



January 1994

Criminal Procedure: Pretrial, Trial and Appeal

Robert Udashen

Gary A. Udashen

Recommended Citation

Robert Udashen & Gary A. Udashen, *Criminal Procedure: Pretrial, Trial and Appeal*, 47 SMU L. REV. 995 (1994)

<https://scholar.smu.edu/smulr/vol47/iss4/12>

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

CRIMINAL PROCEDURE: PRETRIAL, TRIAL AND APPEAL

Robert Udashen *
Gary A. Udashen **

THIS Article reviews the major cases from the United States Supreme Court, the Texas Court of Criminal Appeals, and the Texas courts of appeals in these areas of criminal procedure: pretrial (with the exception of confession, search, and seizure), trial and appeal. This Article also reviews the major changes to the Code of Criminal Procedure in these areas as a result of the last legislative session.

I. FORMER JEOPARDY

In a significant step backward for double jeopardy jurisprudence, the Supreme Court, in *United States v. Dixon*,¹ overruled the recent case of *Grady v. Corbin*.²

Dixon combined the appeals in two cases that arose out of nonsummary criminal contempt proceedings. In both cases a court issued an order forbidding a person to engage in criminal conduct. In one case the court incorporated the entire criminal code and in the other the court forbade the commission of assault. Both persons violated the court orders and were later found in contempt. Subsequently, both persons were criminally prosecuted. One person was successful in having his criminal prosecution dismissed on double jeopardy grounds. The other was not successful. The government appealed the dismissal of the first and the contemnor appealed the failure to dismiss the other case.

The initial question for the Supreme Court in *Dixon* was whether the protections of the double jeopardy clause³ apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions; the Supreme Court held that they do apply.⁴ The more difficult question for the court was whether the subsequent criminal prosecutions were barred by the double jeopardy clause.

Prior to *Grady v. Corbin* a subsequent prosecution was barred by the double jeopardy clause unless each offense contained an element not con-

* B.A., J.D., The University of Texas, Attorney at Law, Dallas, Texas.

** B.A., The University of Texas; J.D., Southern Methodist University, Attorney at Law, Dallas, Texas.

1. 113 S. Ct. 2849 (1993).

2. 495 U.S. 508 (1990).

3. U.S. CONST. amend. V.

4. 113 S. Ct. at 2856.

tained in the other offense.⁵ *Grady* held that a subsequent prosecution was also barred "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."⁶

Dixon used the suggested *Grady* analysis by first determining whether *Blockburger* permits subsequent prosecution in the criminal contempt context where the criminal act was prohibited by judicial order.⁷ The court found that at least some of the criminal charges were barred by *Blockburger* because the elements were the same as the previous contempt offense.⁸ For those criminal charges that were not barred by *Blockburger*, the court proceeded to determine if they were barred by the *Grady* test.⁹ The court found that they were barred by *Grady* but then concluded that *Grady* must be overruled.¹⁰

The Supreme Court overruled *Grady* because "[t]he 'same conduct' rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy."¹¹ According to the court, *Grady* was a mistake that should not be saved by the rule of stare decisis.¹² In reality, however, the overruling of *Grady* was a result driven decision that ignored the historical underpinnings of *Grady*.

Prior to *Dixon* the Texas Court of Criminal Appeals considered the application of *Grady* in several different decisions. For example, in *State v. Houth*¹³ the Court of Criminal Appeals addressed the question of whether a conviction for failure to maintain a single lane would bar a subsequent prosecution for driving while intoxicated arising out of the same incident. The Court of Criminal Appeals construed *Grady* to mean that an offense for which the defendant has already been prosecuted will bar a subsequent prosecution only if the state will rely on evidence of conduct of the first offense to prove an essential element of the subsequent prosecution.¹⁴ Only when the prosecutor will rely solely on evidence of unprosecuted conduct to prove the essential elements of the subsequent prosecution is the second prosecution not jeopardy barred.¹⁵ The Court of Criminal Appeals allowed the driving while intoxicated prosecution to proceed as long as the state relied on evidence other than the defendant's failure to maintain a single lane to prove the element of driving while intoxicated.¹⁶

5. This test is based on *Blockburger v. United States*, 284 U.S. 299, 304 (1930).

6. 495 U.S. at 510.

7. 113 S. Ct. at 2856.

8. *Id.* at 2858.

9. *Id.* at 2859.

10. *Id.* at 2860.

11. *Id.*

12. *Id.* at 2864.

13. 845 S.W.2d 853 (Tex. Crim. App. 1992).

14. *Id.* at 864.

15. *Id.*

16. It is interesting to note that despite the Supreme Court's characterization of *Grady* as "wholly inconsistent with earlier Supreme Court precedent," the court of criminal appeals saw *Grady* as a logical outgrowth of earlier precedent. *United States v. Dixon*, 113 S. Ct. 2849, 2864 (1993). See *Houth*, 845 S.W.2d at 856-60.

The Court of Criminal Appeals dealt with *Grady* issues on other occasions during the Survey period.¹⁷ The court, however, finally recognized the demise of *Grady* in *State v. Holguin*.¹⁸ There the court returned to the *Blockburger* same elements test for determining whether a subsequent prosecution is barred by double jeopardy.

Strictly speaking, *Austin v. United States*¹⁹ did not concern the double jeopardy clause. It was an Eighth Amendment excessive fines clause case.²⁰ In *Austin* the Supreme Court was asked to decide whether the excessive fines clause applies to civil forfeitures of property arising out of drug transactions. The Supreme Court's answer to that question has broad implications not only in the context of the Eighth Amendment, but also for double jeopardy jurisprudence.

The purpose of the excessive fines clause, according to the Supreme Court, was to limit the government's power to punish.²¹ Recognizing that civil proceedings may advance punitive and remedial goals, the court engaged in an historical review of forfeiture law in order to determine whether civil drug forfeitures should be considered punishment.²² The court concluded "that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."²³ Similarly, forfeitures under the specific statutory punishment scheme at issue in *Austin* were found to be punishment.²⁴

The holding that civil forfeitures arising out of drug transactions are intended to punish is significant in the double jeopardy context, because one of the abuses against which the double jeopardy clause protects is multiple punishments for the same offense.²⁵ Once a civil forfeiture is characterized as punishment, then the protection against multiple punishments applies. This could cause a major shift in forfeiture litigation, because most courts had assumed that the double jeopardy clause did not apply to civil forfeiture proceedings.²⁶ Prosecutors will now be forced to determine whether to consolidate a forfeiture action with a criminal action or whether to abandon a forfeiture claim. Defense attorneys will have to decide whether to allow

17. See, e.g., *Parrish v. State*, 851 S.W.2d 864 (Tex. Crim. App. 1993); *Hensley v. State*, 851 S.W.2d 867 (Tex. Crim. App. 1993); *Leman v. State*, 845 S.W.2d 872 (Tex. Crim. App. 1992).

18. 861 S.W.2d 919 (Tex. Crim. App. 1993).

19. 113 S. Ct. 2801 (1993).

20. Amendment VIII of the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

21. 113 S. Ct. at 2805.

22. *Id.* at 2806.

23. *Id.* at 2810.

24. *Id.* at 2810-11 (The statute in question in *Austin* was 21 U.S.C. §§ 881(a)(4) and (a)(7)).

25. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

26. See, e.g., *United States v. A Parcel of Land*, 884 F.2d 41, 43 (1st Cir. 1989). Many of these decisions were based on language in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), which indicated that the double jeopardy clause did not apply to civil forfeiture proceedings. This language, however, was limited to cases where the forfeiture could be characterized as remedial. *Id.* at 364.

seized property to be forfeited in order to set up a double jeopardy bar to a criminal prosecution.

In *Proctor v. State*²⁷ the Court of Criminal Appeals explained the procedure that the State must follow to abandon or dismiss charges if the State wants to preserve the charges for later prosecution. The court held that the State may press a charge at a later time if the charge is affirmatively abandoned or dismissed with the trial court's permission before jeopardy attaches.²⁸ In *Sanchez v. State*²⁹ the State failed to comply with this rule. The State dismissed a charging instrument after jeopardy attached and then tried to pursue the charge on a later date. The Court of Criminal Appeals barred the prosecution on double jeopardy grounds.³⁰

*Granger v. State*³¹ pondered the question of whether the double jeopardy clause bars a prosecution for murder when the accused was previously convicted of capital murder, the conviction was reversed on appeal due to the insufficiency of the evidence to prove the capital element, and the jury charge at the capital murder trial included instructions on capital murder and murder.³² In answering this question the court first applied the *Blockburger* analysis to the two offenses and concluded that for purposes of double jeopardy the two offenses are the same.³³ The court did not stop there, however. Even though capital murder and murder are the same offense in the context of the double jeopardy clause, the court did not view the double jeopardy clause as an absolute bar to the subsequent prosecution.³⁴ The reversal of the original capital murder decision did not constitute a decision that the lesser offense of murder was not proved. In fact, since the jury found the accused guilty of capital murder, the Court of Criminal Appeals believed the jury would have convicted the defendant of murder if given only that option.³⁵ Since an instruction on the lesser offense of murder was given and the accused was not acquitted of that offense, the double jeopardy clause does not bar the murder prosecution.³⁶ The unfortunate aspect of this decision is that it allows the state a second chance to convict the accused when it was the state that selected the charge for which the evidence was insufficient. Surely the double jeopardy clause was intended to prevent the state from taking such multiple shots at the accused.

27. 841 S.W.2d 1 (Tex. Crim. App. 1992).

28. *Id.* at 4.

29. 845 S.W.2d 273 (Tex. Crim. App. 1992).

30. *Id.* at 276.

31. 850 S.W.2d 513 (Tex. Crim. App. 1993).

32. The Court of Criminal Appeals previously held that a reversal of a conviction based on the insufficiency of the evidence to prove an aggravating element bars a later prosecution for a lesser included offense when the trial court had neither instructed on the lesser included offense nor erroneously refused the State's request for such an instruction. *State v. Engelking*, 817 S.W.2d 64, 67 (Tex. Crim. App. 1991); *Stephen v. State*, 806 S.W.2d 812, 814 n.4 (Tex. Crim. App. 1990), *cert. denied*, 112 S. Ct. 350 (1991).

33. 850 S.W.2d at 516-17.

34. *Id.* at 517.

35. *Id.* at 519.

36. *Id.* at 519-20.

In *Ex parte Carter*³⁷ the San Antonio Court of Appeals explained the proper procedure for obtaining a pretrial appellate determination of a double jeopardy issue.³⁸ First, an application for a pretrial writ of habeas corpus must be filed in the trial court.³⁹ The trial court should be requested to issue a writ of habeas corpus pursuant to that application and then make a determination on the merits of the applicant's claim for relief. If relief is denied on the merits, then the applicant may appeal the denial of that relief.⁴⁰ A failure of the trial court to issue the writ of habeas corpus, even if a hearing is held by the trial court, precludes an appeal.⁴¹ There is no appeal from a denial of a habeas corpus application or a refusal to issue a writ. An appeal may be taken only from the denial of relief following the issuance of a pretrial writ of habeas corpus.⁴²

Finally, in *Ex parte Scales*⁴³ a little life was breathed back into the old carving doctrine.⁴⁴ The carving doctrine barred "multiple prosecutions and convictions carved out of a single criminal transaction"⁴⁵ and thus provided protections similar to those of the double jeopardy clause.⁴⁶ The carving doctrine was abandoned by the Court of Criminal Appeals in 1980.⁴⁷ The abandonment was made retroactive in 1984.⁴⁸ *Scales* overruled the decision that made the abandonment of the carving doctrine retroactive because that decision constituted an *ex post facto* law.⁴⁹ The carving doctrine will therefore continue to apply to criminal transactions that occurred before 1982.

