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Criminal Law

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CRIMINAL LAW

*Judge Chuck Miller**
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THIS Article addresses substantive criminal law. First, it discusses recent and significant amendments to the Texas Penal Code by the Texas Legislature. Most of these new amendments were effective September 1, 1994, and no case law interpreting them has yet been written. Second, this article compiles those particularly important decisions from the 1993-1994 term of the Texas Court of Criminal Appeals that will have a pervasive impact on the trial of criminal cases in Texas, as well as a few relevant cases from the United States Supreme Court. The cases cited and discussed in this article were selected either because 1) they should have the most significant impact on the trials of criminal cases in Texas, 2) they provide an excellent recapitulation of established legal principles or 3) they reaffirm established caselaw that had come into question or fallen into disuse. The cases are set out by topic, in the general order in which they occur in the evolution of a criminal case.

I. SELECTED PENAL CODE PROVISIONS

This portion presents recent changes in the Texas Penal Code. There have been numerous additions and revisions, including the addition of a new class of punishment called the "state jail felony." Most of the changes reflect the state's new policy that our jail cells should be reserved for the most serious offenders. Because of limited space, this article will only discuss the more significant changes.

A. REQUIREMENT OF VOLUNTARY ACT OR OMISSION

A person may now be prosecuted for the failure to act where there is a duty to act under any law, including constitutional law or a written opinion of a court of record, and not just statutory law.¹

B. SELF DEFENSE

The legislature eliminated the common law "right to arm yourself and seek a peaceful resolution" defense.² Section 9.31(a)(5) was added to prohibit the use of force against another if "the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was carrying a weapon in violation of Section 46.02 [Penal Code]."³

C. PUNISHMENTS

The legislature created a new punishment category called a state jail felony,⁴ which is essentially a fourth degree felony.⁵ A state jail felony has a punishment range of 180 days to two years.⁶ After a judge or jury has assessed a sentence within this range, the judge must automatically suspend the sentence and place the defendant on a period of community supervision ranging from two to five years.⁷ The judge may, however, require that the defendant serve short periods of time in county or state jail as a condition of the community supervision.⁸

State jail felonies are listed throughout the Penal Code and largely consist of previous third degree, low-level property felonies (such as theft of property valued at \$1500 or more, but less than \$20,000,⁹ forgery,¹⁰ credit card or debit card abuse),¹¹ and some former misdemeanors (such as criminally negligent homicide¹² and criminal nonsupport¹³). In addition, some previously first or second degree felonies are now state jail felonies,

1. TEX. PENAL CODE ANN. §§ 1.07(a)(30), 6.01(c) (Vernon 1994).

2. *Id.* § 9.31 (amending § 9.31 (Vernon 1993)).

3. *Id.* § 9.31(a)(5).

4. *Id.* § 12.35.

5. A detailed analysis of the State Jail Felony system is beyond the scope of this survey. For a full discussion of this system, see George E. West, *The New Penal Code, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, 1 ADVANCED CRIMINAL LAW COURSE G* (1994).

6. TEX. PENAL CODE ANN. § 12.35(a) (Vernon 1994).

7. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(a)(b) (Vernon Supp. 1994).

8. Confinement, as a condition of the suspension, is limited to up to 30 days in a county jail or 60 days in a state jail if a defendant has no prior felony convictions; up to 60 days in county jail or 180 days in a state jail if a defendant has one prior felony conviction; or up to a year in a state jail if a defendant has 2 or more prior felony convictions or is convicted of delivery of less than one gram of a controlled substance in penalty group 1. See *id.* art. 42.12, §§ (b), (c), (d).

9. TEX. PENAL CODE ANN. § 31.03(e)(4) (Vernon 1994).

10. *Id.* § 32.21.

11. *Id.* § 32.31.

12. *Id.* § 19.05.

13. *Id.* § 25.05.

such as burglary of a building other than a habitation,¹⁴ or possession and delivery of less than one gram of a penalty group I controlled substance.¹⁵

D. CRIMINAL HOMICIDE

1. Murder

The legislature eliminated voluntary manslaughter as an offense separate from murder.¹⁶ Revised section 19.02 makes voluntary manslaughter a punishment issue where the defendant must prove, by a preponderance of the evidence, that "he caused the death under the immediate influence of sudden passion arising from an adequate cause."¹⁷

2. Capital Murder

The legislature created three new categories of capital murder.¹⁸ First, revised section 19.03 makes it a capital offense to knowingly or intentionally murder a child under six years of age.¹⁹ Second, it is capital murder for prison inmates to commit murder "with the intent to establish, maintain, or participate in a combination [prison gang] or in the profits of a combination . . ."²⁰ Finally, a prison inmate commits a capital offense if he murders another: 1) while incarcerated for murder or capital murder²¹ or 2) while serving a sentence of life or ninety-nine years for aggravated kidnapping,²² aggravated sexual assault²³ or aggravated robbery.²⁴

E. KIDNAPPING

Section 20.04(c) was added to make the voluntary release of the victim in a safe place a punishment issue that the defendant must prove by a preponderance of the evidence.²⁵ It is not an issue for the guilt/innocence phase of the trial.²⁶

F. ASSAULT

Section 22.01 of the Penal Code was modified to simplify the assault classifications. Causing bodily injury is now a Class "A" misdemeanor,

14. TEX. PENAL CODE ANN. § 30.02(c)(1).

15. TEX. HEALTH & SAFETY CODE ANN. §§ 481.115, 481.112 (Vernon Supp. 1995).

16. See TEX. PENAL CODE ANN. § 19.02 Historical and Statutory Note; see also *id.* § 19.04 Historical and Statutory Note.

