard."[181]

In *Potier v. State*, the Court of Criminal Appeals determined that while exclusion of testimony regarding self-defense was erroneously excluded, the defendant was still able to put on the defense and therefore there was no constitutional error.[182] The court found that the defendant was denied his right to have compulsory process for obtaining witnesses in his favor because:

> the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense.[183]

However, both the defendant and another witness testified to the self-defense theory, which made this error harmless.[184]

In a legal sufficiency challenge, the court of appeals in *Freeman v. State*, determined that there was sufficient evidence to support a DWI conviction.[185] The circumstantial evidence of shifting the car into gear, and the vehicle's wheel resting against the curb of a public street, was sufficient to support the inference that the defendant was operating a vehicle while intoxicated.[186]

In *Willover v. State*, the Court of Criminal Appeals found that the trial court did not abuse its discretion in refusing to admit videotaped interviews of the victim in a sexual assault case.[187] The defendant wanted to introduce two videotaped interviews with the victim because she gave inconsistent stories.[188] The court determined that the trial court could have found that the tapes contained both admissible and inadmissible testimony and the burden was on the defense to isolate statements to use for impeachment purposes.[189]

B. JURY CHARGE

In *Gilmore v. State*, the court of appeals held that it was not error to give a misleading instruction regarding the effect of "good conduct" time on parole eligibility for someone convicted of murder.[190] "A jury found appellant guilty of murder, and assessed punishment at life imprison-

180. *Id.*
181. *Id.*
182. Potier v. State, 68 S.W.3d 657, 666 (Tex. Crim. App. 2002) (en banc).
183. *Id.* at 660.
184. *Id.* at 665-66.
185. Freeman v. State, 69 S.W.3d 374, 376 (Tex. App.—Dallas 2002, no pet.).
186. *Id.*
187. Willover v. State, 70 S.W.3d 841, 847 (Tex. Crim. App. 2002).
188. *Id.* at 842.
189. *Id.* at 846-47.
190. Gilmore v. State, 68 S.W.3d 741, 742-43 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd).

ment."[191] The trial court had instructed the jury that appellant's time in prison may be reduced through the award of 'good conduct' time [though] appellant was not eligible for such a reduction" because he was serving prison time for murder.[192] While noting a contrary holding from the First Court of Appeals,[193] the court held that "the instruction as a whole correctly described the calculation of parole eligibility and the role of 'good conduct' time in reducing the period of incarceration."[194] Because the jury had been "warned that the award of 'good conduct' time [could not] be predicted and that they should not consider the extent to which 'good conduct' time might be awarded," appellant had not shown egregious harm.[195]

In *Thumann v. State*, the court of appeals upheld appellant's conviction for theft.[196] The evidence showed that appellant had engaged in two separate transactions, each of which could have given to a conviction. In the first, appellant falsely represented to the owner of some equipment that he had rented the equipment when in fact he had sold it and kept the proceeds. In the second, appellant, in obtaining a line of credit that went unpaid, represented to a bank that he maintained sole ownership of equipment that he put up as collateral when, in fact, the equipment was simply at his business on consignment. Appellant argued that he was entitled to an instruction on the defense of "ownership" because, he claimed, he and the equipment owner in the first transaction were in a partnership. The court held that the exclusion of such an instruction was not error because appellant merely sought an instruction to negate an element of the offense, *i.e.*, lack of consent.[197]

In *Dudley v. State*, the Beaumont Court of Appeals determined whether the defendant, who was convicted of possession of codeine in an amount of 200 grams or more but less than 400 grams, was entitled to a jury instruction on the "ultimate user" exemption.[198] On appeal, the defendant argued "that the trial court erred in overruling his objection to the jury charge [that] it did not require the jury to find that [the defendant] lacked a valid prescription for the codeine," as required by Texas Health and Safely Code section 481.062(a)(3).[199] Texas Health and Safely Code section 481.062(a)(3) provides that a person may possess a controlled substance if that person is "an ultimate user or a person in possession of the controlled substance under a lawful order of a practi-

191. *Id.* at 742.

192. *Id.*

193. Jimenez v. State, 992 S.W.2d 633, 638 (Tex. App.—Houston [1st Dist.] 1999), *rev'd on other grounds*, 32 S.W.3d 233 (Tex. Crim. App. 2000).

194. *Gilmore*, 68 S.W.3d at 743.

195. *Id.*

196. Thumann v. State, 62 S.W.3d 248, 249 (Tex. App.—Houston [1st Dist] 2001, no pet.) (en banc).

197. *Id.* at 252.

198. Dudley v. State, 58 S.W.3d 296, 297 (Tex. App.—Beaumont 2001, no pet.).

199. *Id.* at 301.

tioner."[200] The court of appeals affirmed, explaining that "a person claiming the benefit of the 'ultimate user' exemption or defense has the burden of producing evidence that raises the defense."[201] Accordingly, because the defendant "presented no evidence that he acquired the codeine by a valid prescription, he was not entitled to [an 'ultimate user'] jury instruction."[202]

In *Mendoza v. State*, the Court of Criminal Appeals addressed "whether the court of appeals erred in holding that the trial court properly refused requested paragraphs [to a jury charge], given that [the] issues were controverted at trial."[203] After concluding that the excluded paragraphs were contested issues at trial and evidence was in the record supporting each party's contention, "[t]he court of appeals held that a general jury instruction regarding the voluntariness of the confession was all that was required by article 38.22, section 7 of the Texas Code of Criminal Procedure.[204] In its review, the Court of Criminal Appeals noted that each of appellant's excluded paragraphs "dealt with the voluntariness of his confession," although presenting different scenarios for each.[205] The court then held that the trial court "appropriately" charged the jury under Article 38.22, section 7 of the Texas Code of Criminal Procedure because the trial court properly included the general instruction about voluntariness and, within its discretion, excluded the fact-based instructions.[206] Accordingly, the Court of Criminal Appeals affirmed the judgment of the court of appeals.