II. DISCOVERY

The Court of Criminal Appeals reversed two cases during the Survey period because of the State's failure to disclose exculpatory evidence. In *Thomas v. State*⁵⁰ two witnesses testified to seeing the accused drag the deceased behind an apartment building and shoot him. A third witness was interviewed by the prosecutor and an investigator prior to trial. That witness said he saw the accused in front of the apartment building and someone else behind the building with a gun. The prosecutor did not call this witness to testify at trial nor did the prosecutor reveal the witness to the defendant

37. 849 S.W.2d 410 (Tex. App.—San Antonio 1993, pet. ref'd).

38. A special plea pursuant to TEX. CODE CRIM. PROC. ANN. art. 27.05 (Vernon 1989) may also be used to assert a double jeopardy claim. The denial of a special plea may only be appealed following the entry of a final judgment in the case.

39. See TEX. CODE CRIM. PROC. ANN. art. 11.01 (Vernon 1977).

40. 849 S.W.2d at 413.

41. *Id.*

42. *Id.*

43. 853 S.W.2d 586 (Tex. Crim. App. 1993).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Ex parte McWilliams*, 634 S.W.2d 815 (Tex. Crim. App. 1980), *cert. denied*, 459 U.S. 1036 (1982).

48. *Ex parte Clay*, 675 S.W.2d 765 (Tex. Crim. App. 1984), *cert. denied*, 470 U.S. 1029 (1985).

49. 853 S.W.2d at 588.

50. 841 S.W.2d 399 (Tex. Crim. App. 1992).

even though the defendant had filed a motion seeking exculpatory evidence. The Court of Criminal Appeals reversed the conviction because of the prosecutor's failure to disclose the witness.⁵¹ The court held that a prosecutor violates the due process clause of the fourteenth amendment when the prosecutor: 1) fails to disclose evidence, 2) which is favorable to the accused, 3) that creates a probability sufficient to undermine confidence in the outcome of the proceeding.⁵² The testimony of the unrevealed witness met these criteria because it tended to exculpate the defendant and to impeach the state's two witnesses.⁵³ The Court of Criminal Appeals emphasized in *Thomas* that the State has an affirmative duty to disclose evidence favorable and material to a defendant's guilt or punishment with or without a request for the evidence.⁵⁴

In *Ex parte Mitchell*⁵⁵ the county sheriff's office suppressed the testimony of two witnesses who could have cast doubt on the testimony of two accomplice witnesses as to the time of the offense. The witnesses were not revealed to the prosecutors or defense counsel. Nevertheless, the Court of Criminal Appeals held the state responsible for the failure to reveal the witnesses, because the witness' statements were concealed by agents of the State.⁵⁶ Relying on the authority of *Thomas*, the Court of Criminal Appeals overturned the conviction, because the suppressed evidence was both exculpatory to the accused and could be used to impeach the accomplice testimony.⁵⁷ In addition, failure to reveal the evidence hampered the ability of the accused to prepare a defense.⁵⁸

Thomas and *Mitchell* illustrate the difficulty of allowing the state to decide what evidence is exculpatory and what should be turned over to defense counsel. Clearly trial judges should take a more active role in reviewing the prosecution's files, examining the prosecution's witnesses, etc. in order to insure that all exculpatory evidence is revealed to the defense.

In *Espinosa v. State*⁵⁹ the Court of Criminal Appeals clarified the procedure for requesting notice of the State's intent to offer evidence at trial of extraneous offenses.⁶⁰ The court said the request should be in writing and served on the prosecution.⁶¹ "The better practice would be for a defendant to file a separate document entitled Request for Notice of Intent to Offer Extraneous Offenses specifically referring to the provisions of Rule 404(b)"

51. *Id.* at 407.

52. *Id.* at 404.

53. *Id.*

54. *Id.* at 407.

55. 853 S.W.2d 1 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 183 (1993).

56. *Id.* at 4.

57. *Id.*

58. *Id.* at 5.

59. 853 S.W.2d 36 (Tex. Crim. App. 1993).

60. Rule 404(b) of the Texas Rules of Criminal Evidence requires the state, upon timely request by the accused, to give reasonable notice "in advance of trial of intent to introduce in the state's case in chief such evidence other than that arising in the same transaction." TEX. R. CRIM. EVID. 404(b).

61. 853 S.W.2d at 38.

of the Texas Rules of Criminal Evidence.⁶² Placing the request for notice of extraneous offenses in a discovery motion directed to the trial court rather than the state does not automatically trigger the State's obligation to provide notice.⁶³ When a defendant relies on a discovery motion to request notice he must secure a ruling on the motion in order to require the State to provide the requested notice.⁶⁴ A simple Rule 404(b) request directed to the State need not be acted on by the trial court before the State is obligated to comply.⁶⁵ In other words, the State should simply tell the defense about extraneous offenses once a proper request is made without the intervention of the trial court.

The State's right to discovery of a tape of an interview between a defense investigator and a state's witness was at issue in *Washington v. State*.⁶⁶ The defense relied on the work-product doctrine to resist discovery. The court held that the tape was protected work-product.⁶⁷ In reaching this conclusion the court analyzed the scope of the work-product doctrine with respect to the State's rights. The court pointed out that traditionally "a recording of a statement made by a witness without any questions by the interviewer is clearly discoverable."⁶⁸ On the other hand, a recording is not discoverable if it contains comments by the attorney concerning his trial strategy or opinions regarding the case.⁶⁹ Between these extremes, the trial court must examine the tape *in camera* and decide which portions of the tape, if any, are discoverable.⁷⁰ The tape here was protected by the work-product doctrine because it was made in an attempt to evaluate the strengths and weaknesses of the State's case and to prepare the defense case.⁷¹ The work-product privilege was not waived by using information from the tape to cross-examine the state's witness.⁷²

The Legislature amended that portion of the Government Code governing the crimestoppers program to provide a procedure for a defendant to file a motion with the trial court to obtain exculpatory information from the records of the crimestoppers program.⁷³ This amendment eliminated the statutory requirement that the Texas Supreme Court authorize the release of crimestoppers information.⁷⁴

III. BAIL

In fixing the amount of bail in a particular case a judge or magistrate may

62. *Id.* at 38 n.3.

63. *Id.* at 39.

64. *Id.*

65. *Id.* at 38.

66. 856 S.W.2d 184 (Tex. Crim. App. 1993).

67. *Id.* at 187.

68. *Id.* at 188.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 189.

73. TEX. GOV'T CODE ANN. § 414.008(b)(c)(d)(e) (Vernon Supp. 1994).

74. See TEX. GOV'T CODE ANN. § 414.008(b) (Vernon 1993) prior to amendment.

now consider the future safety of the community.⁷⁵ This amendment was apparently designed to encourage trial judges to set high bail for dangerous offenders. This is a not so subtle attempt by the Legislature to deny defendants' bail despite the Constitutional right to bail in most cases.⁷⁶

For a defendant charged with the new offense of stalking⁷⁷ a defendant may be ordered, as a condition of release on bond, not to "communicate directly or indirectly with the victim" or "go to or near the residence, place of employment, or business of the victim or to or near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance."⁷⁸ This statute and the stalking law itself represent the latest in fad criminal laws.

Cash bonds have traditionally been forfeited and turned into fines and convictions upon the non-appearance of the defendant in court. This was generally done without any notice to the defendant and thus was subject to abuse. The Legislature changed this procedure during the Survey period to require courts to notify a defendant of a judgment and forfeiture.⁷⁹ The Legislature also gave defendants the right to a new trial in the case if the new trial is requested within ten days after the date of the judgment and forfeiture.⁸⁰

The Code of Criminal Procedure requires the trial court to release a defendant from custody either on personal bond or by reducing the amount of bail required if the state is not ready for trial within certain specified time periods for various degrees of offenses.⁸¹ A reduction in the amount of bail required for release to an amount that the defendant still cannot post does not comply with the statute.⁸² The defendant must be released from custody if the state is not ready for trial within the specified time period. There are no exceptions to this statute.⁸³

The San Antonio Court of Appeals provided a good review of the rules for fixing the amount of bail in *Ex parte McDonald*.⁸⁴ McDonald was indicted for capital murder. He was unable to post the \$1,000,000 bail amount in lieu of which he was detained in custody. After reviewing numerous cases concerning the setting of pretrial bail amounts, the court of appeals reduced McDonald's bail to \$75,000.⁸⁵

IV. COMPETENCY

Richard Moran killed three people, including his former wife, and then

75. TEX. CODE CRIM. PROC. ANN. art. 17.15, 5 (Vernon Supp. 1994).

76. See TEX. CONST. art. I, § 11.

77. TEX. PENAL CODE ANN. § 42.07(a)(7) (Vernon Supp. 1994).

78. TEX. CODE CRIM. PROC. ANN. art. 17.46(a) (Vernon Supp. 1994).

79. TEX. CODE CRIM. PROC. ANN. art. 45.231(b)(1) (Vernon Supp. 1994).

80. TEX. CODE CRIM. PROC. ANN. art. 45.231(b)(2) and (c) (Vernon Supp. 1994).

81. TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon Supp. 1994).

82. *Rowe v. State*, 853 S.W.2d 581, 582 (Tex. Crim. App. 1993).

83. *Id.*

84. 852 S.W.2d 730 (Tex. App.—San Antonio 1993, no pet. h.).

85. *Id.* at 736.

tried to kill himself.⁸⁶ Moran survived and was charged with three counts of capital murder.⁸⁷ Moran entered not guilty pleas to the charges.⁸⁸ The trial court ordered Moran examined by two psychiatrists, and both determined that Moran was competent and could stand trial.⁸⁹ The death penalty was then sought by the State.⁹⁰ Subsequently, Moran requested permission to discharge his attorneys and change his pleas to guilty.⁹¹ The trial court accepted Moran's waiver of his right to counsel and his guilty pleas after properly admonishing him regarding the consequences of both. In *Godinez*, the Supreme Court was asked to decide whether a different standard of competency applied for pleading guilty or waiving the right to counsel than for standing trial. The Supreme Court characterized this question as one that has split both the federal courts of appeals and the state courts of last resort.

*Dusky v. United States*⁹² held that the standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."⁹³ The Supreme Court in *Godinez* rejected the notion that a standard higher than or different from *Dusky* applied to the decision to plead guilty or to waive the right to counsel.⁹⁴ The same standard applies across the board in criminal cases. The dissent, however, pointed out that this monolithic approach to competency is "true to neither life nor the law" because "[c]ompetency for one purpose does not necessarily translate to competency for another purpose."⁹⁵

V. CHARGING INSTRUMENTS

Obed Aguilar was charged by information with the offense of driving while intoxicated. The complaint upon which the information was based stated that it was sworn out on a date before the offense allegedly occurred. Aguilar did not point this defect out to the trial court. Subsequently, Aguilar was convicted of driving while intoxicated. Aguilar then argued on appeal that the discrepancy in the complaint rendered the information void.⁹⁶

The Code of Criminal Procedure requires an information to be based on a complaint.⁹⁷ Prior to the 1985 amendment to article V, section 12(b) of the

86. *Godinez v. Moran*, 113 S. Ct. 2680, 2682 (1993).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 2682-83.

91. *Id.* at 2683.

92. 362 U.S. 402 (1960).

93. *Id.* at 402.

94. 113 S. Ct. at 2686.

95. 113 S. Ct. at 2694 (Blackmun, J. dissenting).

96. *Aguilar v. State*, 846 S.W.2d 318 (Tex. Crim. App. 1993).