17. TEX. PENAL CODE ANN. § 19.02(d) (Vernon 1994).

18. *Id.* § 19.03.

19. *Id.* § 19.03(a)(8).

20. *Id.* § 19.03(a)(5)(B).

21. *Id.* § 19.03(a)(6)(A).

22. TEX. PENAL CODE ANN. §§ 19.03(a)(6)(B), 20.04 (Vernon 1994).

23. *Id.* §§ 19.03(a)(6)(B), 22.021.

24. *Id.* §§ 19.03(a)(6)(B), 29.03.

25. *Id.* § 20.04(c).

26. *Id.* (effectively overruling *Williams v. State*, 851 S.W.2d 282 (Tex. Crim. App. 1993)).

and threatening injury or causing offensive contact is a Class "C" misdemeanor.²⁷

G. SEXUAL ASSAULT

Section 22.011(b)(8) was added to make clear that sexual assault "is without the consent of the other person if . . . the actor is a public servant who coerces the other person to submit or participate."²⁸ Coercion means threatening to commit an offense; to inflict bodily injury on any person in the future; to accuse a person of an offense; to expose a person to hatred, contempt or ridicule; to harm the credit or business repute of any person; or to take or withhold action as a public servant.²⁹

The legislature eliminated the promiscuity of a victim between fourteen and seventeen years of age as a defense to sexual assault³⁰ or indecency with a child.³¹ The affirmative defense that the actor was not more than two years older than the victim was increased to three years for both offenses.³²

H. AGGRAVATED ASSAULT

An aggravated assault is committed now by not only causing serious bodily injury, but also merely exhibiting a deadly weapon.³³ An offense under this section is now upgraded from a third to a second degree felony.³⁴ The offense becomes a first degree felony, however, if it is committed:

(1) by a public servant acting under color of the servant's office or employment; (2) against a . . . public servant while the . . . servant is lawfully discharging an official duty, or in retaliation . . . of an exercise of official power or performance of an official duty . . .; or (3) in retaliation against or on account of the service of another as a witness, . . . informant, or person . . . report[ing] . . . [a] crime.³⁵

The actor is presumed to know the victim is a public servant if the servant is wearing a badge or uniform.³⁶

I. AGGRAVATED SEXUAL ASSAULT

Section 22.021(a)(2)(v) was added to elevate sexual assault to aggravated sexual assault if the defendant acts in concert with another.³⁷ This revision is primarily aimed at gang-type rapes.

27. TEX. PENAL CODE ANN. § 22.01 (Vernon 1994).

28. *Id.* § 22.011(b)(8).

29. *Id.* § 1.07(a)(9).

30. *See id.* § 22.011(d).

31. *See* TEX. PENAL CODE ANN. § 21.11 (Vernon 1994).

32. *Id.* §§ 22.011(e), 21.11(b)(1).

33. *Id.* § 22.02(a)(2).

34. *Id.* § 22.02(b).

35. *Id.* § 22.02(b).

36. TEX. PENAL CODE ANN. § 22.02(c) (Vernon 1994).

37. *Id.* § 22.021(a)(2)(v).

J. INJURY TO A CHILD, ELDERLY INDIVIDUAL OR DISABLED INDIVIDUAL

An affirmative defense was added for a defendant charged with injury by omission.³⁸ The defendant must show: 1) no evidence exists that the defendant knew of any injury prior to the charged act and failed to report it; 2) the defendant was a victim of family violence committed by a codefendant in the injury case; 3) the defendant did not actually cause the injury; and 4) the defendant did not reasonably believe at the time of the omission that an effort to prevent the offense would have an effect.³⁹

K. DEADLY CONDUCT

Formerly entitled "Reckless Conduct," section 22.05 increases the penalty for pointing a firearm in the direction of another to a Class "A" misdemeanor.⁴⁰ Additionally, it is now a third degree felony to knowingly discharge a firearm 1) at or in the direction of a person, or 2) in the direction of a habitation, building or vehicle where the actor "is reckless as to whether the habitation, building, or vehicle is occupied."⁴¹ The changes in this law were primarily made to address drive-by shootings.