In *Boget v. State*, the Court of Criminal Appeals addressed the issue of "whether a jury charge on self-defense is available when a defendant is charged with an offense other than one involving force against another."[207] In this case, the appellant was charged with criminal mischief because he shattered the windshield of a truck with his flashlight while two people were in the vehicle. The appellant argued that he should be permitted to offer a self-defense instruction to the jury because, according to the appellant, the driver of the vehicle was trying to run him over when he hit the windshield. The trial court held that he was not entitled to the instruction because the offense that he was charged with, criminal mischief, did not involve the use of force against another.[208] The Court of Criminal Appeals noted that section 9.31 of the Penal Code allows a person to use "force against another when . . . he reasonably believes the force is immediately necessary to protect himself." The court noted that the relevant inquiry was what it means to use direct force "against" another. After considering the legislative history of the statute, the law in

200. TEX. HEALTH & SAFETY CODE § 481.062(a)(3) (Vernon 1992).
201. *Dudley*, 58 S.W.3d at 301.
202. *Id.*
203. Mendoza v. State, 88 S.W.3d 236 (Tex. Crim. App. 2002) (en banc).
204. *Id.* at 238.
205. *Id.* at 240.
206. *Id.*
207. Boget v. State, 74 S.W.3d 23 (Tex. Crim. App. 2002).
208. *Id.* at 25.

other jurisdictions, and the intent of the statute, the court overruled *Johnson v. State*[209] to the extent that it held that self-defense was available only where the defendant is charged with an offense involving the use of force against another.[210] Specifically, although the appellant was not charged with an offense related to the use of force against another such as murder or battery, when he hit the windshield his force was directed against the occupants of the vehicle. Thus, the appellant's actions satisfied the relevant inquiry—whether the appellants force was directed against another—and he was entitled to a jury instruction on self-defense.[211]

In *Smith v. State*, the court of appeals determined that to find a defendant guilty of felony DWI, a jury did not have to explicitly state that it found the defendant had been twice convicted of DWI.[212] Smith had stipulated that he had previously been convicted, and that stipulation was admitted into evidence during the trial.[213] The court determined that this was enough to find the defendant guilty of felony DWI, since a jury must not find by special issue that prior convictions exist.[214]

Smith also challenged the manner in which the evidence was obtained against him.[215] He argued "that a jury instruction was necessary because the arresting officer did not observe any suspicious conduct before he made the decision to detain Smith."[216] The court determined that since two witnesses testified that they observed drunken behavior and Smith did not challenge this testimony, there were "no fact issues regarding the legality of the manner in which the evidence was obtained."[217]

Similarly, in *Shpikula v. State*, the court of appeals found that because Shpikula did not challenge the State's proof regarding the justification of the traffic stop, there was no factual dispute that required a special jury charge.[218] In this DWI case, the defendant argued that even though the arresting officers testified that "they observed [his] tail light was out from a quarter of a mile away, the testimony was unbelievable [and] therefore, there was a conflict in the testimony."[219] However, because the defendant "did not testify or call any witness [to] controvert [ ] the State's proof regarding the justification for the traffic stop," the court determined "that the trial court did not err in refusing the [requested jury] charge."[220]

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209. Johnson v. State, 650 S.W.2d 414 (Tex. Crim. App. 1983).
210. *Id.* at 31.
211. *Id.*
212. Smith v. State, 65 S.W.3d 332, 338 (Tex. App.—Waco 2001, no pet.).
213. *Id.*
214. *Id.*
215. *Id.* at 342.
216. *Id.*
217. *Id.* at 342-43.
218. Shpikula v. State, 68 S.W.3d 212, 217 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).
219. *Id.*
220. *Id.*

In another DWI case, *Vrba v. State*, the defendant argued that the trial court erred by failing to instruct the jury to acquit him "if it found that [the officer] did not have a legally permissible basis for the stop."[221] The court of appeals agreed, since Vrba's testimony regarding his driving was inconsistent with the officer's testimony regarding the same.[222] The trial court had been "statutorily bound" to submit the instruction and because "[t]he record contain[ed] no evidence of . . . guilt independent of that obtained as a result of the stop," the defendant suffered "some harm" and the error required reversal.[223]

C. PUNISHMENT

In *Mann v. State*,[224] the Court of Criminal Appeals adopted the court of appeals' opinion in rejecting the appellant's contention that Article 42.12, section 3g(a)(2) of the Texas Code of Criminal Procedure, did not authorize a deadly weapon finding in any prosecution for driving while intoxicated. The appellant had been convicted for driving while intoxicated, third offense. The evidence showed that appellant had "nearly hit another vehicle head-on while driving and that a collision was avoided only because the other driver took evasive action."[225] The jury found that appellant "had used a deadly weapon, namely an automobile, during the commission of the offense."[226] This "deadly weapon finding limits a defendant's eligibility for community supervision and parole."[227] The appellant argued that, because the use of an automobile was an element of the underlying offense, his punishment could not be enhanced simply by the use of the automobile during the commission of the DWI. In holding otherwise, the court of appeals had held that a "deadly weapon" finding was permissible if others were endangered, but not if there was "merely a hypothetical potential for danger if others had been present."[228]

