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Crinminal Procedure: Pretrial, Trial and Appeal

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CRIMINAL PROCEDURE: PRETRIAL, TRIAL AND APPEAL

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I. PRETRIAL

IN *Ex parte Werne*,[1] the applicant was arrested on Texas state offenses. He satisfied these sentences in jail, but remained in custody because of a warrant out of Mississippi. After spending two months in jail, without counsel and without bond set, the applicant filed an application for habeas corpus relief. Over two months after the application was filed, the trial court released the applicant on a $5,000 bond. In the interim, a warrant was issued in Texas for the applicant's arrest based on the Mississippi charges, and thus the applicant was rearrested. He again filed an application for habeas corpus, contending that the trial court's error in not granting proper relief on his first application denied him his constitutional right to liberty and that this deprivation could not be cured by the subsequent warrant. The Texarkana Court of Appeals disagreed, holding that, while the trial court erred in not granting the applicant a faster hearing on his first application and in not releasing him unconditionally, any error was harmless because the warrant was indisputably

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1. *Ex parte* Werne, 118 S.W.3d 833 (Tex. App.—Texarkana 2003, no pet.).

valid.[2]

In *Shaw v. State*,[3] the Texas Court of Criminal Appeals considered whether the Texarkana Court of Appeals erred when it held that a thirty-eight month delay in bringing defendant to trial violated his right to a speedy trial. The Court of Criminal Appeals began its analysis by stating that a trial court must employ a "balancing test in which the conduct of both the State and the defendant are weighed."[4] The court found that a one-year delay triggers a speedy trial inquiry, and in this inquiry, the court balanced the State's proffered reasons for the delay, the defendant's own motion for continuance and the trial court's crowded docket. The Court of Criminal Appeals found that the trial court's crowded docket weighed against the State, but that the defendant had not sought a "speedy trial . . . until [twenty-nine] months after his first trial," which had ended in a mistrial, and that the defendant had not been prejudiced because he had been out on bond and had not demonstrated "any unusual anxiety or concern" in the interim.[5] Weighing these factors, the Court of Criminal Appeals found that the factors weighed against a finding that appellant's right to a speedy trial was violated and reversed the court of appeals.[6]

Similarly, the Corpus Christi-Edinburg Court of Appeals held that a seventeen-and-a-half month delay did not violate Fifth or Sixth Amendment rights to a speedy trial.[7] The court in *State v. McCoy* found that "the preindictment delay was due to . . . [the] thorough investigation of the case" and that the additional five-and-a-half month delay to the start of the trial was due to the court's crowded docket.[8] Further, the court opined that the defendant's assertion of the right was merely to have the trial court dismiss the indictment and not to actually have a speedy trial since defense counsel first asked for a continuance to seek witnesses.[9] Finally, the court found that while the defendant suffered from some anxiety while awaiting trial, it did not impair his defense.[10]

A. INDICTMENT

In *Lopez v. State*,[11] the Texas Court of Criminal Appeals barred two separate convictions based upon a single sale of a controlled substance as a violation of the Double Jeopardy Clause. Appellant contacted an undercover officer and negotiated the sale of cocaine.[12] Later that day, ap-

2. *Id.* at 837-38.
3. Shaw v. State, 117 S.W.3d 883 (Tex. Crim. App. 2003).
4. *Id.* at 888 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972); Harris v. State, 827 S.W.3d 949, 956 (Tex. Crim. App. 1992)).
5. *Id.* at 890.
6. *Id.* at 891.
7. State v. McCoy, 94 S.W.3d 296, 305 (Tex. App.—Corpus Christ 2002, no pet.).
8. *Id.* at 302.
9. *Id.* at 303.
10. *Id.* at 305.
11. Lopez v. State, 108 S.W.3d 293 (Tex. Crim. App. 2003).
12. *Id.* at 294.

pellant met with the officer at a mall and participated in the delivery of the cocaine. Appellant was charged and convicted of two separate counts of controlled substance violations under Section 481.112 of the Texas Health and Safety Code. The first court charged that Lopez intentionally or knowingly delivered a controlled substance by offering to sell the controlled substance. The second count alleged that Lopez intentionally or knowingly possessed a controlled substance with intent to deliver the substance. The jury found Lopez "guilty on both counts and sentenced him to twenty-five years imprisonment for each count."[13]

Lopez appealed, arguing that he was convicted twice for the same offense in violation of the Double Jeopardy Clause. That clause protects individuals against multiple convictions for the same offense.[14] Therefore, the Court of Criminal Appeals needed to determine whether "the Legislature intend[ed] each step taken toward [a] single sale itself constitutes a different violation of the statute."[15] The court concluded that the legislature intended that the statute provide several different means for committing one offense. The State may charge the offense under one or any of the different modes of violation, but "it cannot obtain two convictions for the same sale."[16] Therefore, the court held that "[t]he entry of two convictions [was improper] because the steps in this single drug transaction were all 'the result of the original impulse,' and therefore each step was not a 'new bargain.'"[17]

B. Voir Dire

In *Roberts v. State*,[18] the appellant made several complaints about jury selection in his trial wherein he was convicted of delivery of a controlled substance. The Tyler Court of Appeals first held that, while it was error for the trial court to *sua sponte* order a jury shuffle after the commencement of voir dire, any error was harmless because the resultant panel would still be entirely random.[19] The court of appeals next found that, while a juror may be equivocal about his ability to disregard the defendant's choice not to take the stand, the appellate court must defer to the trial court's judgment regarding whether that juror will follow the court's instruction.[20] Finally, the court of appeals found that the trial court did not err in informing a prospective juror about his right to seek an exemption if he was over the age of sixty-five so long as the juror himself exercised the exemption and the court did not order the juror removed on that basis.[21]

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13. *Id.* at 295.
14. *Id.* at 295 (citing North Carolina v. Pearce, 395 U.S. 711 (1969)).
15. *Id.* at 296.
16. *Id.* at 300.
17. *Id.* at 300-01.
18. Roberts v. State, No. 12-94-00295-CR, 2003 WL 22204995 (Tex. App.—Tyler Sept. 24, 2003, no pet.).
19. *Id.* at *1.
20. *Id.* at *2 (citing Brown v. State, 913 S.W.2d 577, 580 (Tex. Crim. App. 1996)).
21. *Id.* at *3.