L. CRIMINAL MISCHIEF

The legislature has created a new value ladder in all value-related offenses such as criminal mischief, theft, and theft of services:⁴²

PUNISHMENT RANGE	PREVIOUS VALUE	NEW VALUE
Class C Misdemeanor	Less than \$20	Same
Class B Misdemeanor	\$20 or more, but less than \$200	\$20 or more, but less than \$500
Class A Misdemeanor	\$200 or more, but less than \$750	\$500 or more, but less than \$1,500
State Jail Felony	N/A	\$1,500 or more, but less than \$20,000
3rd Degree Felony	\$750 or more, but less than \$20,000	\$20,000 or more, but less than \$100,000
2nd Degree Felony	\$20,000 or more, but less than \$100,000	\$100,000 or more, but less than \$200,000
1st Degree Felony	\$100,000 or more ⁴³	\$200,000 or more

38. See *id.* § 22.04(k)(2).

39. *Id.* § 22.04(k)(2).

40. *Id.* § 22.05(e).

41. TEX. PENAL CODE ANN. § 22.05(b) (Vernon 1994).

42. See *id.* §§ 28.03, 31.03, 31.04. A similar value ladder has also been used for the following offenses: interference with railroad property, *id.* § 28.07; illegal recruitment of athlete, *id.* § 32.441; misapplication of fiduciary property, *id.* § 32.45; and securing execution of document by deception, *id.* § 32.46.

43. Prior to the 1993 amendments, criminal mischief and theft of services did not have loss values representing a 1st degree felony. TEX. PENAL CODE ANN. §§ 28.03, 31.04 (Vernon 1994). For these crimes, any loss value of \$20,000 or more was a 2nd degree

M. BURGLARY

Burglary of a habitation with the intent to commit theft is now a second degree felony, and burglary of a building other than a habitation with the intent to commit a felony or theft is now a state jail felony.⁴⁴ However, burglary of a habitation with the intent to commit a felony other than theft remains a first degree felony.⁴⁵ Burglary of a vehicle has been downgraded from a third degree felony to a class "A" misdemeanor.⁴⁶

N. THEFT

The legislature has adopted a new value ladder for theft that is similar to the one used for criminal mischief.⁴⁷ The definition of coercion has been moved to the general definition section.⁴⁸ Additionally, under section 31.01, consent is not effective if "given by a person who by reason of advanced age is known by the actor to have []diminished capacity to make informed and rational decisions about the reasonable disposition of property."⁴⁹

O. BRIBERY AND CORRUPT INFLUENCE

Several changes were made in this chapter of the Penal Code. First, "an expenditure made and reported in accordance with Chapter 305, Government Code" is now included as a prohibited benefit.⁵⁰ Second, the legislature added a prohibition against offering or conferring a benefit on a witness "to abstain from, discontinue, or delay the prosecution of another witness."⁵¹ Third, revised section 36.06 now prohibits harming or threatening to harm another to prevent or delay the service of a public servant, witness or informant.⁵² The previous version of the statute only prohibited harming or threatening harm in retaliation.⁵³ Fourth, section 36.07 was amended to allow public servants to accept meals, lodging, and transportation expenses for engagements where the public servant renders services that are more than "merely perfunctory."⁵⁴ Fifth, the legislature now allows public servants who receive unsolicited gifts to donate the gift to the government or to a charitable organization.⁵⁵ Finally, items under fifty dollars (excluding cash or a negotiable instrument) and

felony. *Id.* In this comparative chart, the 1st degree felony classification applied only to theft. *Id.* § 31.03.

44. *Id.* § 30.02 (c).

45. *Id.* § 30.02(d).

46. TEX. PENAL CODE ANN. § 30.04(c) (Vernon 1994).

47. *See supra* part I(L).

48. *See* TEX. PENAL CODE ANN. § 1.07(9) (Vernon 1994).

49. *Id.* § 31.01(3)(E).

50. *Id.* § 36.02(a)(4); *see* TEX. GOV'T CODE ANN. § 305 (Vernon 1988) (concerning lobbying activities).

51. TEX. PENAL CODE ANN. § 36.05(a)(5) (Vernon 1994).

52. *Id.* § 36.06(a)(2).

53. *Id.* § 36.06(a)(1) (Vernon Supp. 1993).

54. *Id.* § 36.07(b) (Vernon 1994).