97. The Texas Code of Criminal Procedure provides in part that "[n]o information shall be presented until affidavit has been made by some credible person charging the defendant with an offense." TEX. CODE CRIM. PROC. ANN. art. 21.22 (Vernon Supp. 1994). See also, TEX. CODE CRIM. PROC. ANN. art. 15.04 (Vernon Supp. 1994).

Texas Constitution⁹⁸ an information based on an invalid complaint was considered fundamentally defective.⁹⁹ Error concerning such an information and complaint could be raised, for the first time, on appeal since it went to the jurisdiction of the court to try the case.¹⁰⁰ Now, however, the mere presentment of an information to a trial court invests that court with jurisdiction over the person of the defendant, regardless of any defect that might exist in the underlying complaint.¹⁰¹ Defects in information and complaints must be raised before trial or they will be waived.¹⁰² There is no more laying behind the log where a defective charging instrument is concerned.

VI. JOINDER AND SEVERANCE OF OFFENSES

The Texas Penal Code allows the state to join several different charging instruments in a single trial if the alleged offenses arose out of the same criminal episode and the state gives written notice at least thirty days before trial of the consolidation of the charging instruments for trial.¹⁰³ A defendant, however, does not have the right to consolidate for trial several different charging instruments even if the offenses were committed in the same criminal episode.¹⁰⁴ On the other hand, a defendant may force a severance of multiple charging instruments that were consolidated for trial by the state.¹⁰⁵ The failure to grant a severance requested by the defendant is reversible error not subject to a harmless error analysis.¹⁰⁶

VII. SEVERANCE OF DEFENDANTS

Both federal and state law allow the joinder for trial of defendants alleged to have participated in the same offense or transaction.¹⁰⁷ Both federal and state law provide for the severance of defendants if a joint trial would prejudice a defendant.¹⁰⁸ In *Zafiro v. United States*¹⁰⁹ the Supreme Court was asked to decide whether mutually antagonistic defenses create sufficient prejudice to justify a severance as a matter of law.¹¹⁰

Gloria Zafiro and three other persons were prosecuted for distributing illegal drugs. All of the defendants moved for severance alleging that their defenses were mutually antagonistic.¹¹¹ The trial court denied the severance

98. TEX. CONST. art. V, § 12(b).

99. 846 S.W.2d at 320.

100. *Id.*

101. *Id.*

102. *Id.*

103. TEX. PENAL CODE ANN. § 3.02(b) (Vernon Supp. 1994); *Wedlow v. State*, 807 S.W.2d 847, 850 (Tex. App.—Dallas 1991, pet. ref'd).

104. *Nelson v. State*, 864 S.W.2d 496 (Tex. Crim. App. 1993).

105. TEX. PENAL CODE ANN. § 3.04(a) (Vernon Supp. 1994); *Coleman v. State*, 788 S.W.2d 369, 371 (Tex. Crim. App. 1990) (defendant's right to a severance is absolute).

106. *Warmowski v. State*, 853 S.W.2d 575, 581 (Tex. Crim. App. 1993).

107. TEX. CODE CRIM. PROC. ANN. art. 36.09 (Vernon Supp. 1994); FED. R. CRIM. P. 8(b).

108. TEX. CODE CRIM. PROC. ANN. art. 36.09 (Vernon Supp. 1994); FED. R. CRIM. P. 14.

109. 113 S. Ct. 933 (1993).

110. *Id.* at 933.

111. Defendant Soto argued that he did not know the contents of the box in which drugs

motions and tried all four defendants together.

The Supreme Court first noted the preference in the federal system for joint trials.¹¹² The court then held that a severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."¹¹³ Such prejudice may arise if many defendants of differing levels of culpability are tried together, when evidence of a codefendant's wrongdoing could erroneously be considered against the defendant, or when exculpatory evidence that would be available to a defendant tried alone is excluded in a joint trial.¹¹⁴ In other words, the risk of prejudice is a factual determination that must be made by the trial court.¹¹⁵ Mutually antagonistic defenses are not prejudicial as a matter of law.¹¹⁶ The fact that a defendant may have a better chance of acquittal in a separate trial does not entitle the defendant to a severance.¹¹⁷ A defendant is entitled to a severance only if a joint trial would result in some legally cognizable prejudice as determined by the trial court.¹¹⁸

Zafiro demonstrates the difficulty, particularly in the federal system, of obtaining a severance. There is a decided preference for trying defendants together in the name of judicial economy and thereby sacrificing an accused person's right to a fair trial.

VIII. RECUSAL

In *Arnold v. State*¹¹⁹ the Court of Criminal Appeals held that the procedures of rule 18a in the Texas Rules of Civil Procedure governing the recusal of trial judges apply to criminal cases.¹²⁰ Because the appellants in *Arnold* failed to comply with the ten-day notice provision in Rule 18a, they waived their appellate complaint of the denial of the opportunity to have their recusal motions heard by a judge other than the judge assigned to hear their case.¹²¹

IX. VISITING JUDGES

Most lawyers know that they have the right to object to the assignment of

were found. *Id.* at 936. Garcia claimed ignorance of the contents of the box and said the box belonged to Soto. *Id.* Defendant Zafiro said she was only defendant Martinez's girlfriend and knew nothing about drugs found in a suitcase stored in her closet. *Id.* Martinez, however, said he was only visiting his girlfriend's apartment and did not know about the drugs in the suitcase. *Id.*

112. *Id.* at 937.

113. *Id.* at 938.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 939.

119. 853 S.W.2d 543 (Tex. Crim. App. 1993).

120. *Id.* at 544.

121. *Id.* at 544-45; see TEX. R. CIV. P. 18a (recusal motion must be filed at least ten days before date set for trial or other hearing in trial court.)

a visiting judge to hear a civil case.¹²² In 1991 the statute from which this right derives was amended to provide that “[a] former judge or justice who was not a retired judge may not sit in a case if either party objects to that judge or justice.”¹²³ Since this amendment did not specifically state that it was limited to civil cases, the Harris County District Attorney objected to the assignment of a former judge to hear a criminal case. In *Lanford v. Fourteenth Court of Appeals*¹²⁴ the court of criminal appeals determined that the amendment was ambiguous in that it could be understood to apply to civil cases only or to civil and criminal cases.¹²⁵ Then, by considering extratextual factors the court concluded that the amendment applied only to civil cases.¹²⁶ The Harris County District Attorney was therefore not entitled to challenge the assignment of a former judge to hear a criminal case.

X. WAIVER OF JURY

Prior to 1991 Article 1.13 of the Code of Criminal Procedure allowed a defendant in a felony prosecution less than capital to waive his right to a trial by jury if the waiver was made in writing with the consent and approval of the prosecutor and the court.¹²⁷ In *Meek v. State*¹²⁸ the Court of Criminal Appeals held that the failure of a defendant to sign a jury waiver in compliance with the Code of Criminal Procedure (when the defendant was tried without a jury) is reversible error that is not subject to a harm analysis.¹²⁹ The court even went so far as to state that application of the harmless error rule to the failure to sign a jury waiver is “perverse and inappropriate.”¹³⁰

In 1991 Article 1.13 of the Code of Criminal Procedure was amended so as to make it applicable to all criminal prosecutions other than a prosecution for a capital felony in which the state seeks the death penalty.¹³¹ Consequently, the state now has the right to a jury trial in both felony and misde-

122. TEX. GOV'T CODE ANN. § 74.053 (Vernon Supp. 1994).

123. *Id.* § 74.083(d).

124. 847 S.W.2d 581 (Tex. Crim. App. 1993).

125. *Id.* at 587.

126. *Id.* The court based its conclusion on several factors: 1) before the statute was amended it applied only to civil cases; 2) there was nothing in the legislative history of the amendment which suggests it should be applied to civil and criminal cases; 3) applying the statute to criminal cases would give prosecutors inordinate power that legislators did not contemplate; and 4) extending the right to challenge former judges to criminal cases would give prosecutors and defense attorneys the right to automatic continuances). *Id.* at 586-87.

127. Article 1.13 of the Texas Code of Criminal Procedure provided in relevant part, prior to amendment: “The defendant in a criminal prosecution for any offense classified as a felony less than capital shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that such waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the State.” TEX. CODE CRIM. PROC. art. 1.13 (Vernon 1990).

128. 851 S.W.2d 868 (Tex. Crim. App. 1993).

129. *Id.* at 871.

130. *Id.*

131. Article 1.13 of the Texas Code of Criminal Procedure now provides in relevant part: “The defendant in a criminal prosecution for any offense other than a capital felony case in which the State notifies the court and the defendant that it will seek the death penalty shall have the right upon entering a plea, to waive the right of trial by jury . . . with the consent and

meanor cases.¹³²

XI. JURY SELECTION

In a controversial opinion with potentially far-reaching implications the Court of Criminal Appeals reversed a capital murder case based on the trial court's erroneous granting of a state's challenge for cause to a jury venireman. In *Garrett v. State*¹³³ the court held that a venireman who stated that he could not answer the special issue regarding future dangerousness of the defendant¹³⁴ affirmatively based upon the facts of the crime alone was not challengeable for cause by the state.¹³⁵

During the *Garrett* voir dire, the juror made it unmistakably clear that he could not find that the defendant would engage in acts of violence in the future based strictly upon the facts of the case being tried.¹³⁶ The state challenged the juror for cause based on Article 35.16(b)(3) of the Texas Code of Criminal Procedure.¹³⁷ Under this code provision, a juror is challengeable for cause if he harbors some bias or prejudice against some aspect of the law upon which the state is entitled to rely. The trial court agreed with the State's challenge, and the juror was excused over the defendant's objection.¹³⁸

In reversing the case, the Court of Criminal Appeals cited cases holding that the facts of a capital crime, if severe enough, will support a jury verdict of yes to the future dangerousness issue.¹³⁹ However, the court explained that none of these cases require a particular jury, or an individual juror, to answer the special issue yes based on the facts of a particular case, and that the cited cases concern reviews of the sufficiency of the evidence and not questions of qualification of a juror.¹⁴⁰

The court went on to explain that a particular juror's understanding of proof beyond a reasonable doubt may lead him to require more than the minimum amount of evidence necessary to sustain a finding of future dangerousness on appeal.¹⁴¹ The fact that a juror may set his threshold of rea-

approval of . . . the attorney representing the state." TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon. Supp. 1994).

132. *State v. Carr*, 847 S.W.2d 561, 562 (Tex. Crim. App. 1992).

133. 851 S.W.2d 853 (Tex. Crim. App. 1993).

134. Article 37.071(b)(2) states the following:

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1994).

135. 851 S.W.2d at 859-61.

136. *Id.* at 857-59.

137. "(b) A challenge for cause may be made by the state for any of the following reasons:

(3) that he has a bias or prejudice against any phase of the law upon which the state is entitled to rely for conviction or punishment." TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon Supp. 1994).

138. 851 S.W.2d at 859.

139. *Id.* at 859 n.3 & 4.

140. *Id.* at 859-60.

