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CRIMINAL LAW

*Judge Chuck Miller**

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THIS Article addresses substantive criminal law. First, the Article discusses recent and significant amendments to the Texas Penal Code by the Texas Legislature. Most of these new amendments were effective September 1, 1993, and no case law interpreting them has yet been delivered. Second, this Article compiles particularly important decisions of the Texas Court of Criminal Appeals, delivered from October 1, 1992 to September 30, 1993, that will have a pervasive impact on the trial of criminal cases in Texas. These cases either provide an excellent recapitulation of established legal principles, reaffirm established case law that had come into question or fallen into disuse, or establish new precedent. The cases are set out by topic, in the general order in which they occur in the evolution of a criminal case.

This Article does not encompass legislative developments and case law on criminal procedure or the legislative developments relating to the overhaul of the Texas Penal Code and the sentencing reforms due to go into effect in September of 1994.

I. LEGISLATIVE CHANGES IN THE PENAL CODE

This portion presents recent changes in the Penal Code. There have been numerous additions and revisions affecting the definition of and punishment for certain crimes, which, for the purposes of this Article, have been grouped in broad categories according to type of crime. For obvious reasons, this Article will discuss only the more significant changes. All of the below described changes went into effect on September 1, 1993, unless stated otherwise.

It is also noteworthy that as the Penal Code was set to expire in 1994, the legislature had to not only submit and pass amendments to the existing code, but also reintroduce such portions of the "old" code that it wished to continue in existence. Whether on purpose or by oversight, some of the changes that were made during this past legislative term, applicable to the 1993 Penal Code, were not incorporated into the "new" Penal Code. Those provisions that were not incorporated will therefore have a short life and only be effec-

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tive until August 31, 1994. Any such expirations applicable to the statutes discussed below have been noted in an accompanying footnote.¹

A. CRIMINAL INSTRUMENTS AND OFFENSES INVOLVING CERTAIN COMMUNICATIONS

Section 16.02 of the Texas Penal Code,² dealing with unlawful interception, use, or disclosure of wire, oral, or electronic communications, which was set to expire on September 1, 1993, has been extended for another twelve years. The new expiration date is September 1, 2005.

B. CRIMINAL HOMICIDE

The legislature has amended section 19.03 of the code³ to add additional situations that constitute capital murder.⁴ It is now a capital offense to murder an individual who is under six years of age. The new language does not state whether it is necessary that the actor be aware of the age of the child at the time of the murder, although there is some legislative history that suggests that such knowledge is a requirement under the new provision. A person now commits capital murder when, while serving a prison term, he commits murder with the intent to participate in a "combination,"⁵ such as a prison gang. This amendment appears to be an attempt to respond to the decision in *Rice v. State*,⁶ wherein the court held that the proof that a prison gang member committed a murder to maintain and enhance his status in a prison gang would not be sufficient to maintain a capital murder for remuneration conviction as such benefits were "too intangible to satisfy the remuneration element."⁷ Finally, the legislature made it a capital offense for a person to commit murder while serving a sentence of life or ninety-nine years for a "3g offense."⁸

C. SEXUAL OFFENSES

The legislature added a new section to this chapter that makes it a third degree felony for a mental health provider to engage in sexual contact or sexually exploitive behavior with a patient or former patient.⁹ Consent is

1. Special thanks is given to The Texas District and County Attorneys Association, whose publication regarding changes in the Penal Code along with the aforementioned Penal Laws of Texas, was extremely useful in preparing this section.

2. TEX. PENAL CODE ANN. § 16.02 (Vernon Supp. 1994).

3. *Id.* § 19.03 (Vernon 1989).

4. *Id.* § 19.03(a).

5. TEX. PENAL CODE ANN. § 71.01(a) (Vernon Supp. 1994).

6. 805 S.W.2d 432 (Tex. Crim. App. 1991).

7. *Id.* at 435.

8. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1) (Vernon Supp. 1994). The "3g offenses" are capital murder, murder, aggravated kidnapping, aggravated sexual assault, aggravated robbery, and indecency with a child. Note that murder and indecency with a child were added during the last legislative session and went into effect on September 1, 1993.

9. TEX. PENAL CODE ANN. § 21.14 (Vernon Supp. 1994) (to be entitled "Sexual Exploitation by Mental Health Services Provider").

not a defense under this new section.¹⁰ Sexual conduct that is part of a professionally recognized medical treatment, however, is a defense to this section.¹¹ It is also a defense that the victim is no longer emotionally dependent on the defendant and psychotherapy has terminated more than two years before the date of the sexual contact or behavior.¹² A repeat offense under this section is a second degree felony.¹³

D. CRIMINAL TRESPASS

The legislature added "the visible presence on the property of a crop grown for human consumption" to the list of items constituting notice¹⁴ for the purpose of criminal trespass.¹⁵ In other words, it is now an offense to trespass on farmland with growing crops, even where there is no fencing, signs, or oral or written communication forbidding such entry or remainder.¹⁶

E. FRAUD

A new section was added that makes it an offense for a person to deceive an insurer regarding a matter material to a claim or affecting the right or amount of payment to which a person is entitled or for a person to solicit, offer, pay, or receive a benefit regarding health care goods or services under an insurance policy with the intent to deceive an insurer.¹⁷ The classification level of the offense varies according to the value of the claim and whether or not the defendant is a health care practitioner or has prior convictions for that same offense.¹⁸

F. MONEY LAUNDERING

An entire new chapter was added criminalizing the activity of handling the proceeds of criminal activities¹⁹ and will act as a companion to Texas Penal Code Chapter 59 (Forfeitures). There are numerous defenses to this offense, including the receipt of funds for legal fees by an attorney who did not have actual knowledge that the funds were derived from illegal activities.²⁰ The offense of money laundering is a felony, with the degree of offense tied to the amount of money involved.²¹ Money laundering has also been

10. *Id.* § 21.14(c)(1).

11. *Id.* § 21.14(f).

12. *Id.* § 21.14(d).

13. This section was not made part of the 1994 Penal Code and so expires on August 31, 1994.

14. TEX. PENAL CODE ANN. § 30.05(b)(2) (Vernon Supp. 1994).

15. *Id.* § 30.05.

16. Compare TEX. PENAL CODE ANN. § 30.05(b)(2) (Vernon Supp. 1994) with TEX. PENAL CODE ANN. § 30.05 (Vernon 1989) (unamended statute).

17. TEX. PENAL CODE ANN. § 32.55 (Vernon Supp. 1994) (to be entitled "Insurance Claim Fraud").

18. Expires August 31, 1994.

19. TEX. PENAL CODE ANN., ch. 34 (to be entitled "Money Laundering").

20. *Id.* § 34.02(d).

21. See *id.* § 34.02(e).

added to the list of offenses that may underlie an organized crime charge.²²

G. BARRATRY AND OTHER LEGAL PROFESSION RELATED OFFENSES

The legislature completely rewrote the barratry statute in this last session.²³ Among other things, the statute now specifically sets out prohibited actions, including written communications to potential clients within thirty days of the occurrence that would give rise to the claim and certain activities by health care professionals or professional investigators.²⁴ The typical in-person or telephonic solicitation type offense would now be third degree felonies, while violations of the restrictions on written communications are a Class A misdemeanor for a first offense and a third degree felony on the second offense.

The legislature also made the unauthorized practice of law²⁵ and the act of falsely holding oneself out as a lawyer²⁶ criminal offenses, the latter being a third degree felony²⁷ and the former being a Class A misdemeanor on the first offense and a third degree felony on the second offense.²⁸

H. HARASSMENT

The harassment statute has been expanded to include actions commonly known as "stalking."²⁹ It is now an offense for an individual, on more than one occasion, to engage in conduct directed specifically at a person that is likely to harass, annoy, alarm, abuse, torment, or embarrass that person, including following that person.³⁰ It is also necessary that the defendant, on at least one occasion, has threatened to inflict bodily harm on that person, that person's family, or that person's property and that at least one of those occasions be after the person at whom the conduct is directed has reported at least one incident to law enforcement authorities.³¹ "Stalking" is a Class A misdemeanor, unless the actor has a previous stalking conviction, in which case, it becomes a third degree felony.³² This law went into effect on March 19, 1993.

22. TEX. PENAL CODE ANN. § 71.02 (Vernon Supp. 1994).

23. *Id.* § 38.12.

24. This revised statute is, in fact, the subject of a federal lawsuit against the State of Texas and most of the district attorneys' offices in the state, that alleges that the new statute violates free speech rights. The United States District Court for the Southern District of Texas, in the case of *Moore v. Morales*, C.A. No. 931270, has imposed temporary orders enjoining the State from prosecuting any violations under that statute. Trial on the merits in that case is pending.

25. TEX. PENAL CODE ANN. § 38.123 (Vernon Supp. 1994) (to be entitled "Unauthorized Practice of Law").

26. *Id.* § 38.122 (to be entitled "Falsely Holding Oneself Out as a Lawyer").

27. *Id.* § 38.122(b).

28. *Id.* § 38.123(c) & (d).

29. *Id.* § 42.07 (Vernon 1989).

30. This will be TEX. PENAL CODE ANN. § 42.07(a)(7) (Vernon Supp. 1994).

31. *Id.*

32. TEX. PENAL CODE ANN. § 42.07(d).

I. MISCELLANEOUS PROVISIONS

There were also some significant additions and revisions to a number of provisions that are not related to a specific crime. A "hate crimes" statute was enacted that raises the punishment for an offense, other than a first degree offense, to the next highest punishment category if, during the punishment phase, the court makes an affirmative finding under Article 42.014 of the Texas Code of Criminal Procedure³³ that the victim of the crime was selected because of the defendant's prejudice against a person or group.³⁴ Additionally, an amendment was made to the solicitation statute that makes it an offense to solicit a child to commit any felony.³⁵ It is not necessary that the felony be a first-degree felony, as is required for the solicitation of adults.³⁶ The legislature also amended the requirement of a voluntary act statute to state that a person can commit a crime by omission if there was a duty to act under any "law," not only under a "statute."³⁷

II. SIGNIFICANT CASE LAW

A. PRETRIAL AREAS

In the pretrial area, cases decided last year by the Court of Criminal Appeals address such issues as implied consent to a crime scene search, *Faretta* admonishments,³⁸ defects in complaints, the State's duty to disclose evidence, defense work product, a defendant's right to an appointment of a defense expert, double jeopardy, the State's right to jury trial in a misdemeanor case, warnings regarding consequences of the refusal of a intoxilyzer test, release on bond under Article 17.151 of the Texas Code of Criminal Procedure,³⁹ waiver of ten days preparation time, and adequate notice that the State would seek an affirmative finding that a deadly weapon was used.

1. Search and Seizure

a. Implied Consent of Owner Is Sufficient to Permit the Search of a Crime Scene

In *Brown v. State*⁴⁰ the Court of Criminal Appeals, for the first time, addressed the doctrine of implied consent for a search of a crime scene.⁴¹ In *Brown* the court found that where a defendant had summoned police to his

33. Article 42.014 was added to the Texas Code of Criminal Procedure during the last session. It went into effect on September 1, 1993. TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon Supp. 1994).

34. *Id.* § 12.47 (to be entitled "Penalty if Offense Committed Because of Bias or Prejudice").

35. This will be TEX. PENAL CODE ANN. § 15.03(a)(2) (Vernon Supp. 1994). Expires August 31, 1994.

36. To be TEX. PENAL CODE ANN. § 15.03(a)(1) (Vernon Supp. 1994); see TEX. PENAL CODE ANN. § 15.03(a) (Vernon 1974).

37. TEX. PENAL CODE ANN. § 6.01(c) (Vernon 1974).

38. *Faretta v. California*, 422 U.S. 806 (1975).

39. TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon 1989).

40. 856 S.W.2d 177 (Tex. Crim. App. 1993).

41. *Id.* at 179.

home, after reporting that he had found his wife dead in the garage and suspected that she had been robbed, implied consent was given to the officers to search the attached home, where they found evidence that implicated the defendant, even though the defendant had never been asked to consent to such a search.⁴² The court held when a crime is reported to the police by an individual who

controls the premises to which the police are summoned, and that individual either states or suggests that the crime was committed by a third person, he or she implicitly consents to a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator. As long as the individual is not a suspect in the case or does nothing to revoke his consent, the police may search the premises for these purposes, and evidence obtained thereby is admissible.⁴³

However, the implied consent is valid only for the initial investigation conducted at the scene and does not carry over into any future visits.⁴⁴ This doctrine of implied consent has already been adopted by a number of states, whose reasoning the court adopted.⁴⁵

2. *Statutory Warnings*

a. Giving More Than Statutory Warnings May Destroy Voluntariness

Under Article 6701I-5, section 2 of the Texas Revised Civil Statutes,⁴⁶ a person who is suspected of driving while intoxicated must voluntarily consent to submit to a breath test or none shall be taken. This section also provides that a person arrested for this offense must be warned that if he refuses to submit to the breath test, his driver's license will be suspended for ninety days and evidence of his refusal will be admissible against him in court.⁴⁷ However, the Court of Criminal Appeals has now held that giving anything more than these warnings may destroy the voluntariness of any consent given.

The defendant in *Erdman v. State*⁴⁸ was arrested for driving while intoxicated and was asked to submit to a breath test. The deputy who arrested the defendant, however, not only gave him the two warnings required by the statute, but also told him that if he did not submit to the breath test, D.W.I. charges would be filed against him and he would be placed in jail that night. The defendant then "consented," took the test, failed, and was charged with D.W.I. He later filed a motion to suppress the results of the intoxilyzer test, that was overruled. On appeal, the Court of Criminal Appeals found that the additional "warnings" were of the nature that would normally result in

42. *Id.* at 178.

43. *Id.* at 182.

44. *Id.*

45. *Id.*

46. TEX. REV. CIV. STAT. ANN. art. 6701I-5, § 2 (Vernon Supp. 1994); *see also* Turpin v. State, 606 S.W.2d 907, 914 (Tex. Crim. App. 1980).

47. TEX. REV. CIV. STAT. ANN. art. 6701I-5, § 2(b) (Vernon Supp. 1994).

48. *Erdman v. State*, 861 S.W.2d 890 (Tex. Crim. App. 1993).

considerable psychological pressure on a D.W.I. suspect to consent to taking a breath test and thus the defendant's consent had been involuntary.⁴⁹ The court held that since the defendant's results were inadmissible, the trial court had abused its discretion in refusing to suppress the results.⁵⁰

The concurring opinion in *Erdman* expounded on the appellate standard to be applied, stating that voluntariness was a mixed question of law and fact and that at trial the State was required to prove voluntariness by clear and convincing evidence.⁵¹ On appeal, the decision of the trial court to admit or refuse to admit the evidence would not be reversed unless it could be shown that the trial court abused its discretion.⁵²

3. Waiver of Rights

a. Faretta Compliance Must Appear in the Record, Even in an Unrecorded Misdemeanor

In *Faretta v. California*⁵³ the United States Supreme Court required that in order to invoke the right of self-representation, a defendant should be made aware of the dangers and disadvantages of self-representation.⁵⁴ The Supreme Court stated that the record must contain proper admonishments concerning pro se representation and any necessary inquiries of the defendant so that the trial court could ascertain that the defendant was making a knowledgeable choice to represent himself.⁵⁵

This "*Faretta* requirement" was codified into Texas law by way of Article 1.051(g) of the Texas Code of Criminal Procedure⁵⁶ and, although the dictates of that Article have been held not to be mandatory,⁵⁷ it is still necessary that the record be sufficient for the reviewing court to make an assessment that the defendant knowingly exercised his right to defend himself.⁵⁸

In *Goffney v. State*⁵⁹ the Court of Criminal Appeals was faced with the question of whether a statement in the judgment and sentence that the defendant had "knowingly, intelligently and voluntarily waived his right to counsel"⁶⁰ and the presumption of regularity in court proceedings were sufficient to meet the *Faretta* requirement. In holding that they were not, the majority in *Goffney* noted that the issue at hand was not whether the defendant had properly waived his right to counsel, but rather, whether the record reflected that the defendant made his choice of self-representation "with his eyes open" and whether the record contained the admonishments about the

49. *Id.* at 894.

50. *Id.*

51. *Id.* at 895 (Baird, J., concurring).

52. *Id.* at 895.

53. 422 U.S. 806 (1975).

54. *Id.* at 835.

55. *Id.* at 836.

56. TEX. CODE CRIM. PROC. ANN. art. 1.051(g) (Vernon Supp. 1994).

57. *Burgess v. State*, 816 S.W.2d 424, 430 (Tex. Crim. App. 1991).

58. *Johnson v. State*, 760 S.W.2d 277, 279 (Tex. Crim. App. 1988).

59. 843 S.W.2d 583 (Tex. Crim. App. 1992).

60. *Id.* at 585.

dangers and disadvantages of self-representation.⁶¹ Finding that the record did not, the court upheld the reversal of the defendant's conviction.⁶²

The dissent broadly hints that an express statement in the record (rather than an implicit reflection) that the *Faretta* admonishments were given would suffice, even if the record did not show the actual admonishments.⁶³

b. Defendant Must Affirmatively Waive Right to Ten Days Preparation After Appointment of Counsel

Marin v. State,⁶⁴ while discussing the particular issue of a waiver pursuant to Article 1.051(e) of the Texas Code of Criminal Procedure,⁶⁵ also provides a definitive analysis of the means by which different types of rights may be preserved and a clarification of when a harm analysis under Rule 81(b)(2) of the Texas Rules of Appellate Procedure⁶⁶ is appropriate.⁶⁷

In *Marin* the defendant did not expressly waive his right under Article 1.051(e) of the Texas Code of Criminal Procedure for his newly appointed counsel to have ten days to prepare for trial, yet his case proceeded to trial six days after the appointment. On appeal, the defendant argued that he was entitled to the ten day preparation time and that the denial of such a right was preserved even though he had made no objection at the trial court level.

In holding that the defendant had preserved such issue for appeal, the Court of Criminal Appeals noted that there are three distinct kinds of rules:⁶⁸ 1) absolute requirements and prohibitions, which cannot be waived or forfeited (such as jurisdiction); 2) rights that must be implemented unless expressly waived (such as right to counsel or right to a jury trial); and 3) rights that are to be implemented by request (such as a preemptory challenge or jury shuffle) and thus can be waived by procedural default under Rule 52(a) of the Texas Rules of Appellate Procedure.⁶⁹ Applying such reasoning to the *Marin* case, the court held that the ten days preparation time granted by Article 1.051(e) of the Texas Code of Criminal Procedure falls into the category of those rights that must be implemented unless they are expressly waived.⁷⁰ Since the defendant had not expressly waived that right, the court held that the denial of this right was properly preserved, and sustained that ground for review.⁷¹

61. *Id.*

62. *Id.*

63. *Id.* at 586 (Miller, J., dissenting).

64. 851 S.W.2d 275 (Tex. Crim. App. 1993).

65. TEX. CODE CRIM. PROC. ANN. art. 1.051(e) (Vernon Supp. 1994) (granting an appointed counsel ten days to prepare for a proceeding, which preparation time can be waived with the consent of the defendant in writing or on the record in open court).

66. TEX. R. APP. P. 81(b)(2) (providing that, where there is error, an appellate court must reverse a judgment unless it determines beyond a reasonable doubt that the error made no contribution to the punishment or conviction).

67. *Marin*, 851 S.W.2d at 282.

68. *Id.* at 279.

69. TEX. R. APP. P. 52(a) (requiring a timely, specific objection in order for a complaint to be preserved for appellate review).

70. *Marin*, 851 S.W.2d at 280.

71. *Id.*

The court also addressed the application of Rule 81(b)(2) of the Texas Rules of Appellate Procedure stating that the harmless error rule that was codified in Rule 81(b)(2) applies only "to those trial errors concerning which the record is likely to provide concrete data from which an appellate court can meaningfully gauge or quantify the effect of the error."⁷² Accordingly, the rule does not apply to those cases where "it is extremely difficult to know whether they might have affected the outcome, or the likelihood that they have influenced the outcome is so strong that it is not worth expending the judicial resources necessary to evaluate the effect of the error in particular cases," such as the possible effects of not having ten days to prepare for trial.⁷³

4. Charging Instruments

a. Defect in Complaint Must Be Raised Before Trial or Be Waived

The court in *Aguilar v. State*⁷⁴ held that defects in complaints underlying an information are no longer "fundamental" or "jurisdictional" error, but must be raised in the trial court by way of a motion to set aside the indictment or information or be waived.⁷⁵ The *Aguilar* court recognized that traditionally an invalid complaint resulted in the trial court not obtaining jurisdiction over a defendant, but noted that the 1985 amendment of Article 5, section 12(b) of the Texas Constitution⁷⁶ vests a county court with jurisdiction at the time of the filing of an information.⁷⁷ The court stated that because of that amendment, the trial court did gain jurisdiction over the defendant regardless of the defect in the underlying complaint and so the defendant could not raise such error for the first time on appeal.⁷⁸ It should be noted that the problem of a variance between a complaint and an indictment, as discussed in *Holland v. State*,⁷⁹ is still with us. However, after *Aguilar*, such variance presumably will have to be raised before trial in a motion to set aside or at a pretrial hearing.

b. Notice That State Seeking Deadly Weapon Finding

Persons accused of a crime are entitled to notice that the use of a deadly weapon will be a fact issue if the state intends to pursue an affirmative finding of the use of a deadly weapon at trial.⁸⁰ However, even a mere "allegation which avers a death was caused by a named weapon or instrument necessarily includes an allegation that the named weapon or instrument was in the manner of its use . . . capable of causing death" and is sufficient notice

72. *Id.* at 282.

73. *Id.* at 281.

74. 846 S.W.2d 318 (Tex. Crim. App. 1993).

75. *Id.* at 320.

76. TEX. CONST. art. V, § 12(b).

77. *Aguilar*, 846 S.W.2d at 320.

78. *Id.*

79. 623 S.W.2d 651 (Tex. Crim. App. 1981).

80. *Ex parte Patterson*, 740 S.W.2d 766 (Tex. Crim. App. 1987).

that a deadly weapon finding is being sought.⁸¹

In *Ex parte McKithan*⁸² the Court of Criminal Appeals applied this reasoning to an involuntary manslaughter by driving while intoxicated case, holding that the indictment, which alleged that the defendant had caused the death of an individual by "causing the [defendant's] motor vehicle to collide with the vehicle driven by [the deceased]," was sufficient to give notice that the State was seeking an affirmative finding of defendant's use of a deadly weapon.⁸³

c. Use of Language in a Pleading Other Than Precise Statutory Term

In *Kinsey v. State*⁸⁴ the court adopted the dicta in *Chance v. State*⁸⁵ that it is not always necessary to use the exact language of a statute in order to charge an offense.⁸⁶ In *Kinsey*, a criminal trespass case, the State pled "owner thereof" instead of tracking the statute and pleading "of another," and the defendant was granted a motion to quash on this basis. In reversing the trial court and the court of appeals, the Court of Criminal Appeals noted that if statutory words have a technical meaning, they cannot be replaced by other words in a pleading.⁸⁷ However, if words equivalent to the "common everyday usage" of the technical term were also equivalent to the *definition* of the technical term in the penal code, substitution is allowed.⁸⁸ In *Kinsey* the court found that the technical definition of "another" ("a person other than the actor") in section 1.07 (a)(4) of the Texas Penal Code⁸⁹ was equivalent to the common everyday usage of the word and that "owner" conveys the same meaning and includes the sense of the statutory word "another" and so substitution of "owner" for "another" was permissible.⁹⁰

5. Release on Bond Under Article 17.151⁹¹

Article 17.151 of the Texas Code of Criminal Procedure provides that if the State is not ready for trial within ninety days after the commencement of detention for a felony, the defendant must be released either by reducing the amount of bail required or on personal bond.⁹²

The Court of Criminal Appeals, in *Ex parte Rowe*,⁹³ stated that Article 17.151 means precisely what it says - the defendant must be released.⁹⁴ The bond must be reduced to an amount that the record indicates the defendant

81. *Ex parte Beck*, 769 S.W.2d 525, 526 (Tex. Crim. App. 1989).