55. *Id.* § 36.08(i).

items issued by a governmental entity that allow the use of property or facilities owned, leased or operated by the entity are exempted from section 36.08 (gift to a public servant) and section 36.09 (offering gift to a public servant).⁵⁶

P. PERJURY & OTHER FALSIFICATION

The legislature rewrote section 37.08 to penalize a person who makes a false *statement* to a peace officer conducting a criminal investigation, if the statement is material to the investigation.⁵⁷ Previously, the person only committed an offense if he related a false *incident* to a peace officer.⁵⁸

Q. PUBLIC INDECENCY

The definition of "child" was raised from under seventeen to under eighteen years old in sections 43.25 (Sexual Performance by a Child) and 43.251 (Employment Harmful to Children).⁵⁹

R. WEAPONS

A felon may not carry a firearm within five years of his release from confinement or supervision, and then he may only carry it at the premises where he lives.⁶⁰ Formerly, a person convicted of a violent felony could not possess a firearm away from the premises where he lived.⁶¹ Additionally, section 46.06 was revised to prohibit a person from selling a firearm to a felon within five years of the felon's release.⁶²

S. INTOXICATION AND ALCOHOLIC BEVERAGE OFFENSES

1. Definitions

The definition of "intoxicated" was modified as follows: "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a *dangerous drug*, a combination of two or more of those substances, or *any other substance* into the body."⁶³ Additionally, the terms Motor Vehicle and Watercraft are now defined.⁶⁴

56. TEX. PENAL CODE ANN. § 36.10 (Vernon 1994).

57. *Id.* § 37.08.

58. *See* TEX. PENAL CODE ANN. § 37.08 (Vernon 1994).

59. *Id.* §§ 43.25, 43.251.

60. *Id.* § 46.04.

61. *See* TEX. PENAL CODE ANN. § 46.04 (Vernon 1994).

62. *Id.* § 46.06(a)(4).

63. *Id.* § 49.01(2)(A) (emphasis added).

64. *See id.* § 49.01(3), (4).

2. *Driving While Intoxicated*

Driving while intoxicated (DWI),⁶⁵ including flying⁶⁶ and boating⁶⁷ while intoxicated, has been moved to chapter 49 and standardized. The first offense for any of the above offenses is a Class "B" misdemeanor with a minimum term of confinement of seventy-two hours.⁶⁸ If the defendant commits an offense of driving while intoxicated under section 49.04 and is in possession of an open container, the minimum confinement is increased to six days.⁶⁹ A second offense for these offenses is a Class "A" misdemeanor with minimum term of confinement of fifteen days, and the third offense is punishable as a third degree felony.⁷⁰

3. *Intoxication Assault and Manslaughter*

If by reason of driving while intoxicated the defendant causes serious bodily injury to another person, the offense becomes a third degree felony.⁷¹ If by reason of driving while intoxicated the defendant kills another person, the offense is punishable as a second degree felony.⁷²

T. ORGANIZED CRIME

Deadly conduct, assault punishable as a Class A misdemeanor, burglary of a motor vehicle, and unauthorized use of a motor vehicle were added to the list of crimes that may constitute organized criminal activity.⁷³

U. SELECTED HEALTH AND SAFETY CODE PROVISIONS

1. *Section 481.002(49)*

"Adulterant and dilutant" are defined as "any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance."⁷⁴

65. *Id.* § 49.04(a).

66. TEX. PENAL CODE ANN. § 49.05(a) (Vernon 1994).

67. *Id.* § 49.06(a).

68. *Id.* §§ 49.04(b), 49.05(b), 49.06(b).

69. *Id.* § 49.04(c).

70. *Id.* § 49.09.

71. TEX. PENAL CODE ANN. § 49.07 (Vernon 1994).

72. *Id.* § 49.08.

73. *Id.* § 71.02(a)(1).

74. TEX. HEALTH & SAFETY CODE ANN. § 481.002(49) (Vernon Supp. 1995).

2. *Revision of the Punishment Ranges, Sections 481.112 - 481.121*a. Possession: Penalty Group 1⁷⁵

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
Less than 28 grams	2nd Degree Felony	State Jail Felony if less than 1 gram 3rd Degree Felony if 1 gram or more, but less than 4 grams
28 grams or more, but less than 400 grams	5-99 years or life & maximum \$50,000 fine	2nd Degree Felony if 4 grams or more, but less than 200 grams 1st Degree Felony if 200 grams or more, but less than 400 gram
400 grams or more	10-99 years or life & maximum \$100,000 fine	Same

b. Possession: Penalty Group 2⁷⁶

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
Less than 28 grams	3rd Degree Felony	State Jail Felony if less than 1 gram 3rd Degree Felony if 1 gram or more, but less than 4 grams
28 grams or more, but less than 400 grams	5-99 years or life & maximum \$50,000 fine	2nd Degree Felony if 4 grams or more, but less than 400 grams
400 grams or more	10-99 years or life & maximum \$100,000 fine	5-99 years or life & maximum \$50,000 fine

75. *Id.* § 481.115.76. *Id.* § 481.116.

c. Possession: Penalty Group 3⁷⁷

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
Less than 200 grams	Class A Misdemeanor	Class A Misdemeanor if less than 28 grams 3rd Degree Felony if 28 grams or more, but less than 200 grams
200 grams or more, but less than 400 grams	5-99 years or life & maximum \$50,000 fine	2nd Degree Felony
400 grams or more	10-99 years or life & maximum \$100,000 fine	
5-99 years or life & maximum \$50,000 fine		

d. Possession: Penalty Group 4⁷⁸

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
Less than 200 grams	Class B Misdemeanor	Class B Misdemeanor if less than 28 grams 3rd Degree Felony if 28 grams or more, but less than 200 grams
200 grams or more, but less than 400 grams	5-99 years or life & maximum \$100,000 fine	2nd Degree Felony
400 grams or more	10-99 years or life & maximum \$100,000 fine	5-99 years or life & maximum \$50,000 fine