141. *Id.* at 860.

sonable doubt higher than the minimum required to sustain a jury verdict on appeal does not indicate that he has a bias or prejudice against the law.¹⁴² He is therefore not challengeable for cause under Article 35.16(b)(3).¹⁴³ According to the court, if the State did not want this juror to serve they were required to exercise a peremptory challenge against him.¹⁴⁴

In dissent, Judge Campbell complained that the majority ignored *stare decisis* and effectively overruled substantial established case law.¹⁴⁵ Judge Campbell also predicted that the reasoning of *Garrett* would lead to an overruling of other cases upholding state's challenges for cause.¹⁴⁶ Specifically, Judge Campbell argued that *Garrett* was inconsistent with cases holding that the State may challenge for cause jurors who could never answer the future dangerousness issue yes unless the defendant was a serial killer.¹⁴⁷ Judge Campbell also stated that *Garrett* is inconsistent with cases holding the State may challenge jurors for cause who could never find the defendant guilty based on the testimony of one witness,¹⁴⁸ or based on circumstantial evidence.¹⁴⁹ Likewise, he found *Garrett* to be inconsistent with cases holding that a juror was challengeable for cause if the defendant was not the triggerman, and the juror could not answer the future dangerousness issue affirmatively.¹⁵⁰

Judge Campbell's predictions of the future implications of *Garrett* have not yet come to pass. However, his reasoning that *Garrett* is inconsistent with the other parallel cases appears sound. Based on the frequent repetition of the type of issues discussed in *Garrett*, this case is likely to have a substantial impact on future jury selection issues.

In another capital murder case, a badly divided Court of Criminal Appeals¹⁵¹ held that only one shuffle of the jury venire is authorized under Article 35.11 of the¹⁵² Texas Code of Criminal Proce-

142. *Id.*

143. *Id.*

144. *Id.* at 859-60.

145. *Id.* at 861.

146. *Id.* at 863.

147. *Fuller v. State*, 829 S.W.2d 191, 199-01 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 2418 (1993).

148. *Caldwell v. State*, 818 S.W.2d 790, 797 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 1684 (1992).

149. *Barnard v. State*, 730 S.W.2d 703, 712-14 (Tex. Crim. App. 1987), *cert. denied*, 113 S. Ct. 990 (1993).

150. *Phillips v. State*, 701 S.W.2d 875, 883-84 (Tex. Crim. App. 1985), *cert. denied*, 477 U.S. 909 (1986).

151. Majority opinion by Judge Baird, with Judge Maloney joining only in part. Dissents by Presiding Judge McCormick and Judges Miller, Meyers and Overstreet.

152. Article 35.11 states:

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. The clerk shall randomly select the jurors by a computer or other process of random selection and shall write or print the names, in the order selected, on the jury list from which the jury is to be selected to try the case. The clerk shall deliver a copy of the list to the State's counsel and to the defendant or his attorney.

ture.¹⁵³ In *Chappell* the court reversed the conviction based on the trial court's granting the state a jury shuffle after the venire was already shuffled on the defendant's motion.¹⁵⁴ Citing several recent cases indicating that only one proper shuffle is allowed under Article 35.11,¹⁵⁵ the court explicitly held that only one shuffle is allowed.¹⁵⁶ Whether the State or defense requests the shuffle, if it is properly done, the other party is precluded from a second shuffle.¹⁵⁷

The court also rejected the State's argument that the granting of the second shuffle was harmless error.¹⁵⁸ Following well-established precedent, the court held that no injury need be shown by a defendant to obtain reversal when the jury shuffle rules of Article 35.11 are violated.¹⁵⁹ Article 35.11 was characterized as a mandatory statute,¹⁶⁰ a violation of which is not subject to a harm analysis under Rule 81(b)(2) of the Texas Rules of Appellate Procedure.¹⁶¹ Citing *Roberts v. State*¹⁶² the court explained that, "in cases involving breach of many procedural statutes, the record will contain no concrete data from which an appellate court can meaningfully gauge that the error did or did not contribute to the conviction or punishment of the accused."¹⁶³ Since the State has the burden under Rule 81(b)(2) to prove harmlessness, and the trial record is insufficient to resolve the issue, reversal is required.

In *Batson v. Kentucky*¹⁶⁴ the Supreme Court held that race was not a legitimate basis for the exercise of a peremptory challenge.¹⁶⁵ Under *Batson*, a party can challenge his opponents exercise of peremptory strikes and under certain procedural rules require his opponent to justify the exercise of his peremptory strikes based on non-racial reasons. The question of whether the procedural framework of *Batson* and its progeny should be extended to gender-based peremptory strikes was recently addressed by the United States Court of Appeals for the Fifth Circuit. In *U.S. v. Broussard*¹⁶⁶ the court held that *Batson* does not extend to gender-based discrimination in the exercise of peremptory strikes.¹⁶⁷

TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1994).

153. *Chappell v. State*, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993).

154. *Id.* at 511-12.

155. *Jones v. State*, 833 S.W.2d 146 (Tex. Crim. App. 1992); *Davis v. State*, 782 S.W.2d 211 (Tex. Crim. App. 1989).

156. 850 S.W.2d at 511.

157. *Id.*

158. *Id.* at 512-13.

159. *See Fotenot v. State*, 379 S.W.2d 334 (Tex. Crim. App. 1964).

160. 850 S.W.2d at 512

161. Rule 81(b)(2) states: "If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment." TEX. R. APP. P. 81(b)(2).

162. 784 S.W.2d 430 (Tex. Crim. App. 1990).

163. *Id.* at 435.

164. 476 U.S. 79 (1986).

165. *Id.* at 138.

166. 987 F.2d 215 (5th Cir. 1993).

167. *Id.* at 217.

In concluding that gender-based strikes are not covered by *Batson*, the court found that while equal protection principles recognize women as a protected class, the level of scrutiny of actions against women is less than that applied to questions of racial discrimination.¹⁶⁸ Additionally, the court stated that women were not a numerical minority and did not face the same barriers to full jury participation as faced by racial minorities.¹⁶⁹ Based on this, the court concluded that the prophylactic protections that *Batson* gives to racial minorities is not necessary to protect women from discrimination in jury selection.¹⁷⁰

By declining to extend *Batson* to gender-based discrimination, the Fifth Circuit aligned itself with the Fourth Circuit which had previously reached the same conclusion.¹⁷¹ The court disagreed with the contrary holding of *U.S. v. De Gross*,¹⁷² where the Ninth Circuit applied *Batson* to gender-based discrimination. Several state courts reaching various results were also cited.¹⁷³ The United States Supreme Court¹⁷⁴ and the Texas Court of Criminal Appeals have yet to address this issue.

XII. JURY QUESTIONING OF WITNESSES

The incipient experiment of allowing jurors to submit questions to witnesses was recently brought to an abrupt end in the Texas criminal courts by the Court of Criminal Appeals. In *Morrison v. State*¹⁷⁵ the court ruled that jurors will not be permitted to question witnesses.¹⁷⁶ While recognizing that many other courts have allowed the practice,¹⁷⁷ the Court of Criminal Appeals concluded that juror questioning undermines the adversary nature of the criminal justice system and removes the jury from its role as a passive fact finder.¹⁷⁸ The majority opinion cited concerns that allowing jurors to submit questions could lead the jurors to draw conclusions or settle on a given legal theory before the parties completed their presentations and before the court instructed the jury on the law.¹⁷⁹

In *Morrison* the trial court allowed the jurors to question witnesses by means of submitting written questions to the court.¹⁸⁰ While this was but

168. *Id.* at 218-20.

169. *Id.* at 220.

170. *Id.*

171. *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988).

172. 960 F.2d 1433 (9th Cir. 1992) (en banc).

173. *State v. Culver*, 444 N.W.2d 662 (Neb. 1989) (refusing to apply *Batson* to gender); *State v. Oliviera*, 534 A.2d 867 (R.I. 1987) (refusing to apply *Batson* to gender); *People v. Irizarry*, 165 A.D.2d 715 (N.Y. 1990) (extending *Batson* to gender).

174. The Supreme Court granted certiorari to address this question in *J.E.B. v. T.B.*, No. 92-1239. Oral argument was presented on November 2, 1993 and a decision is expected during the current term of the court.

175. 845 S.W.2d 882 (Tex. Crim. App. 1992).

176. *Id.* at 884-89.

177. *Id.* at 884 n.5.

178. *Id.* at 885.

179. *Id.* at 887.

180. *Morrison* stated the following:

The trial judge instructed the jury that following each witness jurors could submit questions to the court to be asked of that witness. The court would rule on

one method of allowing juror questioning, the Court of Criminal Appeals nevertheless has flatly banned the practice.

In the area of jury service, the legislature added Article 44.46 to the Texas Code of Criminal Procedure¹⁸¹ in an effort to avoid reversals of convictions when a disqualified person serves as a juror. Under the new statute, reversal based on jury service by a disqualified person will be rare.

XIII. EVIDENCE

The long held maxim that a witness can be impeached with prior convictions for felonies or misdemeanors involving moral turpitude was recently clarified by the Court of Criminal Appeals in *Theus v. State*.¹⁸² In the course of a detailed explanation of the law on impeachment the court made it clear that a trial court cannot admit any and all felony convictions for impeachment purposes without a close consideration of the limitations of Rule 609(a)¹⁸³ of the Texas Rules of Criminal Evidence.

Joe Theus was charged with the offenses of possessing and delivering cocaine.¹⁸⁴ During Theus's jury trial, the State was allowed to impeach his testimony with evidence of a prior arson conviction.¹⁸⁵ The court found that the trial court had erred in allowing the impeachment and reversed and remanded the case to the court of appeals for a harm analysis.¹⁸⁶

In finding the evidence concerning the arson conviction inadmissible, the court dealt with two different proposed reasons for its admissibility. Initially, the court found that the arson conviction was not admissible in order to correct an alleged false impression left by Theus concerning his lawful character.¹⁸⁷

the questions outside of the presence of the jury. If a question was ruled admissible, the judge would recall the jury and reads the question to the witness. The parties were allowed to ask follow-up questions of the witness, limited to the subject matter of the juror's question. Appellant objected to the process on the grounds that it is not authorized by law. Appellant's objection was overruled, but appellant perfected a running objection to "the whole process." *Id.* at 833 n.1.

181. A conviction in a criminal case may be reversed on appeal on the ground that a juror in the case was absolutely disqualified from service under Article 35.19 of this code only if:

(1) the defendant raises the disqualification before the verdict is entered; or
(2) the disqualification was not discovered or brought to the attention of the trial court until after the verdict was entered and the defendant makes a showing of significant harm by the service of the disqualified juror. TEX. CODE CRIM. PROC. ANN. art. 44.46 (Vernon Supp. 1994).

182. 845 S.W.2d 874 (Tex. Crim. App. 1992).

183. Rule 609(a) states:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

TEX. R. CRIM. EVID. 609(a).

184. 845 S.W.2d at 874.

185. *Id.* at 876.

186. *Id.* at 882.

187. *Id.* at 878-79.

In *Prescott v. State*¹⁸⁸ the court held that "when a witness, during direct examination, leaves a false impression as to the extent of either his prior (1) arrests, (2) convictions, (3) charges, or (4) 'trouble' with the police,"¹⁸⁹ he may be impeached with incidents that would otherwise not be available for impeachment.¹⁹⁰ The State argued that Theus had left a false impression with the jury, and therefore the arson conviction was admissible on this basis.

Theus testified that he ran a tire store, had never sold drugs and that he had reported a drug dealer to the police.¹⁹¹ He also presented witnesses that testified he was not involved with drugs.¹⁹² The court noted, however, that Theus "in no way asserted that he had never been convicted of a felony."¹⁹³ For this reason, Theus had not given the jury a false impression which the State was entitled to rebut by introducing the prior arson conviction.¹⁹⁴

The court likewise found the prior conviction inadmissible under Rule 609.¹⁹⁵ Initially, the court rejected Theus' argument that a showing of relevance was necessary in order to render a prior conviction admissible for impeachment.¹⁹⁶ The court stated relevance is not a consideration under Rule 609.¹⁹⁷ Therefore, if a felony is to be deemed inadmissible for impeachment under Rule 609, it must be on the basis that its probative value is outweighed by its prejudicial effect. It is on this basis that the court found the arson conviction inadmissible.¹⁹⁸

The court drew from federal cases in identifying a number of factors to consider in weighing the probative value of a conviction against its prejudicial effect.¹⁹⁹ These factors include, 1) the impeachment value of the prior crime, 2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history, 3) the similarity between the past crime and the offense being prosecuted, 4) the importance of the defendant's testimony, and 5) the importance of the credibility issue.²⁰⁰

These factors are not to be applied with mathematical precision and the weight of their applications will vary from case to case. The court did, however, provide general guidelines for application of these factors. For instance, it was noted that the impeachment value of crimes that involve deception is higher than crimes that involve violence, and the latter have a

188. 744 S.W.2d 128 (Tex. Crim. App. 1988).

