

January 1993

## Criminal Law

Chuck Miller

David Coale

---

### Recommended Citation

Chuck Miller & David Coale, *Criminal Law*, 46 SMU L. REV. 1211 (1993)  
<https://scholar.smu.edu/smulr/vol46/iss4/12>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# CRIMINAL LAW

*Judge Chuck Miller\**

*David Coale\*\**

**T**HIS Article addresses substantive criminal law. It compiles particularly important decisions from the Texas Court of Criminal Appeals issued since last year's Annual Survey that will have a pervasive impact on criminal cases in Texas. The cases cited and discussed in this article were selected because they are significant to the trial of criminal cases in Texas, because they provide an excellent recapitulation of established legal principles, or because they reaffirm established case law that had come into question or fallen into disuse. The cases are set out by topic in the general order in which they occur in the evolution of a criminal case.

## I. PRETRIAL AREAS

In the pretrial area, cases from the court of criminal appeals addressed several search and seizure issues, including the status in Texas of the pretext arrest and the inevitable arrest doctrines, the difference between an arrest and an investigative detention, and the limits on searches of public school students. The court also decided several cases regarding the amendment of informations and indictments, addressing the issues of whether a name change in an indictment is an amendment, what types of amendments are improper because they charge different offenses or prejudice a defendant's substantial rights, the proper procedures for amending an indictment, and whether improper amendments will be subjected to a harm analysis on appeal. Other cases decided by the court addressed the defendant's right to choose counsel, the defendant's right to an investigator in a drug case, when jeopardy attaches to multiple but abandoned counts in an indictment, habeas corpus procedure, and a trial judge's power to dismiss charges.

### A. SEARCH AND SEIZURE

#### *1. Pretext Arrest or Search Doctrine Abandoned as a Matter of United States Constitutional Law*

Because as a matter of Fourth Amendment law, eleven of the twelve federal circuit courts<sup>1</sup> have abandoned the subjective bad faith test that is the

---

\* Judge Chuck Miller, B.A., SMU; J.D., SMU; Judge, Court of Criminal Appeals.

\*\* David Coale, A.B. Harvard University; J.D. candidate, University of Texas; Intern, Court of Criminal Appeals.

1. See *Garcia v. State*, 827 S.W.2d 937, 942 (Tex. Crim. App. 1992). Only the Ninth Circuit still adheres to a wholly subjective analysis. *Id.*

heart of the pretext search/arrest doctrine, the court of criminal appeals also abandoned it in *Garcia v. State*.<sup>2</sup> There are two objective tests floating among the circuits. The majority test simply asks whether there was any objective legal reason for the stop or search. If one is present, the search will be upheld.<sup>3</sup> The minority view applies a modified objective test, which is "not whether the officer could have validly made the stop but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purposes."<sup>4</sup> The court of criminal appeals overruled *Black v. State*,<sup>5</sup> the primary Texas pretext case, and adopted the pure objective test.<sup>6</sup> Texas constitutional law was not raised in this case so the viability of the doctrine under Texas law is still open.<sup>7</sup>

## 2. *Inevitable Discovery Doctrine Thrown Out Under Article 38.23(a) of the Texas Code of Criminal Procedure*

The Texas statutory exclusionary rule is embodied in article 38.23(a) of the Texas Code of Criminal Procedure and says basically that no evidence obtained in violation of any Texas or United States law shall be admitted in trial.<sup>8</sup> A four judge plurality of the court of criminal appeals construed this article narrowly in *Garcia v. State*,<sup>9</sup> stating that since the legislature did not spell out an exception for the inevitable discovery doctrine, as it did for the good faith exception in article 38.23(b),<sup>10</sup> the court would not create such an exception.<sup>11</sup> The plurality opinion noted that while the court has applied the inevitable discovery doctrine many times, this case was the first in which the defendant argued that the doctrine was a creation of the United States Supreme Court.<sup>12</sup> Since states can enlarge, but not shrink, a defendant's rights from their interpretation by the Supreme Court, the plurality held that Texas statutory law precludes the application of the doctrine in Texas state courts.<sup>13</sup> Two judges concurred in the result by applying the inevitable discovery doctrine and holding that the State had not met its burden of prov-

---

2. *Id.* at 942.

3. Seven circuit courts have indicated that an entirely objective evaluation must be accorded the facts. *Id.* at 942. The Fifth Circuit is among them. See *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc).

4. *Garcia*, 827 S.W.2d at 942 (quoting *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986)). Three circuits have adopted this test.

5. 739 S.W.2d 240 (Tex. Crim. App. 1987).

6. *Garcia*, 827 S.W.2d at 944.

7. See *Heitman v. State*, 815 S.W.2d 681, 690 & n.22 (Tex. Crim. App. 1991) (holding that the Texas Constitution can protect rights more expansively than the United States Constitution).

8. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 1993).

9. 829 S.W.2d 796 (Tex. Crim. App. 1992).

10. TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon Supp. 1993).

11. *Garcia*, 829 S.W.2d at 799-800.

12. *Id.* at 797 n.18, 798.

13. *Id.* at 799-800. The plurality opinion was joined by one judge who wrote separately to make additional observations about statutory interpretation. *Id.* at 800 (Clinton, J., concurring).

ing it up in this case.<sup>14</sup> Another judge concurred without giving a reason,<sup>15</sup> and two judges dissented.<sup>16</sup>

### 3. Arrest vs. Investigative Detention: Probable Cause and Radio Dispatches

*Amores v. State*<sup>17</sup> is a good recapitulation of prior law distinguishing an arrest from an investigative detention. The difference can be crucial because an investigative detention<sup>18</sup> requires "a reasonable, articulable suspicion that the person detained is connected with criminal activity," whereas an arrest requires probable cause to believe a crime is being or has been committed by the arrestee.<sup>19</sup> "An arrest occurs when a person's liberty of movement is restricted or restrained."<sup>20</sup> The *Amores* court concluded that the defendant was arrested under the United States Constitution,<sup>21</sup> as well as under article 15.22 of the Texas Code of Criminal Procedure,<sup>22</sup> noting that he was on the ground with guns pointed at him.<sup>23</sup> The court found that the officer's characterization of this as an investigative detention was not determinative, and cited six cases as examples of just when an arrest occurs.<sup>24</sup>

Turning to whether there was probable cause to arrest for burglary, the court noted that although the officer relied on a radio dispatch reporting a burglary in progress, because the prosecutor had not called the dispatcher to testify, no probable cause for the content of the broadcast was in evidence.<sup>25</sup> Standing alone, a police broadcast does not sufficiently establish probable cause for an arrest.<sup>26</sup> Additional facts must be available to the officer, or to the dispatcher, which would warrant a reasonable person to conclude that a crime had been or was being committed by the arrestee.<sup>27</sup> The facts may be known only to the dispatcher. In this situation, the officer can rely on the dispatcher's broadcast conclusion, here that a burglary by a man fitting the defendant's description and location was in progress, in making the arrest.<sup>28</sup> But when that arrest is challenged in court, the facts relied on by the dispatcher have to be testified to by the dispatcher or they will not be factored into the probable cause determination.<sup>29</sup>

---

14. *Id.* at 803 (Miller and Campbell, JJ., concurring).

15. *Id.* at 800 (McCormick, P.J., concurring).

16. *Id.* at 800 (White and Baird, JJ., dissenting).

17. 816 S.W.2d 407 (Tex. Crim. App. 1991).

18. An investigative detention is often called a *Terry* stop, after *Terry v. Ohio*, 392 U.S. 1 (1968).

19. *Amores*, 816 S.W.2d at 411.

20. *Id.* (citing *Hoag v. State*, 728 S.W.2d 375, 379 (Tex. Crim. App. 1987)).

21. U.S. CONST. amends. IV & XIV.

22. TEX. CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1977) (defining when a person is arrested).

23. *Amores*, 816 S.W.2d at 412.

24. *Id.* at 412 & n.7.

25. *Id.* at 414-15. These two pages of *Amores* provide some excellent examples of when the dispatcher needs to testify.

26. *Id.* at 416.

27. *Id.*

28. *Id.*

29. *See id.* at 416-17.