In *Simpson v. State*,[22] the appellant, convicted of capital murder, challenged the propriety of jury selection. First, he argued that he was denied his statutory right to question a juror who stated that she opposed the death penalty when the trial court granted the state's challenge to the juror without giving the defense the opportunity to question her. The Texas Court of Criminal Appeals agreed that this was error, but found that such error was harmless because the record demonstrated that "it [was] *highly unlikely* that the appellant would have been able to convince" the prospective juror to change her position.[23] The court of criminal appeals also rejected the appellant's *Batson* challenge, finding that the prosecution's statement that it struck certain jurors because they knew people in prison did not evince "inherently discriminatory intent."[24]

II. TRIAL

The Texarkana Court of Appeals considered the effect of television cameras in the courtroom in a criminal trial in *Graham v. State*.[25] A jury convicted the appellant pursuant to his guilty plea of arson and sentenced him to seventy years in prison and a $10,000 fine. One of appellant's grounds for appeal was the trial court's decision to permit cameras in the courtroom during his trial.[26] The court of appeals noted that "the trial court has the power to control the procedural aspects of a case," including whether to permit cameras in the courtroom.[27] The court admitted that while cameras can sometimes cause a "circus atmosphere, . . . there is nothing in [the] record to suggest the existence . . . of [an] inappropriate atmosphere."[28] Accordingly, the court held "under this record, the trial court did not abuse its discretion by permitting the media to remain in the courtroom."[29] In a concurring opinion, one justice noted that "because no rule-making authority in Texas has expressly authorized such coverage in criminal cases, trial courts should not permit it in those proceedings."[30] However, the concurring justice noted that because the appellant did not "show that [television] coverage of his particular case had an adverse impact . . . sufficient to constitute a denial of due process," he concurred with the majority in denying appellant's claim.[31]

In *Compton v. State*,[32] the Texarkana Court of Appeals considered whether an officer's deviation from the official standards in administering field sobriety tests would make those tests inadmissible. The appellant

22. Simpson v. State, 119 S.W.3d 262 (Tex. Crim. App. 2003).
23. *Id.* at 267 (emphasis added).
24. *Id.* at 268.
25. Graham v. State, 96 S.W.3d 658 (Tex. App.—Texarkana 2003, pet. ref'd).
26. *Id.* at 660.
27. *Id.* (quoting Marx v. State, 987 S.W.2d 577, 588 (Tex. Crim. App. 1999) (Keller, J., dissenting)).
28. *Id.*
29. *Id.* at 661.
30. *Id.* at 662 (Ross, J., concurring).
31. *Id.*
32. Compton v. State, 120 S.W.3d 375 (Tex. App.—Texarkana 2003, pet. ref'd).

claimed that the officer failed to administer the horizontal gage nystagmus (HGN) and one-legged stand tests in accordance with the State's official manual. The court of appeals held that slight deviations from the manual's standards would not invalidate the tests, but instead considered the harm any such deviations may have caused.[33] Applying this standard, the court found no error in admitting the tests into evidence. First, the officer's error in administering the HGN test, doing the tests too quickly, was insufficient to "automatically undermine" the results because the variations were too small.[34] Second, the officer's error in administering the one-legged stand test, failing to instruct the appellant not to use his arms for balance, was harmless because using arms for balance should have actually improved the appellant's performance on the test.[35]

In *Gonzalez v. State*,[36] the trial court disqualified the defendant's chosen counsel, finding that counsel had key testimony that made him a potential witness. The defendant appealed, claiming that the disqualification "violated his Sixth Amendment right to counsel of his choice."[37] Appellant was convicted of theft, in which he and others conspired to commit insurance fraud by staging car accidents. One of the co-conspirators, Percy Gonzalez, was the State's key witness. Percy had several conversations with Ralph Gonzalez, appellant's attorney, during which "it was agreed that appellant would pay Percy $10,000."[38] Percy later testified that the payment was an attempt to buy favorable testimony, while attorney Gonzalez argued that the payment was to help Percy hire an attorney. The Texas Court of Criminal Appeals held that the possibility of prejudice to the State outweighed the defendant's Sixth Amendment right, and thus affirmed the disqualification. The court stated that "the State would have been prejudiced not only by the undue weight jurors might have attached to counsel's testimony, but also by the confusion that would most likely have resulted during argument regarding whether counsel was summarizing evidence or further testifying as to personal knowledge."[39] The court also found the disqualification was supported by the fact that the defendant may have been prejudiced if, for example, the State were to impeach the attorney's credibility.[40]

In *Xu v. State*,[41] the San Antonio Court of Appeals considered an interesting case involving a husband confessing to his wife's murder after being given his *Miranda* warnings more than eighteen hours before the confession. The defendant's wife was brought to the hospital unconscious, and she died soon after. When the police arrived at the hospital, they informed the defendant of his *Miranda* rights and interviewed him

33. *Id.* at 378-79.
34. *Id.*
35. *Id.* at 379.
36. Gonzalez v. State, 117 S.W.3d 831 (Tex. Crim. App. 2003).
37. *Id.* at 835.
38. *Id.*
39. *Id.* at 840.
40. *Id.*
41. Xu v. State, 100 S.W.3d 408 (Tex. App.—San Antonio 2002, pet. filed).

about the circumstances of his wife's death, which the medical examiner later determined was caused by strangulation.[42] The following day, the defendant consented to a search of his home and voluntarily went to the police station for questioning. Initially, the defendant gave a written statement indicating that he pushed his wife and that she passed out, but hours later, after being confronted with evidence that his wife was strangled, the defendant signed a second statement confessing that he "got really mad and grabbed her by the throat."[43] After the confession, the police did not immediately obtain an arrest warrant because they feared a trial court might not admit the defendant's confession at trial if the court thought that Xu confessed while in custody without receiving the required *Miranda* warnings. One of the detectives testified they "would have had a 'problem with the custodial interrogation,'—Xu's 'statements [would] come in if [they] let him go home.'"[44] Accordingly, the police permitted him to leave the police station, although they informed the defendant's friends and relatives that he admitted to killing his wife. The police arrested Xu two days later.[45] At trial, the court allowed Xu's confession into evidence, and he was convicted of murdering his wife and sentenced to twenty-five years in prison.[46] The San Antonio Court of Appeals reversed the trial court's decision because Xu's confession was the product of a custodial interrogation, and it was improperly admitted into evidence because he was not given *Miranda* warnings before making the statements.[47] The court noted that "[a] written statement made by an accused as a result of custodial interrogation is inadmissible unless it is shown on the face of the statement that: (1) before making the statement, the accused received specific warnings from a magistrate or the person to whom the statement is made and (2) the accused knowingly, intelligently, and voluntarily waived the rights set out in the warnings."[48] Because Xu's written statement did not show that he was given the necessary warnings or that he waived his rights, his written statement was inadmissible. In addition, the court of appeals noted that Xu was in "custody" when he made his written statement because the police had probable cause to arrest him, and the police did not tell Xu he was free to leave.[49] Ultimately, the court of appeals found that it could not "conclude beyond a reasonable doubt that the erroneous admission of Xu's second statement did not contribute to his conviction" and it reversed the trial court's judgment and remanded the case for a new trial.[50]

42. *Id.* at 410.
43. *Id.* at 412.
44. *Id.* (alterations in original).
45. *Id.*
46. *Id.* at 410.
47. *Id.* at 415.
48. *Id.* at 413 (citing TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2 (Vernon 1979)).
49. *Id.*
50. *Id.* at 416.