189. *Id.* at 130.

190. *Id.* at 131.

191. 845 S.W.2d at 879.

192. *Id.* at 879.

193. *Id.*

194. *Id.* at 879.

195. *Id.* at 879-82.

196. *Id.* at 879; *see also* *United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983) (interpreting federal counterpart to Rule 609, the court found that, "Congress believed that all felonies have some probative value on the issue of credibility.").

197. 845 S.W.2d at 879.

198. 845 S.W.2d at 881-82.

199. *See* *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976).

200. 845 S.W.2d at 880.

higher potential for prejudice.²⁰¹ For this reason, if the crime being used for impeachment relates more to deception, this weighs in favor of its admissibility. Likewise, if the past crime is recent and the witness has a propensity for violating the law these factors would favor admissibility.²⁰² However, if the past crime and the charged offense are similar this will militate against admissibility because of the high possibility that the jury would convict on the perception of past conduct rather than the focus of the charged offense.²⁰³

The importance of the defendant's testimony and the importance of the credibility issue were found to be related.²⁰⁴ When the defendant presents his defense through other witnesses, his credibility is not likely to be a critical issue and he may not need to testify. This would tend to lessen the need for the State to impeach the defendant and would weigh against admissibility of the prior offense. However, when the case involves only the testimony of the defendant and the State's witnesses, the defendant's credibility becomes more of an issue and the probative value of impeachment evidence increases.²⁰⁵

In applying the five enumerated factors to the question of the admissibility of the arson conviction the court focused on the facts of the arson in finding that it had very little probative value as to Theus's credibility.²⁰⁶ The facts of the arson were that after a domestic dispute with his girlfriend, Theus had taken a beer can filled with gasoline, poured the gasoline through his girlfriend's postal slot and then set fire to the postal slot.²⁰⁷ The court found that although most of the five factors weighed in favor of admissibility of the arson conviction the unique facts of this case compelled a conclusion that the arson conviction possessed very little probative value and had a great prejudicial effect.²⁰⁸ This was based on the fact that a jury being told of an arson conviction could easily conjure up images of burning buildings and insurance fraud. The potential prejudice was exacerbated by the refusal of the trial court to allow Theus to present any evidence to the jury of the facts of the arson.²⁰⁹

The importance of *Theus* is the message it sends that all felonies are not automatically admissible for impeachment. Trial courts are expected to engage in a meaningful weighing of the probative value of the evidence of a prior conviction against its prejudicial effect and run a real risk of reversal if they erroneously admit impeachment evidence.

201. See *United States v. Jackson*, 627 F.2d 1198, 1210 (D.C. Cir. 1980).

202. See *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977).

203. See *Jackson*, 627 F.2d at 1210.

204. 845 S.W.2d at 881.

205. See *United States v. Fountain*, 642 F.2d 1083, 1092 (7th Cir.), *cert. denied*, 451 U.S. 993 (1981).

206. 845 S.W.2d at 881.

207. *Id.* at 882.

208. *Id.* at 881-82.

209. *Id.* at 882.

In *Rogers v. State*²¹⁰ the Court of Criminal Appeals added necessity to the list of exceptions to the prohibition on admission of evidence of other crimes, wrongs, or acts found in Texas Rules of Criminal Evidence 404(b).²¹¹ However, the facts of *Rogers* did not meet the court's stringent definition of necessity and the case was nevertheless reversed and remanded to the court of appeals for a harm analysis.²¹²

Rogers was charged in a single indictment with two separate offenses of burglary of a habitation and with possession of methamphetamine. He was convicted on all three charges in a single trial. In the course of the trial, the State introduced evidence that several police officers went to appellant's residence with an arrest warrant for one of the burglary cases. Upon entering the house, the officers observed appellant sitting on a couch in the living room, pushing a package down between the cushions of the couch. The officers recovered the package from the couch and determined that it contained methamphetamine. This formed the basis of the methamphetamine charge. The officers also searched the house and found marijuana between a mattress and bed spring in a bedroom. Rogers admitted that the marijuana was his.²¹³ Additionally, at trial the State offered Rogers' written confession in which he admitted using and selling marijuana and methamphetamine. As part of Rogers' confession, he said that he sold methamphetamine to finance his own drug habit. Rogers' objections to all of this testimony were overruled.²¹⁴ The court's opinion in *Rogers* focused on the admissibility of the marijuana evidence.²¹⁵

The Court of Criminal Appeals relied largely upon *Mayes v. State*²¹⁶ in determining the admissibility of this evidence. *Mayes* set forth a test under Texas Rules of Criminal Evidence 401 and 404(b) to determine the admissibility of what the court called background evidence.²¹⁷ The first question is whether the background evidence is relevant under Rule 401.²¹⁸ If the background evidence is relevant, the next question is whether it should be admitted as an exception under Rule 404(b).²¹⁹

Applying the *Mayes* test to Rogers' case, the court first decided that the

210. 853 S.W.2d 29 (Tex. Crim. App. 1993).

211. Rule 404(b) states:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided, upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction.

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

212. 853 S.W.2d at 34-35.

213. *Id.* at 31.

214. *Id.*

215. *Id.*

216. 816 S.W.2d 79 (Tex. Crim. App. 1991).

217. *Id.* at 84-87.

218. *Id.* at 84.

219. *Id.* at 85-87.

marijuana evidence was relevant to the possession of methamphetamine charge against Rogers.²²⁰ Although the relevancy was deemed questionable, the court nevertheless held that it was possible that a person who possessed one type of illegal drug would also be inclined to be in possession of another illegal drug.²²¹ While not necessarily finding that this type of evidence would always be relevant, the court held "that it was within the zone of reasonable disagreement for the trial court to find that the evidence pertaining to the marijuana was relevant."²²²

Having accepted that the evidence was relevant, the court next addressed whether the background evidence was admissible as an exception to Rule 404(b).²²³ Citing *Montgomery v. State*²²⁴ the *Rogers* court stated that the list of purposes under Rule 404(b) for which "other crimes, acts or wrongs [are] admissible" is not "exclusive nor collectively exhaustive."²²⁵

In *Mayer* the court separated evidence of other crimes, wrongs, or acts into two categories.²²⁶ These categories were same transaction contextual evidence and background contextual evidence.²²⁷ The same transaction evidence involves acts, words and conduct of a defendant at the time of the offense or his arrest.²²⁸ Background contextual evidence is evidence of extraneous matters not occurring at the time of the offense or the defendant's arrest.²²⁹

The evidence admitted against Rogers concerning the marijuana was characterized as same transaction contextual evidence since it concerned events at the time of his arrest.²³⁰ In the crux of the opinion, the court found that same transaction contextual evidence is admissible as an exception under Rule 404(b) where such evidence is necessary to the jury's understanding of the offense on trial.²³¹ The necessity exception under Rule 404(b) applies because in describing the primary offense, it is impractical to avoid describing the other offense.²³² The court said that the necessity requirement is met "[o]nly if the facts and circumstances of the instant offense would make little or no sense without also bringing in the same transaction contextual evidence."²³³

However, having found necessity to be a valid purpose under Rule 404(b), the court nevertheless found that the necessity test was not met in this case.²³⁴ According to the court, "the State could simply have described the

220. 853 S.W.2d at 32-33.

221. *Id.* at 32.

222. *Id.* at 32-33.

223. *Id.* at 33-34.

224. 810 S.W.2d 372, 388 (Tex. Crim. App. 1991) (op. on reh'g).

225. 853 S.W.2d at 33.

226. 810 S.W.2d at 386-87.

227. *Id.*

228. *Id.*

229. 816 S.W.2d at 86-87.

230. 853 S.W.2d at 33.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 34.

events of appellant's arrest without mentioning that marijuana was found, in addition to methamphetamine. The jury's understanding of the instant offenses would not have been impaired or clouded had the State described appellant's arrest without including the evidence concerning the marijuana."²³⁵

In a concurring opinion Judge Clinton made several pertinent observations. First, he said by "'necessity' [it] is meant that it is impossible to present a coherent picture of the charged offense without inadvertently proving the 'other crime, wrong, or act.'"²³⁶ Secondly, because of the limited reason for the admissibility of the evidence, i.e., the impossibility of presenting a coherent picture without it, a defendant will be entitled to a limiting instruction.²³⁷

The *Rogers* case is likely to provoke considerable litigation over what is "necessary" in explaining the facts of a case. No doubt prosecutors will attempt to fit virtually all crimes, wrongs, or acts committed during the course of an arrest or offense into this cubbyhole. However, in *Rogers*, the court indicated that the necessity exception is narrowly drawn and it appears that a trial court will likely err in interpreting it too broadly.

Bolstering as an objection to evidence was essentially eliminated by the Court of Criminal Appeals in *Cohn v. State*.²³⁸ In *Cohn* the defendant was convicted of two charges of indecency with a child and one charge of injury to a child. The child complainants testified that the defendant, who was babysitting them, got drunk and sexually molested both of them.²³⁹ Dr. Braden Roy, a psychiatrist, testified during the State's case in chief. He said that he had examined the children a few days after the offense. Dr. Roy testified in general terms that sexually abused children could be expected to experience crying episodes and angry episodes and to manifest problems with concentration at school. He also said that they tend to hang onto their parents and to constantly try to get reassurance.

The prosecutor next inquired as to the particular demeanor of the children when Roy interviewed them. Cohn lodged a bolstering objection, which was overruled. Roy then stated that the girl was mildly depressed and that her affect was constricted, which was consistent with experiencing trauma. When she went into the details, she was appropriate with her feelings and was crying and nervous. He said the boy was in distress, displaying fear, anger and helplessness.

Roy's testimony did not state directly that the children were sexually abused or were telling the truth, therefore it was not prohibited under *Duckett v. State*.²⁴⁰ However, Cohn argued that under *Duckett* the trial court

235. *Id.*

236. *Id.* at 36.

237. *Id.*

238. 849 S.W.2d 817 (Tex. Crim. App. 1993).

239. *Id.* at 817.

240. 797 S.W.2d 906 (Tex. Crim. App. 1990). *Duckett* held that expert testimony which provided the jury with information concerning child sexual abuse syndrome and applied elements of the syndrome to the facts of the case was admissible as expert testimony so long as

may not admit this kind of testimony unless the child witness has first been impeached.²⁴¹

The court initially discussed the general admissibility of testimony such as that presented by Roy stating that²⁴² Roy's testimony may have been objectionable under Texas Rules of Criminal Evidence 705(c)²⁴³ if it was meant to suggest that evidence of anxiety behavior is enough in and of itself to indicate sexual abuse.²⁴⁴ However, Cohn made no objection on this basis. The court additionally stated that to the extent that Roy's testimony only provided circumstantial evidence that the children experienced some traumatic event, and that their behavior is consistent with sexual abuse, the evidence was relevant²⁴⁵ under Texas Rules of Criminal Evidence 401²⁴⁶ and 402.²⁴⁷ However, the court stated that even with a finding that the evidence was relevant, an analysis of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice is necessary before the evidence is to be admitted.²⁴⁸

The basis for the defendant's objection to the testimony, i.e., bolstering, was found to be an essentially non-existent objection under the Rules of Criminal Evidence.²⁴⁹ The court acknowledged that *Duckett*²⁵⁰ may have

the testimony did not directly state that the child was sexually abused or that the child was telling the truth. *Id.* at 290.