In *Bawcom v. State* the Court of Criminal Appeals addressed the issue of "whether the trial court may consider actions taken by the state before [a] motion to revoke is filed in determining whether the state has exercised due diligence in apprehending [a] probationer."[229] Before filing a motion to revoke probation, "the state made numerous efforts to contact the probationer."[230] After the capias issued, however, the state made "few efforts to contact him and the probationer was not apprehended

221. Vrba v. State, 69 S.W.3d 713, 718 (Tex. App.—Waco 2002, no pet.).
222. *Id.* at 719.
223. *Id.*
224. Mann v. State, 58 S.W.3d 132 (Tex. Crim. App. 2001).
225. *Id.* at 132.
226. *Id.*
227. *Id.* at n.1 *See* TEX. CODE CRIM. PROC. art. 42.12, § 3g(a)(2) (Vernon 1979); TEX. GOV'T CODE §§ 508.145, .149, .151 (Vernon 1998).
228. Mann v. State, 13 S.W.3d 89, 93 (Tex. App.—Austin 2000), *aff'd*, 58 S.W.3d 132 (Tex. Crim. App. 2001).
229. Bawcom v. State, 78 S.W.3d 360 (Tex. Crim. App. 2002).
230. *Id.* at 361.

until after his probationary period had expired."[231] "[T]he Court of Appeals discounted efforts to contact [the probationer] made before the motion to revoke was filed (and the capias issued)" and reversed and remanded to the trial court for it to dismiss the state's motion to revoke.[232] The Court of Criminal Appeals remanded, "hold[ing] that the trial court may consider such evidence."[233]

In *Ellerbe v. State*, after accepting the defendant's plea of nolo contendere, the state violated the agreement by revoking the defendant's probation when he refused to admit guilt in the course of a court-ordered treatment program.[234] The defendant "pleaded nolo contendere to the felony offense of aggravated sexual assault of a child under the age of 14" after a mistrial.[235] "[T]he trial court deferred adjudication of [his] guilt and placed [the defendant under] community supervision" pursuant to his plea agreement.[236] The community supervision required the defendant to attend a counseling program, which requested him to sign a document stating he had committed sexual assault.[237] The defendant refused to sign the document, failed to meet other program requirements, and was terminated from the program.[238] After the defendant was terminated from a second program with similar requirements, "the trial court found [the defendant] had failed to submit to . . . treatment, found him guilty, and assessed his punishment of 18 years at confinement" upon the state's second motion to adjudicate guilt.[239] The defendant appealed, alleging the trial court and state violated his plea agreement.[240] The First Court of Appeals determined that his "plea of nolo contendere [did] not relieve [the] defendant from having to admit [he committed] an offense so [he could] fully participate in a treatment program as a condition of community supervision" and that thus his plea agreement was not violated.[241] Accordingly, the court of appeals dismissed the appeal for lack of jurisdiction because it could "not consider any complaint concerning [an] original plea," which was essentially what the defendant was challenging.[242]

Sunbury v. State the Court of Criminal Appeals decided, as a matter of law, evidence of appellant's non-final sentences was inadmissible under Article 37.07, section 3(a) of the Texas Code of Criminal Procedure.[243] As "one of the guiding principles for the admissibility of evidence at the

231. *Id.*
232. *Id.* at 362.
233. *Id.* at 361.
234. Ellerbe v. State, 80 S.W.3d 721, 722 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 723.
242. *Id.*
243. Sanbury v. State, 88 S.W.3d 229, 230 (Tex. Crim. App. 2002).

punishment phase of a trial [Article 37.07, section 3(a)] permits the introduction of relevant punishment evidence, including extraneous offense evidence, by the State and the defendant."[244] Here, following the policy reasons identified in *Rogers v. State*, 991 S.W.2d 263 (Tex. Crim. App. 1999), the court held that "the punishment assessed for non-final convictions is relevant evidence during the punishment phase at trial."[245] The court reasoned that "[j]ust as it is important that the fact-finder take into account whether the objectives of the Penal Code will be furthered by the imposition of a harsher sentence, it is equally important to take the objectives into consideration when deciding whether any circumstances warrant imposition of a lesser sentence."[246] Thus, the court affirmed the judgment of the court of appeals, which concluded that "the trial court erred in excluding the evidence based on the ground that the prior sentences were not final convictions."[247]

In *Burnett v. State*, the Court of Criminal Appeals granted "[d]iscretionary [r]eview to determine whether the court of appeals properly reversed appellant's conviction because the trial judge failed to admonish [the] appellant regarding the punishment range for his offense, as required by Code of Crim. Proc. art. 26.13."[248] First, the court agreed with the court of appeal's judgment that the failure to admonish appellant regarding the range of punishment was clearly error under Article 26.13 of the Texas Code of Criminal Procedure.[249] The court, however, disagreed "with the court of appeals' analysis and conclusion on the harm issue."[250] The court concluded that "a reviewing court [pursuant to Texas Rule of Appellate Procedure 44.2(b)] must independently examine the record for indications [of the defendant's awareness] of the consequences of his plea and whether he was misled or harmed by the trial court's failure to admonish him of the punishment range."[251] The court then found that the "record [was] replete with statements concerning the applicable range of punishment" and, as a result, the error by the trial court was not misleading or harmful.[252] Accordingly, the court reversed and remanded to the court of appeals "for consideration of appellant's remaining points of error."[253]