82. 838 S.W.2d 560 (Tex. Crim. App. 1992).

83. *Id.* at 561.

84. 861 S.W.2d 383 (Tex. Crim. App. 1993).

85. 563 S.W.2d 812 (Tex. Crim. App. 1978).

86. *Kinsey*, 861 S.W.2d at 384.

87. *Id.*

88. *Id.*

89. TEX. PENAL CODE ANN. § 1.07(a)(4) (Vernon 1974).

90. *Kinsey*, 861 S.W.2d at 384.

91. TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon 1989).

92. *Id.* art. 17.151, § 1(1).

93. 853 S.W.2d 581 (Tex. Crim. App. 1993).

94. *Id.* at 582.

can make.⁹⁵ Where the record indicates that a defendant can make no bond, then the court must release the defendant on a personal bond.⁹⁶

Further, the reason for the delay is of no moment. Article 17.151 of the Texas Code of Criminal Procedure contains no provisions excluding certain periods from the statutory time limit to accommodate special, exceptional circumstances.⁹⁷

6. State's Right to a Jury Trial

Prior to 1991, Article 1.13(a) of the Texas Code of Criminal Procedure⁹⁸ provided that, in order for a defendant to waive a jury trial "for any offense classified as a felony less than . . . capital," the waiver must be in open court, in writing, and with the consent of the State.⁹⁹ In 1991, the legislature amended Article 1.13(a) by removing the "felony less than capital" language and substituting in its place "for any offense other than a capital felony . . . in which the State . . . seek[s] the death penalty."¹⁰⁰

The issue in *State ex rel. Curry v. Carr*¹⁰¹ was whether the new language had the effect of broadening the types of cases to which the waiver requirements were applicable, namely, whether Article 1.13(a) of the Texas Code of Criminal Procedure now required the State's consent to waive a jury trial in a misdemeanor case. In holding that it did,¹⁰² the Court of Criminal Appeals pointed out the change in the language and found that the trial court had no authority to act as the fact finder in a misdemeanor case, absent the consent and approval of the State.¹⁰³ The dissent vociferously protested the extension of the State's right to force a jury trial to misdemeanor cases, arguing that the legislative history did not support the majority's interpretation of the intent of the amendment.¹⁰⁴

7. Discovery and Disclosure

a. Law Enforcement's Knowledge of Exculpatory Evidence Imputed to Prosecutor

In *Ex parte Mitchell*¹⁰⁵ the Court of Criminal Appeals held that since the Smith County Sheriff's Office knew of two witnesses, one who was a deputy sheriff and one who was a game warden, who possessed information that was exculpatory for the defendant, the State violated the defendant's rights by not giving him that information when he made a request for exculpatory

95. *Id.* at 582 n.1.

96. *Id.* at 582.

97. *Id.*

98. TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (Vernon Supp. 1994).

99. *Id.* art. 1.13 (Vernon 1977).

100. *Id.* art. 1.13(a) (Vernon Supp. 1994).

101. 847 S.W.2d 561 (Tex. Crim. App. 1992).

102. *Id.* at 562. This holding applies to Class A and Class B misdemeanors only. Class C misdemeanors are covered by TEX. CODE CRIM. PROC. ANN. art. 45.24 (Vernon 1974).

103. *Ex rel. Curry*, 847 S.W.2d at 562.

104. *Id.* at 562-67 (Miller, J. dissenting).

105. 853 S.W.2d 1 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 183 (1993).

evidence, even though the prosecutor had no knowledge of the existence of the witnesses.¹⁰⁶

The most incriminating evidence at the defendant's trial for capital murder was the testimony of two accomplices who stated that he had murdered the victim around 8:30 p.m. The testimony of the two witnesses, who were not made known to the defendant, would have been that they had seen a person who might have been the victim alive several hours after 8:30 p.m. The Court of Criminal Appeals ruled that it was highly probable that the suppression of this evidence hampered defense counsel's efforts to prepare a case that would have created a reasonable doubt that the victim could have been alive at the time that the accomplices testified that the murder was committed.¹⁰⁷

b. Discovery of Defense Work Product

In *Washington v. State*¹⁰⁸ an investigator for defense counsel interviewed a State's witness prior to trial and recorded the interview. At trial, defense counsel asked the witness whether he had told the investigator something different than he had said at trial. At this point, the trial judge, over the defendant's objection that the tape was work-product, turned over the entire tape of the interview to the State, which then had the tape admitted into evidence and played to the jury.

The Court of Criminal Appeals held that the tape was work product because it was essentially analogous to taking notes of an interview with a prospective witness and used to prepare the defendant's case for trial and so was not discoverable.¹⁰⁹ The court also held that since the defendant had never attempted to make a testimonial use of the tape, the "use before the jury" doctrine¹¹⁰ did not apply and defendant did not waive his work-product privilege.¹¹¹

The State also argued that the tape was admissible under the rule of optional completeness, but the court held that the rule was not applicable in this case because the defense never mentioned the taped conversation nor attempted to have any portion of the tape admitted into evidence.¹¹²

c. State's Disclosure of Exculpatory Evidence

The opinion of the Court of Criminal Appeals in *Thomas v. State*¹¹³ provides an excellent recapitulation of the history of the State's duty to disclose favorable evidence and the burden of proof and persuasion based on the specificity of the request. The court also recounts the three-part test used to determine when a prosecutor has violated a defendant's due process rights

106. *Id.* at 4-6.

107. *Id.* at 5.

108. 856 S.W.2d 184 (Tex. Crim. App. 1993).

109. *Id.* at 189.

110. *See Mendoza v. State*, 552 S.W.2d 444, 448 (Tex. Crim. App. 1977).

111. *Washington*, 856 S.W.2d at 190.

112. *Id.* at 186.

113. 841 S.W.2d 399 (Tex. Crim. App. 1992).

by failing to disclose evidence. Under such test, a violation occurs when the prosecutor 1) fails to disclose evidence; 2) that is favorable to the defendant [as either substantive or impeachment evidence]; and 3) that creates a probability sufficient to undermine the confidence in the outcome of the proceeding.¹¹⁴ In *Thomas* the prosecutor failed to inform the defense about a witness whose testimony would directly impeach the eyewitness testimony put on by the State and the Court of Criminal Appeals found that these actions met the requirements of the three-part test and so ordered a new trial.¹¹⁵

8. *Expert Witnesses*

a. An Indigent Defendant with a Viable Insanity Claim Has the Right to a Court-Appointed Defense Expert

The Court of Criminal Appeals reexamined the rule of *Ake v. Oklahoma*¹¹⁶ in light of Article 46.03, section 3(a) of the Texas Code of Criminal Procedure¹¹⁷ in *De Freece v. State*.¹¹⁸ In *Ake* the United States Supreme Court held that when a defendant demonstrates to the trial judge that insanity will be a significant factor at trial, the state must, at a minimum, provide the defendant with access to a competent psychiatrist who will conduct an examination and assist in preparation of the evaluation and preparation of the defense.¹¹⁹ Article 46.03, section 3 provides for the appointment of a disinterested expert to examine the defendant, present a written report, and testify at any trial or hearing on the issue.¹²⁰ Traditionally, in Texas, *Ake* and Article 46.03, section 3 have been interpreted to only require the appointment of a neutral expert.¹²¹

The issue in *De Freece* was whether the defendant was entitled to have the court appoint an expert who would be an actual member of the defense team and assist in preparing and presenting his insanity defense at trial, rather than merely a disinterested expert who could testify for either side.¹²² In finding that he did have this right, the Court of Criminal Appeals stated that, despite the traditional application, *Ake* contained some internal contradictions in requiring a single competent expert not of the defendant's choosing, and, on the other hand, indicating that the defendant is entitled to an expert who will participate with him in the case.¹²³ The court noted that all

114. *Id.* at 404.

115. *Id.* at 404-07.

116. 470 U.S. 68 (1985).

117. TEX. CODE CRIM. PROC. ANN. art. 46.03, § 3(a) (Vernon 1989) (providing that if the insanity defense is filed, the court may "appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue.").

118. 848 S.W.2d 150 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 284 (1993).

119. *Ake*, 470 U.S. at 83.

120. *Id.* art. 46.03, § 3(a) and (d).

121. *Granviel v. Lynaugh*, 881 F.2d 185, 192 (5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990).

122. The court, in fact, had already appointed an expert, who had evaluated the defendant and was scheduled to testify for the State. *De Freece*, 848 S.W.2d at 152.

123. *Id.* at 156.

courts which have examined the *Ake* issue, aside from the Fifth Circuit in *Granviel v. Lynaugh*,¹²⁴ have held that *Ake* requires more than a mere examination and testimony from a neutral expert.¹²⁵ The court then stated that since psychiatry is not an exact science, the defendant needs a psychiatrist to assist in his case if he is to present the fact finder with a perspective broad enough to ensure an informed resolution of the sanity question.¹²⁶

The court concluded by holding that, if the preliminary examination provided for in Article 46.03, section 3, shows a viable insanity claim, the trial court abuses its discretion if it fails to appoint or approve reasonable expenses incurred by counsel to obtain a competent psychiatrist to assist the defendant in the evaluation, preparation and presentation of the insanity defense.¹²⁷

9. Jeopardy

a. Jeopardy and the Defectively Amended Indictment

In *Ex parte Sanchez*¹²⁸ the defendant was charged with the misdemeanor offense of public lewdness at a certain theater. He pled not guilty to the information. Subsequently, the State filed a motion to amend, which was granted. No physical alteration of the information occurred, however, and so, per *Ward v. State*,¹²⁹ the information was never actually amended. When the defendant was arraigned, the prosecutor read the "new" information, which simply alleged the name of a different theater. It was to the "new" information that the defendant pled not guilty. The case was continued and the State ultimately dismissed the information and refiled, alleging the same charge that had been in the "amended" information. The defendant then argued double jeopardy, asserting that since he had already pled not guilty to the dismissed information, he could not be tried on the newly filed information.

In reviewing the defendant's claims, the Court of Criminal Appeals agreed with the defendant that, in trials before a court, "jeopardy attaches when both sides have announced ready and the defendant has pled to the charging instrument."¹³⁰ The court also said that since the defendant had pled to the information that the State thought was amended to name the second theater (although technically it was not) and both sides had announced ready, jeopardy had attached to that information (which actually named the first theater).¹³¹

The court noted that the information had been dismissed and so could not

124. 881 F.2d 185 (5th Cir. 1989), cert. denied, 495 U.S. 963 (1990).

125. *DeFreece*, 848 S.W.2d at 157.

126. *Id.* at 159.

127. *Id.*

128. 845 S.W.2d 273 (Tex. Crim. App. 1992).

129. 829 S.W.2d 787 (Tex. Crim. App. 1992).

130. *Sanchez*, 845 S.W.2d at 275 (citing *State v. Torres*, 805 S.W.2d 418, 421 (Tex. Crim. App. 1991)).