241. 849 S.W.2d at 818. *Cohn* apparently relied on language in *Duckett* which indicated that the credibility of the child must be attacked before this type of expert testimony is admissible. *See Duckett*, 797 S.W.2d at 917-20.

242. 849 S.W.2d at 818-19.

243. Texas Rule of Criminal Evidence 705(c) states: "Admissibility of Opinion: If the court determines that the expert does not have a sufficient basis for his opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data." TEX. R. CRIM. EVID. 705(c).

244. 849 S.W.2d at 819 & n.3.

245. *Id.* at 819.

246. Texas Rule of Criminal Evidence 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. CRIM. EVID. 401.

247. Texas Rule of Criminal Evidence 402 states: "All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible." TEX. R. CRIM. EVID. 402.

The court noted, however, that the testimony should have been objectionable, under Rule 702 and *Kelly v. State*, 824 S.W.2d 568, 574-75 (Tex. Crim. App. 1992) (Clinton, Jr., concurring), on the basis that the expert testimony was not helpful to a jury and that the jury did not need an expert to tell them that anxiety behavior is consistent with sexual abuse. 849 S.W.2d at 819 n.4.

Texas Rule of Criminal Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." TEX. R. CRIM. EVID. 702.

248. 849 S.W.2d at 819; *see* TEX. R. CRIM. EVID. 403. Texas Rule of Criminal Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. CRIM. EVID. 403.

249. 849 S.W.2d at 819-20.

250. 797 S.W.2d at 917, 919.

left the impression that relevant expert testimony of the type presented here is not admissible unless it serves some rehabilitative function.²⁵¹ However, the court specifically disapproved of this language in *Duckett* and held that the showing of a rehabilitative function is not required to admit this testimony.²⁵²

Bolstering occurs "when one item of evidence is improperly used by a party to add credence or weight to some earlier unimpeached piece of evidence offered by the same party."²⁵³ However, the court in *Cohn* stated that "evidence that corroborates another witness' story or enhances inferences to be drawn from another source of evidence, in the sense that it has an incrementally further tendency to establish a fact of consequence, should not be considered bolstering."²⁵⁴

Bolstering as an objection to evidence was found to have been essentially eliminated under the Rules of Evidence with two exceptions.²⁵⁵ Under Rule 608(a)²⁵⁶ opinion or reputation evidence as to the character of a party's own witness for truthfulness is admissible only after the witness' character for truthfulness has already been attacked by the other party. Rule 612(c)²⁵⁷ prevents the use of prior consistent statements of a witness for the sole purpose of enhancing his credibility. Neither rule addresses the admissibility of substantive evidence that happens to corroborate a witness.²⁵⁸ The court found that no rule in the Texas Rules of Criminal Evidence mandates the exclusion of relevant evidence simply because it corroborates the testimony of an earlier witness.²⁵⁹ In other words, testimony that is otherwise relevant and admissible is not rendered inadmissible just because it is "bolstering."

Concurring in the court's opinion, Judge Campbell pointed out that an objection that evidence is bolstering likely preserves nothing for review on

251. 849 S.W.2d at 819.

252. *Id.* at 819-21.

253. *See Sledge v. State*, 686 S.W.2d 127, 129 (Tex. Crim. App. 1984) (citing *Pless v. State*, 576 S.W.2d 83, 84 (Tex. Crim. App. 1978)).

254. 849 S.W.2d at 820.

255. *Id.* at 820.

256. Texas Rule of Criminal Evidence 608(a) states:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

TEX. R. CRIM. EVID. 608(a).

257. Texas Rule of Criminal Evidence 612(c) states: "A prior statement of a witness which is consistent with his testimony is inadmissible except as provided in 801(e)(1)(B)." TEX. R. CRIM. EVID. 612(c).

Texas Rule of Criminal Evidence 801(e)(1)(B) states: "A statement is not hearsay if:

(1) Prior statement by witness: The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive."

TEX. R. CRIM. EVID. 801(e)(1)(B).

258. 849 S.W.2d at 820.

259. *Id.* at 820-21.

appeal.²⁶⁰ Under the Rules of Evidence, a party objecting to certain evidence must object specifically under the rules and explain clearly to the trial court why particular evidence is inadmissible under the rules.²⁶¹

In a significant change in evidentiary rules on sexual offense prosecutions, the legislature amended Article 38.07 of the Texas Code of Criminal Procedure.²⁶² The amended version of the statute reads as follows:

A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense.

Id.

The prior version of the statute required the victim to report the offense within six months.²⁶³ Additionally, the prior version waived the reporting requirement only if the victim was younger than 14.²⁶⁴

XIV. JURY INSTRUCTIONS

In *Cage v. Louisiana*²⁶⁵ the Supreme Court previously held that a reasonable doubt instruction which equated reasonable doubt with "grave uncertainty" and "actual substantial doubt" was violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.²⁶⁶ In *Sullivan v. Louisiana*²⁶⁷ the Supreme Court took the *Cage* holding one step further and held that the giving of this same deficient reasonable doubt instruction requires reversal and is not amenable to a harmless error analysis.²⁶⁸

In *Sullivan* the defendant was convicted of first degree murder and sentenced to death in a Louisiana state court.²⁶⁹ On appeal, the Louisiana Supreme Court recognized, in conformity with *Cage*, that the reasonable doubt instruction was deficient but found it to be harmless beyond a reasonable doubt.²⁷⁰ The United States Supreme Court granted certiorari to decide whether the giving of a deficient harmless error instruction can be harmless error.²⁷¹

The Court, through Justice Scalia, cited *Duncan v. Louisiana*²⁷² for the

260. *Id.* at 821-22.

261. *Id.*

262. TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1994).

263. TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1993).

264. *Id.*

265. 498 U.S. 39 (1990) (per curiam).

266. 498 U.S. at 41.

267. 113 S. Ct. 2078 (1993).

268. *Id.* at 2081-83.

269. *Id.* at 2080.

270. 596 So. 2d 177, 186 (La. 1992).

271. 113 S. Ct. 373 (1992).

272. 391 U.S. 145, 149 (1968).

proposition that because the right to a trial by jury in serious criminal cases is "fundamental to the American scheme of justice" it therefore applies in state prosecutions.²⁷³ The most important element of this right is to have the jury rather than the judge reach the requisite finding of guilty.²⁷⁴ Under the Due Process Clause,²⁷⁵ the prosecution bears the burden of proving all elements of the offense beyond a reasonable doubt.²⁷⁶ Justice Scalia noted that the Fifth Amendment requirement of proof beyond a reasonable²⁷⁷ doubt and the Sixth Amendment requirement of a jury verdict²⁷⁸ are interrelated²⁷⁹ and that the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.²⁸⁰ Therefore, the deficient reasonable doubt instruction violated Sullivan's Sixth Amendment right to a jury trial.²⁸¹

Having reaffirmed the seriousness of the error in the jury instructions, the Court next addressed whether a harmless error analysis was appropriate.²⁸² In *Chapman v. California*²⁸³ the Court previously rejected the view that all federal constitutional errors in a criminal trial require reversal.²⁸⁴ Under *Chapman* and its progeny, two categories of constitutional error are established.²⁸⁵ The first category includes errors that may be harmless in terms of their effect on the fact-finding process at trial.²⁸⁶ The second category includes constitutional errors that will always invalidate a conviction.²⁸⁷ The Court found the error of giving the jury a constitutionally deficient reasonable doubt instruction to be in the second category and to require reversal without a harmless error analysis.²⁸⁸

Justice Scalia explained that *Chapman* instructs the reviewing court not to consider what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at bar.²⁸⁹ According to Justice Scalia, the inquiry "is not

273. 113 S. Ct. at 2080.

274. *Id.*; see *Sparf and Hansen v. U.S.*, 156 U.S. 51, 55-56 (1895).

275. "No person shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

"... nor shall any State deprive any person of life, liberty, or Property, without due Process of law." U.S. CONST. amend. XIV § 1.

276. 113 S. Ct. at 2080-81.

277. *In re Winship*, 397 U.S. 358, 364 (1970).

278. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI.

279. 113 S. Ct. at 2081.

280. *Id.*

281. *Id.*

282. *Id.*

283. 386 U.S. 18 (1967).

284. *Id.* at 21.

285. *Id.* at 24; *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *Arizona v. Fulminante*, 111 S. Ct. 1246, 1254 (1991).

286. 386 U.S. at 24.

287. 113 S. Ct. at 2081; *Fulminante*, 111 S. Ct. at 1265 (citing *inter alia*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial by a biased judge); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (right to self-representation).

288. 113 S. Ct. at 2081-82.

289. *Id.* at 2081.

whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."²⁹⁰ Since *Sullivan* did not receive a jury verdict within the meaning of the Sixth Amendment, the entire premise of the *Chapman* review is absent. Justice Scalia stated that since there is no jury verdict of beyond a reasonable doubt there can be no inquiry into whether the same verdict of guilty beyond a reasonable doubt would have been rendered absent the constitutional error.²⁹¹ In other words, since the basis of a harmless error analysis is to determine what effect the error had upon the guilty verdict rendered, and in this case the error is in the rendering of the verdict itself, there can be no harmless error analysis.

The Court also applied the test of *Arizona v. Fulminante*²⁹² in further concluding that a harmless error analysis is inappropriate.²⁹³ *Fulminante* distinguished between "structural defects in the constitution of the trial mechanism which defy analysis by 'harmless error' standards"²⁹⁴ and trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented."²⁹⁵ Justice Scalia found the right to a jury verdict of guilty beyond a reasonable doubt to be of the former sort.²⁹⁶ He stated that the "deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error,'"²⁹⁷ and are not amenable to a harmless error analysis.

XV. PUNISHMENT

The class of defendants eligible for deferred adjudication probation was significantly broadened by the Court of Criminal Appeals in *Cabezas v. State*.²⁹⁸ In *Cabezas* a unanimous court held that there is nothing in the statute governing deferred adjudication²⁹⁹ probation which limits the eligi-

290. *Id.* at 2081-82.

291. *Id.* at 2082.

292. 111 S. Ct. at 1252, 1254 (1991).

293. 113 S. Ct. at 2083.

294. 111 S. Ct. at 1264.

295. *Id.* at 1265.

296. 113 S. Ct. at 2083.

297. *Id.*

298. 848 S.W.2d 693 (Tex. Crim. App. 1993).

299. Article 42.12, Section 5 of the Texas Code of Criminal Procedure, now states in part: Deferred Adjudication; Community Supervision. (a) Except as provided by Subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision. The judge shall inform the defendant orally or in writing of the possible consequences under Subsection (b) of this section of a violation of community supervision. If the information is provided orally, the judge must record and maintain the judge's statement to the defendant. In a felony case, the period of community supervision may not exceed 10 years. In a misdemeanor case, the period of community supervision may not exceed two years. A judge may increase the maximum period of community supervision in the manner provided

bility for deferred adjudication to those cases where the minimum sentence is ten years or less.