A. EVIDENCE

In *Byrd v. State*,[51] the Fort Worth Court of Appeals affirmed the appellant's conviction of injury to a child by omission for failing to seek medical care. Appellant was spanking his seven-year old child when the child suddenly "went limp."[52] Soon thereafter, the child started to shake, so the appellant called 911. By the time the medical team arrived, the child had stopped shaking and was sitting upright and conscious. However, the medical team found the son with several injuries, including a gash on his nose, burns on his skin, and numerous bruises.[53] Appellant was convicted and sentenced to five years imprisonment for "injury to a child by omission, serious bodily injury."[54]

Byrd appealed, arguing "that the evidence is factually insufficient to establish that he committed bodily injury to a child by omission by failing to seek medical care."[55] The appellate court disagreed. The court recognized that "it was not sufficient for the State to prove that appellant failed to provide medical care for a bodily injury. Instead, it was necessary to prove that [the son] suffered bodily injury because the appellant failed to provide him medical care."[56] An emergency room doctor testified that if the nose injury had been timely sutured, the scarring would have been minimized. Also, the doctor testified that medical treatment of the burns would have exposed the boy to less pain. Finally, the wrist injury, which was probably seven to ten days old, could potentially result in a deformity if left untreated.[57] Appellant admitted that he knew of the injuries, but evidence indicated that appellant failed to seek medical attention because he wanted to get insurance first.[58] Therefore, the court found that the evidence was sufficient to support the trial court's conviction.[59]

In *Ochoa v. State*,[60] the San Antonio Court of Appeals affirmed appellant's conviction and sentence of forty years imprisonment for driving while intoxicated and for using his vehicle as a deadly weapon. A police officer noticed Ochoa driving a Suburban erratically.[61] The officer turned on his camera and recorded the vehicle swerving into on-coming traffic nearly hitting another vehicle. The officer pulled him over and arrested him. At trial, the jury found that Ochoa used his motor vehicle as a deadly weapon.

Ochoa appealed, claiming "there [was] insufficient evidence to support the jury's finding that [he] used his motor vehicle as a deadly weapon."[62]

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51. Byrd v. State, 112 S.W.3d 675 (Tex. App.—Fort Worth 2003, pet. ref'd).
52. *Id.* at 676.
53. *Id.*
54. *Id.* at 677.
55. *Id.*
56. *Id.* (citation omitted).
57. *Id.* at 678.
58. *Id.*
59. *Id.* at 679.
60. Ochoa v. State, 119 S.W.3d 825 (Tex. App.—San Antonio 2003, no pet.).
61. *Id.* at 827.
62. *Id.*

The appellate court disagreed. A deadly weapon is defined as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury."[63] "[T]o sustain a deadly weapon finding[, there must be] evidence that other people were endangered by the defendant's use of the vehicle and not merely a hypothetical potential for danger.[64] The court concluded that the police officer's testimony and the recording were sufficient evidence to prove that "other drivers on the road were actually endangered by defendant's use of his vehicle."[65] Therefore, the court found "there [was] sufficient evidence to support the deadly weapon finding."[66]

In *State v. Mechler*,[67] the Houston Court of Appeals considered whether the State is required to provide retrograde extrapolation evidence in order to offer intoxylyzer evidence based on a test administered one-and-one-half hours after arrest, and whether the results of such a test would be prejudicial. The State admitted that it did not have sufficient evidence to extrapolate the results backwards to estimate blood alcohol content at the time of the arrest. The defendant thus moved to suppress the results, stating that this failure made the tests irrelevant. The court of appeals disagreed, relying on other courts of appeals that had found that the admissibility of intoxilyzer results in a DWI case is prescribed by statute, and the statute does not mandate extrapolation.[68] The court also held that the evidence should not be suppressed under Texas Rule of Evidence 403 because the probative value of the test, demonstrating intoxication, outweighed the potential prejudice of the jury being misled, which was slight given the defendant's ability to tell the jury about the potential for error in the test.[69]

In *Dunn v. State*,[70] the appellant, convicted of aggravated sexual assault of a child, argued that videotaped interviews of the alleged victims should not be introduced into evidence because they violated his right to confront the witnesses against him. Under Texas statute, statements made by a child to the first adult person the child told of the offense are not excludable under the hearsay rule.[71] The defendant argued that the statements were made on a videotape, which is not a "person" subject to the statute and not available for cross-examination. The Texarkana Court of Appeals first found that the statute did not contemplate the introduction of videotaped interviews, and thus the statements were excludable hearsay.[72] But the court found that, because similar testimony was offered by

63. *Id.* (quoting TEX. PEN. CODE ANN. § 1.07(a)(17)(B) (Vernon 2003)).
64. *Id.*
65. *Id.* at 828.
66. *Id.*
67. State v. Mechler, 123 S.W.3d 449 (Tex. App.—Houston [14th Dist.] 2003, pet. filed).
68. *Id.* at 452.
69. *Id.* at 454-57.
70. Dunn v. State, 125 S.W.3d 610 (Tex. App.—Texarkana 2003, no pet. h.).
71. *Id.* at 612 (citing TEX. CODE. CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 2004)).
72. *Id.* at 613.

the witnesses live and subject to cross-examination, such error in the admission of the videotapes was harmless.[73]

The Texas Court of Criminal Appeals championed the *Brady* rule in *Arroyo v. State*.[74] The defendant was charged with misdemeanor assault. In accordance with the *Brady* rule, which requires "the State 'to disclose the arrest and conviction records of each witness' the State intend[s] to call at trial" upon motion by the defendant, the State turned over the rap sheet of the victim.[75] The defendant then "attempted to impeach [the victim's] credibility with evidence that she had a criminal record."[76]

Ironically, the State argued that the rap sheets should not be admissible as impeachment evidence because they were not relevant. The reason the exhibits were not relevant, according to the State, was because the defendant "had not demonstrated that [the victim] and the person(s) mentioned in the exhibits were one and the same."[77] The trial court excluded the proffered exhibits from evidence, and the San Antonio Court of Appeals upheld the trial court's decision.