In *Smith v. State*, the defendant argued that "at the punishment stage . . . the jury should [be] instructed to not take into account [a defendant's] failure to testify at the guilt-innocence stage of trial."[254] The court determined that there is no authority for this proposition and overruled this

244. *Id.* at 233.
245. *Id.* at 235.
246. *Id.*
247. *Id.*
248. Burnett v. State, 88 S.W.3d 633, 634 (Tex. Crim. App. 2002).
249. *Id.* at 637.
250. *Id.*
251. *Id.* at 638.
252. *Id.* at 635.
253. *Id.*
254. Smith v. State, 65 S.W.3d 332, 341 (Tex. App.—Waco 2001, no pet.).

point of error.[255]

In *Cuellar v. State*, the Court of Criminal Appeals determined that the defendant could not be convicted as a felon in possession of a firearm because his prior felony conviction had been set aside.[256] After the defendant had successfully completed probation for his heroin conviction, the trial court set aside the conviction and dismissed the indictment.[257] The court found that this is not a conviction, and therefore the defendant could not be charged as a felon in possession of a firearm.[258]

III. APPEAL

In *Hernandez v. State*, the Court of Criminal Appeals held "that the admission of evidence obtained in violation of the Fourth Amendment is [constitutional] error," reversing the court of appeals' holding that such error was non-constitutional error not to be analyzed under Texas Rule of Appellate Procedure 44.2(a).[259] Appellant was convicted for possession of cocaine with the intent to deliver. During the punishment phase of the trial, the trial court allowed the admission of evidence seized during an unlawful traffic stop. The court of appeals held that the evidence should have been excluded, but that the error was non-constitutional because it "did not directly offend the United States Constitution, was not required by the Constitution itself, and therefore was not a federal constitutional error for purposes of 44.2(a)."[260]

In reversing, the Court of Criminal Appeals relied on the United States Supreme Court's opinion in *Bumper v. North Carolina*,[261] in which the court held that the proper harm analysis for evidence seized in violation of the Fourth Amendment was "harmless error."[262] The Court of Criminal Appeals explained that "[c]onstitutional rights . . . do not contain express exclusionary rules," but those rights and the constitutional exclusionary rules derive from the constitution and its amendments. Accordingly, "the harm analysis for the erroneous admission of evidence [seized] in violation of the Fourth Amendment must be Rule 44.2(a)'s constitutional standard."[263]

In *Jones v. State*, the Court of Criminal Appeals determined "whether a conviction is 'final' for purposes of the mandatory driver's license suspension statute after a defendant pleads guilty and is sentenced but before the time for filing a notice of appeal has expired."[264] The court of appeals reversed, determining that "because the [defendant's] underlying

255. *Id.*
256. Cuellar v. State, 70 S.W.3d 815, 820 (Tex. Crim. App. 2002).
257. *Id.* at 816.
258. *Id.* at 820.
259. Hernandez v. State, 60 S.W.3d 106 (Tex. Crim. App. 2001).
260. Hernandez v. State, 13 S.W.3d 492, 508 (Tex. App.—Amarillo 2000), *rev'd and remanded*, 60 S.W.3d 106 (Tex. Crim. App. 2001).
261. Bumper v. North Carolina, 391 U.S. 543 (1968).
262. *Id.* at 550.
263. *Hernandez*, 60 S.W.3d at 108.
264. Jones v. State, 77 S.W.3d 819 (Tex. Crim. App. 2002).

conviction remained subject to appellate review at the time he was charged, . . . his underlying conviction was not final."[265] The Court of Criminal Appeals reversed, holding that "when there is no evidence that [the] defendant ever filed a notice of appeal, a conviction is deemed to be final on the date of the sentencing."[266]

Motilla v. State involved the issue of whether an appellate court is required to disregard overwhelming evidence of a defendant's guilt in a harm analysis under Texas Rule of Appellate Procedure 44.2(b).[267] A juvenile certified to stand trial as an adult appealed his capital murder conviction on the grounds "that the evidence was legally and factually insufficient and that the trial judge erred [in] allowing the testimony of [the victim's] mother because it was irrelevant and its more prejudicial than probative."[268] The court of appeals reversed and remanded, determining that the evidence was sufficient but that the trial judge erred in admitting the victim's mother's testimony and that it influenced the jury under a harm analysis.[269] The court of appeals indicated that an appellate court should not focus on guilt in a harm analysis.[270] Reversing, the Court of Criminal Appeals held that evidence of the defendant's guilt is a factor that should be considered in a harm analysis under Texas Rule of Appellate Procedure 44.2(b).[271]

The issue in *Johnson v. State* is whether a defendant's general notice of appeal from a plea-bargained conviction invokes the court of appeals' jurisdiction.[272] "After their motions to suppress evidence were denied, the [defendants] plead guilty to . . . drug offenses, pursuant to plea bargains."[273] Subsequently, the defendants "filed 'general' notices of appeal . . . stat[ing] that the named defendant 'excepting to the ruling of the court, filed this written notice of appeal of said conviction to the Court of Appeals pursuant to Texas Rule of Appellate Procedure 40(b)(1).'"[274] On appeal, the defendants claimed the trial court erroneously denied their motions to suppress.[275] The State responded that the court of appeals' jurisdiction was not invoked through the general notices of appeal.[276] The Court of Criminal Appeals reversed and dismissed the appeals, holding that substantial compliance is sufficient to satisfy the notice of appeal requirements from plea-bargained convictions but that the defendants' general notice of appeal did not evoke the court of appeals'