131. *Id.* at 275-76.

be retried.¹³² The court then held that since it was undisputed that the newly filed information related to precisely the same offense as the dismissed information,¹³³ the State was precluded from litigating the allegations in the newly filed information.¹³⁴

b. Subsequent Prosecutions — When Barred Under *Grady v. Corbin*¹³⁵

The Court of Criminal Appeals handed down two decisions last session dealing with the analysis of double jeopardy issues under *Grady v. Corbin*, which applied a “same conduct” test for determining whether a defendant was placed in double jeopardy. As of June 28, 1993, *Grady v. Corbin* is no longer the applicable standard.¹³⁶ Rather, the *Blockburger*¹³⁷ “same elements” test is to be applied. The two significant cases analyzed by the Court of Criminal Appeals under the *Grady v. Corbin* standard were *State v. Florio*¹³⁸ and *Houth v. State*.¹³⁹

In *Florio* the court, citing the standards it had set out in *Ex parte Ramos*,¹⁴⁰ held that since the State, in a prosecution for the murder of a child, was attempting to prove conduct (hitting a child) that constituted an offense for which the defendant had already been prosecuted (jeopardy had attached to the first trial’s indictment’s allegations in a paragraph alleging a separate injury to a child), the defendant had been placed in double jeopardy under the *Grady v. Corbin* test.¹⁴¹

In *Houth* the court held that when the State will prove previously prosecuted conduct (here, weaving in traffic), “but also will prove previous conduct in the same transaction that has not been prosecuted, to establish an element of a subsequently charged offense” (here, driving while intoxicated), it must rely solely on the latter conduct at trial to prove beyond a reasonable doubt the existence of that element.¹⁴²

B. TRIAL AREAS

The Court of Criminal Appeals decided several cases involving jury selection, including issues of the eligibility of jurors who require more evidence than the legal minimum, limits on the number of jury shuffles and group bias based peremptory strikes by the prosecution. In the area of evidence law,

132. *Id.* at 276 (citing *State v. Proctor*, 841 S.W.2d 1, 3 (Tex. Crim. App. 1992) and *Ex parte Preston*, 833 S.W.2d 515, 517 (Tex. Crim. App. 1992)).

133. However, the informations did not contain the same language since, under *Ward*, the dismissed information had never been amended and so still alleged lewdness at the “Star Movie Theater,” while the newly filed information alleged lewdness at the “Golden Star Movie Theater.” *Sanchez*, 845 S.W.2d at 274-75.

134. *Id.* at 276.

135. 495 U.S. 508 (1990).

136. *United States v. Dixon*, 113 S. Ct. 2849 (1993).

137. *Blockburger v. United States*, 284 U.S. 299 (1932) (applying a “same elements” test).

138. 845 S.W.2d 849 (Tex. Crim. App. 1992).

139. 845 S.W.2d 853 (Tex. Crim. App. 1992).

140. 806 S.W.2d 845 (Tex. Crim. App. 1991).

141. *Florio*, 845 S.W.2d at 853.

142. *Houth*, 845 S.W.2d at 864.

the court examined the statements against interest exception to the hearsay rule, the admissibility of enhanced duplicate recordings, confessions, impeachment of a witness with evidence of a conviction, bolstering testimony, the admissibility of eyewitness expert testimony, the admissibility of unadjudicated extraneous offenses at the punishment phase of a trial and also the admissibility of background evidence to prove certain factors. The court also clarified when a jury instruction on mere presence is required, stated that individual jurors may not cause questions to be asked of witnesses and held that a judge may only answer a question from the jury during deliberations if the question involves a legal matter. The court also held that a defendant in a D.W.I. trial may ask the jury not to suspend his license even if he does not possess a license, declared who has the burden of producing evidence that shows that a kidnap victim was released in a safe place and stated that no body is necessary as a prerequisite to conviction in a murder trial. In the area of punishment, the court restated the rule that any type of incarceration is not allowed, including electronic monitoring, if the defendant receives deferred adjudication, extended the rule that a defendant has an absolute right to a punishment hearing and can preserve error by filing a motion for a new trial, and held that deferred adjudication may be given to a felon even if the minimum sentence for the crime is more than ten years, the length restriction on deferred adjudication probation.

1. *Jury Selection*

a. **Juror Who Requires More Than the Minimum Evidence Is a Qualified Juror**

A juror who would never vote yes to the future dangerousness issue if the only evidence is the facts of the case was eligible to sit on the jury in *Garrett v. State*.¹⁴³ The trial judge granted the prosecution's challenge for cause in that capital case to a venireperson who indicated that under no circumstance could he assess the death penalty based solely on the facts of the crime itself. The prosecution reasoned that the venireperson had a "bias or prejudice against some aspect of the law upon which the State is entitled to rely."¹⁴⁴ The Court of Criminal Appeals reviewed the record and found that the venireperson did state that he would not answer both special issues affirmatively if the only evidence was the facts of the crime alleged. The court stated that an individual venireperson who sets his reasonable doubt threshold higher than the legal minimum is not subject to a challenge for cause.¹⁴⁵ Therefore, the trial judge committed reversible error by granting the prosecution's challenge for cause.¹⁴⁶ The State should have had to use a peremptory strike to have the juror removed from the panel. The effect of this decision is that in all cases, not merely capital cases, it is improper to challenge a juror for cause solely because he would require more evidence than

143. 851 S.W.2d 853 (Tex. Crim. App. 1993).

144. *Id.*

145. *Id.* at 860.

146. *Id.* at 861.

the legal minimum. The court declared that this was so because the law permits the facts of the crime alone to support a verdict of "yes" to the second special issue, but does not require a jury "to answer the second special issue affirmatively solely on the facts of that particular crime."¹⁴⁷

The court applied this holding to *Wilson v. State*¹⁴⁸ to reach the same result in a factually indistinguishable case. In a concurring opinion, one judge theorized that as long as the venireperson requires evidence that the State is allowed to bring in order to answer a special issue yes, then the venireperson was qualified to serve as a juror.¹⁴⁹ Such evidence includes prior criminal record, reputation, character, psychiatric evidence and other evidence admissible under the rules of evidence. However, the concurring judge reasoned that if the venireperson requires evidence the State is not allowed to bring, or requires evidence that constitutes another crime, that person is probably not qualified to be a juror.¹⁵⁰ Evidence the State is not allowed to bring includes testimony from the defendant and testimony that is privileged.¹⁵¹ For example, if a venireperson requires that the State show a serial killing¹⁵² in a capital murder prosecution under section 19.03(a)(2) of the Texas Penal Code,¹⁵³ then that is evidence that constitutes a different crime. Hence, that venireperson would not be qualified to serve as a juror.

b. Only One Shuffle Allowed, Period!

The State in *Chappell v. State*¹⁵⁴ moved to shuffle the venire after the venire had been shuffled at the defendant's request. Over defendant's objection, the trial court granted the State's motion and allowed the second jury shuffle. The Court of Criminal Appeals reversed the trial court, holding that under Article 35.11 of the Texas Code of Criminal Procedure¹⁵⁵ only one shuffle of the venire is authorized at the request of either the State or the defendant.¹⁵⁶ The court held that the second jury shuffle was reversible error that was not subject to a harm analysis.¹⁵⁷ The court went on to clarify a holding relied on by the State in *Stark v. State*¹⁵⁸ where a defendant's request to shuffle the jury a second time was denied, and the court of criminal

147. *Id.* at 859.

148. 863 S.W.2d 59 (Tex. Crim. App. 1993).

149. *Id.* at 70, (Miller, J. concurring).

150. *Id.*

151. *Id.*

152. TEX. PENAL CODE ANN. § 19.03(a)(7) (Vernon 1989 & Supp. 1994).

153. *Id.* § 19.03(a)(2) (capital murder involving murder during the course of committing a felony).

154. 850 S.W.2d 508 (Tex. Crim. App. 1993).

155. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon 1989). Art. 35.11 states that "the trial judge, on the demand of the defendant or his attorney, or of the State's counsel, shall cause a sufficient number of jurors from which a jury may be selected to try the case to be randomly selected from the members of the general panel drawn or assigned as jurors in the case." *Id.*

156. *Chappell*, 850 S.W.2d at 511.

157. *Id.* at 513.

158. 657 S.W.2d 115 (Tex. Crim. App. 1983).

appeals reversed.¹⁵⁹ The court cited the explanation in *Jones v. State*¹⁶⁰ that *Stark* was reversed based on improper procedures implemented by the trial judge in shuffling the jury and not because of the denial of the defendant's motion to shuffle.¹⁶¹ The court restated the rule in Texas that only one jury shuffle is authorized in any case.¹⁶²

c. A Prosecutor's Group Bias Is Not a Legitimate Reason to Strike

*Emerson v. State*¹⁶³ held that a peremptory strike by the prosecution of a venireperson based on her occupation in the collegiate environment was not a valid race-neutral strike and thus invalidated the entire jury selection process.¹⁶⁴ The defendant was an African-American. The State used a peremptory strike on an African-American venireperson because the prosecutor believed she was a college professor or college student. The prosecutor testified in the *Batson*¹⁶⁵ hearing that he believed the venireperson's occupation as a college teaching assistant suggested severe liberalism, a characteristic he did not want a member of the jury to have. However, the prosecutor did not ask any questions of the venireperson to confirm that this prospective juror had any liberal characteristics. He further stated that he struck this juror because she was unemployed, but the prosecutor did not strike several white veniremen who were unemployed. The trial court ruled that the State's explanations for striking the potential juror were race-neutral. The Court of Criminal Appeals concluded that the State applied a group bias without inquiring whether it applied to the individual venireperson and, for that reason, the explanation would not support the trial judge's finding of no purposeful discrimination.¹⁶⁶ The court also held that the State's explanations of the strike were insufficient as a matter of law to rebut the defendant's prima facie showing of racial discrimination in the jury selection process and that this reason also would fail to support the trial judge's finding of no purposeful racial discrimination.¹⁶⁷

2. Evidence

a. Hearsay — Tex. R. Crim. Evid. 803(24) — Statements Against Interest: What Are They?

In *McFarland v. State*¹⁶⁸ the trial court admitted statements made by the defendant's accomplice to two individuals that implicated both men in the rape and murder of a young woman. The Court of Criminal Appeals held that a statement made by an accomplice after the conspiracy was over that

159. *Id.* at 116.

160. 833 S.W.2d 146 (Tex. Crim. App. 1992).

161. *Id.* at 148-49.

162. *Chappell*, 850 S.W.2d at 511.

163. 851 S.W.2d 269 (Tex. Crim. App. 1993).

164. *Id.* at 274-75.

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

166. *Emerson*, 851 S.W.2d at 274.