Cabezas plead *nolo contendere* to the offense of delivery of cocaine weighing at least 400 grams. Under Texas Health and Safety Code, Section 481.112(d)(3),³⁰⁰ the minimum punishment for this offense was imprisonment for fifteen years. The trial court found the best interest of society and Cabezas would be served by deferring Cabezas's adjudication of guilt.³⁰¹ However, the trial court concluded that Cabezas was not eligible for deferred adjudication because his minimum punishment exceeded ten years.³⁰² Therefore, the court sentenced him to the statutory minimum of fifteen years imprisonment.³⁰³

The Court of Criminal Appeals distinguished deferred adjudication probation under Article 42.12, Section 5, Texas Code of Criminal Procedure, from that of court-ordered probation under Article 42.12, Section 3³⁰⁴ and jury-

by Section 22(c) of this article. The judge may impose a fine applicable to the offense and require any reasonable conditions of community supervision, including mental health treatment under Section 11(d) of this article, that a judge could impose on a defendant placed on community supervision for a conviction that was probated and suspended, including confinement. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the judge shall proceed to final adjudication as in all other cases.

TEX. CODE CRIM. PROC. ANN. art 42.12 (Vernon Supp. 1994).

300. Texas Health and Safety Code, Section 481.112, states in relevant part:

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1.

(c) A person commits an aggravated offense if the person commits an offense under Subsection (a) and the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants and dilutants, 28 grams or more.

(d) An offense under Subsection (c) is:

(3) punishable by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed \$250,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon 1992).

301. 848 S.W.2d at 693.

302. *Id.*

303. *Id.*

304. Article 42.12, Section 3, Texas Code of Criminal Procedure, now states:
Judge Ordered Community Supervision.

(a) A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or *nolo contendere*, may suspend the imposition of the sentence and place the defendant on community supervision or impose a fine applicable to the offense and place the defendant on community supervision.

(b) In a felony case the minimum period of community supervision is the same as the minimum term of imprisonment applicable to the offense and the maximum period of community supervision is 10 years.

(c) The maximum period of community supervision in a misdemeanor case is two years.

(d) A judge may increase the maximum period of community supervision in the manner provided by Section 22(c) of this article.

ordered probation under Article 42.12, Section 4.³⁰⁵ A defendant is eligible for court-ordered probation "where the maximum punishment assessed against the defendant does not exceed 10 years imprisonment."³⁰⁶ A defendant is eligible for probation from a jury where the defendant has never before been convicted of a felony in Texas or any other state and where the punishment assessed by the jury does not exceed ten years.³⁰⁷ By contrast, the statutory language establishing eligibility for deferred adjudication makes no reference to any maximum sentence length.³⁰⁸ The court found this difference in the statutory language controlling and concluded that the fact that the offense carries a statutory minimum sentence of over ten years does not affect eligibility for deferred adjudication probation.³⁰⁹

The court noted that it had previously held that when a defendant was not eligible for one type of probation, that fact does not preclude his eligibility for another type of probation.³¹⁰ In *West v. State*³¹¹ the court held that even though a defendant convicted of aggravated sexual assault was precluded

(e) A defendant is not eligible for community supervision under this section if the defendant:

- (1) is sentenced to a term of imprisonment that exceeds 10 years; or
- (2) is sentenced to serve a term of confinement under Section 12.35, Penal Code.

TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon Supp. 1994).

305. 848 S.W.2d at 694. Article 42.12, Section 4 of the Texas Code of Criminal Procedure, now states:

Jury Recommended Community Supervision.

(a) A jury that imposes confinement as punishment for an offense may recommend to the judge that the judge suspend the imposition of the sentence and place the defendant on community supervision. A judge shall suspend the imposition of the sentence and place the defendant on community supervision if the jury makes that recommendation in the verdict.

(b) If the jury recommends to the judge that the judge place the defendant on community supervision, the judge shall place the defendant on community supervision for any period permitted under Section 3(b) or 3(c) of this article, as appropriate.

(c) A judge may increase the maximum period of community supervision in the manner provided by Section 22(c) of this article.

(d) A defendant is not eligible for community supervision under this section if the defendant:

- (1) is sentenced to a term of imprisonment that exceeds 10 years;
- (2) is sentenced to serve a term of confinement under Section 12.35, Penal Code; or

(3) does not file a sworn motion under Subsection (e) of this section or for whom the jury does not enter in the verdict a finding that the information contained in the motion is true.

(e) A defendant is eligible for community supervision under this section only if before the trial begins the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony in this or any other state, and the jury enters in the verdict a finding that the information in the defendant's motion is true.

TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon Supp. 1994).

306. *Id.* § 3.

307. *Id.* § 4.

308. *Id.* § 5.

309. 848 S.W.2d at 694-95.

310. *Id.* at 694.

311. 702 S.W.2d 629 (Tex. Crim. App. 1986).

from regular court-ordered probation under Article 42.12, Section 3g(a)(1),³¹² such preclusion did not necessarily foreclose the option of deferred adjudication under Article 42.12, Section 5.³¹³ Following *West*, the *Cabezas* court held that the statutory language controls eligibility for deferred adjudication.³¹⁴ Since *Cabezas* was not precluded from receiving it, he was eligible.³¹⁵

In *Cabezas* the State argued that public policy precluded allowing deferred adjudication in cases where high minimum sentences were established by the legislature.³¹⁶ In particular, the court recognized that a habitual offender, indicted under Texas Penal Code, Section 12.42³¹⁷ would be eligible for deferred adjudication probation even though his statutory minimum sentence was twenty-five years.³¹⁸ Nevertheless, the court noted that the deferred adjudication statute provides that deferred adjudication will only be granted when "the best interest of society and the defendant will be served."³¹⁹ The opinion stated, "we do not perceive of a scenario where the interests of society will be best served by granting deferred adjudication to habitual offenders."³²⁰ However, if a trial court believes, for whatever reason, that the best interest of society and the defendant would be served by granting an habitual offender probation, he is free to do so.

312. Article 42.12, Section 3g(a)(1) and (2), now states in part:

Limitation on Judge Ordered Community Supervision. (a) The provisions of Section 3 of this article do not apply:

(1) to a defendant adjudged guilty of an offense defined by the following sections of the Penal Code:

- (A) Section 19.02 (Murder);
- (B) Section 19.03 (Capital Murder);
- (C) Section 21.11(a)(1) (Indecency with a child);
- (D) Section 20.04 (Aggravated kidnapping);
- (E) Section 22.021 (Aggravated sexual assault);
- (F) Section 29.03 (Aggravated robbery); or

(2) to a defendant when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. On an affirmative finding under this subdivision, the trial court shall enter the finding in the judgment of the court. On an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in its judgment.

TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon Supp. 1994).

313. 702 S.W.2d at 634.

314. 848 S.W.2d at 694-95.

315. *Id.*

316. *Id.* at 695.

317. Texas Penal Code, Section 12.42, states in part:

(d) If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 25 years.

TEX. PENAL CODE ANN. § 12.42 (Vernon Supp. 1993).

318. 848 S.W.2d at 695.

319. *Id.*

320. *Id.*

In late 1992, the conflict between the courts of appeals over whether unadjudicated extraneous offenses were admissible at the punishment phase of a non-capital offense was resolved by the Court of Criminal Appeals. In the consolidated cases of *Grunsfeld v. State*³²¹ and *Hunter v. State*³²² the court concluded that evidence of unadjudicated extraneous offenses was not admissible under these circumstances.³²³ However, in 1993, the Texas legislature weighed in with what is likely the final word on the subject, legislatively overruling *Grunsfeld* and establishing that evidence of unadjudicated extraneous offenses is admissible at the punishment phase of a non-capital trial under certain circumstances.³²⁴

In *Grunsfeld* the court consolidated two courts of appeals cases requesting review of the same issue. The courts of appeals interpreted the 1989 amendment to Article 37.07(3)(a) of the Texas Code of Criminal Procedure, in different ways. The specific language at issue from the 1989 amendment stated that evidence may be offered at punishment as to "any matter the court deems relevant to sentencing"³²⁵ In *Grunsfeld*³²⁶ the Dallas Court of Appeals held that this language did not change prior law which prohibited the introduction of evidence of unadjudicated extraneous offenses at the punishment phase of a non-capital trial.³²⁷ In *Hunter*³²⁸ the Ft. Worth Court of Appeals came to the opposite conclusion, ruling that the amendment to Article 37.07(3)(a) was intended to have the same meaning and effect as Article 37.071(2)(a) of the³²⁹ Texas Code of Criminal Procedure, which has been interpreted as allowing evidence of unadjudicated extraneous offenses to be presented in the punishment phase of a capital murder prosecution.³³⁰

The Court of Criminal Appeals overruled *Hunter* and affirmed *Grunsfeld*, agreeing with the Dallas Court of Appeals by construing Article 37.07(3)(a) to provide that even if deemed relevant to sentencing by the trial court, evidence is not admissible at punishment unless (1) it is permitted by the Rules of Evidence and (2) if the evidence sought to be admitted is evidence of an extraneous offense, it satisfies Article 37.07(3)(a)'s definition of prior criminal record.³³¹ Since the definition of prior criminal record under Article

321. 843 S.W.2d 521 (Tex. Crim. App. 1992).

322. *Id.*

323. *Id.*

324. TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon Supp. 1994).

325. 843 S.W.2d at 522.

326. *Grunsfeld v. State*, 813 S.W.2d 158 (Tex. App.—Dallas 1991).

327. 843 S.W.2d at 522.

328. *Hunter v. State*, No. 2-90-170-CR (Tex. App.—Ft. Worth, August 30, 1991) (unpublished opinion).

329. Article 37.071(2)(a) provided in relevant part that in the punishment phase of a capital murder prosecution "evidence may be presented as to any matter the court deems relevant to sentence." TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(a) (Vernon Supp. 1993). This language has been consistently interpreted as allowing introduction of evidence of extraneous unadjudicated offense at the punishment phase of a capital murder trial. See *Gentry v. State*, 770 S.W.2d 780, 793 (Tex. Crim. App. 1988); *Rumbaugh v. State*, 629 S.W.2d 747, 754 (Tex. Crim. App. 1982); *Garcia v. State*, 581 S.W.2d 168, 178-79 (Tex. Crim. App. 1979).

330. 843 S.W.2d at 522.

331. *Id.* at 523.

37.07(3)(a)³³² does not include unadjudicated extraneous offenses, their admission was prohibited.

Determined not to allow *Grunsfeld* to be the final word on the issue, the Texas legislature in 1993 amended Article 37.07(3)(a).³³³ In unambiguous

332. Article 37.07(3)(a) previously defined prior criminal record as follows: "The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged." TEX. CODE CRIM. PROC. ANN. art. 37.07(3)(a) (Vernon Supp. 1993).

This language has been removed from the amended version of Article 37.07(3)(a). TEX. CODE CRIM. PROC. ANN. art. 37.07(3)(a) (Vernon Supp. 1994).

333. Article 37.07(3)(a), now reads:

Section 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.

(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Criminal Evidence, any other 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. A court may consider as a factor in mitigating punishment the conduct of a defendant while participating in a program under Chapter 17 of this code as a condition of release on bail. Additionally, notwithstanding Rule 609(d), Texas Rules of Criminal Evidence, evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of felony unless:

(1) the adjudication is based on conduct committed more than five years before the commission of the offense for which the person is being tried; and

(2) in the five years preceding the date of the commission of the offense for which the person is being tried, the person did not engage in conduct for which the person has been adjudicated as a delinquent child or a child in need of supervision and did not commit an offense for which the person has been convicted.

(b) After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(c) In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

(d) When the judge assesses the punishment, he may order an investigative report as contemplated in Section 9 of Article 42.12 of this code and after considering the report, and after the hearing of the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.

(e) Nothing herein contained shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

(f) In cases in which the matter of punishment is referred to a jury, either party may offer into evidence the availability of community corrections facilities serving the jurisdiction in which the offense was committed.