77. *Id.* § 481.117.78. *Id.* § 481.118.

e. Manufacture or Delivery: Penalty Group 1⁷⁹

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
Less than 28 grams	1st Degree Felony	State Jail Felony if less than 1 gram
		2nd Degree Felony if 1 gram or more, but less than 4 grams
28 grams or more, but less than 200 grams	5-99 years or life & maximum \$50,000 fine	1st Degree Felony if 4 grams or more, but less than 200 grams
200 grams or more, but less than 400 grams	10-99 years or life & maximum \$100,000 fine	Same
400 grams or more	15-99 years or life & maximum \$250,000 fine	Same

f. Manufacture or Delivery: Penalty Group 2⁸⁰

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
Less than 28 grams	2nd Degree Felony	State Jail Felony if less than 1 gram
		2nd Degree Felony if 1 gram or more, but less than 4 grams
28 grams or more, but less than 400 grams	5-99 years or life & maximum \$50,000 fine	1st Degree Felony if 4 grams or more, but less than 400 grams
400 grams or more	10-99 years or life & maximum \$100,000 fine	Same

79. TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon Supp. 1995).

80. *Id.* § 481.113.

g. Manufacture or Delivery: Penalty Group 3 or 4⁸¹

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
Less than 200 grams	3rd Degree Felony	State Jail Felony if less than 28 grams 2nd Degree Felony if 28 grams or more, but less than 200 grams
200 grams or more, but less than 400 grams	5-99 years or life & maximum \$50,000 fine	1st Degree Felony
400 grams or more	10-99 years or life & maximum \$100,000 fine	Same

h. Possession of Marihuana⁸²

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
2 ounces or less	Class B Misdemeanor	Same
4 ounces or less, but more than 2 ounces	Class A Misdemeanor	Same
5 pounds or less, but more than 4 ounces	3rd Degree Felony	State Jail Felony
50 pounds or less, but more than 5 pounds	2nd Degree Felony	3rd Degree Felony
200 pounds or less, but more than 50 pounds	5-99 years or life & maximum \$50,000 fine	2nd Degree Felony if 2000 pounds or less, but more than 50 pounds
2000 pounds or less, but more than 200 pounds	10-99 years or life & maximum \$100,000 fine	2nd Degree Felony if 2000 pounds or less, but more than 50 pounds
More than 2000 pounds	15-99 years or life & maximum \$250,000 fine	5-99 years or life & maximum \$50,000 fine

81. *Id.* § 481.114.82. *Id.* § 481.121.

i. Delivery of Marihuana⁸³

PREVIOUS WEIGHTS	PREVIOUS RANGES	NEW WEIGHTS & RANGES
1/4 of an ounce or less	Class B Misdemeanor	Same
	Class A Misdemeanor if remuneration	Same
4 ounces or less, but more than 1/4 of an ounce	3rd Degree Felony	State Jail Felony if 5 pounds or less, but more than 1/4 of an ounce
5 pounds or less, but more than 4 ounces	2nd Degree Felony	State Jail Felony if 5 pounds or less, but more than 1/4 of an ounce
50 pounds or less, but more than 5 pounds	1st Degree Felony	2nd Degree Felony
200 pounds or less, but more than 50 pounds	5-99 years or life & maximum \$50,000 fine	1st Degree Felony if 2000 pounds or less, but more than 50 pounds
2000 pounds or less, but more than 200 pounds	10-99 years or life & maximum \$100,000 fine	1st Degree Felony if 2000 pounds or less, but more than 50 pounds
More than 2000 pounds	15-99 years or life & maximum \$250,000 fine	10-99 years or life & maximum \$100,000 fine

II. SIGNIFICANT CASE LAW

The 1993-94 term of the Court of Criminal Appeals saw a continuation of the moderate trend of decisionmaking that often springs from a fairly philosophically balanced judicial body. The continuation of frequent personnel changes, this time in the form of Steve Mansfield and Sharon Keller replacing Chuck Miller and Chuck Campbell on January 1, 1995, once again impairs predictability of future decisions. But, for the present, the court was able to add another layer of interpretation over the ever-changing landscape of criminal law. The highlights of this court term include: a declaration that pen registers (a modified telephone tap) could constitute an unconstitutional search under Article I, section 9 of the Texas Constitution, even though the United States Supreme Court had held that they

83. *Id.* § 481.120.

were unconstitutional under the Fourth Amendment;⁸⁴ liberalized rules for granting writs of mandamus against a trial judge that benefit the prosecution;⁸⁵ a new remedy at the trial level for *Batson* error;⁸⁶ cases that construe seven of the most frequently-used rules of criminal evidence, as well as clarify the correct way to publish evidence to a jury;⁸⁷ and a declaration that DWI roadblocks are unconstitutional.⁸⁸