The Court of Criminal Appeals granted the petition for discretionary review. The court stated that "[w]e have recognized before that a party may be estopped from asserting a claim that is inconsistent with that party's prior conduct."[78] Since the State provided the rap sheets and gave no indication that the information on the rap sheets was incorrect, the State could not then claim the exhibits should be inadmissible on the grounds of identity. Thus, the court vacated the lower court's judgment and remanded the case for further proceedings.[79]

In *Rodriguez v. State*,[80] the defendant was charged with delivering cocaine to a minor—his daughter to be specific. Defendant's daughter testified that he had given "cocaine to her 'maybe [twenty] to [thirty] times' during the nine-month period preceeding [the] date" defendant was charged.[81] The Texas Court of Criminal Appeals addressed two interesting issues in this case: (1) whether the minor's testimony of the other incidents where defendant had given her cocaine was evidence extraneous to the offense charged; and (2) whether the minor can be an accomplice to the delivery of cocaine. The court answered "no" to both questions.[82]

As to the first issue, the court looked to well-settled precedent to hold that the daughter's testimony of the twenty to thirty other times the defendant had delivered cocaine to her was not inadmissible as extraneous

73. *Id.* at 615.
74. Arroyo v. State, 117 S.W.3d 795 (Tex. Crim. App. 2003, pet. filed).
75. *Id.* at 796 (internal citations omitted).
76. *Id.*
77. *Id.* at 797.
78. *Id.* at 798.
79. *Id.*
80. Rodriguez v. State, 104 S.W.3d 87 (Tex. Crim. App. 2003).
81. *Id.* at 88.
82. *Id.* at 91.

offense evidence.[83] The court stated that the defendant's "remedy was to require the State to elect the occurrence on which it sought to rely for conviction."[84] According to the court, "the benefit a defendant receives in cases like this is that, absent an election, he cannot later be prosecuted for the separate acts of misconduct upon which the jury could have convicted the defendant."[85]

As to the second issue, the court indicated that it would be absurd to hold the recipient of the cocaine to be an accomplice to the offense of delivering cocaine. Although the defendant could not be guilty of the offense without his daughter's participation in receiving the cocaine, she could "not [aid in] the 'delivering act' by [defendant]."[86] The court cites the exception to accomplice liability discussed in *Robinson v. State*, which is that "the crime is so defined that participation by another is inevitably incident to its commission."[87] Therefore, the court holds that while the daughter might be guilty of some other offense, she cannot be guilty as an accomplice to the charge against her father of "delivering" cocaine to a minor.[88]

In *Resendiz v. State*,[89] the Texas Court of Criminal Appeals affirmed appellant's conviction of capital murder. Resendiz appealed, claiming "he was denied a fair trail [because] the trial court refused to admit scene photographs relating to extraneous murder offenses committed by" Resendiz into evidence.[90] An expert witness, relying partly on the photographs of the extraneous crime scenes, testified that he believed appellant was insane due to the manner in which the crimes had been perpetrated.[91] When the defense attempted to admit the photographs into evidence, the State objected, arguing "that the photographs were not relevant because the question . . . was whether appellant was insane at the time he committed [the] murder [in question], [and] not [whether he was insane at the time of] the murders depicted in the photographs."[92] The trial court sustained the objection and the photographs were not admitted.

The appellate court affirmed. Although it found the photographs to be relevant, it stated that the relevant evidence should be excluded because its probative value was substantially outweighed by the danger of confusing the issues or misleading the jury.[93] The majority opinion of the appel-

83. *Id.* (citing Sledge v. State, 953 S.W.2d 253 (Tex. Crim. App. 1997); Rankin v. State, 953 S.W.2d 740 (Tex. Crim. App. 1996)).
84. *Id.*
85. *Id.*
86. *Id.* at 92.
87. *Id.* (quoting Robinson v. State, 815 S.W.2d 361, 363 (Tex. App.—Austin 1991, no pet.)
88. *Id.*
89. Resendiz v. State, 112 S.W.3d 541 (Tex. Crim. App. 2003) (en banc).
90. *Id.* at 544.
91. *Id.*
92. *Id.*
93. *Id.* at 545-46.

late court believed that the photographs could distract the jury on facts tangential to the case before it. It stated that the evidence's probative value was limited because merely viewing the photographs would not prove legal insanity. It further stated that after viewing the evidence, the jury could confuse legally insane with "crazy." That is, the court argues that even though the photographs could show "that appellant had committed acts unthinkable to most 'normal' people, [they did not disprove the fact] that appellant did not know his conduct was wrong" when he committed the murder in question.[94]

The dissenting opinion took issue with the exclusion of the photographs.[95] The dissent argued that the evidence would not have distracted the jurors. Further, it believed that the correct inquiry should have been whether the photographs would distract the jurors from the contested issue—the appellant's insanity.[96] The dissent also argued that the evidence did not need to prove insanity outright, as suggested by the majority, but it need only have any tendency to make the existence of the fact more or less probable. The dissenting opinion further believed that the jurors would not have confused abnormality and legal insanity. In fact, the dissent believed that the evidence of abnormality could tend to prove legal insanity. Therefore, the dissenting opinion believed that the court should have admitted the photographs of the extraneous crime scenes.[97]

In *Bustamante v. State*,[98] the Texas Court of Criminal Appeals affirmed appellant's conviction of capital murder. Bustamante appealed, arguing among other points of error that he "should have [been] granted a mistrial or a new trial [due to the jury's] receipt of evidence that was not admitted at trial."[99] During the course of investigation of the robbery and murder of the victim, the police obtained a signed, written statement from appellant's brother.[100] During trial, the court ordered the brother to testify, granting him immunity for any testimony given. However, the brother refused to testify and the trial court held him in contempt.[101]

The State had marked the brother's written statement as Exhibit 107, but it was never admitted into evidence.[102] Later, another item was marked as Exhibit 107 and admitted into evidence. Both items were included as exhibits in the jury room. During deliberations, the letter was read aloud by one of the jurors as the rest listened "with varying degrees of attentiveness."[103] Thereafter, several jury members became concerned about whether the brother's statement was proper before the jury. The trial judge had the statement removed as soon as it was discovered that

94. *Id.* at 545.
95. *Id.* at 552 (Womack, J., dissenting).
96. *Id.*
97. *Id.* at 554.
98. Bustamante v. State, 106 S.W.3d 738 (Tex. Crim. App. 2003).
99. *Id.* at 742-43.
100. *Id.* at 741.
101. *Id.*
102. *Id.*
103. *Id.*

the statement was in the jury room. The trial judge then questioned each juror individually.[104] "[A]ll twelve jurors said that they could completely disregard the exhibit if instructed to do so."[105] After individual questioning, the trial judge instructed the jurors as a group to disregard the written statement. After the jury was sent back to deliberate, the appellant moved for a mistrial, which was denied. The jury came back with a guilty verdict for capital murder. The appellant then moved for a new trial, which was also denied.[106]

The appellate court affirmed the conviction after applying a two-pronged test. In order to obtain a new trial due to the jury's receipt of evidence not admitted at trial, "(1) the evidence must be received by the jury, and (2) the evidence must be detrimental or adverse to the defendant."[107] The appellate court found that the first prong had not been satisfied. The trial court took proper measures after it discovered that the brother's statement was before the jury. It met with each juror individually and each stated that he or she could disregard the statement. The court then gave an instruction to the group to disregard the evidence. Therefore, it was as though the evidence was never "'received' by the jury."[108] Therefore, the trial court properly denied a new trial.