265. Jones v. State, 21 S.W.3d 639, 642 (Tex. App.—Amarillo 2000), *rev'd*, 77 S.W.3d 819 (Tex. Crim. App. 2002).
266. *Jones*, 77 S.W.3d at 820.
267. Motilla v. State, 78 S.W.3d 352, 353-54 (Tex. Crim. App. 2002).
268. *Id.* at 355.
269. *Id.*
270. *Id.* at 356.
271. *Id.* at 360.
272. Johnson v. State, 84 S.W.3d 658 (Tex. Crim. App. 2002) (en banc).
273. *Id.* at 659.
274. *Id.*
275. *Id.*
276. *Id.*

jurisdiction, overruling *Riley v. State*.[277]

Strong v. State dealt with the threshold issue of whether the court's jurisdiction over the state's cross-point of error was properly invoked under Article 44.01(c) of the Texas Code of Criminal Procedure.[278] Recognizing a split on the issue, the court was "not persuaded by the reasoning of the courts" that do not require the state to file a notice of appeal when it appeals pursuant to article 44.01(c).[279] Instead, the court dismissed the state's cross-point of error for lack of jurisdiction, "agree[ing] with the Austin and Beaumont courts that the State must file a notice of appeal pursuant to appellate rule 25.2(a)."[280] The court also concluded that it would not have had jurisdiction over the State's point of error even if the State had filed a notice of appeal because interpreting Article 44.01(c) to allow the appeal of an acquittal on the driving while intoxicated ("DWI") offense would have violated the double jeopardy clause of the United States Constitution.[281] Finally, the court "agree[d] with appellant that the concept of attempted DWI [as a lesser included offense] does not fit the statutory scheme provided by the legislature . . . and it is not consistent with the penal code's [policy] of insuring the public safety."[282] Accordingly, the court vacated the trial court's conviction of attempted DWI and rendered judgment that appellant was acquitted of the charged offense of DWI.

In *Hailey v. State*, "appellant claimed [at trial] that the results of his blood-alcohol test should have been suppressed, arguing that the blood drawn by [a] hospital worker constituted an unreasonable search and seizure by the police under the Fourth Amendment."[283] "The trial court denied appellant's motion to suppress," finding that the blood-alcohol test was reasonable in light of appellant's intoxication, and not at the direction of the police.[284] Appellant's theory on appeal asserted that his blood was taken in violation of the Texas Transportation Code because no one died as a result of the accident, which is required under the statute.[285] The court of appeals rejected appellant's theory but decided the "appellant's blood-alcohol test should have been suppressed because the hospital worker's [withdrawal of appellant's blood] was an unlawful assault."[286] The court affirmed the trial court's judgment and reversed the court of appeals decision because "it violate[d] 'ordinary notions of procedural default' for a court of appeals to reverse a trial court's decision on a legal theory not presented to the trial court by the complaining

277. *Id.* at 660-61 (citing Riley v. State, 825 S.W.2d 699 (Tex. Crim. App. 1992)).
278. Strong v. State, 87 S.W.3d 206 (Tex. App.—Dallas 2002, no pet.).
279. *Id.* at 212.
280. *Id.*
281. *Id.* at 213-14.
282. *Id.* at 218.
283. Hailey v. State, 87 S.W.2d 118, 119-20 (Tex. Crim. App. 2002).
284. *Id.* at 120.
285. *Id.*
286. *Id.* at 121.

party."[287]

Ellison v. State dealt with whether the court of appeals applied the proper harm analysis, as required by *Almanza*[288] and its progeny.[289] In *Ellison*, a jury convicted appellant of aggravated robbery and "assessed punishment at ninety-nine years in prison and a $5,000 fine." "During the punishment phase of trial, the trial court admitted evidence of extraneous offenses, but failed to instruct the jury that, before it could consider the extraneous-offense evidence, it must find that the state had proved those acts beyond a reasonable doubt."[290]

According to the Court of Criminal Appeals in *Ellison*, the appellate court correctly noted that the error by the trial court was its "failure to give, *sua sponte*, a reasonable-doubt instruction regarding the extraneous offenses."[291] In addition, the court of appeals correctly noted "that the error must be reviewed under the . . . *Almanza* criteria," which requires the court to assess the degree of harm based on the entire jury charge, and the entire state of the evidence.[292] The court concluded, however, that the court of appeals erred because it applied its analysis to the wrong issues. Instead of a finding of error on the admission of the evidence, the court of appeals should have focused on the omission of the reasonable-doubt instruction.[293] Accordingly, the Court of Criminal Appeals remanded the case to the court of appeals for a harm analysis on the impact of the omission of the reasonable-doubt instruction.