(g) On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Criminal Evidence. If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final

language, the new version of the statute provides that evidence may be offered at the punishment phase of a trial as to any "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."³³⁴ Since Texas case law has consistently allowed admission of evidence of unadjudicated extraneous offenses in the punishment phase of capital murder prosecutions³³⁵ and since the language of the amended Article 37.07(3)(a) is clear, this type of evidence will become common in prosecutions throughout the state.

XVI. MOTION FOR NEW TRIAL

Rule 30(b) of the Texas Rules of Appellate Procedure³³⁶ lists a number of grounds upon which a trial court may grant a new trial. In *Reyes v. State*³³⁷ the state argued that the list was an exclusive one. The Court of Criminal Appeals, however, stated that the rule does not limit the grounds upon which a new trial may be granted.³³⁸ The list is illustrative rather than exhaustive.³³⁹ Consequently, the court held that ineffective assistance of counsel may be raised in a motion for new trial.³⁴⁰ The court then went on to consider whether a trial court must hold a hearing on a motion for new trial that is based on ineffective assistance of counsel.³⁴¹ The court held that when a defendant raises matters in a motion for new trial that are not determinable from the record and upon which the defendant could be entitled to relief, it is an abuse of discretion for the trial judge to fail to hold a hearing on the motion.³⁴²

The non-exclusive nature of the list of grounds in Rule 30(b) upon which a motion for new trial may be based was dramatically illustrated in *State v. Gonzales*.³⁴³ In that case, the defendant asked the trial judge for a new trial "in the interest of justice."³⁴⁴ The trial judge granted the motion and the State appealed. The State first complained about the granting of a new trial

conviction in a court of record or a probated or suspended sentence, notice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon Supp. 1994).

334. *Id.*

335. See *Gentry, Rumbaugh, Garcia, supra* note 330.

336. TEX. R. APP. P. 30(b).

337. 849 S.W.2d 812 (Tex. Crim. App. 1993).

338. *Id.* at 814.

339. *Id.* at 815.

340. *Id.*

341. *Id.*

342. *Id.* at 816; *cf. Jordan v. State*, 852 S.W.2d 689, 692 (Tex. App.—Houston [14th] 1993) (hearing not necessary on motion for new trial raising ineffective assistance of counsel because specific allegations, even if true, would not entitle defendant to relief).

343. 855 S.W.2d 692 (Tex. Crim. App. 1993).

344. *Id.* at 693.

on a basis not identified in Rule 30(b). The Court of Criminal Appeals upheld the trial judge's action by reiterating that the grounds identified in Rule 30(b) are not the exclusive grounds upon which a motion for new trial may be granted.³⁴⁵ The State then complained both about the failure of the new trial motion to allege a factual basis and about the failure of the defendant to offer proof demonstrating that the trial judge erred in accepting the defendant's guilty pleas. The Court of Criminal Appeals agreed that a defendant must allege sufficient grounds in a motion for new trial to apprise the court and the State why he believes himself entitled to a new trial.³⁴⁶ The court, however, held that the allegation that a witness was unavailable to testify at the defendant's trial coupled with the presentation of that witness at the hearing on the motion for new trial is sufficient, even though it was never specified what the witness would have testified about, because the State failed to develop a record on that matter when given the opportunity.³⁴⁷ Finally, the Court of Criminal Appeals held that the granting of a motion for new trial, just like the denial of a motion for new trial, would be judged by the abuse of discretion standard.³⁴⁸

The Texas legislature amended the Code of Criminal Procedure to provide a defendant with a right to a new trial "where material evidence favorable to the accused has been discovered since trial."³⁴⁹ It is unclear how this statute fits in with the provisions of the Texas Rules of Appellate Procedure governing motions for new trial.

The legislature also amended the Code of Criminal Procedure to allow a defendant a new trial if requested within ten days after the entry of a judgment of conviction for a Class C misdemeanor offense based on the forfeiture of a cash bond.³⁵⁰ In order to effect this right a trial court must notify a defendant, in writing, of the entry of the judgment.³⁵¹

XVII. APPEAL

The Texas Rules of Appellate Procedure require a defendant to file notice of appeal within thirty days "after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge."³⁵² In *Rodarte v. State*³⁵³ the appellant argued that the rule is ambiguous in cases of direct appeal from a judgment of conviction. According to the appellant, the time period for filing a notice of appeal could start from the day sentence is imposed or suspended in open court *or* from the day the judgment, "an appealable order," is signed. The Court of Criminal Appeals,

345. *Id.* at 694.

346. *Id.* at 694-95.

347. *Id.* at 695.

348. *Id.* at 696; *accord*, *State v. Charlton*, 847 S.W.2d 443, 444 (Tex. App.—Houston [1st] 1993).

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

350. TEX. CODE CRIM. PROC. ANN. art. 45.231(b)(2) (Vernon Supp. 1994).

351. *Id.*

352. TEX. R. APP. P. 41(b)(1) (the time period is extended to ninety days if a motion for new trial is filed).

353. 860 S.W.2d 108 (Tex. Crim. App. 1993).

however, did not find the rule to be ambiguous.³⁵⁴ The court found the starting point for calculating the timeliness of a notice of appeal “depends upon what is being appealed.”³⁵⁵ When the defendant appeals from a judgment of conviction, the starting point for determining when a notice of appeal should be filed is the day sentence is imposed or suspended in open court.³⁵⁶ In other appeals, such as from the denial on the merits of an application for writ of habeas corpus or when the State appeals, the timetable begins on the day of the signing of an appealable order.³⁵⁷ Appellant’s notice of appeal came thirty-one days after the day sentence was imposed in open court and was thus untimely.³⁵⁸

An appellant is entitled to a new trial if he makes a timely request for a statement of facts and the statement of facts cannot be prepared because the court reporter’s notes and records have been lost or destroyed without appellant’s fault.³⁵⁹ A request is “timely” if it is made in writing to the court reporter at or before the time prescribed for perfecting the appeal.³⁶⁰ In addition, an appellant must show due diligence in attempting to obtain a complete statement of facts before a new trial will be ordered because of a missing statement of facts.³⁶¹ A request to one court reporter for a statement of facts does not constitute a request to another court reporter who may have reported another part of the proceedings.³⁶² Doing nothing once the appellant learns that a second court reporter reported part of the proceedings does not constitute due diligence.³⁶³ In such a circumstance, the appellant is not entitled to a new trial.³⁶⁴

In *Olowosuko v. State*³⁶⁵ the Court of Criminal Appeals reiterated that no appeal may be taken from a determination to proceed with an adjudication of guilt.³⁶⁶ An appeal, however, may be taken from all proceedings after the adjudication of guilt.³⁶⁷

In *Marin v. State*³⁶⁸ the Court of Criminal Appeals divided the various rules governing the Texas criminal justice system into three kinds: “(1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.”³⁶⁹ The first two catego-

354. *Id.* at 109.

355. *Id.*

356. *Id.*

357. *Id.* at 110.

358. *Id.*

359. TEX. R. APP. P. 50(e).

360. TEX. R. APP. P. 53(a).

361. *Culton v. State*, 852 S.W.2d 512, 514 (Tex. Crim. App. 1993).

362. *Id.* at 515.

363. *Id.*

364. *Id.*

365. 826 S.W.2d 940 (Tex. Crim. App. 1992).

366. *Id.* at 942; see TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (Vernon Supp. 1994).

367. *Id.*

368. 851 S.W.2d 275 (Tex. Crim. App. 1993).

369. *Id.* at 279 (For example, an absolute requirement of the system is that a felony offense may not be tried in a County Court at Law even by consent. A waivable requirement is the right to a jury trial. Most evidentiary rules fall into the third category).

ries of rules cannot be the subject of procedural default on appeal because, by definition, they are not forfeitable by the mere failure to assert them.³⁷⁰ The third category, however, is forfeited on appeal by the failure of the litigant to assert his right in the trial court.³⁷¹ Accordingly, the court held that Rule 52(a) of the Rules of Appellate Procedure applies only to the actions of the trial judge concerning matters about which a party forfeits the right to complain on appeal if he does not object to the denial of his right at trial.³⁷² Marin was therefore not required to object in the trial court to the failure to allow appointed counsel ten days to prepare for trial because that right must be expressly waived.³⁷³ The trial court's error in putting Marin to trial without first allowing his appointed counsel ten days to prepare is not subject to a harmless error analysis because the record is not likely to provide concrete data from which an appellate court can measure the error.³⁷⁴

Most lawyers have grown up with the belief that it is impossible to reverse a bench trial on appeal because of erroneous evidentiary rulings. This belief prevailed because appellate courts presumed that improperly admitted evidence was disregarded by the trial court.³⁷⁵ The Court of Criminal Appeals, in a decision that could have far reaching implications, overturned that presumption in *Gipson v. State*.³⁷⁶ The trial court in *Gipson* erroneously admitted a confession into evidence. The trial judge specifically stated that she relied, in part, on the confession in finding the defendant guilty. The Court of Criminal Appeals held that the promulgation of Rule 81(b)(2) of the Rules of Appellate Procedure voided the presumption that a trial judge disregards improperly admitted evidence.³⁷⁷ Thus, since the judge did rely on the confession in reaching her judgment, the Court of Criminal Appeals could not determine beyond a reasonable doubt that the error made no contribution to the conviction.³⁷⁸ The conviction was therefore reversed.³⁷⁹

In *Bigley v. State*³⁸⁰ the appellant was convicted by a jury of the offense of possession of 400 grams or more of methamphetamine. The court of appeals found the evidence insufficient to support that conviction. The court of appeals, however, found sufficient evidence to support a conviction of posses-

370. *Id.*

371. *Id.* at 280.

372. *Id.* A party must present a timely request, complaint, or motion to the trial court to preserve a complaint for appellate review. TEX. R. APP. P. 52(a).

373. 851 S.W.2d at 280. Appointed counsel has ten days to prepare for a proceeding unless the time is waived with the consent of the defendant. TEX. CODE CRIM. PROC. ANN. art. 1.051(e) (Vernon Supp. 1994).

374. 851 S.W.2d at 282; see also *Meek v. State*, *supra* refusing to apply a harmless error analysis to the failure of a defendant to execute a written jury waiver.

375. See, e.g., *Johnson v. State*, 478 S.W.2d 442, 444 (Tex. Crim. App. 1972).

376. 844 S.W.2d 738 (Tex. Crim. App. 1992).

377. *Id.* at 741; Texas Rules of Appellate Procedure 81(B)(2) states: "Reversible Error. Criminal Cases. If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment." TEX. R. APP. P. 81(B)(2).

378. 844 S.W.2d at 741.

379. *Id.*

380. No. 939-92 (Tex. Crim. App. June 16, 1993).

sion of methamphetamine in an amount of twenty-eight grams or more but less than 400 grams. Because the jury had been instructed on the lesser included offense, the court of appeals reformed the judgment to reflect a conviction of the lesser offense and then remanded for a new punishment hearing. The Court of Criminal Appeals interpreted Rule 80 of the Texas Rules of Appellate Procedure to authorize this procedure.³⁸¹ The Court of Criminal Appeals therefore affirmed the court of appeals.³⁸²

381. *Id.* slip op. at 2-3; Texas Rules of Appellate Procedure 80(b), reads in pertinent part as follows: "The court of appeals may: . . . (2) modify the judgment of the court below by correcting or reforming it . . ." TEX. R. APP. P. 80(b).

382. The Court of Criminal Appeals also held that it did not have the authority to reform a judgment in such a manner. No. 939-92, slip op. at 2-3.