Under Texas Rule of Evidence 803(24), statements made by an underage female to her parent with regards to sexual activity with an adult are admissible.[109] In *Glover v. State*, the Texarkana Court of Appeals determined that the statements against social interests are sufficiently reliable for purposes of the Confrontation Clause because "she knew her statements would subject her to disgrace in the eyes of her mother."[110] The court opined that the situation provided a basis for the jury to assess the credibility of her statements and that the defense was also able to test the evidence by offering an alternative explanation for her statements.[111]

In *Otto v. State*,[112] the Texas Court of Criminal Appeals upheld the conviction of two defendants for organized criminal activity relating to the aggravated kidnapping of two people. The appellants served as officers in the Republic of Texas, an organization whose members believe that Texas is a sovereign nation. Before the kidnapping, the victims angered members of the Republic of Texas by telling the sheriff that members of the group often carried automatic weapons.[113] The victims

104. *Id.* at 742.
105. *Id.*
106. *Id.*
107. *Id.* at 743 (citing Eckert v. State, 623 S.W.2d 359, 364 (Tex. Crim. App. 1981), *overruled on other grounds*, Reed v. State, 744 S.W.2d 112 (Tex. Crim. App. 1988); Stephenson v. State, 571 S.W.2d 174, 176 (Tex. Crim. App. 1978)).
108. *Id.* at 744.
109. Glover v. State, 102 S.W.3d 754 (Tex. App.—Texarkana 2002, pet. ref'd) (referencing TEX. R. EVID. 802(24)).
110. *Id.* at 768.
111. *Id.*
112. Otto v. State, 95 S.W.3d 282, 283 (Tex. Crim. App. 2003) (en banc).
113. *Id.* at 283-84.

contacted the sheriff regarding a van they saw near their house, and the sheriff arrested the driver. That same day, three heavily-armed Republic of Texas members stormed the victims' house and shot one of the victims through his front door. The members "placed the victims 'under arrest' and held them captive until the Texas Rangers negotiated their release [later] that evening."[114] "Although the appellants were not present at the kidnapping, they were centrally involved."[115] The kidnappers used one of the defendant's vehicles during the kidnapping, they helped plan the kidnapping and they were in radio contact with the kidnappers, directing their behavior.[116]

A jury convicted the appellants of organized criminal activity under Texas Penal Code Section 71.02.[117] The El Paso Court of Appeals overturned the appellants' convictions on the basis that the evidence did not indicate that they committed an overt act during the kidnapping, a required element of the crime. However, the Texas Court of Criminal Appeals disagreed. It found the State's argument, that the law of the parties should apply to the appellants, persuasive because the evidence indicated that the appellants directed, encouraged, and aided in committing the kidnapping.[118] The court of criminal appeals stated that since the "'overt act' element of organized criminal activity need not be criminal in itself, acts that suffice for party liability – those that encourage, solicit, direct, aid or attempt to aid in the commission of the underlying offense" satisfied the overt act requirement of the organized crime statute.[119] Accordingly, the Court of Criminal Appeals reversed the court of appeal's decision to overturn the convictions.[120]

In *Ex Parte Taylor*,[121] the Texas Court of Criminal Appeals considered whether collateral estoppel barred the State from relitigating the ultimate issue of intoxication, regardless of whether the State alleged a different type of intoxicant. In this case, the prosecution could not bring another manslaughter charge because in the first trial the defendant had prevailed on the broad issue of whether he was intoxicated.[122] The source of the appellant's intoxication was not a disputed issue, just the fact of intoxication.[123] Therefore, the court concluded that "there is no reasonable possibility that the jury in the first trial could have decided . . . that appellant *was* intoxicated but not because of alcohol."[124]

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114. *Id.* at 284.
115. *Id.*
116. *Id.*
117. *Id.* at 283-84.
118. *Id.* at 284.
119. *Id.*
120. *Id.* at 285.
121. *Ex parte* Taylor, 101 S.W.3d 434, 436 (Tex. Crim. App. 2002) (en banc).
122. *Id.* at 443.
123. *Id.*
124. *Id.* (emphasis in original).

B. Jury Charge And Argument

In *Thompson v. State*,[125] the Houston Court of Appeals reversed a punishment sentence due to the prosecutor's jury argument stating "'there's something important that I cannot tell you about concerning why you should not give [appellant] anything less than ten years.'"[126] The court found this argument "by its very nature inflammatory" and that an instruction to disregard would not have a curative effect.[127]

In *Watts v. State*,[128] a case involving the discharge of raw sewage into public water, the trial judge took judicial notice of a similar case in open court immediately before reading the jury charge. The trial judge stated the following:

> the Court will take judicial notice that the Texas Court of Criminal Appeals . . . found that [in a] case where evidence showed that a pollutant escaped from the premises onto an adjacent field that formed a large pool and then flowed into a drainage ditch that in that case the drainage ditch was one of the types of surface water the legislature sought to protect under the Water Code Act.[129]

The jury found the defendant guilty under Texas Water Code Section 26.121(a)(1) for "discharging raw sewage from a broken septic tank . . . into 'water in the state,'"[130] a required element of the crime, and he was sentenced "to one year in [jail], probated for two years, and a $10,000 fine."[131]

The defendant appealed the verdict, claiming that the trial judge erred when she took judicial notice of statements contained in a Court of Criminal Appeals opinion regarding drainage ditches being one of the types of surface water that the legislature intended to protect in the presence of the jury. Appellant argued the notice "constituted an improper comment on the weight of the evidence."[132] The Texas Court of Criminal Appeals agreed, holding that the trial judge erred by improperly commenting on the weight of the evidence.[133] The court distinguished between a judge taking judicial notice of adjudicative facts and taking judicial notice of the law. Adjudicative facts that are relevant to the ultimate issue in dispute may be judicially noticed, but they cannot be the subject of the controversy themselves.[134] In addition, the court noted that it is appropriate for judges to take judicial notice of previous cases, but not in the presence of the jury. Ultimately, the court reversed the judgment of the Houston

125. Thompson v. State, 89 S.W.3d 843, 856 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).
126. *Id.* at 848.
127. *Id.* at 851.
128. Watts v. State, 99 S.W.3d 604 (Tex. Crim. App. 2003).
129. *Id.* at 607.
130. *Id.* at 606.
131. *Id.* at 608.
132. *Id.*
133. *Id.* at 613.
134. *Id.* at 610.

Court of Appeals and remanded the case for a harm analysis.[135]

In *Midence v. State*,[136] the Houston Court of Appeals reversed the appellant's conviction of assault on a public servant and remanded for a new trial. Appellant, a prison inmate, was charged with assaulting two correctional officers.[137] The trial court's charge to the jury instructed the jury to find appellant guilty if they found appellant had assaulted either one officer or the other.