#### 4. *School Search Parameters Spelled Out*

Because students enjoy a reasonable expectation of privacy, school authorities are regulated by the Fourteenth Amendment.<sup>30</sup> The test for a school search is not probable cause to believe that the subject of the search is violating the law. Instead, the legality of a search of a public school student depends on the *reasonableness* of the search under all the circumstances.<sup>31</sup> Reasonableness is determined using a two-pronged test. First, the search must be justified at its inception, meaning that the official must have reasonable grounds for suspecting that the search will reveal evidence that the student has violated, or is violating, the law or rules of the school.<sup>32</sup> Second, the search must be related in scope, which requires that the measures used reasonably relate to the objectives of the search and that they are not excessively intrusive.<sup>33</sup> In *Coronado v. State*<sup>34</sup> school officials reasonably suspected the student skipped school, so prong one was met.<sup>35</sup> He was patted down for safety reasons, which was a reasonable, minimally intrusive search. Then, however, his locker and car were searched. These searches were not reasonably related in scope to the question of whether he was skipping school which had justified the initial confrontation.<sup>36</sup> Thus, the trial court should have suppressed the cocaine seized from the student's car.<sup>37</sup>

### B. AMENDMENT OF INFORMATIONS AND INDICTMENTS

#### 1. *Amending to Reflect a Defendant's True Name Is Not an Amendment*

Article 26.08 of the Texas Code of Criminal Procedure says that if, at arraignment, a defendant suggests that his name is other than that in the indictment, the indictment is to be corrected to reflect the defendant's true name.<sup>38</sup> In *Kelley v. State*<sup>39</sup> the defendant made such a suggestion and the indictment was corrected. The defendant then maintained that this change was an amendment as contemplated by article 28.10 of the Texas Code of Criminal Procedure,<sup>40</sup> which entitled him to an automatic ten day continuance. The court of criminal appeals rejected the defendant's argument and held that an article 26.08 name change simply is not an amendment as contemplated by article 28.10.<sup>41</sup>

---

30. See *Coronado v. State*, 835 S.W.2d 636, 640 (Tex. Crim. App. 1992) (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

31. *Id.*

32. *Id.*

33. *Id.*

34. 835 S.W.2d 636 (Tex. Crim. App. June 24, 1992).

35. *Id.* at 641.

36. *Id.*

37. *Id.*

38. TEX. CRIM. PROC. CODE ANN. art. 26.08 (Vernon 1989).

39. 823 S.W.2d 300 (Tex. Crim. App. 1992).

40. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989) (amendment of indictment or information).

41. *Kelley*, 823 S.W.2d at 302.

## 2. Amending Indictments Under Article 28.10 of the Texas Code of Criminal Procedure

Article 28.10(c) of the Texas Code of Criminal Procedure forbids the amendment of an indictment as to form or substance over the defendant's objection if the amended indictment charges a "different offense" or prejudices the "substantial rights" of the defendant.<sup>42</sup> In *Flowers v. State*<sup>43</sup> the court of criminal appeals determined that "different offense" means a different *statutory* offense.<sup>44</sup> Thus, when the theft indictment in that case was amended to add the name of the owner, adding an element of theft omitted from the original indictment, or at least changing an element, the amended indictment did not charge a different offense from the original one.<sup>45</sup>

Concerning whether this change prejudiced the "substantial rights" of the defendant, the court went into great detail to lay the groundwork for a proper analysis. It analogized this inquiry to that concerning "substantial rights" in *Adams v. State*,<sup>46</sup> which held that all of the trial should be looked at retrospectively to determine if any substantial right was prejudiced, with the focus of prejudice being from the standpoint of the particular right claimed to have been prejudiced.<sup>47</sup> Accordingly, since the change or addition of the name of the owner did not result in a different occurrence or incident being charged, the "substantial rights" of the defendant were not affected.<sup>48</sup> The court, however, did not adopt a blanket rule that as long as the change did not charge a different occurrence or incident substantial rights would not be prejudiced. Rather, it held that in most cases this result would be true after a review of the record for prejudice.<sup>49</sup>

## 3. Bright Line Rule for When and How an Indictment Is Amended

*Ward v. State*<sup>50</sup> creates a "bright line rule" for amending indictments and informations under articles 28.10 and 28.11 of the Texas Code of Criminal Procedure.<sup>51</sup> Basically, the correct procedure is that the prosecutor makes a motion to the trial court that the indictment be amended to reflect the necessary changes, the judge grants the motion, and then *the indictment is physically altered* to reflect the changes.<sup>52</sup> It is not enough to make the motion and have it granted, even if the order granting the motion includes words like "the indictment is hereby amended." There is no amendment to an indictment or information until there is a physical alteration such as handwrit-

---

42. TEX. CODE CRIM. PROC. ANN. art. 28.10(c) (Vernon 1989).

43. 815 S.W.2d 724 (Tex. Crim. App. 1991) (per curiam).

44. *Id.* at 728.

45. *Id.* at 729.

46. 707 S.W.2d 900 (Tex. Crim. App. 1986).

47. *Flowers*, 815 S.W.2d at 729 (describing and applying the reasoning of *Adams v. State*).

48. *Id.*

49. *Id.*

50. 829 S.W.2d 787 (Tex. Crim. App. 1992).

51. TEX. CODE CRIM. PROC. ANN. arts. 28.10, 28.11 (Vernon 1989).

52. *Ward*, 829 S.W.2d at 793.

ing on it, typing on it, interlining, or striking out words.<sup>53</sup>

The court applied the same rule to a different fact situation in *Rent v. State*.<sup>54</sup> In *Rent*, the motion was made and granted well before trial, but the physical amendment was not done until the day of trial. The defendant requested his ten day continuance under article 28.10(a) but the trial judge denied the request because the prosecutor's motion to amend had been granted more than ten days before trial. The court of criminal appeals held that the ten days ran from the day the indictment was *physically amended*, and, therefore, the ten day continuance should have been granted.<sup>55</sup> Since the harmless error rule does not apply to the denial of a 28.10(a) continuance according to *Sodipo v. State*,<sup>56</sup> the court affirmed the court of appeals' decision to reverse the conviction.<sup>57</sup>

#### 4. *Violation of Article 28.10 of the Texas Code of Criminal Procedure Is Reversible Error*

Article 28.10 of the Texas Code of Criminal Procedure covers amendments to indictments before and during trial.<sup>58</sup> *Brown v. State*<sup>59</sup> held that any violation of the article, be it an amendment on the day of or during trial which is objected to by the defendant, an amendment before the day of trial alleging an additional or different offense objected to by the defendant, or a continuance requested and denied when required, is *not* subject to a harm analysis.<sup>60</sup> Therefore, such a violation mandates reversal of the conviction.<sup>61</sup>

### C. DEFENDANT'S RIGHT TO CHOOSE COUNSEL UNDER ARTICLE 1.051 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

In *Burgess v. State*<sup>62</sup> the defendant represented himself at trial and lost. On appeal he complained that he had not knowingly and intentionally waived his right to counsel, and also that he had not signed the written waiver of counsel required by article 1.051(g) of the Texas Code of Criminal Procedure.<sup>63</sup> As to the latter, the court of criminal appeals held that the statute is permissive and not mandatory, notwithstanding its seemingly mandatory language.<sup>64</sup> Thus, a defendant may validly waive his right to

53. *Id.* at 793 & n.14.

54. 838 S.W.2d 548 (Tex. Crim. App. 1992) (opinion on state's motion for rehearing).

55. *Id.* at 551.

56. 815 S.W.2d 551, 556 (Tex. Crim. App. 1991) (opinion on state's motion for rehearing).

57. *Rent*, 838 S.W.2d at 551.

58. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989).

59. 828 S.W.2d 762 (Tex. Crim. App. 1991).

60. *Id.* at 764.

61. *Id.*

62. 816 S.W.2d. 424 (Tex. Crim. App. 1991).

63. TEX. CODE CRIM. PROC. ANN. art. 1.051(g) (Vernon Supp. 1993). Article 1.051(g) states that "the court shall provide the defendant with a statement . . . which, if signed by the defendant shall be filed with and become part of the record" if the waiver is intelligently and voluntarily made.

64. *Burgess*, 816 S.W.2d at 430.

counsel, refuse to sign the form, and still be entitled to proceed pro se.<sup>65</sup>

As to the former complaint, the court began by noting that the defendant wanted his court-appointed attorney fired and a new attorney appointed just before trial. The court stated that a trial judge confronted with an eleventh hour request for change of counsel has essentially three options. First, the trial judge can give the defendant new counsel.<sup>66</sup> Second, if the judge denies new counsel and the accused unequivocally asserts his right to self-representation after proper admonishment, the judge must let the accused represent himself.<sup>67</sup> Third, if the judge denies new counsel and the accused does not assert his right to self-representation, the judge must compel the accused to proceed to trial with the lawyer he has, whether he wants to or not.<sup>68</sup> In *Burgess*, the trial judge refused to appoint new counsel, leaving the defendant with the choice of proceeding with an attorney he did not want or proceeding pro se. The court found nothing unfair about forcing the defendant to make that choice, if the trial judge thought that the defendant did so informedly and with eyes open.<sup>69</sup>

#### D. DEFENDANT'S RIGHT TO AN INVESTIGATOR/CHEMIST IN A DRUG CASE

In *McBride v. State*<sup>70</sup> the defense to a charge of drug possession was that the drugs were planted on the defendant by enemy drug dealers. The defendant sought an independent qualitative inspection by a chemist hoping to show that the drugs were cut heavily, under the theory that the dealers did not want to waste good stuff in planting the drugs. The court of criminal appeals held that a defendant has an absolute right to inspection of evidence "indispensable to the State's case."<sup>71</sup> An item is indispensable if its exclusion from evidence would affect the essential proof that the defendant committed the offense.<sup>72</sup> For example, the drugs in a drug case are indispensable, but a tape recorded confession is not necessarily indispensable.<sup>73</sup> In the case of drugs, inspection means inspection by an expert.<sup>74</sup> Because a non-indigent defendant has this right of inspection by an expert, due process and the right to effective assistance of counsel compel the appointment of a qualified chemist to inspect the drug named in the indictment, at no cost to the defendant.<sup>75</sup> This right attaches when the case is "reasonably certain to proceed to trial."<sup>76</sup> The harmless error rule, however, may apply

---

65. *Id.*

66. *Id.* at 428.