167. *Id.*

168. 845 S.W.2d 824 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 2937 (1993).

implicates both the accomplice and the defendant is still admissible as a statement against interest.¹⁶⁹ The defendant argued against the admission of statements made by his accomplice to civilians where the statements were made after the crime had been completed, the body hidden, and the evidence of the crime destroyed. The defendant argued that the statements were hearsay and that they were admitted in violation of Texas Rule of Criminal Evidence 801(e)(2)(E).¹⁷⁰ The Court of Criminal Appeals found that although the statements of the accomplice were made after the conspiracy was over, they were statements against interest and an exception to the hearsay rule.¹⁷¹ The court held that the statements indicated that the declarant was involved with the defendant in some illegal act which could subject them both to criminal liability.¹⁷² Rule 803(24) also requires that the statements be corroborated by facts indicating the trustworthiness of the statements.¹⁷³ The court held that the statements made by the accomplice were corroborated by several facts which were proven at different times.¹⁷⁴ These facts included statements by the victim made just before she died, witnesses who saw the defendant with the accomplice on the night of the crime, witnesses who saw the defendant and his accomplice at the place where the victim worked on the day that she was murdered, as well as other physical evidence.¹⁷⁵ Therefore, the court held that the statements were properly admitted by the trial court under the statements against interest exception to the hearsay rule.¹⁷⁶

b. Admissibility of an Enhanced Duplicate of a Recording

In *Narvaiz v. State*¹⁷⁷ the trial court admitted an electronically-enhanced, tape-recorded copy of a portion of all "911" telephone calls received by the San Antonio police for the date of the crime. The state used an F.B.I. lab to remove a "hiss" sound from a copy of the "911" tape recorded on the night of the crime. The Court of Criminal Appeals examined the record and found that it revealed no evidence that would support a claim that the enhanced duplicate recording of the original "911" reel-to-reel tape was not authentic. The court concluded that the enhanced copy of the tape recording was an accurate reproduction of the relevant portion of the original tape and was admissible under Texas Rule of Criminal Evidence 1003.¹⁷⁸ Rule 1003 only makes a duplicate inadmissible if reasonable jurors might differ as

169. *Id.* at 836.

170. TEX. R. CRIM. EVID. 801(e)(2)(E) (stating that a statement is not hearsay if it is offered against a party and is a statement by a conspirator of a party during the course and in furtherance of the conspiracy).

171. TEX. R. CRIM. EVID. 803(24) (stating that a statement which tends to subject the declarant to such criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true is not excluded by the hearsay rule).

172. *McFarland*, 845 S.W.2d at 836.

173. *Id.* at 835.

174. *Id.* at 836.

175. *Id.*

176. *Id.*

177. 840 S.W.2d 415 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 1422 (1993).

178. TEX. R. CRIM. EVID. 1003 (allowing the admission of a duplicate unless a question is raised as to its authenticity or it would be unfair to admit the original).

to whether the original is what it is claimed to be.¹⁷⁹

c. Confessions

The question in *Almanza v. State*¹⁸⁰ was whether an oral confession would be admissible under the limited exception to Article 38.22 of the Code of Criminal Procedure that is contained in section 3(c).¹⁸¹ The defendant had been arrested and received his *Miranda* warnings and a search of his residence was being conducted pursuant to a valid search warrant. The defendant agreed to help the police officers locate the heroin he was accused of selling. He pointed to the top of a dresser and indicated that what was there was his "stuff." The police later determined this to be heroin. The trial court admitted into evidence the defendant's statement that the wadded up piece of paper containing the heroin was his "stuff." The Court of Criminal Appeals ruled that the admission of the defendant's oral statement was error.¹⁸² The court cited two older cases¹⁸³ that had attempted to define the standard set forth in Article 38.22, section 3(c) for what oral statements were admissible at trial, and concluded that the facts in defendant's case did not meet the requirements of these cases.¹⁸⁴ The court stated that the defendant's statement was little more than an admission of guilt and there was not sufficient indicia of reliability to justify admitting the statement.¹⁸⁵ The court held that unlike the previous case law where such statements were admissible, the defendant's statement did not lead to the discovery of evidence which later verified it, and therefore the statement was not admissible.¹⁸⁶ The court stated that in order for an oral confession to be admissible as an exception to Article 38.22, it must be reliable, and this reliability is provided not by the timing of the oral statement, but rather by the combination of the oral statement and the subsequent discovery of previously unknown evidence that verifies the statement independently.¹⁸⁷

The court affirmed this holding in *Gunter v. State*.¹⁸⁸ In *Gunter* the trial court admitted an oral statement made by the defendant that described the crime in detail. The Court of Criminal Appeals held that as long as assertions within the oral statement are corroborated subsequently, the entire statement is admissible.¹⁸⁹

179. *Narvaiz*, 840 S.W.2d at 431.

180. 839 S.W.2d 817 (Tex. Crim. App. 1992).

181. TEX. CODE CRIM. PROC. Ann. art. 38.22, § 3(c) (Vernon Supp. 1990). Art. 38.22, § 3(c) allows the admission of any statement that "contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused."

182. *Almanza*, 839 S.W.2d at 821.

183. *Port v. State*, 791 S.W.2d 103 (Tex. Crim. App. 1990); *Romero v. State*, 800 S.W.2d 539 (Tex. Crim. App. 1990).

184. *Almanza*, 839 S.W.2d at 821.

185. *Id.*

186. *Id.*

187. *Id.*

188. 858 S.W.2d 430, 449 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 318 (1993).

189. *Id.* (citing *Port*, 791 S.W.2d at 107; *Marini v. State*, 593 S.W.2d 709 (Tex. Crim. App. 1980)).

d. Impeachment Under Texas Rule of Criminal Evidence 609

i. *When the Court Abuses Its Discretion in Allowing Impeachment Evidence*

The issue presented in *Theus v. State*¹⁹⁰ was whether a defendant's prior felony conviction for arson should be admitted as impeachment evidence against the defendant during the guilt stage of the trial. Texas Rule of Criminal Evidence 609¹⁹¹ allows a prosecutor to impeach an accused with a prior felony if the probative value of a conviction outweighs its prejudicial effect. The Court of Criminal Appeals identified five important, non-exclusive factors for the trial court to consider when making this analysis.¹⁹² These factors are as follows: (1) the impeachment value of the prior crime, (2) time passage, (3) the similarity of the offenses, (4) the importance of the defendant's testimony, and (5) the importance of the credibility issue.¹⁹³ The court applied this analysis to the defendant's case by weighing the five factors to determine whether the prior conviction should be admitted for impeachment purposes. The court concluded that the trial court abused its discretion in admitting evidence of the arson conviction because the conviction had very little probative value concerning the defendant's credibility.¹⁹⁴ The court reasoned that discretion was abused because the arson conviction had a highly prejudicial effect and also because the trial judge failed to allow the defendant to mitigate the prejudice when given the opportunity to do so.¹⁹⁵

ii. *Use of Prior Probated Convictions*

The admissibility of prior conviction impeachment evidence under Texas Rule of Criminal Evidence 609(c)¹⁹⁶ was considered for the first time in *Ex Parte Menchaca*.¹⁹⁷ The trial judge allowed the defendant to be impeached with evidence of a prior conviction for which he had completed probation. The predecessor to Rule 609(c) was Article 38.29,¹⁹⁸ which restricted impeachment with a prior conviction to probations that had not expired. The trial judge reasoned that the defendant had not "satisfactorily" completed his probation, it had only expired. The Court of Criminal Appeals held that there is no distinction between a probation period that is expired and one that is satisfactorily completed, and thus the evidence of the defendant's

190. 845 S.W.2d 874 (Tex. Crim. App. 1992), *vacated*, 863 S.W.2d 489 (Tex. Crim. App. 1993).

191. TEX. R. CRIM. EVID. 609 (requiring as a prerequisite to admitting impeachment evidence against an accused that the trial court find that the probative value of the evidence outweighs its prejudicial effect).

192. *Theus*, 845 S.W.2d at 880.

193. *Id.*

194. *Id.* at 882.

195. *Id.*

196. TEX. R. CRIM. EVID. 609(c) (stating that evidence of a conviction is not admissible for impeachment purposes if probation has been satisfactorily completed for the crime for which the person was convicted and that person has not been convicted of a subsequent felony or crime of moral turpitude).

197. 854 S.W.2d 128 (Tex. Crim. App. 1993).

198. TEX. CODE CRIM. PROC. ANN. art. 38.29 (Vernon 1974).

prior felony conviction was not admissible.¹⁹⁹

e. Bolstering Objection Abolished; Rule 702 Expert Testimony as Corroboration

In *Cohn v. State*²⁰⁰ a psychiatrist testified for the State about what behavior would be expected from a child victim of sexual abuse and that the victims in this case behaved in a manner consistent with being abused. The defendant's objection that the testimony was inadmissible "bolstering" of the victims was overruled. The Court of Criminal Appeals stated that "bolstering" is the use of any evidence the sole purpose of which is to convince the fact finder that a particular witness or source of evidence is worthy of credit, without substantially contributing to make a fact of consequence to the case more or less probable.²⁰¹ The court held that the psychiatrist's testimony was relevant under Texas Rule of Criminal Evidence 403²⁰² because the doctor did not testify that the kids had actually been abused or that they were telling the truth, and thus was admissible.²⁰³ When evidence corroborates testimony, it is not bolstering if it also helps establish a fact of consequence.²⁰⁴ Also, though such substantive evidence corroborates prior testimony, it should not for that reason be excluded for "unfair prejudice" if it is otherwise admissible.²⁰⁵

f. Admissibility of Eyewitness Expert Testimony

The controversy in *Rousseau v. State*²⁰⁶ began when the trial court refused to admit the testimony of a psychologist concerning the reliability, or lack thereof, of eyewitness identification. The defendant claimed that the testimony was admissible as expert testimony under Texas Rule of Criminal Evidence 702²⁰⁷ because it was relevant under Rule 402.²⁰⁸ The Court of Criminal Appeals examined Rule 702, recognizing that the failure of an expert witness to fit his testimony to the evidence in the case reduces the likelihood that the jury would be aided by the expert's testimony.²⁰⁹ The record showed that, on voir dire, the expert witness called by the defendant failed to "fit" his testimony to the evidence, because he had not examined any of the eyewitnesses in the case nor did he state whether any factors he planned to discuss would apply to any of the eyewitnesses. The court held that this greatly reduced the likelihood that the jury would be measurably aided by his testimony, and thus, under these facts, the trial judge did not abuse his

199. *Ex parte Menchaca*, 854 S.W.2d at 131.

200. 849 S.W.2d 817 (Tex. Crim. App. 1993).

201. *Id.* at 819-20.

202. TEX. R. CRIM. EVID. 403 (stating that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice).

203. *Cohn*, 849 S.W.2d at 820.

204. *Id.*

205. *Id.* at 820-21.

206. 855 S.W.2d 666 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 313 (1993).

207. TEX. R. CRIM. EVID. 702 (governing testimony by experts).

208. TEX. R. CRIM. EVID. 402.

209. *Rousseau*, 855 S.W.2d at 686.

discretion in excluding the doctor's testimony.²¹⁰

g. Unadjudicated Extraneous Offenses Not Admissible at the Punishment Phase of a Trial Under Texas Code of Criminal Procedure Article 37.07, Section 3

*Grunsfeld v. State*²¹¹ involved the Texas Legislature's 1989 amendment to Article 37.07, section 3(a),²¹² allowing the admission at the punishment phase of the trial of any evidence the trial court deemed relevant to sentencing, in addition to evidence of prior criminal record, general reputation and character that were already admissible under the statute. The trial court in *Grunsfeld*²¹³ admitted, at the punishment phase, testimony from witnesses that the defendants had committed the same sexual offenses against them as the defendants were charged with, even though there were no charges filed. The Court of Criminal Appeals stated that "evidence is not admissible at punishment, unless (1) it is permitted by the Texas Rules of Criminal Evidence, and (2) if the evidence sought to be admitted is evidence of an extraneous offense, it satisfies Article 37.07, section 3(a)'s definition of prior criminal record."²¹⁴ The court interpreted the 1989 amendment to continue the prohibition against admission of non-final or unadjudicated extraneous charges of criminal conduct at the punishment phase of a non-capital offense.²¹⁵ Therefore, the court held that the trial courts abused their discretion in admitting evidence of unadjudicated extraneous offenses under Article 37.07, section 3(a), and reversed the decision of the trial courts.²¹⁶

h. Texas Rule of Criminal Evidence 404(B)

i. Admissibility of "Background Evidence:" *Res Gestae Offenses*

In *Rogers v. State*²¹⁷ the Court of Criminal Appeals had the opportunity to apply the two-part test for determining the admissibility of background evidence, formerly known as the doctrine of *res gestae*. The first question addressed is whether the background evidence is relevant under Texas Rule of Criminal Evidence 401. If relevant, the next issue is whether the background evidence should be "admitted as an 'exception' under Rule 404(b)."²¹⁸ After finding that marijuana seized during a search of the de-

210. *Id.*

211. 843 S.W.2d 521 (Tex. Crim. App. 1992).

212. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon 1989).

213. *Grunsfeld* was actually a consolidation of two cases that sought review of the same issue, and were factually indistinguishable on this issue.

214. *Grunsfeld*, 843 S.W.2d at 523.

215. *Id.* at 526.

216. *Id.* The decision set forth in *Grunsfeld* has been overruled by the legislature. Article 37.07, § 3(a) has been amended yet again, and now allows the admission of "evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. . ." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1994).

217. 853 S.W.2d 29 (Tex. Crim. App. 1993).

218. *Id.* (quoting *Mayes v. State*, 816 S.W.2d 79, 85 (Tex. Crim. App. 1991)); see TEX. R. CRIM. EVID. 404(b) (making admissible evidence of other crimes, wrongs, or acts for purposes

fendant's home was relevant, the court reviewed the trial court's determination that the evidence was admissible as an exception under Rule 404(b).²¹⁹ The court first had to distinguish between two types of background evidence: (1) evidence of other offenses connected with the primary offense, referred to as "same transaction evidence" and (2) general background evidence, referred to as "background contextual evidence."²²⁰ Here, the court stated that the marijuana evidence was "same transaction evidence" since it occurred during a lawful arrest of the defendant and search of his home.²²¹ Necessity is the reason for admitting evidence of the accused's acts, words and conduct at the time of the offense in "same transaction contextual evidence" situations. Only if the facts and circumstances of the primary offense would make little or no sense without bringing in such background evidence should the evidence be admitted.²²² In this case, it was possible for the primary offense to be narrated without mentioning the marijuana that was found or the description of the marijuana in the defendant's confession. Therefore, it was not necessary to admit the evidence.²²³

ii. Notice Requests and Compliance

Texas Rule of Criminal Evidence 404(b) also states that if the State intends to admit evidence of other crimes, wrongs or acts, the defendant is entitled to reasonable notice in advance of trial of such intent, *if* the accused timely requests.²²⁴ In *Espinosa v. State*²²⁵ the State offered and the trial judge admitted evidence of extraneous offenses despite a request by the defendant for notice of such intent. The request was contained in a motion for discovery filed with the trial court, and there was no mention of Rule 404(b). The record failed to show if the trial court ever ruled on the motion. The Court of Criminal Appeals determined that Rule 404(b) requires that the request by the accused be in writing and served on the State, in order to notify the State that the defendant is requesting notice pursuant to Rule 404(b).²²⁶ The court held that a request in a motion filed with the trial judge is not sufficient without a subsequent order by the judge to the State to provide such notice.²²⁷ Consequently, the trial court properly admitted the evidence because the State was under no obligation to provide the defendant with notice.²²⁸

other than to prove the character of a person in order to show that he acted in conformity therewith).

219. *Rogers*, 853 S.W.2d at 32.

220. *Id.* at 33.

221. *Id.*

222. *Id.*

223. *Id.* at 34.

224. TEX. R. CRIM. EVID. 404(b).

225. 853 S.W.2d 36 (Tex. Crim. App. 1993).

226. *Id.* at 38.

227. *Id.* at 39.

228. *Id.*

i. Production of Statements of Witnesses After Testifying — Scope of Texas Rule of Criminal Evidence 614

The scope and application of Texas Rule of Criminal Evidence 614²²⁹ was interpreted for the first time in *Jenkins v. State*.²³⁰ A witness for the prosecution testified about drug importation into the Texas Department of Corrections and admitted on cross-examination that he made reports of his investigations. The defendant requested to see those reports pursuant to Rule 614 but the request was denied. Material subject to Rule 614 must "relate[] to the subject matter concerning which the witness has testified."²³¹ The Court of Criminal Appeals ruled that although the reports sought described offenses which did not involve the defendant, the reports were nevertheless discoverable.²³² The court also ruled that the reports were discoverable even though they were incredibly voluminous as Rule 614 does not exclude production of materials that are or might be voluminous.²³³ The court stated that Rule 614 is extremely broad and is to be interpreted to compel production of "any statement . . . that relates to the subject matter concerning which the witness has testified."²³⁴ The court also found that the meaning of "statements" within Rule 614 includes reports written by a testifying witness, and further found that "possession" encompasses material that is within the witness' control or is readily available to the witness.²³⁵ The State's witness's reports should have been produced to the defendant.

j. Autopsy Reports and Their Admissibility Under Texas Rule of Evidence 803(8)(B)

Under Article 49.25, section 1 of the Texas Code of Criminal Procedure, any Texas county with a population of more than one million must have a medical examiner.²³⁶ When a medical examiner performs an autopsy, Article 49.25, section 11 requires that full and complete records be kept, and such records "shall be public records."²³⁷ Public records are excluded from the hearsay rule by Texas Rule of Evidence 803(8)(B) if they are from a public office or agency and they set forth matters the office has a duty to report, unless they are made by law enforcement personnel in a criminal proceeding.²³⁸ The question in *Garcia v. State*²³⁹ was whether a county medical examiner is law enforcement personnel, thereby excluding autopsy reports from the hearsay exclusion in Rule 803(8)(B). The Court of Criminal Appeals concluded that autopsy reports are prepared by officials with no

229. TEX. R. CRIM. EVID. 614 (outlining the scope and procedure for the production of statements of a testifying witness other than the defendant).

230. No. 71,040, 1993 WL 138800 (Tex. Crim. App. May 5, 1993).

231. TEX. R. CRIM. EVID. 614(a).

232. *Jenkins*, 1993 WL 138800 at *4.

233. *Id.*

234. *Id.* at *5.

235. *Id.* at *5-6.

236. TEX. CODE CRIM. PROC. ANN. art. 49.25, § 1 (Vernon 1989).

237. *Id.* art. 49.25, § 11.

238. TEX. R. CRIM. EVID. 803(8)(B).

239. No. 1095-92, 1993 WL 366511 (Tex. Crim. App. Sept. 22, 1993).

motive to fabricate the results of the reports, and further that the prosecution is not involved in the medical examiner's investigation or the preparation of the report.²⁴⁰ As a result, the court ruled that medical examiners are not law enforcement personnel under Rule 803(8)(B) and that their autopsy reports and death certificates are admissible.²⁴¹

3. *Jury Instructions: Mere Presence — When Is It Required?*

If the evidence raises the issue of mere presence, then on request that charge must be given.²⁴² Mere presence alone of a defendant at the scene of a crime does not render one a party to an offense.²⁴³ In addition, mere presence alone is insufficient to corroborate accomplice testimony.²⁴⁴ In *Golden v. State*,²⁴⁵ a case involving a conspiracy to possess cocaine, the defendant testified that he knew nothing about the plan to purchase the cocaine. The Court of Criminal Appeals stated that this testimony alone was sufficient to raise the issue of mere presence, and therefore a requested charge on mere presence being insufficient to corroborate the accomplice witness's testimony should have been given.²⁴⁶

4. *Jury Questions*

a. Not Allowed During Trial

The Court of Criminal Appeals considered the practice of allowing jurors to question witnesses by means of submitting written questions to the court for the first time in *Morrison v. State*.²⁴⁷ The court agreed with the defendant that such a practice amounts to a form of communication between jurors and the parties, which calls into question the integrity of the adversary system.²⁴⁸ The court also held that the dangers inherent in such a practice could not be adequately circumvented by the imposition of procedural safeguards.²⁴⁹ The court cited a concern for juror impartiality as a basis for disallowing this practice.²⁵⁰ The court also stated that this error was not subject to a harm analysis.²⁵¹

b. Jury Questions During Deliberations and How to Answer

A judge's substantive response to a jury question during deliberations was held to be an additional or supplemental jury instruction that was governed by Article 36.14 of the Texas Code of Criminal Procedure²⁵² in *Daniell v.*

240. *Id.* at *3-4.

241. *Id.* at *4.

242. *Golden v. State*, 851 S.W.2d 291, 294 (Tex. Crim. App. 1993).

243. *Id.*

244. *Id.*

245. 851 S.W.2d 291 (Tex. Crim. App. 1993).

246. *Id.* at 295.

247. 845 S.W.2d 882 (Tex. Crim. App. 1992).

248. *Id.* at 884.

249. *Id.*

250. *Id.* at 887.

251. *Id.* at 889.

252. TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1994).

State.²⁵³ The jury sent out a question during deliberations asking whether there were any local correctional facilities available, as the jury charge authorized a punishment including confinement in “a community correctional facility.” Despite an objection by the defendant that included a suggestion that the jury be told not to consider or discuss particular facilities, the judge answered the jury’s question. The Court of Criminal Appeals held that Article 36.14 only authorizes instructions to the jury on legal, not factual matters.²⁵⁴ The court said that whether there were any correctional facilities in the area was a factual matter about which the jury should not have received an instruction.²⁵⁵

5. *Specific Crimes and Specialty Law*

a. *DWI: When Jury Can Recommend Driver’s License Not Be Revoked*

*Hernandez v. State*²⁵⁶ held that a defendant convicted of driving while intoxicated can ask that the jury recommend that his driver’s license not be suspended, even if the defendant does not have a license.²⁵⁷ Article 42.12 of the Texas Code of Criminal Procedure allows the trial court to instruct a jury that they may recommend that a defendant’s driver’s license not be suspended.²⁵⁸ The Court of Criminal Appeals cited Texas Revised Civil Statutes Article 6687b, section 4A and Article 6687b,²⁵⁹ section 22, which govern suspensions of driver’s licenses, for the rule that one whose license is suspended may not be issued a license during the period of suspension.²⁶⁰ The court said that because there is no requirement that a defendant have a valid driver’s license before the Department of Public Safety can suspend driving privileges, the defendant need not have a valid license before he can ask the jury to recommend that his license not be suspended.²⁶¹

b. *Kidnapping — Safe vs. Unsafe Place — Who Has Burden of Proof?*

In *Williams v. State*²⁶² the Court of Criminal Appeals addressed the question of which party bears the burden of proof on whether a kidnapper released his victim alive and in a safe place.²⁶³ Under section 20.04(b) of the Texas Penal Code,²⁶⁴ aggravated kidnapping is a second degree felony if the accused leaves the victim alive and in a safe place. The court split the bur-

253. 848 S.W.2d 145 (Tex. Crim. App. 1993).

254. *Id.* at 147.

255. *Id.*

256. 842 S.W.2d 294 (Tex. Crim. App. 1992).

257. *Id.* at 296.

258. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13(g) (Vernon 1989).

259. TEX. REV. CIV. STAT. ANN. art. 6687b, § 4A (Vernon 1987); *Id.* § 22.

260. *Hernandez*, 842 S.W.2d at 296.

261. *Id.*

262. 851 S.W.2d 282 (Tex. Crim. App. 1993).

263. See TEX. PENAL CODE ANN. § 20.04(b) (Vernon 1974) (stating the felony degree of the offense of aggravated kidnapping).