A. PRETRIAL AREAS

1. Search and Seizure

a. Pen Registers and the Texas Constitution

*Richardson v. State*⁸⁹ involved the use of telephone pen registers by the police and whether such use constituted a search.⁹⁰ Article 18.21 of the Texas Code of Criminal Procedure allows a court ordered pen register without a showing of probable cause.⁹¹ Such an order was secured in this case for a jail phone, and the list of numbers called was used to provide probable cause to obtain a wiretap under article 18.20.⁹² The court of appeals held that there is never a reasonable expectation of privacy in numbers dialed under either the Fourth Amendment of the U.S. Constitution or article I, section 9 of the Texas Constitution because a person conveys the numbers dialed to the telephone company.⁹³ The Court of Criminal Appeals reversed, holding under the Texas Constitution that phone users have a reasonable expectation of privacy that phone numbers dialed will remain private.⁹⁴ Criticizing the U.S. Supreme Court's *Smith* case authorizing the wholesale use of pen registers by the police, the court recounted that seven states had rejected *Smith* in interpreting their own constitutions and that many authors, including Wayne LaFave and Clifford Fishman, have attacked the reasoning in *Smith*.⁹⁵ Finally, the court performed its own analysis on the expectation of privacy and concluded that, notwithstanding the Supreme Court's opinion in *Smith*, "society recognizes as objectively reasonable the expectation of the telephone customer that the numbers he dials as a necessary incident of his use of the telephone will not be published to the rest of the world."⁹⁶ Thus, the use of a pen register may well constitute a search under article

84. See Part II.A.1.a., *infra*.

85. See Part II.F.1., *infra*.

86. See Part II.F.1., *infra*.

87. See Part II.G.5., *infra*.

88. See Part II.G.8., *infra*.

89. 865 S.W.2d 944 (Tex. Crim. App. 1993).

90. *Id.*

91. TEX. CODE CRIM. PROC. ANN. art. 18.20 (Vernon Supp. 1995).

92. *Richardson*, 865 S.W.2d at 946. See TEX. CODE CRIM. PROC. ANN. art. 18.20 (Vernon Supp. 1995).

93. *Richardson*, 865 S.W.2d at 949 (citing *Smith v. Maryland*, 442 U.S. 735, 743 (1979)).

94. *Id.* at 953.

95. *Id.* at 949-53.

96. *Id.* at 953.

I, section 9 of the Texas Constitution. The Court of Criminal Appeals, however, remanded the case to the court of appeals to see if, among other things, a reasonable expectation of privacy existed in the use of a jail telephone.⁹⁷

2. *Article 38.23, TEX. CODE CRIM. PROC. ANN., and the Attenuation of the Taint Doctrine*

The federal exclusionary rule mandates that all evidence obtained as a result of an illegal arrest (the fruit of the poison tree) is tainted by the arrest.⁹⁸ However, just because a confession, for instance, is obtained at a point in time after an illegal arrest does not mean that it must be excluded; rather, a four-part test per *Brown v. Illinois*⁹⁹ is to be used to see if the "taint" has been "attenuated" by intervening events.¹⁰⁰ In *State v. Johnson*¹⁰¹ the court specifically held that the attenuation doctrine is applicable to our Texas codification of the exclusionary rule¹⁰² that prohibits admission of evidence obtained in violation of the law.¹⁰³ In *Garcia v. State*¹⁰⁴ the inevitable discovery doctrine was held not to be an exception to article 38.23.¹⁰⁵ *Garcia* held that, since the legislature did not expressly create any exceptions to the exclusionary rule, no exceptions would be created by judicial fiat.¹⁰⁶ Here, however, the Court of Criminal Appeals found that, while it is true that the attenuation doctrine is not an exception to article 38.23, it is also true that evidence is not really "obtained" from the arrest, provided that the evidence is sufficiently attenuated from the illegal arrest.¹⁰⁷ Thus, the attenuation doctrine is a viable theory of admission of evidence lawfully acquired at a point in time after an illegal arrest.

3. *Fruits of a Federal Search Warrant Admissible in State Court, Though Warrant not in Compliance with Texas Code of Criminal Procedure*

In *State v. Toone*¹⁰⁸ the federal government, knowing that the defendant was about to possess obscene magazines at his home, obtained a federal anticipatory search warrant to search for the obscene materials as soon as they arrived.¹⁰⁹ They knew the defendant was going to possess obscene magazines because the government, through the post office, was

97. *Id.* at 954.

98. *Brown v. Illinois*, 422 U.S. 590, 599 (1975).

99. *Id.*

100. *Id.*

101. 871 S.W.2d 744 (Tex. Crim. App. 1994).

102. TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 1995).

103. 871 S.W.2d at 750-51.