67. *Id.* at 428-29.

68. *Id.* at 429.

69. *Id.*

70. 838 S.W.2d 248 (Tex. Crim. App. 1992).

71. *Id.* at 251.

72. *Id.* (quoting *Quinones v. State*, 592 S.W.2d 933, 940 (Tex. Crim. App. 1980)).

73. *Id.* (quoting *Quinones*, 592 S.W.2d at 940).

74. *Id.* at 250-52.

75. *Id.* at 251-52.

76. *Id.* at 252.



to a denial of a request for inspection.<sup>77</sup>

#### E. JEOPARDY: WHEN IT ATTACHES TO MULTIPLE BUT ABANDONED COUNTS IN AN INDICTMENT

The defendant in *Ex parte Preston*<sup>78</sup> was indicted under a three count indictment alleging three different offenses. The State abandoned two counts and went to trial on the third and won. It then re-indicted the defendant for the two abandoned counts, at which time the defendant claimed that jeopardy attached and barred the prosecution. The court of criminal appeals first reiterated the rules for when jeopardy attaches to an indictment. In a jury trial, jeopardy attaches when the jury is impaneled and sworn, and in a bench trial jeopardy attaches when both sides have announced they are ready and the defendant has pled to the charging instrument.<sup>79</sup> The court then held that the State must take some affirmative action on the record to dismiss, waive, or abandon<sup>80</sup> the portion of the charging instrument on which they do not want to prosecute *and* get permission from the judge to do so before jeopardy attaches.<sup>81</sup> In this case the State read only one of three counts to the jury and the defendant entered his plea to that count alone. The State, however, did nothing else to abandon, waive, or dismiss the other two counts. Because jeopardy attached as soon as the jury was impaneled and sworn, before the indictment was presented to them, jeopardy attached to all three counts and the defendant could not therefore be tried again on the last two counts.<sup>82</sup>

#### F. HABEAS CORPUS: NON-ARTICLE 11.07, CODE OF CRIMINAL PROCEDURE, WRIT PROCEDURE EXPLAINED: RECAPITULATION CASE

In *Ex parte Hargett*<sup>83</sup> the applicant was suffering collateral legal consequences from a prior conviction because the conviction was impairing his military retirement benefits. Calling this impairment a "restraint,"<sup>84</sup> the applicant filed a writ of habeas corpus. Article 11.01 of the Texas Code of Criminal Procedure provides that a writ of habeas corpus is the remedy when someone is "restrained."<sup>85</sup> A judge can then issue an order requiring an individual to come before that judge and explain the restraint.<sup>86</sup> If the

77. *Id.* The court remanded the case and instructed the court of appeals to determine if the harmless error rule applied. *Id.*

78. 833 S.W.2d 515 (Tex. Crim. App. 1992).

79. *Id.* at 518 (citing *Ex parte Torres*, 805 S.W.2d 418, 421 (Tex. Crim. App. 1981)).

80. In practice, these terms are interchangeable. *See id.* at 517 n.1.

81. *Id.* at 518.

82. *Id.*

83. 819 S.W.2d 866 (Tex. Crim. App. 1991).

84. *See* TEX. CODE CRIM. PROC. ANN. art. 11.22 (Vernon 1977) (defining restraint as "the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right").

85. *Id.* art. 11.01.

86. *Id.*

court issues the writ, the validity of the conviction comes into question and relief is granted if the conviction must be set aside.<sup>87</sup> Constitutional authority for the writ comes from article V, section 8 of the Texas Constitution,<sup>88</sup> and statutory authority is found in articles 11.05, 11.08, and 11.09 of the Texas Code of Criminal Procedure.<sup>89</sup>

*Ex parte Hargett* outlines the procedure for obtaining a writ. First, a petition for a writ is filed with a court. Then the court decides, either with or without a hearing, whether or not to issue the writ. If the decision is not to issue the writ, there is *no* appeal from this decision, but the applicant is free to go to another court and start over or to seek a writ of mandamus.<sup>90</sup> If the writ is issued and, thus, the court rules on the merits of the claim, either with or without a hearing, the applicant *can* appeal that decision to the court of appeals if relief is denied.<sup>91</sup>

Where, as in *Ex parte Hargett*, the procedure is blurred, the appellate court should look at what was done and decide whether appeal is allowable.<sup>92</sup> Here the court fused the procedure so much that after the petition was filed, there was only one hearing. The appellate court examined the case and held that it was a hearing reaching the merits of the claim and not just deciding whether to issue the writ, though the writ was never issued, and correctly decided that the order denying the petition was appealable.<sup>93</sup>

#### G. DISMISSAL OF CHARGES: TRIAL JUDGE CANNOT DISMISS

In *State v. Johnson*<sup>94</sup> the trial judge dismissed a DWI information because the prosecutor did not show up for trial while the defendant was present and ready. The defendant argued that trial courts have inherent authority to dismiss cases. To decide this issue, the court of criminal appeals analyzed the sources of a court's power in detail. "Generally speaking, a court's authority to act is limited to those actions authorized by constitutional, statutory, or common law."<sup>95</sup> The core of this power is the Texas Constitution and involves the authority to hear evidence, decide issues of fact raised by the pleadings, decide relevant questions of law, enter final judgments on the facts and the law, and execute final judgments or sentences.<sup>96</sup> In addition, a court has inherent authority to take certain actions, especially to aid in the

---

87. See TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977 & Supp. 1993).

88. TEX. CONST. art. V, § 8 (granting district courts plenary power including the power to grant writs of habeas corpus).

89. TEX. CODE CRIM. PROC. ANN. arts. 11.05, 11.07-.08 (Vernon 1977 & Supp. 1993). The statutory writ is available only when the applicant is in custody. *Ex parte Hargett*, 819 S.W.2d 866, 867 (Tex. Crim. App. 1991). The writ filed under article V, section 8 of the Texas Constitution, however, is available when the applicant is suffering collateral legal consequences but is not in custody. *Id.*

90. *Hargett*, 819 S.W.2d at 868.

91. *Id.*

92. *Id.* at 869.

93. *Id.*

94. 821 S.W.2d 609 (Tex. Crim. App. 1991).

95. *Id.* at 612 & n.2 (citing *Pope v. Ferguson*, 445 S.W.2d 950 (Tex. 1969)).

96. *Id.* at 611 (citing *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990)).

exercise of its jurisdiction, in the administration of justice, or in the preservation of its independence and integrity.<sup>97</sup> There appears to be no other source of judicial power. In *Johnson* the court found no express constitutional or statutory authority to dismiss an information under these circumstances and found that case law from 1930 held that the common law was against such a notion.<sup>98</sup> Further, the court believed that there was no inherent authority for such a dismissal because it does not aid the courts in the performance of judicial functions or the protection of their dignity, independence, and integrity.<sup>99</sup> The court of criminal appeals therefore held that the trial court did not have the power to dismiss the DWI information.<sup>100</sup>

## II. TRIAL AREAS

The court of criminal appeals decided several cases involving jury selection, including issues of voir dire time limits, proper voir dire questions, the procedure for *Batson* challenges, and a trial judge's power to excuse a venireperson sua sponte. The court also clarified what part of the charge sets the standard for determining the sufficiency of evidence, decided when an instruction must be given on a lesser included offense, and found that the current parole law instruction is constitutional. In the area of evidence law, the court examined the admissibility of DNA evidence, photographs, a witness's earlier grand jury testimony, expert testimony about a defendant's suitability for probation, and conditionally relevant evidence. The court also examined the definition of a deadly weapon and the effect of possessing a deadly weapon on the availability of probation.

### A. JURY SELECTION

#### 1. *Voir Dire: Thirty Minute Time Limit Was Reversible Error*

The right of the defendant to question prospective jurors in order to intelligently and effectively exercise challenges won out over the trial judge's right to impose reasonable time limits on voir dire in *McCarter v. State*.<sup>101</sup> In that case, the judge imposed a thirty minute time limit on the defense attorney's general questioning of the panel and did not grant the attorney more time when the thirty minutes expired. The court of criminal appeals reviewed the record and found that the attorney did not attempt to prolong the voir dire by asking repetitious questions or dwelling on one area of questioning.<sup>102</sup> The court also determined that both the questions the attorney asked and those he was precluded from asking were proper questions, meaning that their purpose was to discover a juror's views on issues applicable to the case.<sup>103</sup> Therefore, the trial judge abused his discretion in setting a thirty

---

97. *Id.* at 612 & n.3.