264. *Id.*

den of proof into two components: the burden of production and the burden of persuasion.²⁶⁵ The court construed section 20.04(b) to be the equivalent of a legal defense, and thus placed the burden of production on the defense.²⁶⁶ If no evidence from either party can support a finding of a safe place, the accused is punished as a first degree felon.²⁶⁷ However, if the issue is raised by some evidence, and the burden of production is met, the prosecution has the burden of persuasion to convince the trier of fact that the place where the victim was released was not safe.²⁶⁸

Note that the legislature has made several significant changes to the Texas Penal Code that affect the decision in *Williams*. Effective September 1, 1994, the voluntary release of a victim in a safe place will be a punishment issue that the defendant must prove by a preponderance of the evidence.²⁶⁹

c. Murder — The Need to Produce a Body

The corpus delicti rule was examined in *Fisher v. State*.²⁷⁰ The corpus delicti of a crime simply consists of the fact that the crime in question has been committed by someone.²⁷¹ The Court of Criminal Appeals reaffirmed their holdings that “the corpus delicti of murder is established if the evidence shows (a) the death of a human being (b) caused by the criminal act of another.”²⁷² Article 1204 of the 1925 Penal Code required the production and identification of the body or remains of the deceased in all murder prosecutions.²⁷³ The fight in *Fisher* concerned whether Article 1204 had been repealed by the legislature in 1974. The Court of Criminal Appeals ruled that the legislature had in fact expressly repealed Article 1204, and that a body was not required to be produced as a prerequisite to a conviction in a murder prosecution.²⁷⁴

6. Punishment

a. Court Cannot Order Incarceration or Electronic Monitoring in Deferred Adjudication Probation

Two sections of Article 42.12 of the Texas Code of Criminal Procedure came into question in *Ex parte Gingell*.²⁷⁵ Article 42.12, section 5²⁷⁶ governs the area of deferred adjudication probation, and Article 42.12, section 21(a)²⁷⁷ provides for electronic monitoring in lieu of incarceration in the county jail or state penitentiary. The Court of Criminal Appeals reiterated

265. *Williams*, 851 S.W.2d at 285.

266. *Id.* at 286.

267. *Id.*

268. *Id.*

269. TEX. PENAL CODE ANN. § 20.04(b) (Vernon Supp. 1994).

270. 851 S.W.2d 298 (Tex. Crim. App. 1993).

271. *Id.* at 303.

272. *Id.*

273. *Id.*; TEX. PENAL CODE ANN. art. 1204 (Vernon 1925).

274. *Fisher*, 851 S.W.2d at 303.

275. 842 S.W.2d 284 (Tex. Crim. App. 1992).

276. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5 (Vernon Supp. 1994).

277. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 21(a) (Vernon 1989).

the rule that incarceration is an unreasonable condition of deferred adjudication probation.²⁷⁸ Since electronic monitoring is only allowed in lieu of incarceration, and incarceration was not allowed in this situation, the court held that the trial court could not impose electronic monitoring as a condition of probation.²⁷⁹ The trial court's orders were reformed to delete electronic monitoring as a condition of the defendant's deferred adjudication probation.²⁸⁰

b. Defendant's Absolute Right to a Punishment Hearing

The trial judge in *Borders v. State*²⁸¹ simultaneously made a finding of guilt and assessed punishment. The defendant did not object at the hearing but instead complained that this was error in a motion for new trial. The Court of Criminal Appeals reaffirmed an earlier decision²⁸² in stating that it is sufficient to preserve this error by raising it for the first time in a motion for new trial.²⁸³ The court stated that Article 42.12, section 5(b) of the Texas Code of Criminal Procedure²⁸⁴ entitles a defendant to a punishment hearing after the adjudication of guilt, and that Article 37.07, section 3²⁸⁵ requires that the trial court afford the defendant the opportunity to present punishment evidence after the finding of guilt.²⁸⁶ The court held that despite his failure to object at trial, the defendant preserved the error by raising an objection in a timely filed motion for new trial, and the court remanded for a sentencing hearing.²⁸⁷

c. Deferred Adjudication Allowed for Felonies with More Than Ten Years

The question in *Cabezas v. State*²⁸⁸ was whether a defendant may receive deferred adjudication probation when the minimum term for the punishment of the crime is greater than ten years. The trial court wanted to give the defendant deferred adjudication but was persuaded by the State that deferred adjudication was unavailable because the minimum sentence exceeded ten years. The Court of Criminal Appeals cited Article 42.12, section 3 of the Texas Code of Criminal Procedure²⁸⁹ and held that nothing in that section limits the eligibility of deferred adjudication where the minimum sentence is greater than ten years.²⁹⁰ The court said that the trial court and

278. *Gingell*, 842 S.W.2d at 285.

279. *Id.*

280. *Id.* The legislature has since repealed the statutory language relied upon by the court in *Gingell* and amended TEX. CODE CRIM. PROC. ANN. § 42.12 to allow electronic monitoring to be imposed as a condition of probation, including deferred adjudication.

281. 846 S.W.2d 834 (Tex. Crim. App. 1992).

282. *See Issa v. State*, 826 S.W.2d 159 (Tex. Crim. App. 1992).

283. *Borders*, 846 S.W.2d at 835.

284. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon 1989).

285. *Id.* art. 37.07, § 3.

286. *Borders*, 846 S.W.2d at 835-36.

287. *Id.*

288. 848 S.W.2d 693 (Tex. Crim. App. 1993).

289. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5 (Vernon 1989).

290. *Cabezas*, 848 S.W.2d at 695.

other courts were confused by Article 42.12, section 3,²⁹¹ which mandates that deferred adjudication probation be no greater than ten years.²⁹² However, certain offenses are excluded from consideration for deferred adjudication under Article 42.12, section 5(d).²⁹³

C. POST-TRIAL AND APPEAL AREAS

In these areas, the Court of Criminal Appeals has addressed the exact moment when the thirty-day period for a notice of appeal begins, the effect of a defendant's withdrawal of a plea on the State, the definition of a district attorney for purposes of a notice of appeal, and the scope of the rule stating permissible grounds for a new trial. The court has also decided cases regarding the propriety of consecutive sentences, the meaning of "dual" representation, and the presumption that a trial judge disregarded inadmissible evidence. The court has considered whether a hearing is mandatory after a defendant files a motion for a new trial, how specific a defendant's motion for new trial must be, and what must be in evidence at a revocation hearing. Additionally, the court has examined who may compute a defendant's back time, the scope of the trial court's authority to order reimbursement from a suddenly non-indigent defendant, and the power of the court of appeals to reform a judgment.

1. Notice of Appeal

Texas Rule of Appellate Procedure 41(b)(1) indicates that an appeal is perfected when notice of appeal is given within thirty days after sentencing in open court or after an appealable order is signed.²⁹⁴ In *Rodarte v. State*²⁹⁵ the defendant argued that a notice of appeal from a judgment of conviction is timely if filed within thirty days from when the trial court signs the judgment.²⁹⁶ The Court of Criminal Appeals said that such an interpretation of Rule 41(b)(1) effectively reads the phrase "the day the sentence is imposed or suspended in open court" out of the rule.²⁹⁷ The court held that which starting point is used in calculating the timeliness of the notice of appeal depends upon what is being appealed.²⁹⁸ For a defendant who appeals a judgment of conviction, the thirty days begin to run on the day sentence is imposed or suspended in open court.²⁹⁹ In other appealable criminal cases, "the timetable for notice of appeal begins on the day of the signing of the appealable order"³⁰⁰

291. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3 (Vernon 1989).

292. *Cabezas*, 848 S.W.2d at 695.

293. *Id.*; TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(d) (Vernon 1989).

294. TEX. R. APP. P. 41(b)(1).

295. 860 S.W.2d 108 (Tex. Crim. App. 1993).

296. *Id.* at 109.

297. *Id.*

298. *Id.*

299. *Id.* at 109-10.

300. *Id.*

2. State's Right to Appeal

a. Allowing a Withdrawal of Plea Can Equal Granting a "New Trial"

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.³⁰¹ One such situation is when the trial court grants a new trial.³⁰² The Court of Criminal Appeals stated in *Evans v. State*³⁰³ that Article 44.01 allows the State to appeal not just orders that mirror the language of the Article, but also orders that have the same effect as the orders enumerated.³⁰⁴ The trial court accepted the defendant's plea bargain and sentenced him. However, the trial court then granted the defendant's "Motion To Withdraw Plea." When the State appealed, the defendant challenged the State's right to appeal. The Court of Criminal Appeals held that the order granting the "Motion To Withdraw Plea" effectively granted the defendant a new trial, and that the State had the right to appeal the judgment.³⁰⁵

The Court of Criminal Appeals found support for the holding in *Evans* in two prior decisions. In *State v. Moreno*³⁰⁶ the court ruled that an order granting a motion to quash effectively is an order dismissing the indictment, and that it is affected by Article 44.01(1).³⁰⁷ In *State v. Young*³⁰⁸ the court held that an order granting a writ of habeas corpus was also an order dismissing the indictment, subject to Article 44.01.³⁰⁹

b. Notice by D.A. Pro-Tem AKA Special Prosecutor

The authority of a "special prosecutor" to appeal came into question in *State v. Rosenbaum*.³¹⁰ The district attorney had been disqualified from the case by the trial judge, who appointed a special prosecutor to investigate and prosecute the case. After a motion to quash was granted, the special prosecutor timely filed a notice of appeal. The Court of Criminal Appeals had previously ruled that Article 44.01 of the Texas Code of Criminal Procedure³¹¹ did not allow the elected district attorney's subordinate to make an appeal.³¹² The *Rosenbaum* court distinguished this case on that point; however, on the grounds that this special prosecutor was actually an attorney *pro*

301. TEX. CODE CRIM. PROC. ANN. art. 44.01 (a-d) (Vernon Supp. 1994). The Article does not specifically provide that the prosecuting attorney may appeal, but rather states that "the state" may appeal, however, it also specifically refers to the prosecuting attorney in imposing the fifteen day time period for filing. *Id.* Therefore, the state and prosecuting attorney are interchangeable terms for the purpose of this Article.

302. TEX. CODE CRIM. PROC. ANN. art. 44.01(3) (Vernon Supp. 1994).

303. 843 S.W.2d 576 (Tex. Crim. App. 1992).

304. *Id.* at 577.

305. *Id.* at 578.

306. 807 S.W.2d 327 (Tex. Crim. App. 1991).

307. *Id.* at 333-34; TEX. CODE CRIM. PROC. ANN. art. 44.01(1) (Vernon Supp. 1994).

308. 810 S.W.2d 221 (Tex. Crim. App. 1991).

309. *Id.* at 223.

310. 852 S.W.2d 525 (Tex. Crim. App. 1993).

311. TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon Supp. 1994).

312. *State v. Muller*, 829 S.W.2d 805 (Tex. Crim. App. 1992).

*tem*³¹³ who therefore substituted for the district attorney.³¹⁴ The court stated that an attorney *pro tem* takes the place of the elected district attorney for purposes of giving notice of an appeal.³¹⁵

3. *Grounds for a New Trial*

In *Evans v. State*³¹⁶ the Court of Criminal Appeals also considered whether Texas Rule of Appellate Procedure 30(b) was an exclusive list of grounds for a motion for a new trial.³¹⁷ The court concluded that the list in Rule 30(b) was merely illustrative and not exhaustive.³¹⁸ The court reasoned that the predecessor to Rule 30(b) included the language "and no other" in the list of reasons a new trial shall be granted.³¹⁹ The court further stated that trial judges have the discretion to consider matters not enumerated in the statute when passing on a motion for new trial.³²⁰ Thus, the trial court did not abuse its discretion when it granted the defendant's motion for new trial.³²¹

Recently, the legislature passed Texas Code of Criminal Procedure Article 40.001,³²² which requires material evidence of innocence, and not just any evidence of innocence, to obtain a new trial. This rule effectively overrides Rule 30(b)(6), which allowed a new trial for newly discovered evidence.³²³

4. *Consecutive Sentences*

Section 3.03 of the Texas Penal Code requires that a defendant who is found guilty of multiple crimes receive concurrent sentences if: (1) the offenses arise out of the same criminal episode; and (2) are prosecuted in a single criminal action.³²⁴ Both of these requirements must be met. In *Duran v. State*³²⁵ the trial court revoked the defendant's probation as to two offenses and ordered that his two sentences run consecutively. The Court of Criminal Appeals held that the defendant had the burden to show that both requirements were met, and there was no evidence in the record to show that the proceeding was a single criminal action.³²⁶ In an earlier case, the court had held that a single criminal action is a proceeding by which a person

313. A district attorney *pro tem* is a lawyer appointed by a district judge who takes an oath to assume the duties of the elected district attorney. A special prosecutor is a lawyer permitted by the district attorney to participate in a case without taking an oath. *Rosenbaum*, 852 S.W.2d at 529.