The inmate appealed, arguing that the jury charge was harmfully erroneous. The appellate court agreed, stating that the charge should not have been stated in the disjunctive.[138] The jury charge was erroneous because it "allowed the possibility of six jurors convicting appellant of the assault on [only one officer] and six jurors convicting appellant of the assault on [the other officer]."[139] The court concluded that the error was harmful because it allowed a jury to return a non-unanimous verdict.[140]

C. Punishment

> [A]n affirmative finding of the use or exhibition of a deadly weapon . . . against a defendant who never used or brandished a deadly weapon during the commission of the offense [is authorized] so long as he (1) was a party to an offense where a deadly weapon was used or exhibited and (2) knew such a weapon would be used or exhibited.[141]

In *Sarmiento v. State*, the Houston Court of Appeals overruled its prior decisions, which suggested that the defendant must have pulled the trigger; there could be no implied findings of the use or exhibition of a deadly weapon.[142]

For purposes of sentence enhancement, a prior conviction only becomes final when the appellate court issues its mandate affirming the conviction.[143] In *Beal v. State*, the defendant challenged his enhanced sentence because the prior offense that was used to enhance his sentence was pending appeal.[144] The Texas Court of Criminal Appeals overruled precedent: "We decline to adhere to a decision that creates the potential for making an indictment's enhancement allegations untrue. We, therefore, overrule *Rener* and hold that an appealed conviction alleged in an indictment for enhancement purposes becomes final when the appellate court issues its mandate affirming the conviction."[145]

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135. *Id.* at 613.
136. Midence v. State, 108 S.W.3d 564 (Tex. App.—Houston [14th Dist.] 2003, no pet.).
137. *Id.* at 565.
138. *Id.*
139. *Id.*
140. *Id.*
141. Sarmiento v. State, 93 S.W.3d 566, 569 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (en banc).
142. *Id.* at 568.
143. Beal v. State, 91 S.W.3d 794, 794 (Tex. Crim. App. 2002).
144. *Id.*
145. *Id.* at 796.

In *Chapman v. State*,[146] the Texas Court of Criminal Appeals affirmed appellant's conviction of aggravated sexual assault and indecency with a child. While on probation for an earlier sex offense conviction, appellant confessed that he had sexually molested two young girls for which he had never been tried.[147] His probation terms required that he attend sex offender treatment programs. Program requirements included good faith participation and full disclosure of information relevant to his rehabilitation. During the treatment, Chapman informed his therapist that he had molested two girls.[148] The therapist informed his probation officer. The probation officer met with Chapman, and again he confessed the acts and also provided the names of the victims.[149] The probation officer informed the police, and Chapman was later charged and sentenced to twenty years in prison after pleading guilty to the two offenses.

Chapman appealed, arguing that the trial court should have dismissed the charges because the State had violated his right against compelled self-incrimination.[150] He alleged that the treatment program required him to reveal his past sexual history. As a result, he claimed he was forced to choose between waiving his Fifth Amendment right against self-incrimination and revoking his probation.

The Court of Criminal Appeals disagreed. The court recognized that normally a party must affirmatively invoke his right against self-incrimination. However, the classic penalty situation exception applies, and affirmative invocation is not necessary, if "a person is threatened with punishment for relying on his Fifth Amendment privilege."[151] After reviewing the United States Supreme Court case of *Minnesota v. Murphy*,[152] the Court of Criminal Appeals determined that that case was directly applicable.[153] The court concluded "that appellant was not subjected to a classic penalty situation" because the State authorities never stated "that appellant's probation would be revoked if he chose to invoke his Fifth Amendment privilege."[154] Further, the therapist never asked appellant directly about his sexual history. In other words, appellant was never put into a dilemma where he must confess his sex offenses or be punished. The court concludes that if appellant had been put in that situation, he could have invoked his privilege without having his probation revoked. Therefore, the court held that appellant's Fifth Amendment right against self-incrimination was not violated and his conviction was

146. Chapman v. State, 115 S.W.3d 1 (Tex. Crim. App. 2003).

147. *Id.* at 3.

148. Appellant admitted that the catalyst for his disclosures was his reading of a book that has the purpose of helping child sexual abuse offenders empathize with their victims. *Id.* at 4.

149. *Id.* at 3.

150. *Id.* at 5.

151. *Id.* at 6.

152. Minn. v. Murphy, 465 U.S. 420 (1984).

153. *Chapman*, 115 S.W.3d at 8.

154. *Id.*

affirmed.[155]

III. APPEAL

Although a majority of the Texas Court of Criminal Appeals denied the petitioner's motion for an extension of time to file a motion for rehearing in *Franks v. State*, the case is still noteworthy because four dissenting judges in the case discussed a "trap for the unwary" that is contained in "Rules 49.1, 49.7 and 68.2 of the Texas Rules of Appellate Procedure" that justified granting the appellant's request for rehearing.[156] The dissent stated that "[t]he language of these rules constitutes a booby trap which may ensnare both the State and the defendant."[157]

The interplay between the timeframes for filing appeals discussed in various appellate rules leads to confusion regarding when motions for rehearing and reconsideration must be filed. First, Rule 49.1 permits

> a party to file motions for rehearing within fifteen days of [a] court's judgment or order. Under Rule 48.9, a party may also file for an extension of time in which to file [a] motion for rehearing. [In addition,] Rule 49.7 allows a party to file a motion for reconsideration en banc. There is, however, no specific time limit set out in Rule 49.7. Thus, a request for reconsideration en banc may be filed *at any time* while the court of appeals still has plenary jurisdiction.[158]

Finally, Rule 68.2 addresses the time periods for filing a petition for discretionary review ("PDR") with the Court of Criminal Appeals. Under 68.2, the timetables for filing a PDR are tolled until the court of appeals either denies or grants a motion for rehearing, "*no other motion will toll the time period.*"[159] The dissent noted that "[i]t is the use of the phrase 'en banc' without citation to Rule 49.1 which controls whether the time period in which to file a PDR is tolled or not."[160] It appears that if a motion for rehearing contains the words "en banc" without specifically mentioning Rule 49.1, a party has only thirty days to file a PDR after the court of appeals renders its original decision, but if Rule 49.1 is mentioned, and then the time is tolled.