98. *Id.* at 612-13 (citing *State v. Anderson*, 119 Tex. 110, 26 S.W.2d 174 (Crim. 1930)).

99. *Id.* at 613.

100. *Id.*

101. 837 S.W.2d 117 (Tex. Crim. App. 1992).

102. *Id.* at 120-21.

103. *Id.* at 121-22.

minute time limit and such an error is not subject to the harmless error rule.<sup>104</sup> Note that counsel may not be precluded from asking questions simply because they are repetitious of questions asked by the D.A. or the judge.<sup>105</sup> Each party must be allowed to question potential jurors in its own manner.<sup>106</sup>

## 2. *Proper Question: Juror's Views About an Undefined Term*

The defendant in *Woolridge v. State*<sup>107</sup> sought to discover the venirepersons' views on the definition of reasonable doubt<sup>108</sup> and the trial court refused to let the defendant do so. The court of criminal appeals reversed the trial court, holding that "it is improper for a trial judge to impose restrictions based on the mere possibility that the otherwise proper question might lengthen the process," although the judge may disallow subsequent similar questions in the interest of time.<sup>109</sup> The court reasoned that despite the fact that the court will not provide a definition for a term, a prospective juror's understanding of that term may be relevant.<sup>110</sup> Because the lack of a definition for a term may allow a juror's perception of that term to be skewed, the juror's understanding can become critical to the exercise of peremptory challenges.<sup>111</sup> Note that the denial of the asking of a proper question<sup>112</sup> is error that is *not* subject to a harm analysis and, therefore, results in automatic reversible error.<sup>113</sup>

The court affirmed this holding in *Lane v. State*.<sup>114</sup> In *Lane* the defense attorney sought to ask questions about reasonable doubt after the prosecuting attorney had already asked some broader questions. The court allowed the questions, holding that *Woolridge* allows defense counsel to supplement the prosecutor's questions when the inquiry is on an issue applicable to the trial, is not repetitious, and is in proper form.<sup>115</sup>

## 3. *Batson Revisited: Great Restatement of Prima Facie Case and Batson Law*

Starting with the proposition that a single strike exercised on the basis of race offends the Constitution, *Linscomb v. State*<sup>116</sup> deals with the prima facie

---

104. *Id.* at 122.

105. *Id.* at 121.

106. *Id.*

107. 827 S.W.2d 900 (Tex. Crim. App. 1992).

108. The trial of this case took place before the court of criminal appeals defined reasonable doubt in *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991). *Woolridge*, 827 S.W.2d at 906 n.4.

109. *Woolridge*, 827 S.W.2d at 905-06.

110. *Id.* at 906.

111. *Id.*

112. A proper question is one that seeks to reveal a juror's views on an issue applicable to the case. See *Caldwell v. State*, 818 S.W.2d 790, 794 (Tex. Crim. App. 1991).

113. *Woolridge*, 827 S.W.2d at 906-07 (quoting *Nunfio v. State*, 808 S.W.2d 482, 485 (Tex. Crim. App. 1991)).

114. 828 S.W.2d 764, 766 (Tex. Crim. App. 1992).

115. *Id.* at 766.

116. 829 S.W.2d 164, 166 (Tex. Crim. App. 1992).

*Batson* case and its philosophical legal meaning in Texas. The court equated a prima facie case with a situation where some explanation of the motives for minority strikes seems clearly necessary, such as where minorities are struck in a higher proportion than their numbers on the panel.<sup>117</sup> Phrases used by the court to describe the prima facie case include: "any relevant evidence with more than a modicum of probative value," "to incline toward a belief;" and "inferences which have been fairly raised."<sup>118</sup> In *Linscomb*, the prosecutors used forty percent of their strikes to strike a racial group that comprised thirteen percent of the panel. The court of appeals pointed out, however, that two members of that minority served on the jury, and, therefore, the jury had a higher proportion of minority members (seventeen percent) than the panel (thirteen percent). Stating that the burden of proving a prima facie case is not onerous, the court of criminal appeals used the first statistics to find that they alone raised a prima facie case calling for the prosecution to come forward with neutral explanations.<sup>119</sup> Because the court of appeals had held that no prima facie case was raised, and had therefore ruled against the defendant's *Batson* claim, the case was remanded to answer the merits of the claim.<sup>120</sup>

#### 4. *Batson Violation Remedy: Article 35.261 of the Texas Code of Criminal Procedure Is Sole Remedy*

*Hill v. State*<sup>121</sup> held that article 35.261 of the Texas Code of Criminal Procedure<sup>122</sup> means that a defendant must make a *Batson*<sup>123</sup> motion after the jury strike lists are given to the judge, but before the judge impanels the jury. If the motion succeeds, the only relief is that the entire array be dismissed, a new panel brought up, and voir dire begun all over again.<sup>124</sup> In *Batson* the Supreme Court had suggested that another possible remedy would be to simply disallow a racially motivated State strike and seat that minority juror,<sup>125</sup> but a detailed look into the legislative history of article 35.261 showed that the legislature specifically rejected this remedy and consciously chose to go with the more extreme dismissal of the entire panel.<sup>126</sup> Holding that determining *Batson* procedure was properly a legislative function and that this article was within the legislature's power and prerogative to enact, the court pronounced that this was the sole remedy.<sup>127</sup>

The court went on to find that the defendant had carried his burden of

---

117. *Id.*

118. *Id.* at 166-67.

119. *Id.*

120. *Id.* at 168.

121. 827 S.W.2d 860 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 297 (1992).

122. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989). Article 35.261 states that "[a]fter the parties have delivered their lists . . . and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case," and if the defendant proves discrimination, "the court shall call a new array in the case." *Id.*

123. *Batson v. Kentucky*, 476 U.S. 79 (1986).

124. *Hill*, 827 S.W.2d at 863-64.

125. *Batson*, 476 U.S. at 99 n.24.

126. *Hill*, 827 S.W.2d at 863-64.

127. *Id.*

proving that the prosecutor's explanations were pretextual.<sup>128</sup> The explanation found to be a pretext was: "I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions."<sup>129</sup> In a concurring opinion, four judges on the court embraced the self-evident notion that a reason based partially on race cannot be race neutral.<sup>130</sup> Although the four judge plurality did not embrace this notion and required race to be the sole reason, it found pretext anyway.<sup>131</sup> The ninth and deciding vote took a pass by concurring in the result only.<sup>132</sup>

##### 5. *Batson Error: Comparative Analysis Argument Allowed for First Time on Appeal*

In its original opinion in *Young v. State*<sup>133</sup> the court of criminal appeals held that a defendant was not required to request the trial judge to consider a comparative analysis of alleged disparate treatment of venirepersons through the State's peremptory challenges in order to ask the appellate court to consider such an analysis.<sup>134</sup> On motion for rehearing this holding stood.<sup>135</sup> Therefore, trial judges must be alert and look for disparate treatment between venirepersons of different races and consider this treatment when deciding whether the State's peremptory challenges were racially motivated. The defendant need not point out such treatment because this is evidence that is already before the trial judge who witnessed the voir dire.<sup>136</sup> At best, comparative analysis on appeal is an argument, not an objection or new legal theory.<sup>137</sup> The objection and legal theory upon which the appeal is based is that the State used racially motivated strikes against certain venirepersons.<sup>138</sup> In an attempt to show balance, the *Young* court pointed out that several preservation of error rules historically favored the State. For example, the State may raise standing for the first time on appeal when a defendant alleges an illegal search and seizure.<sup>139</sup> Furthermore, trial judge rulings on the admission of evidence will be upheld on appeal even if the trial judge's reason for doing so was clearly wrong, as long as the State can come up with a "right" reason.<sup>140</sup>

---

128. *Id.* at 868-70.

129. *Id.* at 869 (quoting *Hill v. State*, 787 S.W.2d 74, 78 (Tex. App.—Dallas 1990)).

130. *Id.* at 875 (Baird, Benavides, Clinton, & Overstreet, JJ., concurring).

131. *Id.* at 868-70.

132. *Id.* at 870 (Miller, J., concurring).

133. 826 S.W.2d 141 (Tex. Crim. App. 1991) (opinion on appellant's petition for discretionary review).

134. *Id.* at 146.

135. *Id.* 152-53 (opinion denying state's motions for rehearing).

136. *Id.* at 150.

137. *Id.* at 150-51.

138. *Id.*

139. *Id.* at 151 (citing *Wilson v. State*, 692 S.W.2d 661 (Tex. Crim. App. 1984) (opinion on State's motion for rehearing)).