104. 829 S.W.2d 796 (Tex. Crim. App. 1992).

105. *Id.* at 800.

106. *Id.* at 798-800.

107. 871 S.W.2d at 750-51.

108. 872 S.W.2d 750 (Tex. Crim. App. 1994).

109. *Id.* at 750-51.

about to deliver them to him via the regular mail service.¹¹⁰ The defendant was prosecuted in state court for possession of cocaine that was seized during the search.¹¹¹ The defense argued that procurement of the warrant under these circumstances violated chapter 18 of the Code of Criminal Procedure since, at the time the warrant was issued, there was no contraband in the home.¹¹² Therefore, the evidence seized pursuant to that warrant should arguably be excluded under the Texas exclusionary rule.¹¹³ The Court of Criminal Appeals simply stated that article 18.01 does not govern federal search warrants.¹¹⁴ Therefore, whether the warrant procurement complies with state law is irrelevant. The court, however, dodged the question of whether state anticipatory search warrants can be in compliance with Texas state law.¹¹⁵

B. JEOPARDY

1. *A Sua Sponte Mistrial for Manifest Necessity Does not Bar a Retrial*

After jeopardy attached in *Alvarez v. State*,¹¹⁶ the trial judge determined that reversible error had occurred during the voir dire process.¹¹⁷ The judge then declared a mistrial and the defendant pled jeopardy as a bar to retrial.¹¹⁸ The Court of Criminal Appeals first noted that a mistrial declared for manifest necessity does not create a jeopardy bar.¹¹⁹ Whatever manifest necessity means, the facts of this case fit the definition.¹²⁰ It would be a senseless waste of judicial resources to continue a trial after an obvious procedural or other error has occurred that necessitates reversal on appeal (that is, making reversal a certainty).¹²¹ In this case, the error that the trial judge worried about was indeed reversible on appeal because it involved comments that were not susceptible to even a curative instruction.¹²² Thus, the record supported the trial court's determination of manifest necessity to declare a mistrial.¹²³

2. *No Jeopardy Bar to Lesser Included Charge After Acquittal of Greater Charge in a Non-Jury Trial*

In *Ex Parte Shute*¹²⁴ the Court of Criminal Appeals held that a reversal for insufficient evidence after a bench trial did not bar a retrial for a

110. *Id.* at 750.

111. *Id.* at 751.

112. *Id.*

113. See TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 1995).

114. 827 S.W.2d at 752.

115. *Id.*

116. 864 S.W.2d 64 (Tex. Crim. App. 1993).

117. *Id.* at 65-66.

118. *Id.*

119. *Id.* at 65.

120. *Id.* at 65-66.

121. 864 S.W.2d at 66.

122. *Id.*

123. *Id.*

124. 877 S.W.2d 314 (Tex. Crim. App. 1994).

lesser included offense.¹²⁵ In *Granger v. State*¹²⁶ the court previously held that if a conviction is reversed for insufficient evidence in a jury trial, retrial of a lesser offense is not barred by a jeopardy claim if: 1) sufficient evidence was introduced at the first trial to prove the lesser offense, and 2) the jury was instructed on the lesser offense in the charge and given the opportunity to convict the defendant of the charge at that time.¹²⁷ The theory is that the State prosecutes for a primary offense and all secondary (that is, lesser) offenses every time it goes to trial. If no charge is submitted on a lesser offense in a jury trial, the State is deemed to have abandoned it without manifest necessity after jeopardy has attached.¹²⁸ This theory, however, does not apply in a bench trial where there is no charge because the trial judge, without any instructions, is empowered to find a defendant guilty of any lesser charges.¹²⁹

C. INDICTMENTS AND INFORMATIONS

1. *Specificity Required in the Face of a Motion to Quash*

The defendant in *State v. Kinsey*¹³⁰ was charged with criminal trespass.¹³¹ The defendant filed a motion to quash because the information failed to state an offense.¹³² Specifically, the State had pleaded "owner thereof" instead of tracking the statute by pleading "of another."¹³³ The trial court granted defendant's motion, and the court of appeals affirmed.¹³⁴ The Court of Criminal Appeals began by stating that, if statutory words have a technical meaning, they cannot be replaced by other words in a pleading.¹³⁵ A caveat to this rule, however, is that if words equivalent to the common everyday usage of the technical term were also equivalent to the definition of the technical term in the Penal Code, substitution is allowed.¹³⁶ The word "another" is technically defined as "a person other than the actor" and is equivalent to the common everyday usage of the word.¹³⁷ Since substitution of a term that has the same meaning is allowed and "owner" conveys the same meaning and includes the sense of the statutory word "another," the substitution was allowed.¹³⁸

125. *Id.* at 315.

126. 850 S.W.2d 513 (Tex. Crim. App. 1993).

127. *Id.* at 519-20.

128. *Id.*

129. 314 S.W.2d at 315.

130. 861 S.W.2d 383 (Tex. Crim. App. 1993).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 384.