Because of this confusion, the dissenting judges provided the following guidelines to parties wishing to appeal:

- eliminate the phrase "en banc" from the title.
- always title the document "Motion for Rehearing."
- always add a reference to Rule 49.1 in the motion.
- never refer to Rule 49.7 in the title of the motion.
- alternatively, file two separate documents. Title the first one "Motion for Rehearing under Rule 49.1" and file it within fifteen days after the court of appeals renders its decision. File a second,

155. *Id.* at 11.
156. Franks v. State, 97 S.W.3d 584 (Tex. Crim. App. 2003) (Cochran, J., dissenting).
157. *Id.*
158. *Id.* (internal citations omitted).
159. *Id.* at 585.
160. *Id.*

> separate document either earlier, later, or at the same time, titled "Motion for Reconsideration En Banc under Rule 49.7."[161]

Ultimately, the dissent noted that because the interplay between the various appellate rules was less than obvious, the appellant's motion for rehearing should have been granted.[162]

In *Monreal v. State*, the Texas Court of Criminal Appeals held that a defendant that enters into "a valid, non-negotiated waiver of appeal" may not appeal "any issue without the consent of the trial court."[163] Alfredo Monreal, Jr. pled guilty to aggravated robbery without a plea bargain. Judgment was rendered by the trial court, and seven days later Monreal "signed a waiver of his right to appeal."[164] His attorney then filed an appeal less than a month later, and "Monreal himself filed a *pro se* notice of appeal."[165] Predictably, "the State filed a motion in the court of appeals to dismiss Monreal's appeal."[166]

Monreal's appeal was dismissed by the Fort Worth Court of Appeals due to the waiver. The Court of Criminal Appeals granted review. Monreal argued that consent of the trial court should not be required to appeal, because he signed a non-negotiated waiver of appeal. The Court of Criminal Appeals disagreed.[167]

"Article 1.14 of the [Code of Criminal Procedure] provides that a defendant in a non-capital felony case may waive any right secured to him by law."[168] After reviewing some of the previous case law, the court followed the *Helms* rule, extended by *Young*, in holding that the test to be applied is "whether the waiver was knowingly, voluntarily, and intelligently made."[169] The court stated that:

> When asked to choose between a rule stating that a waiver of appeal is binding unless and until the defendant files a notice of appeal and a rule stating that a valid waiver of appeal is binding on the defendant and will prevent the defendant from appealing without the consent of the trial court, we have consistently opted for the latter.[170]

The court went on to say that the "decision has never been based on whether the defendant received some benefit in exchange for the waiver, but rather on whether, as the rule states, the waiver was voluntary, intelligent, and knowing, and thus valid."[171]

The court, therefore, upheld the court of appeals's dismissal of Monreal's appeal. Monreal also attempted to argue that the court of ap-

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161. *Id.*
162. *Id.* at 586.
163. Monreal v. State, 99 S.W.3d 615, 616 (Tex. Crim. App. 2003) (en banc).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 616.
168. *Id.* at 617.
169. *Id.* at 619 (applying the test from Helms v. State, 484 S.W.2d 925 (Tex. Crim. App. 1972) and Young v. State, 8 S.W.3d 656 (Tex. Crim. App. 2000)).
170. *Id.* at 622.
171. *Id.*

peals should have allowed him to amend his appeal to ask permission of the trial court to let him appeal his waiver. However, the court of criminal appeals held that the lower court did not err in denying the amendment to his notice of appeal, "because Monreal waited until after he had filed his appellate brief to request the court of appeals' permission to amend the notice of appeal."[172]

In an interesting case involving a Chapter 64 DNA challenge,[173] the Dallas Court of Appeals held that the State may not "appeal a trial court's finding that a post-conviction DNA test is favorable to a convicted person."[174] Under the statute, the legislature has not authorized such an appeal by the State, according to the court. Therefore, the court found that it had no jurisdiction over the case and dismissed the appeal.[175]

"James Douglas Waller filed a motion for post-conviction DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure."[176] The DNA test was conducted and the findings were favorable to Waller. The State appealed, and Waller filed a motion to dismiss the appeal for lack of jurisdiction.

The legislature has set out the instances in which the State can appeal a criminal case in statute. "[A]rticle 44.01 of the Code of Criminal Procedure [is] the only 'general law' authorizing the State to appeal in a 'criminal case.'"[177] After stating that a Chapter 64 DNA proceeding is a criminal case, the court found that "article 44.01 currently does not authorize the State to appeal a post-conviction DNA favorable finding under Chapter 64."[178]

The Texas Court of Criminal Appeals determined in *Bayless v. State*[179] that Texas Rule of Appellate Procedure 25.2(d) permits a defendant to file an amended notice of appeal any time before the defendant's brief is filed.[180] In *Bayless*, the defendant entered into a negotiated plea and then two days later filed a general notice of appeal.[181] Then, "[a]fter the time for filing the notice of appeal had expired, but prior to the filing of her brief, the [defendant] filed an amended notice containing the notice of appeal requirements under Texas Rule of Appellate Procedure 25."[182] The court determined that the defendant's actions were sufficient to give the Dallas Court of Appeals jurisdiction to hear her appeal.[183]

172. *Id.* at 622-23.
173. *See* TEX. CODE CRIM. PROC. ANN. art. 64.01 (Vernon Supp. 2003).
174. State v. Waller, 104 S.W.3d 307, 309 (Tex. App.—Dallas 2003, pet. ref'd).
175. *Id.*
176. *Id.* at 308.
177. *Id.*
178. *Id.* (internal citation omitted).
179. Bayless v. State, 91 S.W.3d 801 (Tex. Crim. App. 2002).
180. *Id.* at 803.
181. *Id.* at 802.
182. *Id.* at 802-03 (citing TEX. R. APP. P. 25.2(b)(3)).
183. *Id.* at 806.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In *Rylander v. State*,[184] the Texas Court of Criminal Appeals showed once again how difficult it is for a defendant to be successful in an appeal for ineffective assistance of counsel.[185] Although the court did not directly decide whether defendant's counsel was ineffective, and indicated that the defendant could raise the issue in an application for a writ of *habeas corpus*, the court held "that the court of appeals erred in holding that [the defendant] was afforded ineffective assistance of counsel at trial."[186]

The defendant was charged with three counts of aggravated assault for striking several cars and people in a bar parking lot with his truck after an altercation. Defendant claimed that he had a medical condition that prevented him from forming the intent the State accused him of. Due to diabetes and severe head trauma suffered in a motorcycle accident, the defendant claimed he suffered memory lapses and did not even remember the incident for which he was charged.[187]

Defendant argued that his counsel was ineffective under the *Strickland* standard for failing to introduce evidence at trial that would support his only defense—that his actions were not voluntary and/or he could not be held culpable for his actions. Specifically, defendant complained that his counsel did not introduce any "qualified medical testimony in support of that defense, but rather sought to submit such testimony through non-medical witnesses, whose testimony . . . the trial court disallowed."[188] Defendant's counsel also had many other failings before trial and during the punishment phase, which the San Antonio Court of Appeals cited as support for finding ineffective assistance of counsel.[189]

Although the Court of Criminal Appeals recognized that the above incidents "raise questions as to the wisdom and rationale for certain trial preparation and trial strategy decisions," the court stated that "because the ineffective assistance claim is raised on direct appeal, trial counsel has not had an opportunity to respond to these areas of concern."[190] The court deemed "a writ of *habeas corpus* [to be] 'the more appropriate vehicle' to raise [an] ineffective assistance of counsel claim."[191] The court held that the first prong of the *Strickland* test was not met here because trial counsel was not given the opportunity to explain his actions. Also, "the record on direct appeal will generally 'not be sufficient to show that counsel's representation was so deficient as to meet the first part of the *Strickland* standard' as '[t]he reasonableness of counsel's choices often