140. *Id.* at 151-52 (citing *Spann v. State*, 448 S.W.2d 128 (Tex. Crim. App. 1969)).

## 6. *Sua Sponte Excusal of Venireperson May Be O.K.*

*Butler v. State*<sup>141</sup> involved a trial judge's sua sponte excusal of venirepersons and the interplay, in chapter 35 of the Texas Code of Criminal Procedure (Formation of the Jury), between article 35.03 (Excuses), article 35.16 (Reasons For Challenge For Cause), and article 35.19 (Absolute Disqualification).<sup>142</sup> Discussing established case law holding that a judge should not sua sponte excuse a venireperson unless absolutely disqualified under article 35.19, the court of criminal appeals pointed out that these cases have never considered article 35.03 in their analysis.<sup>143</sup> Under article 35.03, a judge can excuse or postpone a juror's service for almost any reason the judge deems sufficient since there are no enumerated bases in article 35.03 limiting the judge.<sup>144</sup> The court held in *Butler* that a judge may sua sponte excuse a venireperson at any time during the voir dire under article 35.03.<sup>145</sup> As long as the record is clear, as it was in this case, that the excusal is not a sua sponte excusal under article 35.16, there is no error.<sup>146</sup>

Note that Chapter 62 of the Texas Government Code<sup>147</sup> now lists qualifications for jury service in section 62.102, reasons for disqualification in a particular case in section 62.105, exemptions for jurors eligible to serve but who may opt out in section 62.106, and judicial excusal of jurors in section 62.110. While most of this chapter applies to civil and criminal juries, a concurring opinion in *Butler* points out that section 62.110, being a general law, has been preempted in criminal cases by article 35.03, just as section 62.112,<sup>148</sup> dealing with excusal for religious holidays, has been preempted by article 35.03, section 3, which also deals with excusal for religious holidays.<sup>149</sup>

## B. JURY INSTRUCTIONS

### 1. *Application Paragraph Is the Yardstick for Sufficiency of the Evidence*

A trio of cases, *Walker v. State*,<sup>150</sup> *Jones v. State*,<sup>151</sup> and *Biggins v. State*,<sup>152</sup> stands for the proposition that the part of the jury charge applying the law to the facts, called the application paragraph, will be the sole criterion for determining sufficiency of the evidence.<sup>153</sup> The charge as a whole

141. 830 S.W.2d 125 (Tex. Crim. App. 1992) (per curiam).

142. TEX. CODE CRIM. PROC. ANN. arts. 35.03, 35.16, 35.19 (Vernon 1989 & Supp. 1993).

143. *Butler*, 830 S.W.2d at 130.

144. TEX. CODE CRIM. PROC. ANN. art. 35.03, § 1 (Vernon 1989). Article 35.03, section 1 states that "the court shall hear and determine excuses offered . . . and if the court deems the excuse sufficient, the court shall discharge the juror. . . ."

145. *Butler*, 830 S.W.2d at 130-31.

146. *Id.* at 131-32.

147. TEX. GOV'T. CODE ANN. §§ 62.102, 62.105, 62.106, 62.110 (Vernon 1988 & Supp. 1993).

148. TEX. GOV'T. CODE ANN. § 62.112 (Vernon 1989).

149. *Butler*, 830 S.W.2d at 132-34 (Miller, J., concurring).

150. 823 S.W.2d 247 (Tex. Crim. App. 1991) (per curiam), *cert. denied*, 112 S. Ct. 1481 (1992).

151. 815 S.W.2d 667 (Tex. Crim. App. 1991) (per curiam).

152. 824 S.W.2d 179 (Tex. Crim. App. 1992) (per curiam).

153. *Biggins*, 824 S.W.2d at 180; *Walker*, 823 S.W.2d at 248; *Jones*, 815 S.W.2d at 670.

will not be considered. Only if a definition or other abstract portion of the charge is incorporated by reference into the application paragraph will it be considered in determining sufficiency.<sup>154</sup> In *Biggins* the abstract part of the charge contained the law of parties but the application paragraph did not. Since the state only proved the defendant guilty as a party, he was entitled to an acquittal on appeal, or in a motion for a new trial.<sup>155</sup> The same situation and result occurred in *Jones*<sup>156</sup> and *Walker*.<sup>157</sup>

## 2. Lesser Included Offenses

If the evidence indicates that a defendant is guilty only of a lesser included offense, then on request a charge on that offense must be given.<sup>158</sup> Evidence may indicate that a defendant is guilty only of a lesser included offense in two ways. "First, there may be evidence which refutes or negates other evidence establishing the greater offense."<sup>159</sup> For example, proof in an aggravated robbery case that the defendant did not have a deadly weapon would require that a charge on robbery be given upon request.<sup>160</sup> "Second, a defendant may be shown to be guilty only of the lesser offense if the evidence presented is subject to different interpretations."<sup>161</sup> In *Saunders v. State*,<sup>162</sup> a case involving the murder of a child, the evidence showed that the seventeen year old defendant, in an effort to quiet the screaming child, squeezed the back of the baby's neck and head, fracturing the skull and causing death fifteen days later. Because this evidence is subject to the interpretation that he intended to kill the baby, which is murder, and is also subject to the interpretation that he was unaware of the risk of death but should have been aware, which is criminally negligent homicide, the charge on criminally negligent homicide should have been given.<sup>163</sup>

## 3. Parole Law Charge Is Constitutional

The parole law instruction in article 37.07, section 4 of the Texas Code of Criminal Procedure<sup>164</sup> was held to not run afoul of sections 13, 19 or 29 of article I of the Texas Constitution<sup>165</sup> in *Oakley v. State*.<sup>166</sup> Article 37.07, section 4 was held to be constitutional because of the constitutional amendment creating article IV, section 11(a) of the Texas Constitution that was

---

154. *Biggins*, 824 S.W.2d at 180.

155. *Id.*

156. 815 S.W.2d at 670-71.

157. 823 S.W.2d at 248-49.

158. *Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992) (per curiam).

159. *Id.*

160. *Id.* at 391-92.

161. *Id.* at 392.

162. 840 S.W.2d 390.

163. *Id.* at 392.

164. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (Vernon Supp. 1993).

165. TEX. CONST. art. I, §§ 13 (Excessive bail or fines; cruel and unusual punishment; remedy by due course of law), 19 (Deprivation of life, liberty, etc.; due course of law), 29 (Provisions of Bill of Rights excepted from powers of government, to forever remain inviolate).

166. 830 S.W.2d 107, 110 (Tex. Crim. App. 1992).



passed in 1989.<sup>167</sup> *Rose v. State*,<sup>168</sup> which declared the previous version of article 37.07, section 4 unconstitutional, is no longer good law according to *Oakley*.<sup>169</sup> The parole law instruction in article 37.07, section 4 was also held to not run afoul of the due process clauses of either the Fifth or Fourteenth Amendments of the United States Constitution (due process) in *Muhammad v. State*.<sup>170</sup> *French v. State*<sup>171</sup> further held that the parole law instruction may be given in cases involving offenses committed before 1989 without offending the ex post facto provisions of the Texas Constitution.<sup>172</sup>

### C. SPECIFIC CRIMES AND SPECIALTY LAW

#### 1. DNA Evidence is Admissible

In *Kelly v. State*,<sup>173</sup> the first court of criminal appeals case in which the admissibility per se of DNA identification evidence was challenged based on reliability, the court established a two part test for trial judges to use.<sup>174</sup> First, the trial judge must decide if evidence is reliable.<sup>175</sup> Reliability of scientific evidence is generally proven by three criteria and seven factors set out in the opinion.<sup>176</sup> Second, if the trial judge determines that the testimony is reliable, and thus probative and relevant, the judge "must still decide whether the probative value of the testimony is outweighed by one or more of the factors identified in Rule 403."<sup>177</sup> The *Frye* test, adopted by some jurisdictions, was disavowed in favor of this test based on Rules 702 and 403 of the Texas Rules of Criminal Evidence.<sup>178</sup> Under the evidence in this case,

167. TEX. CONST. art. IV, § 11(a) (giving the legislature power to pass laws requiring or allowing juries to be informed about the effect of good conduct time and eligibility for parole).

168. 752 S.W.2d 529, 552-53 (Tex. Crim. App. 1987) (opinion on court's own motion for rehearing).

169. 830 S.W.2d at 110.

170. 830 S.W.2d 953, 956-57 (Tex. Crim. App. 1992).

171. 830 S.W.2d 607 (Tex. Crim. App. 1992).

172. *Id.* at 608-09.

173. 824 S.W.2d 568 (Tex. Crim. App. 1992).

174. *Id.* at 572.

175. *Id.*

176. *Id.* at 573.

[E]vidence derived from a scientific theory, to be considered reliable, must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question. . . .