In *Hampton v. State*, "police officers took appellant, a juvenile, into custody [and] told his mother that they were doing so because he had absconded from juvenile probation."[294] "The next morning, without re-establishing contact with appellant's mother, [a police] officer questioned the appellant about a . . . murder," to which the "[a]ppellant gave a videotaped statement," admitting to the murder.[295] "A jury convicted appellant and sentenced him to 35 years imprisonment."[296] The court of appeals reversed the conviction and ordered a new trial, "finding that: 1) appellant's videotaped statement was taken in violation of section 52.02(b); and 2) the State's failure to disclose potentially exculpatory material was harmful . . . ."[297]

The Texas Court of Criminal Appeals reversed and remanded the case.[298] First, the court concluded that there was no violation of section

287. *Id.* at 122 (quoting State v. Mercado, 972 S.W.2d 75, 77-78 (Tex. Crim. App. 1998)).
288. Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1985).
289. Ellison v. State, 86 S.W.3d 226, 228 (Tex. Crim. App. 2002) (en banc).
290. *Ellison*, 86 S.W.3d at 226.
291. *Id.* at 227.
292. *Id.* at 228.
293. *Id.*
294. Hampton v. State, 86 S.W.3d 603, 605 (Tex. Crim. App. 2002).
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* at 606.

52.02(b) of the Texas Family Code because the officer "promptly notified both appellant's mother and the appropriate juvenile authorities that he had taken appellant into custody and [the] reason for doing so."[299] The rationale for the court's conclusion included the determination that the "statement of the reason for taking the child into custody" did not mean "the legal reason for taking the child into custody, and any other suspicions."[300] Furthermore, the court concluded that it could not "determine whether the court of appeals applied the standard for *Brady* error rather than an inappropriate general harmless error."[301] Thus, the court "remand[ed] the case to the court of appeals for it to determine whether appellant has demonstrated that the State's failure to timely produce a police officer's supplementary report was material" under the proper *Brady* error analysis.[302]

Bishop v. State dealt with "[w]hether the court of appeals erred in holding that appellant failed to present evidence that her detention was conducted without a search warrant."[303] After the trial court denied appellant's motion to suppress evidence on affidavit evidence alone, a jury "convicted [her] of possession of cocaine weighing at least 400 grams, with intent to deliver," and "assessed [her] punishment at 60 years confinement and a $250,000 fine."[304] "[T]he court of appeals, without reaching the merits, overruled appellant's claim of lack of probable cause for the initial traffic stop" and affirmed appellant's judgment and sentence.[305] The Texas Court of Criminal Appeals "unanimously concluded that the court of appeals should have considered . . . the merits of appellant's motion and the attached affidavit under article 28.01, section 1(6) of the Texas Code of Criminal Procedure since there were no witnesses called and no evidence was presented at a hearing on the motion to suppress.[306] Thus, the court sustained appellant's ground for review, reversed the judgment of the court of appeals, and remanded the case.

In *State v. Martinez*, the trial court held that the defendant's recorded conversations with the city attorney were protected by the attorney-client privilege.[307] The State appealed, and the appellate court, relying on *State v. Roberts*,[308] refused to hear the case on the basis that it did not have jurisdiction to hear the case under Texas Code of Criminal Procedure Article 44.01(a)(5). However, noting that it had recently overruled *Roberts* in *State v. Medrano*,[309] and "held that Article 44.01(a)(5) is not limited solely to pretrial rulings that suppress 'illegally obtained' evidence,"

299. *Id.* at 611.
300. *Id.* at 609-10.
301. *Id.* at 612.
302. *Id.* at 606.
303. Bishop v. State, 85 S.W.3d 819, 820 n.1 (Tex. Crim. App. 2002) (en banc).
304. *Id.* at 820.
305. *Id.* at 821-22.
306. *Id.* at 822.
307. State v. Martinez, 70 S.W.3d 894 (Tex. Crim. App. 2002).
308. State v. Roberts, 940 S.W.2d 655 (Tex. Crim. App. 1996).
309. State v. Medrano, 67 S.W.3d 892 (Tex. Crim. App. 2002).

the Court of Criminal Appeals "vacate[d] the judgment of the court of appeals, and remand[ed the case] for reconsideration in light of the [*Medrano* decision]."

In *Idowu v. State*, the Court of Criminal Appeals addressed the issue of "whether a court of appeals should determine the correct amount of restitution that a defendant must pay as a condition of probation, when the defense argues—at a hearing on a motion for new trial which raises an ineffective assistance of counsel issue—that restitution should never have been ordered in the first place."[310] The court answered "no" when the appellant did not preserve the restitution issue for appellate review. The court noted that in a sufficiency of the evidence review, the appellant need not preserve issues by objection at the trial level in order to raise them on appeal. However, the court noted that it need not address "whether a party must object to preserve a sufficiency claim concerning a restitution order" because, in this case, there was a factual basis for the restitution ordered by the trial court.[311] Thus, "because [appellant] failed to make a specific [objection] in the trial court at the time [that] the order was imposed," he waived the issue for appeal.[312]

In *Hull v. State*, the defendant attempted to argue for the first time on direct appeal that the trial court's zero tolerance probation violated due process.[313] The court determined that this argument was waived by the defendant who failed to raise the issue in the trial court.[314] First, the defendant did not object to the zero tolerance policy at the imposition of his conditions of probation.[315] Second, he did not object when his probation was revoked.[316]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In *Woods v. State*, the appellant's conviction for attempted sexual assault was reversed on the ground that he received ineffective assistance of counsel.[317] The appellant pleaded guilty to the charge pursuant to a plea bargaining agreement, and the trial court assessed the punishment recommended in that agreement. However, appellant later appealed, raising issues as to his mental capacity at the time of the offense and at the time he accepted the plea bargain. The court of appeals remanded the case to the trial court for the appointment of counsel to address whether appellant received ineffective assistance of counsel, in view of appellant's history of mental illness, by failing to file a notice of intent to present an insanity defense and by failing to request the appointment of a defense mental health expert. On appeal, the court held that, even though appel-