314. *Id.*

315. *Id.*

316. 843 S.W.2d 576 (Tex. Crim. App. 1992).

317. TEX. R. APP. P. 30(b) (stating that a new trial shall be granted, for one of nine enumerated grounds).

318. *Evans*, 843 S.W.2d at 578.

319. *Id.*

320. *Id.* at 578-79.

321. *Id.* at 578.

322. TEX. CODE CRIM. PROC. ANN. art. 40.001 (Vernon Supp. 1994).

323. TEX. R. APP. P. 30(b)(6).

324. TEX. PENAL CODE ANN. § 3.03 (Vernon Supp. 1994).

325. 844 S.W.2d 745 (Tex. Crim. App. 1992).

326. *Id.* at 746.

charged with a crime is either found guilty or not guilty and sentenced.³²⁷ In *Duran*, one judge explained that by placing the defendant on probation, imposition of the sentence was suspended and thus the proceeding did not meet the definition of a criminal action.³²⁸

5. *Self-Representation on Appeal*

In *Hathorne v. State*³²⁹ the defendant wanted to represent himself on appeal. The trial court appointed an appellate lawyer to assist the defendant. The defendant objected to the appointment of an attorney. The Court of Criminal Appeals recognized the right of a defendant to proceed pro se without the aid of counsel.³³⁰ The court approved of the appellate hybrid representation that the defendant received, stating that such a decision is within the discretion of the trial court.³³¹ The court believed that hybrid representation on appeal, as was done in this case, does not deny a defendant his right to self-representation as long as he is allowed to view the record and file a brief on his own behalf.³³² One concern with hybrid representation arises when there is a conflict inherent in the arguments presented by the defendant and those presented by the appointed counsel. The court held that appellate courts must give full and adequate consideration to the points of error raised by both appointed counsel and by the defendant in his pro se brief.³³³

6. *Appellate Presumptions*

Under Rule 81(b)(2) of the Texas Rules of Appellate Procedure, every judgment shall be reversed where the appellate court finds error in the proceedings below, unless the court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.³³⁴ The Court of Criminal Appeals decided in *Gipson v. State*³³⁵ that this rule voided the long-standing doctrine of conditional presumption.³³⁶ According to this doctrine, in a trial before a judge, where there is nothing in the record to indicate that the judgment was based on inadmissible evidence that was mistakenly admitted, it will be presumed that the trial judge disregarded the inadmissible evidence.³³⁷ The promulgation of Rule 81(b)(2) has implicitly overruled the presumption test, and errors in the trial court are analyzed the same whether the trial is before a judge or a jury.³³⁸

327. See *LaPorte v. State*, 840 S.W.2d 412 (Tex. Crim. App. 1992).

328. *Duran*, 844 S.W.2d at 747 (Baird, J. concurring).

329. 848 S.W.2d 101 (Tex. Crim. App. 1992).

330. *Id.* at 122-23.

331. *Id.* at 123.

332. *Id.*

333. *Id.* at 123-24.

334. TEX. R. APP. P. 81(b)(2).

335. 844 S.W.2d 738 (Tex. Crim. App. 1992).

336. *Id.* at 741.

337. *Id.*

338. *Id.*

7. Motion for New Trial

a. Hearing — When Mandatory

In *Reyes v. State*³³⁹ the Court of Criminal Appeals held that a trial judge must hold a hearing on a motion for a new trial when the defendant raises matters not determinable from the record upon which he could be entitled to relief.³⁴⁰ The defendant raised ineffective assistance of counsel in a motion for a new trial, supported by an affidavit pursuant to Texas Rule of Appellate Procedure 31.³⁴¹ The court held that a hearing on a motion for a new trial is not required when the matters raised in the motion are determinable from the record.³⁴² Alternatively, it is an abuse of discretion for a trial judge not to hold a Rule 31(d) hearing on a motion for a new trial that raises matters which are not determinable from the record.³⁴³ The court concluded that the trial judge had abused his discretion as the defendant's motion for new trial did raise a matter not determinable from the record, upon which he could be entitled to relief.³⁴⁴

b. Specificity Required in a Defendant's Motion for New Trial

The list of reasons for granting a motion for new trial in Texas Rule of Appellate Procedure 30(b) are illustrative and not exclusive.³⁴⁵ In *State v. Gonzalez*³⁴⁶ the defendant was permitted to seek a new trial in the interest of justice, a reason not enumerated in Rule 30(b). The State objected that the defendant had failed to allege a factual basis in his motion and failed to offer proof supporting his claim. The Court of Criminal Appeals held that a defendant must allege sufficient grounds to apprise the trial judge and the State why a new trial is warranted.³⁴⁷ The court found that the defendant alleged a sufficient factual basis for a new trial in requesting to present favorable witnesses that were not presented at the time of sentencing.³⁴⁸

The court also raised the issue of the standard of appellate review. The court reaffirmed consistent case law that says that a decision on a motion for new trial is within the sound discretion of the trial judge and will only be reversed on a showing of abuse of discretion.³⁴⁹ The appealing party has the burden of demonstrating that the trial judge abused his discretion.³⁵⁰

339. 849 S.W.2d 812 (Tex. Crim. App. 1993).

340. *Id.* at 815.

341. TEX. R. APP. P. 31.

342. *Reyes*, 849 S.W.2d at 816.

343. *Id.*

344. *Id.*

345. *Evans v. State*, 843 S.W.2d 576 (Tex. Crim. App. 1992).

346. 855 S.W.2d 692 (Tex. Crim. App. 1993).

347. *Id.* at 694-95.

348. *Id.* at 695.

349. *Id.* at 696.

350. *Id.*

8. Probation

a. Revocation

The question in *Cobb v. State*³⁵¹ was whether formal proof was necessary in a probation revocation hearing to establish the terms and conditions of probation. The Court of Criminal Appeals stated that a probation revocation hearing is an administrative hearing, not a criminal or civil trial.³⁵² The State must prove by a preponderance of the evidence that a defendant violated the terms of his probation.³⁵³ The Court found that the State had failed to adequately prove the terms of this defendant's probation.³⁵⁴ The court held that formal proof is not necessary to establish the terms and conditions of probation, and that the trial court does not need to judicially notice nor must the State prove the conviction and terms of probation, as long as the judgment and order of probation appear in the appellate record.³⁵⁵ However, the State still must prove the identity of the probationer, and that the probationer violated the terms of the order of probation.³⁵⁶

b. Specificity Necessary When Ordering Community Service

Texas trial courts find authority to require community service as a condition of probation in Article 42.12, sections 11(a)(10) and 17(a) of the Texas Code of Criminal Procedure.³⁵⁷ Under section 11(a)(10), the community service work program is to be "designated by the court."³⁵⁸ Section 17(a) requires that the community service project or organization be "named in the court's order."³⁵⁹ In *Lemon v. State*³⁶⁰ the Court of Criminal Appeals considered a condition of probation imposing 600 hours of community service as directed by the Adult Probation Officer. The court recognized that section 10(d) of Article 42.12 allows a probation officer to modify a probation order, but only when authorized by the trial court.³⁶¹ However, section 10(a) states that it remains the responsibility of the trial court in the first instance to impose the conditions of probation.³⁶² Given this, the court concluded that the law has been and remains that when community service is ordered, the trial judge must designate a specific community service project.³⁶³ Thus, the order by the trial judge imposing conditions of probation violated Article 42.12.³⁶⁴

351. 851 S.W.2d 871 (Tex. Crim. App. 1993).

352. *Id.* at 873.

353. *Id.* at 874.

354. *Id.*

355. *Id.* at 873.

356. *Id.* at 874.

357. TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 11(a)(10), 17(a) (Vernon Supp. 1994).

358. *Id.* art. 42.12, § 11(a)(10).

359. *Id.* art. 42.12, § 17(a).

360. 861 S.W.2d 249 (Tex. Crim. App. 1994).

361. *Id.* at 251.

362. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 10(a) (Vernon Supp. 1993).

363. *Lemon*, 861 S.W.2d at 251.

364. *Id.* at 252.

9. *Computation of Back Time*

In *Ex parte Harvey*³⁶⁵ the Court of Criminal Appeals held that when a trial judge awards back time credit for pre-sentence time served in jail, the Texas Department of Criminal Justice, Institutional Division, may not require that the trial judge specify why the defendant is entitled to such credit.³⁶⁶ Computing the amount of back time due to a defendant for pre-sentence confinement is solely the responsibility of the trial court, under Texas Code of Criminal Procedure Article 42.03, Sections 2(a), 3 and 4.³⁶⁷ No requirement exists that the trial court detail the reasons for the award provided that such credit does not exceed the time between the date of commission of the offense and the imposition of the sentence.³⁶⁸

10. *Reimbursement of Court Appointed Attorney's Fees*

A defendant whose trial is conducted by a state-appointed attorney may be required to repay the county for the court-appointed attorney's fees pursuant to Code of Criminal Procedure Article 26.05(e).³⁶⁹ In *Curry v. Wilson*³⁷⁰ the defendant claimed that after the judgment of acquittal had been entered, the trial court no longer had jurisdiction to order him to repay the legal fees. The Court of Criminal Appeals held that the trial court does not lose jurisdiction until all of the issues which arise as a result of the initial action have been resolved.³⁷¹ The court found support for this jurisdiction in Article 26.05(e), stating that the Article gives the trial court continuing authority to order repayment of the county funds expended for the defendant's counsel.³⁷²

11. *Reformation of Judgments*

Under Texas Rule of Appellate Procedure 80, the court of appeals may modify the judgment of the court below by correcting or reforming it.³⁷³ In *Bigley v. State*³⁷⁴ the court of appeals found there was insufficient evidence to support a finding of guilt of the charged crime, but that the evidence was sufficient to support a lesser included offense.³⁷⁵ Consequently, the court of appeals reformed the judgment to reflect a conviction for the lesser included offense.³⁷⁶ The Court of Criminal Appeals, while recognizing that Rule 80

365. 846 S.W.2d 328 (Tex. Crim. App. 1993).

366. *Id.* at 329.

367. TEX. CODE CRIM. PROC. ANN. art. 42.03, §§ 2(a), 3, and 4 (Vernon 1989).

368. *Id.*

369. TEX. CODE CRIM. PROC. ANN. art. 26.05(e) (Vernon 1989) (stating that if a trial court finds that a defendant who had been provided appointed legal counsel at the expense of the county has the financial resources to offset the costs of his defense, the judge shall order him to repay the county).

370. 853 S.W.2d 40 (Tex. Crim. App. 1993).

371. *Id.* at 44.

372. *Id.* at 45.

373. TEX. R. APP. P. 80.

374. No. 939-92, 1993 WL 205004 (Tex. Crim. App. June 16, 1993).

375. *Id.* at *26.

376. *Id.*

does not permit it to modify a judgment, found that such a reformation was within the power of the court of appeals.³⁷⁷ The court refused to limit the Rule 80 power of courts of appeals to reform judgments to only those situations involving mistakes of a clerical nature.³⁷⁸

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377. *Id.*

378. *Id.*