Factors that could affect a trial court's determination of reliability include, *but are not limited to*, the following: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.

*Id.* (citations omitted).

177. *Id.* at 572.

178. *Id.* at 571-72. The *Frye* test requires that a scientific principle supporting expert testimony "be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F.2d 1013, 1014 (D.C. Cir. 1923). The Court

the court found that the trial court did not abuse its discretion in finding by clear and convincing evidence that the scientific principle underlying DNA testing was valid, that the technique used was valid and properly applied here, that the statistical analysis that led to the identification was valid and reliable, and that the Rule 403 test was met.<sup>179</sup> Thus, the matchup between the DNA in a semen stain found at the home of the deceased and the DNA in the defendant's blood was admissible.<sup>180</sup> The court of criminal appeals applied the *Kelly* test in *Fuller v. State*<sup>181</sup> and again upheld a trial court decision to admit DNA evidence.<sup>182</sup>

## 2. *Deadly Weapon Finding Not Allowed in Weapon Possession Cases*

*Ex parte Petty*<sup>183</sup> held that the finding that the defendant used or exhibited a deadly weapon<sup>184</sup> may not be entered if the crime which the defendant is convicted is possession of a firearm by a felon<sup>185</sup> or possession of a prohibited weapon.<sup>186</sup> In order to merit such a finding, one must "use" a weapon in an associated felony other than mere possession of the weapon.<sup>187</sup>

## D. EVIDENCE

### 1. *New Rules Governing Admissibility of Photographs*

The rules of evidence were applied for the first time to the admissibility of photographs in *Long v. State*<sup>188</sup> and much older case law was overruled,<sup>189</sup> specifically the old rule stated in *Martin v. State*.<sup>190</sup> Citing *Montgomery v.*

reasoned that this test, while mentioned in some earlier cases, did not survive the adoption of the Texas Rules of Criminal Evidence. *Kelly*, 824 S.W.2d at 572 & n.12.

179. *Kelly*, 824 S.W.2d at 574.

180. *Id.*

181. 827 S.W.2d 919 (Tex. Crim. App. 1992). The *Fuller* court summarized the *Kelly* test in this way:

[p]ursuant to Rule 702 of the Texas Rules of Criminal Evidence, the proponent of such evidence must prove to the trial court, by clear and convincing evidence and outside the presence of the jury, that the proffered evidence is relevant; whereupon such is admissible before the jury unless the trial court determines that the probative value of the evidence is outweighed per Rule 403.

*Id.* at 930.

182. *Id.* at 930.

183. 833 S.W.2d 145 (Tex. Crim. App. 1992).

184. See TEX. PENAL CODE ANN. § 1.07(a)(11) (Vernon 1974) (defining deadly weapon).

185. See TEX. PENAL CODE ANN. § 46.05 (Vernon 1989) (Unlawful Possession of Firearm by Felon).

186. *Ex parte Petty*, 823 S.W.2d at 145; see TEX. PENAL CODE ANN. § 46.06 (Vernon 1989 & Supp. 1993) (Prohibited Weapons).

187. *Ex parte Petty*, 833 S.W.2d at 145.

188. 823 S.W.2d 259 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 3042 (1992).

189. *Id.* at 272.

190. 475 S.W.2d 265 (Tex. Crim. App. 1972) (on appellant's motion for rehearing). The rule stated as follows:

[i]f a photograph is competent, material and relevant to the issue on trial, it is not rendered inadmissible merely because it is gruesome or might tend to arouse the passions of the jury, unless it is offered solely to inflame the minds of the jury. If a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible.

*Id.* at 267 (footnotes omitted).

*State*,<sup>191</sup> the seminal case discussing admissibility of evidence under the Texas Rules of Criminal Evidence,<sup>192</sup> and discussing Texas Rule of Criminal Evidence 403,<sup>193</sup> the court specifically applied the rules of evidence to photographs.<sup>194</sup> Borrowing from *Goodwin v. State*,<sup>195</sup> the court suggested that the Rule 403 balancing test be used considering factors such as: (1) number of photos (whether all must come in or whether there is a redundancy that can be deleted), (2) gruesomeness, (3) detail, (4) size of the photos, (5) whether they are in color or in black and white, (6) whether they are close-up, and (7) whether a body shown in the photographs is naked or clothed.<sup>196</sup> The court then abandoned the *Martin* test in favor of a straight Rule 403 balancing test.<sup>197</sup> In this case, the prosecutor removed seventy-five percent of the photos taken at the crime scene to eliminate redundancy and the photos were gory only because the crime was gory. Therefore, the court held that the trial judge did not abuse his discretion in admitting the photos.<sup>198</sup>

## 2. *Sufficiency: Deadly Weapon Revisited: Definition Broader Now Under Penal Code*

The factual question presented in *Thomas v. State*<sup>199</sup> was whether a "shank" was a deadly weapon. The court of criminal appeals exhaustively discussed the various ways that something could be a deadly weapon and did some damage to the old deadly weapon per se case law.<sup>200</sup> Earlier cases had primarily been based upon the probability that a particular instrument could cause serious bodily injury.<sup>201</sup> Under these old pronouncements, many short bladed knives and other instruments were not deadly weapons per se.<sup>202</sup> The *Thomas* court noted that section 1.07(a)(11) of the Texas Penal Code now specifies the only two tests of whether something is a deadly weapon.<sup>203</sup> Section 1.07(a)(11)(A) provides that a deadly weapon is "a fire-arm or anything manifestly designed, made or adapted for the purpose of inflicting serious bodily injury."<sup>204</sup> Whereas a long carving knife, designed for the kitchen, is not a deadly weapon under Subsection (A), a short bladed "shank" may be.<sup>205</sup> The other test, in section 1.07(a)(11)(B), focuses on the use of the instrument, stating that a deadly weapon is "anything that in the

---

191. 810 S.W.2d 372 (Tex. Crim. App. 1991).

192. See *Long*, 823 S.W.2d at 271.

193. TEX. R. CRIM. EVID. 403.

194. *Long*, 823 S.W.2d at 271-72 & nn.18-20.

195. 799 S.W.2d 719 (Tex. Crim. App. 1990), *cert. denied*, 111 S. Ct. 2913 (1991).

196. *Long*, 823 S.W.2d at 272.

197. *Id.*

198. *Id.* at 273.

199. 821 S.W.2d 616 (Tex. Crim. App. 1991).

200. *Id.* at 620.

201. See *Hardy v. State*, 36 Tex. Crim. 400, 37 S.W. 434 (1896); *Miller v. State*, 140 Tex. Crim. 182, 143 S.W.2d 778 (1940).

202. See *Thomas*, 821 S.W.2d at 618.

203. TEX. PENAL CODE ANN. § 1.07(a)(11) (Vernon 1974) (Definitions: Deadly Weapon).

204. *Id.* § 1.07(a)(11)(A).

205. Bayonets, scimitars, and swords of various kinds qualify as deadly weapons under this test. *Thomas*, 821 S.W.2d at 620.

manner of its use or intended use is capable of causing . . . serious bodily injury”<sup>206</sup> and, thus, while the kitchen knife could be the deadly weapon and not the “shank.”<sup>207</sup> The court reasoned that one way to show that a shank was a deadly weapon was by simple testimony about what it was designed for.<sup>208</sup> The term “deadly weapon per se” now refers to instruments described in section 1.07(a)(11)(A),<sup>209</sup> but there must be evidence at trial that the instrument was a firearm or was manifestly designed, made, or adapted for the purpose of causing serious injury.<sup>210</sup> Most importantly, it is not necessary under section 1.07(a)(11) that the instrument be *capable* of causing death.<sup>211</sup> In this case, since a shank was specifically described as a home-made stabbing device, it may qualify as a deadly weapon if it was specifically adapted to cause serious bodily injury, even if it was never used.<sup>212</sup>

### 3. *Use of Grand Jury Testimony Under Texas Rule of Criminal Evidence 804: Witness Unavailable*

In *Jones v. State*<sup>213</sup> a witness who testified at the grand jury asserted her Fifth Amendment right at trial, so the defendant sought to introduce her grand jury testimony under Texas Rule of Criminal Evidence 804(b)(1).<sup>214</sup> After noting that the assertion of a Fifth Amendment privilege makes a witness “unavailable,”<sup>215</sup> the court of criminal appeals held that grand jury testimony fits within the hearsay exception of Rule 804(b)(1) and was admissible in this case.<sup>216</sup> The testimony met the rule’s requirement that the State have an “opportunity and similar motive to develop the testimony.”<sup>217</sup> Some of the transcript of the testimony, however, was hearsay within hearsay, because the witness had narrated statements that the defendant had made to the witness, and therefore those parts were inadmissible under Texas Rule of Criminal Evidence 805.<sup>218</sup> Since the defendant offered all the testimony without specifically offering only the admissible part, error was waived.<sup>219</sup> Under established case law, “[w]hen evidence which is partially admissible and partially inadmissible is excluded, a party may not complain upon appeal unless the admissible evidence was specifically offered.”<sup>220</sup>

206. TEX. PENAL CODE ANN. § 1.07(a)(11)(B) (Vernon 1974).

207. Utility knives, straight razors, and eating utensils could qualify as deadly weapons under this test. *Thomas*, 821 S.W.2d at 620.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 620-21.