310. Idowu v. State, 73 S.W.3d 918, 918-19 (Tex. Crim. App. 2002).
311. *Id.* at 922.
312. *Id.* at 923.
313. Hull v. State, 67 S.W.3d 215, 216 (Tex. Crim. App. 2002).
314. *Id.* at 217-18.
315. *Id.*
316. *Id.*
317. Woods v. State, 59 S.W.3d 833 (Tex. App.—Texarkana 2001, pet. granted).

lant's trial counsel failed to follow the strictures of Article 46.03 of the Texas Code of Criminal Procedure in raising an insanity defense, appellant suffered no prejudice because the issue was raised by filing a "Motion for Psychiatric Examination: Sanity" that was the custom in Harris County.[318]

The court found, however, that under the United States Supreme Court's holding in *Ake v. Oklahoma*,[319] the state was required to provide appellant with a psychiatrist's assistance once he made a preliminary showing that his sanity at the time of the offense was likely to be a significant factor at trial.[320] Given appellant's "significant recorded history of mental illness . . . defense counsel was required to request the court-appointed assistance of a mental health expert."[321] The "failure to do so was prejudicial and undermine[d the] confidence in the outcome of the proceedings," requiring reversal.[322]

In *Bone v. State*, the Court of Criminal Appeals determined whether the defendant received ineffective assistance of counsel under the standard of *Strickland v. Washington*.[323] The defendant argued on appeal that his counsel was ineffective by:

> (1) failing to pursue prejudice among prospective jurors; (2) making offensive remarks regarding drinking and driving; (3) failing to offer any significant evidence in his favor during the punishment phase of the trial; (4) offering evidence during the punishment phase of the trial that was harmful to his credibility; (5) failing to make the correct objection to the State's attempt to offer into evidence a document which weighed directly on his credibility; and (6) making statements that affirmatively prejudiced him.[324]

The court of appeals concluded that counsel's efforts were minimal and reversed and remanded.[325] The Court of Criminal Appeals reversed, holding that "an appellate court may [not] reverse a conviction on ineffective assistance of counsel grounds when counsel's actions or omissions may have been based upon tactical decisions."[326]

In *Purchase v. State*, the First Court of Appeals addressed the issue of whether defense counsel's failure to investigate the defendant's psychiatric condition to determine if he was competent to stand trial amounted to ineffective assistance.[327] A jury found the defendant guilty of theft and

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318. *Id.* at 837.
319. Ake v. Oklahoma, 470 U.S. 68 (1985).
320. *Woods*, 59 S.W.3d at 837.
321. *Id.* at 838.
322. *Id.*
323. Bone v. State, 77 S.W.3d 828, 833 n.4 (Tex. Crim. App. 2002) (citing Strickland v. Washington, 466 U.S. 668 (1984)).
324. *Id.* at 832.
325. *Id.*
326. *Id.* at 830.
327. Purchase v. State, 84 S.W.3d 696, 700 (Tex. App.—Houston [1st. Dist.] 2002, no pet.).

he was sentenced to four years probation.[328] The defendant appealed, arguing, among other issues, that his counsel's failure to ask him about his psychiatric history constituted ineffective assistance.[329] The court of appeals affirmed, holding that "there [was] no evidence that counsel knew of factors, such as disability payments or a lack of understanding about trial proceedings, that might have prompted further investigation into [the defendant's] competency."[330]

In *Cochran v. State*, the appellant claimed that he was denied effective assistance of counsel and his parole was revoked because his trial counsel "failed to file any pre-trial discovery motions, . . . did not request a continuance when his subpoenaed witness failed to attend the revocation hearing [and] failed to demand a separate hearing on punishment."[331] The court of appeals held that the appellant was not denied effective assistance of counsel because: another witness appeared and testified in the subpoenaed witness' place, appellant's counsel reasonably exercised his judgment in allowing the other witness to testify, the appellant's mother gave punishment testimony during the revocation hearing, and the appellant failed to allege any evidence that he believed his trial attorney failed to obtain.[332] The court held "that the trial court [did not err] in failing to conduct an evidentiary hearing on [appellant's] motion for new trial" because the motion was never presented to the trial court.[333] Furthermore, appellant filed the motion for new trial and his appeal on the same day, depriving the trial court of jurisdiction to hear his motion for new trial. The court also concluded that appellant did not preserve his argument that he deserved a separate hearing on punishment for appeal.[334] The court held that the appellant's right to due process was not denied "because he was not ordered to attend an educational program designed to rehabilitate [offenders] who have driven while intoxicated" because he did not preserve the issue for appeal and because the trial court is permitted to waive the educational program requirement.[335] Finally, the court held that "[t]he trial court did not abuse its discretion in revoking Appellant's probation."[336]

In *Mitchell v. State*, the Court of Criminal Appeals rejected the argument that the defendant was denied effective assistance of counsel because his attorney permitted him to wear an incriminating shirt during voir dire.[337] The defendant came to court wearing a shirt like the one the robber wore.[338] The State conceded that there was a deficiency in per-