184. Rylander v. State, 101 S.W.3d 107 (Tex. Crim. App. 2003) (en banc).
185. *Id.* at 110.
186. *Id.* at 111.
187. *Id.* at 109.
188. *Id.* at 110.
189. *Id.*
190. *Id.*
191. *Id.* (citing Mitchell v. State, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002)).

involves facts that do not appear in the appellate record.'"[192]

A dissent by Justice Meyers questions why the court chose to dispose of the claim rather than analyzing it. "[I]f counsel's errors were so obviously unprofessional then there should be no need for an explanation of his subjective intent."[193]

V. HABEAS CORPUS

In *Ex parte Hale*,[194] the Texas Court of Criminal Appeals decided, en banc, whether a prisoner who was erroneously released on mandatory supervision should be given credit for that time as if spent incarcerated. Petitioner was sentenced to seven years imprisonment for burglary, and while incarcerated was convicted for carrying a weapon in prison, which carried an eight-year sentence that would not begin until after his original sentence had run. However, the applicant was twice erroneously released to mandatory supervision, and thus spent nearly six-years out of jail when he should have been in jail. He was subsequently arrested for violation of the conditions of his mandatory supervision. The applicant argued he should be given credit against his sentence as if he had spent that time in prison because it was not his fault that he had left prison when he was told to do so. The court agreed that the applicant was not at fault, but held that his release was a "highly desired alternative to incarceration" and under the statute that applied at the time of his release, he should not be given credit for that time.[195] The court held that a person who is erroneously released should be treated not as an inmate but as a releasee, and the applicant would not be given credit for the time he spent as such if his release was revoked.[196]

In *Ex parte Jones*,[197] a prisoner, who plead guilty to burglary and was sentenced to twenty-five years in prison, filed a writ of habeas corpus application claiming that his attorney provided ineffective assistance of counsel by failing to pursue an insanity defense. Although this case sounds like many others, it has a unique twist. The applicant attached to his writ application documents bearing the Texas State Seal and a doctor's signature, indicating that the applicant had an IQ of 26, is autistic, and suffers from another serious mental disorder.[198] The State responded with proof that these documents were, in fact, false and fraudulent. The Texas Court of Criminal Appeals found that "the applicant has abused The Great Writ" and that the applicant "may have committed forgery" by creating the false documents.[199] The court noted that if the applicant is convicted of an offense while in prison, the trial court shall

192. *Id.* (quoting *Mitchell*, 68 S.W.3d at 642 (modifications in original)).
193. *Id.* at 111 (Meyers, J., dissenting).
194. *Ex parte* Hale, 117 S.W.3d 866 (Tex. Crim. App. 2003) (en banc).
195. *Id.* at 872.
196. *Id.*
197. *Ex parte* Jones, 97 S.W.3d 586 (Tex. Crim. App. 2003) (per curiam).
198. *Id.* at 587.
199. *Id.* at 588.

"stack" the sentences, so he will have to complete his first sentence before starting his second. Finally, the court noted that the denial of a frivolous writ will bar the applicant from additional applications except in extraordinary situations.[200]

In *Ex parte Tuley*, the Texas Court of Criminal Appeals held that a defendant's guilty plea does not later prevent him from claiming actual innocence in a habeas corpus proceeding.[201] In this case, the applicant had pled guilty to charges of aggravated sexual assault after his jury was deadlocked.[202] While serving time, the applicant found out that the victim recanted the story.[203] He sought to collaterally attack his conviction based on actual innocence.[204] He stated that he had only pled guilty because he could not make bail or keep his retained lawyer.[205] The court was "convinced by clear and convincing evidence that no rational jury would convict the applicant in light of the new evidence."[206]

VI. MANDAMUS

In *Winters v. Presiding Judge of the Criminal District Court Number Three of Tarrant County*,[207] the Texas Court of Criminal Appeals held that an inmate must be appointed counsel if requested when the inmate applies for DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure.[208] Here, the defendant pleaded guilty to aggravated sexual assault and was sentenced to twenty years imprisonment. While imprisoned, he moved for DNA testing. The trial court denied the motion and defendant's request for counsel. In response to relation's application for writ of mandamus, the trial court stated that it denied appointment of counsel because it was highly unlikely that such testing would have produced any relevant evidence. The Court of Criminal Appeals found that, "notwithstanding the improbability of obtaining relief, appointment of counsel is mandatory" under the express terms of the statute.[209] The court found that, while there was no constitutional right to counsel for a post-conviction collateral attack, Article 64 granted a statutory right by stating that "[a] convicted person is entitled to counsel during a proceeding under this chapter . . . if the court determines that the person is indigent, the court shall appoint counsel for the person,"[210] and "no wording in the statute gives a judge the discretion to deny [counsel] merely because the judge concludes that doing so would be

200. *Id.* at 589.
201. *Ex parte* Tuley, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002).
202. *Id.* at 389-90.
203. *Id.* at 390.
204. *Id.*
205. *Id.* at 395.
206. *Id.* at 397.
207. Winters v. Presiding Judge of the Dist. Court Number Three of Tarrant County, 118 S.W.3d 773 (Tex. Crim. App. 2003).
208. *Id.* at 774.
209. *Id.*
210. *Id.* at 775 (quoting TEX. CODE CRIM. PROC. art. 64.01(c) (Vernon Supp. 2003)).

'useless.'"[211]

In *Bell v. State*, a seemingly contradictory case, the Texas Court of Criminal Appeals held that people convicted of murder are not guaranteed post conviction DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure.[212] The court looked at the legislative history of Chapter 64 and determined "that the legislature intended to require that a convicted person demonstrate to the trial court that a reasonable probability exists that DNA tests would prove his or her innocence."[213]

In *Cravin v. State*, the Houston Court of Appeals held that a defendant's absence from post-conviction DNA proceedings does not implicate the Confrontation Clause.[214] In this case, the court analogized DNA proceedings to habeas corpus proceedings and found that "an applicant for a post-conviction DNA proceeding enjoys neither a presumption of innocence nor a constitutional right to be present at a hearing."[215]

211. *Id.*
212. Bell v. State, 90 S.W.3d 301, 308 (Tex. Crim. App. 2002) (en banc).
213. *Id.* at 306 (citing Kutzner v. State, 75 S.W.3d 427, 438 (Tex. Crim. App. 2002)).
214. Cravin v. State, 95 S.W.3d 506, 510 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).
215. *Id.* (citing *Ex parte* Mines, 26 S.W.3d 910, 914 (Tex. Crim. App. 2000)).