213. No. 69,894 (Tex. Crim. App. Sept. 23, 1992).

214. TEX. R. CRIM. EVID. 804(b)(1) (stating that if a witness is “unavailable” her testimony given at certain types of prior hearings is admissible).

215. *Jones*, slip op. at 2.

216. *Id.* slip op at 4-5.

217. *Id.* at 3 (quoting TEX. R. CRIM. EVID. 804(b)).

218. *Id.* at 5-6; TEX. R. CRIM. EVID. 805 (precluding hearsay within hearsay unless each part of the combined statement meets an exception to the hearsay rules).

219. *Jones*, slip op. at 6.

220. *Id.* (citing *Schultz v. State*, 446 S.W.2d 872 (Tex. Crim. App. 1969)).

#### 4. *Admissibility of Expert Testimony Regarding Suitability for Probation*

*Ortiz v. State*<sup>221</sup> began when the State, over objection, offered the testimony of a psychiatrist who said that the defendant was not a good candidate for probation. On appeal, the court of appeals relied on previous case law from the court of criminal appeals and held that admission of this testimony was error.<sup>222</sup> The court of criminal appeals interpreted Texas Rule of Criminal Evidence 403<sup>223</sup> and Rule 702<sup>224</sup> and held that the admissibility of expert testimony was a trial judge's decision that would be reversed on appeal only for abuse of discretion.<sup>225</sup> As long as there is a rational basis for a trial judge's decision that under Rule 702 evidence will assist the jury, or will not assist them, then appellate courts should not conduct a *de novo* review of the trial judge's decision to admit or exclude expert testimony.<sup>226</sup> Therefore, a battle of experts is acceptable if the trial judge wants to allow one.

#### E. PRESERVATION OF ERROR UNDER TEXAS RULE OF CRIMINAL EVIDENCE 104(b): THE "I'LL CONNECT IT UP LATER" RULE

Texas Rule of Criminal Evidence 104(b) states that when relevancy of a piece of evidence (piece #1) depends upon the admission of another piece or other pieces of evidence (piece #2, etc.), the trial court shall admit it subject to the admission of that other piece.<sup>227</sup> In *Fuller v. State*<sup>228</sup> the State was proving up the existence of a prison club called the Aryan Brotherhood (piece #1) before it proved up that the defendant was a member (piece #2). The State, however, never got around to proving piece #2, and the defendant never objected to this at trial. On appeal, the court of criminal appeals said that the *party opposed* to the introduction of evidence under Rule 104(b) *must object* if piece #2 is never admitted, or that party's complaint is *waived* as to the admission of piece #1.<sup>229</sup> This objection must be timely, which presumably will be when the party proponent rests without proving up piece #2.<sup>230</sup>

### III. POSTTRIAL AND APPEAL AREAS

In these areas, the court of criminal appeals addressed the limits on juror testimony about improper influences, the effect on appeal of the submission of a partial statement of the facts, and the effect of a lawyer's uncontradicted observations about a jury-panel during a *Batson* challenge. The court also decided cases regarding who can authorize an appeal by the state and the

221. 834 S.W.2d 343 (Tex. Crim. App. 1992).

222. *Ortiz v. State*, 781 S.W.2d 399 (Tex. App.—Houston [1st Dist.] 1989, pet. granted).

223. TEX. R. CRIM. EVID. 403 (allowing the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice).

224. *Id.* 702 (governing testimony by experts).

225. *Ortiz*, 834 S.W.2d at 348.

226. *Id.*

227. TEX. R. CRIM. EVID. 104(b).

228. 829 S.W.2d 191 (Tex. Crim. App. 1992).

229. *Id.* at 198-99.

230. *Id.*

time limits for giving notice of an appeal by the state. Additionally, the court examined the defendant's right to choose a jury for setting punishment on remand, the right to a punishment hearing when deferred adjudication probation has been revoked, and the defendant's right to have his trial attorney represent him on appeal.

#### A. PROVING JUROR MISCONDUCT AT A MOTION FOR NEW TRIAL HEARING

At a motion for a new trial hearing where a defendant is trying to show jury misconduct by putting a juror on the stand, Texas Rule of Criminal Evidence 606(b) provides that a juror

may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him . . . except that a juror may testify as to any matter relevant to the validity of the verdict."<sup>231</sup>

Interpreting this rule broadly, the court of criminal appeals held in *Buentello v. State*<sup>232</sup> that the rule addresses anything the trial court deems relevant.<sup>233</sup> "What is considered 'relevant' will be determined on a case-by-case basis, taking into account the court's experiences and observations, the grounds for a new trial set forth in [Texas Rule of Appellate Procedure] 30(b), and the caselaw developed under the predecessor to 30(b)," article 40.03 of the Texas Code of Criminal Procedure.<sup>234</sup> There need not be any "overt act."<sup>235</sup> In *Buentello*, the jurors discussed the parole law and several of them voted for the maximum of twenty years because they thought they had to keep the defendant in prison for one to five real-time years. The court found that this discussion involved a misstatement of the law, asserted to other jurors as fact, that jurors relied on in casting their votes.<sup>236</sup> This finding required reversal and remand.<sup>237</sup>

#### B. PRESERVATION OF ERROR ON APPEAL

##### 1. *Preservation of Error in a Sufficiency Claim*

Texas Rule of Appellate Procedure 53(d) allows a partial statement of facts to be submitted by the appealing party and creates a presumption on

---

231. TEX. R. CRIM. EVID. 606(b).

232. 826 S.W.2d 610 (Tex. Crim. App. 1992).

233. *Id.* at 614.

234. *Id.* In particular, the court noted that the test in *Sneed v. State*, 670 S.W.2d 262 (Tex. Crim. App. 1984), is a viable means of determining whether a jury's discussion of parole law constitutes reversible error. *Buentello*, 826 S.W.2d at 614. According to the *Buentello* court, *Sneed* held that Article 40.03 required that a defendant prove five factors to show reversible error based on a discussion of parole by a jury: "(1) a misstatement of the law; (2) asserted as a fact; (3) by one professing to know the law; (4) which is relied upon by other jurors; (5) who for that reason changed their vote to a harsher punishment." *Id.* at 611 (citing *Sneed*, 670 S.W.2d at 266).

235. *Buentello*, 826 S.W.2d at 614.

236. *Id.* at 615-16.

237. *Id.* at 616.

appeal that nothing omitted from the record is relevant to any of the points raised.<sup>238</sup> Notice of which points will be raised must go to the other party, who can add other parts of the statement of facts to the record.<sup>239</sup> In *Greenwood v. State*<sup>240</sup> the defendant challenged sufficiency and complied with the rule. The court of criminal appeals said that Rule 53(d) was not meant to apply to a sufficiency challenge because of the necessity in a sufficiency challenge that the entire record and statement of facts be reviewed "in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>241</sup> This mandate is constitutional and under Texas Rule of Appellate Procedure 50(d), which places the burden on the party seeking review to come forth with a sufficient record to show error,<sup>242</sup> the defendant must order the entire record to challenge sufficiency.<sup>243</sup>

## 2. *Uncontradicted Observations by Counsel Are Presumed True Proof on Appeal*

In arguing that the trial court should grant his *Batson* motion, the defendant's attorney in *Emerson v. State*<sup>244</sup> mentioned his observations about the panel on the record. He stated that four blacks on the panel were struck by the prosecutor, one of them was not asked any questions, and the attorney utilized a comparative analysis to show that two other panel members were struck because of race. The court of appeals held that the "observations of counsel offered in support of his motion to dismiss the array do not constitute evidence" and dismissed defendant's *Batson* challenge.<sup>245</sup> The court of criminal appeals held that such observations are evidence when made in the presence of the prosecutor and judge and are neither contradicted nor objected to.<sup>246</sup> Thus, the observations were valid proof in support of appellant's showing of a prima facie case of discrimination.<sup>247</sup> The court then reversed the conviction by finding that a prima facie case was made and that the judge did not convene a hearing to get neutral explanations.<sup>248</sup> This case, of course, has broad ramifications concerning uncontradicted observations by counsel beyond *Batson* hearings, and was in no way limited to those hearings.

---

238. TEX. R. APP. P. 53(d).

239. *Id.*

240. 823 S.W.2d 660 (Tex. Crim. App. 1992).

241. *Id.* at 661.

242. TEX. R. APP. P. 50(d).

243. *Greenwood*, 823 S.W.2d at 661.

244. 820 S.W.2d 802 (Tex. Crim. App. 1991).