328. *Id.* at 698.
329. *Id.* at 700.
330. *Id.* at 700-01.
331. Cochran v. State, 78 S.W.3d 20, 23 (Tex. App.—Tyler 2002, no pet.).
332. *Id.* at 24-25.
333. *Id.* at 25.
334. *Id.* at 26.
335. *Id.* at 26-27.
336. *Id.* at 28.
337. Mitchell v. State, 68 S.W.3d 640, 641-42 (Tex. Crim. App. 2002) (en banc).
338. *Id.* at 643.

formance on the part of defendant's counsel, but the court noted that the defendant failed to show he was prejudiced by this deficiency.[339] The court found that the fact that the defendant "was wearing the shirt by his own choice the day after the robbery when he was arrested and taken to jail [and] that he was arrested in the shirt was in evidence independent of his wearing it in front of the venire."[340]

V. HABEAS CORPUS

In *In Ex Parte Anderer*,[341] the Court of Criminal Appeals held that the condition that appellant not operate a motor vehicle during the pendency of his appeal was a reasonable condition of bail. Appellant was convicted of criminally negligent homicide arising out of an accident where appellant was driving a commercial vehicle. The appellant gave notice of appeal, and "[t]he district court set his bail at $50,000 and imposed on the bail the condition that appellant 'was not operate any type of motor vehicle . . . .'"[342] The appellant applied for a writ of habeas corpus, claiming that the condition was unreasonable and violated his due process rights. The district court held a hearing, at which time the appellant admitted he had been in another "injury accident" while operating a commercial vehicle, and denied relief. "A divided panel of the Court of Appeals reversed."[343]

The Court of Criminal Appeals first notes the difference between bail before trial and bail pending appeal. The former "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment before conviction;" while the latter only protects the interest in "protecting the defendant from an erroneous judgment."[344] The interest of appellants must be balanced against society's interest in enforcing the penal laws, chief among those interests being the public safety. In this case, appellant was "convicted of killing an individual [while] driving his vehicle," and he previously had been in another injury accident. Thus, the condition that he not operate any vehicle was reasonable in protecting the public safety.[345]

In *Ex parte Fierro*, the Court of Criminal Appeals determined the limitations of manifest necessity.[346] The trial court declared a mistrial when one jury member in a trial over two alleged incidents of sexual assault stated she was the defendant's cousin, which the trial court understood to mean she was related to the defendant within the third degree of consanguinity under Article 35.16(b)(2) of the Texas Code of Criminal Proce-

339. *Id.*
340. *Id.*
341. *Ex Parte* Anderer, 61 S.W.3d 398 (Tex. Crim. App. 2001) (en banc).
342. *Id.* at 398.
343. Anderer v. State, 7 S.W.3d 245 (Tex. App.—Houston [14th Dist.] 1999), *rev'd* 61 S.W.3d 398 (Tex. Crim. App. 2001).
344. *Ex Parte* Anderer, 61 S.W.3d at 405-06.
345. *Id.* at 406.
346. *Ex Parte* Fierro, 79 S.W.3d 54 (Tex. Crim. App. 2002) (en banc).

dure.[347] The trial court determined it "could not proceed to a verdict in a criminal case with eleven jurors."[348] "The juror at issue, [however,] was not . . . related to [the defendant] within the third degree of consanguinity."[349] The defendant "filed motions to dismiss and petitions for writ of habeas corpus seeking to [bar] re-trial [because] jeopardy had attached when the jury [was] selected and sworn and that there was no showing that the mistrial had been mandated by manifest necessity."[350] The trial court denied the motions and petitions.[351] The court of appeals upheld the trial court's rulings even though "the trial court found manifest necessity without first asking the parties whether they were willing to proceed to trial with eleven jurors."[352] The Court of Criminal Appeals reversed and remanded, holding that the trial court abused its discretion in declaring a mistrial because it did not consider "any less drastic alternatives as is required by *Brown* [such as] determin[ing] if the parties would be willing to proceed with fewer than twelve jurors under Tex. Govt. Code § 62.201."[353]

VI. MANDAMUS

The Court of Appeals for Corpus Christi, in *In re Rodriguez*, addressed a petition for writ of mandamus relating to the issue of "whether a convicting court may deny an indigent person's request for appointment of counsel to assist him in presenting a motion for DNA testing to the court."[354] The court, after first noting the requirements that need to be met in order to obtain mandamus relief, held that Article 64.01(c) of the Code of Criminal Procedure mandates that "a convicted person is entitled to counsel in a proceeding for DNA testing" so long as he is indigent and he requests counsel.[355] Because there is not a requirement that the indigent prove "a *prima facie* case of entitlement to DNA testing before" he or she has such a right to counsel, the court held that "respondent had a ministerial duty to appoint counsel for relator."[356] Thus, the court "conditionally grant[ed] relator's petition for writ of mandamus and direct[ed] respondent [to] appoint counsel to represent relator" and reconsider relator's motion for post-conviction DNA testing after appointing counsel.

347. *Id.* at 55.
348. *Id.*
349. *Id.* at 56.
350. *Id.* at 55.
351. *Id.*
352. *Id.* at 59.
353. *Id.* at 57 (citing Brown v. State, 907 S.W.2d 835 (Tex. Crim. App. 1995)).
354. *In re* Rodriguez, 77 S.W.3d 459, 461 (Tex. App.—Corpus Christi 2002, no pet.).
355. *Id.*
356. *Id.*