245. *Id.* at 804 (quoting *Emerson v. State*, No. A14-80-00778-CR slip op. at 7 (Tex. App.—Houston [14th Dist.] October 4, 1990)).

246. *Id.*

247. *Id.*

248. *Id.* at 804-05.

## C. STATE'S RIGHT TO APPEAL

1. *Who Can Give Notice of Appeal? The Prosecuting Attorney (Pretty Much)*

Article 44.01 of the Texas Code of Criminal Procedure, governing the State's right to appeal, provides that the State, through the prosecuting attorney, may appeal criminal cases in certain situations.<sup>249</sup> The article then defines prosecuting attorney, saying the term "does not include an assistant prosecuting attorney."<sup>250</sup> The court of criminal appeals stated in *State v. Muller*<sup>251</sup> that this statute means what it says and that therefore an assistant may not give notice of appeal for the State.<sup>252</sup> The prosecuting attorney may, however, by a court-imposed modification of article 44.01 invented in this opinion, personally authorize the filing of an appeal by an assistant.<sup>253</sup> Therefore, within the fifteen day window the State is given to appeal, the prosecuting attorney<sup>254</sup> must personally sign the notice of appeal or personally and expressly authorize an assistant to file a specific notice of appeal on his behalf.<sup>255</sup> A standing authorization to an assistant would not meet this test.<sup>256</sup> Also, in *State v. Boseman*,<sup>257</sup> an Assistant City Attorney gave notice of appeal within the fifteen days but the specific authorization from the prosecuting attorney was given after the fifteen days, and this was held to not meet the test.<sup>258</sup> One caveat should be noted: a prosecuting attorney who is out of town should use a fax or telegram to authorize the assistant to give notice of appeal.<sup>259</sup>

2. *Signature Stamp of the Prosecuting Attorney Not Enough*

Following the reasoning in *Muller* above, the court of criminal appeals held in *State v. Shelton*<sup>260</sup> that a signature stamp of the elected county attorney, followed by the real signature of an assistant county attorney, was insufficient to invoke article 44.01 of the Texas Code of Criminal Procedure.<sup>261</sup> Specifically, the State failed in its burden to prove that the appeal was per-

249. TEX. CODE CRIM. PROC. ANN. art. 44.01 (a-d) (Vernon Supp. 1993). The article does not specifically provide that the prosecuting attorney may appeal, but rather states that "the state" may appeal. *Id.* Article 44.01(d), however, specifically refers to the prosecuting attorney in imposing the 15 day time period for filing. *Id.* Therefore, the state and prosecuting attorney are interchangeable terms for the purpose of this article.

250. *Id.* art. 44.01(i) (Vernon Supp. 1993).

251. 829 S.W.2d 805 (Tex. Crim. App. 1992).

252. *Id.* at 810.

253. *Id.*

254. Practically speaking, this means the elected D.A. or County Attorney. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(i).

255. *Muller*, 829 S.W.2d at 811-12.

256. *See id.* at 810 & n.6.

257. 830 S.W.2d 588 (Tex. Crim. App. 1992).

258. *Id.* at 591 (citing *State v. Muller*, 829 S.W.2d 805, 811 (Tex. Crim. App. 1992)).

259. *See Muller*, 829 S.W.2d at 812-13 n.9. The court noted that it would be possible for the prosecutor to supplement the record with evidence that personal approval was given within the time period. *Id.*

260. 830 S.W.2d 605 (Tex. Crim. App. 1992).

261. *Id.* at 606.



sonally, expressly, and specifically authorized by the prosecuting attorney.<sup>262</sup>

### 3. *When Does the Fifteen Day Time Limit for Giving Notice Begin*

Under Article 44.01(d) of the Texas Code of Criminal Procedure, the State has fifteen days from the date an appealable order is *entered* to give notice of appeal.<sup>263</sup> The question in *State v. Rosenbaum*<sup>264</sup> was whether the order was entered when the judge granted it, or when the clerk entered it in the minutes of the court, or at some other time. The court of criminal appeals construed the term "entered" to mean the date on which the judge *signs* the order.<sup>265</sup> By following the procedure outlined by the facts of this case, however, the judge can "post date" the order.<sup>266</sup> Here, the judge signed the order on June 28 but by letter to the clerk he "post dated" it to July 2. Thus, the State had fifteen days from July 2, not June 28, to file notice of appeal.<sup>267</sup>

### D. NEW TRIAL ON PUNISHMENT GETS YOU A NEW ELECTION ON WHO DISHES IT OUT

In *Saldana v. State*<sup>268</sup> the court held that if a case is reversed because of error at the punishment phase, and, therefore, is sent back for reassessment of punishment, or if a motion for new trial is granted for that purpose, then the defendant elects anew whether a jury or the trial judge will set punishment.<sup>269</sup> This is true even if the defendant waived the jury at the first trial or plea.<sup>270</sup> The court found that "the enactment of article 44.29(b)<sup>271</sup> created a right to choose either jury or court assessment of punishment after such a remand, notwithstanding [that] such choice [was made once already] at the original trial."<sup>272</sup>

### E. RIGHT TO A PUNISHMENT HEARING WHEN DEFERRED ADJUDICATION PROBATION IS REVOKED

When a defendant receives deferred adjudication probation under article 42.12, section 5 of the Texas Code of Criminal Procedure,<sup>273</sup> he has certain rights when the State moves to revoke the probation and adjudicate him guilty. The article states that he

262. *Id.*

263. TEX. CODE CRIM. PROC. ANN. art. 44.01(d) (Vernon Supp. 1993).

264. 818 S.W.2d 398 (Tex. Crim. App. 1991).

265. *Id.* at 402.

266. *Id.* at 403.

267. *Id.*

268. 826 S.W.2d 948 (Tex. Crim. App. 1992).

269. *Id.* at 950-51.

270. *Id.*

271. TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (Vernon Supp. 1993). Article 44.29(b) states in pertinent part that "[i]f the defendant elects, the court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is empaneled by the court for other trials before the court."

272. *Saldana*, 826 S.W.2d at 950.

273. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5 (Vernon 1991).

is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, *all proceedings . . . continue as if the adjudication of guilt had not been deferred.*<sup>274</sup>

In *Issa v. State*<sup>275</sup> the court of criminal appeals construed this last emphasized portion to require that the trial judge, after an adjudication of guilt, hold a punishment hearing and afford the defendant, and presumably the State, an opportunity to present evidence.<sup>276</sup>

#### F. RIGHT TO AN ATTORNEY: MUST BE TRIAL ATTORNEY IF DEFENDANT WISHES

In *Buntion v. Harmon*,<sup>277</sup> a mandamus action, the Relator sought to compel the Respondent, the trial judge, to appoint the trial attorney for the appeal. Both the defendant and the trial attorney wanted the attorney to represent the defendant on appeal, but the trial judge, because of policy reasons that were in no way a reflection on the trial attorney, refused and sought to appoint new and different counsel to do the appeal. In conditionally granting relief, the court of criminal appeals held that under the facts of this case, the trial judge had to allow the trial counsel to continue on the appeal.<sup>278</sup> The court reasoned:

Given the fundamental nature of an accused's right to counsel, we cannot agree that a trial judge's discretion to replace appointed trial counsel over the objection of both counsel and defendant extends to a situation where the only justification for such replacement is the trial judge's personal "feelings" and "preferences." There must be some principled reason, apparent from the record, to justify a trial judge's sua sponte replacement of appointed counsel under these circumstances.<sup>279</sup>

#### ORDERING COPIES OF OPINIONS FROM THE COURT OF CRIMINAL APPEALS

State auditors will no longer allow billing for copies of opinions. Payments must, therefore, be sent with your request. The charge for the copy of the opinion is \$1.00 per page. The number of pages can be obtained by calling the office of the Clerk of the Texas Court of Criminal Appeals at (512) 463-1551. You will need to know the name or number of the case and the date it was delivered.

---

274. *Id.* art. 42.12 § 5(b) (emphasis added).

275. 826 S.W.2d 159 (Tex. Crim. App. 1992) (per curiam) (original proceeding).

276. *Id.* at 161.

277. 827 S.W.2d 945 (Tex. Crim. App. 1992).

278. *Id.* at 949.

279. *Id.* (footnotes and citations omitted).

Your request, along with payment, can then be mailed to:

Clerk of the Court of Criminal Appeals  
P.O. Box 12308, Capitol Station  
Austin, Texas 78711

\*\*\*\*\*

#### OPINION SERVICE

Unaffiliated with the court of criminal appeals is a private weekly Opinion Service offered by Fenora Deputy, P.O. Box 1262, Austin, Texas 78767. Phone # (512)346-1804. She offers a complimentary set of opinions on request to potential new subscribers. She charges \$311.52 (plus tax) per year for full copies of all our opinions "hot off the presses" as they are issued by the court.