135. 861 S.W.2d at 384.

136. *Id.*

137. *Id.* (citing TEX. PENAL CODE ANN. § 1.07(a)(4)).

138. 861 S.W.2d at 384-85. Note that the defendant's main complaint was that he was joint owner of the property trespassed upon, and thus, he could not be convicted under the "another" wording since he owned, at least in part, the property. *Id.* However, since the statutory term "owner" includes "greater right to possession than the actor" language, he

Generally, an indictment that tracks the statutory language will survive a motion to quash.¹³⁹ Furthermore, when a term is defined by statute it does not need to be defined again in the indictment.¹⁴⁰ However, "if the statutory language is not completely descriptive of the offense, then additional specificity will be required in the face of a motion to quash."¹⁴¹ *Olurebi v. State*¹⁴² involved credit card abuse by use of a fictitious credit card.¹⁴³ The Court of Criminal Appeals began by holding that a credit card can be fictitious in two ways: 1) it is not issued by the owner (for example, Chevron), or 2) it is issued to a nonexistent cardholder.¹⁴⁴ The court then held that a failure to define "fictitious credit card" in the face of a motion to quash, that complains of insufficient notice of the offense charged, rendered the indictment deficient.¹⁴⁵ The indictment, however, is not insufficient enough to amount to reversible error.¹⁴⁶ There must also be an inquiry as to whether, in the context of the case, this prejudiced the substantial rights of the defendant.¹⁴⁷ Therefore, the case was remanded to the court of appeals for a harm analysis.¹⁴⁸ Harm is examined from the standpoint of whether the error impacted the defendant's ability to prepare a defense and, if so, to what extent.¹⁴⁹

2. *Indictment Confers Jurisdiction, but not for Unauthorized Visiting Judges*

Article V, section 12 of the Texas Constitution confers jurisdiction on a court upon the return of an indictment or information. In *Johnston v. State*¹⁵⁰ a substitute judge, who could not lawfully sit on that bench, was brought into a driving while intoxicated case.¹⁵¹ The Court of Criminal Appeals held that Article V, section 12 did not confer jurisdiction on the court because "in order to constitute a court, a duly authorized officer must be present at the time and place appointed by law."¹⁵² Thus, once the substitute judge took a seat, the court was technically no longer a court.¹⁵³ Therefore, Article V, section 12 did not confer jurisdic-

could be convicted under that wording if he had a lesser right to possession than the person bringing the charges. *Id.* Accordingly, the court held that "owner" requires a higher burden of proof than "another." *Id.* Consequently, the State presumably could not obtain a conviction under the "greater right to possession" theory if they could not use that theory to convict under the word "another." *Id.*

139. *Olurebi v. State*, 870 S.W.2d 58, 62 (Tex. Crim. App. 1994).

140. *Id.*

141. *Id.* (citing *De Vaughn v. State*, 749 S.W.2d 62, 69 (Tex. Crim. App. 1988)).

142. 870 S.W.2d 58 (Tex. Crim. App. 1994).

143. 870 S.W.2d at 58.

144. *Id.* at 60.

145. *Id.* at 61.

146. *Id.*

147. *Id.*

148. 870 S.W.2d at 62.

149. *Id.* at 61.

150. 869 S.W.2d 347 (Tex. Crim. App. 1994).

151. *Id.* at 349.

152. *Id.* at 350.

153. *Id.* at 350.

tion.¹⁵⁴ Because the error was jurisdictional, it could be raised for the first time on appeal.¹⁵⁵

3. *Correcting a Defendant's Name Is not an Amendment*

Under Texas Code of Criminal Procedure articles 26.07 and 26.08, if the defendant's name is incorrect as shown on the indictment, it must be corrected to reflect his true name.¹⁵⁶ *Wynn v. State*¹⁵⁷ simply holds that the correction of a defendant's name is not an amendment of an indictment (or information) under article 28.10. Consequently, the features of chapter 28 (mandatory continuances, etc.) do not apply.

D. MOTION TO SUPPRESS HEARING

1. *Hearsay not Admissible*

Hearsay evidence is not admissible in a motion to suppress hearing. In *McVickers v. State*¹⁵⁸ the testifying officer possessed only hearsay knowledge about why other officers stopped the defendant's car and the legality of that stop. Texas Rule of Criminal Evidence 1101(d)(4) specifically applies the rules of evidence (including article VIII Hearsay) to motions to suppress confessions or other illegally obtained evidence under Code of Criminal Procedure section 38.23. The court noted that hearsay is otherwise generally admissible in motions to suppress matters other than article 38.23 matters (for example, a magistrate testifying about hearsay furnishing probable cause to issue an arrest warrant).¹⁵⁹

E. GUILTY PLEA

1. *Adequacy of Admonishment Vis-A-Vis U.S. Citizenship*

Texas Code of Criminal Procedure article 26.13, entitled Plea of Guilty, requires several admonishments. One requires a defendant must be advised that his plea could result in his deportation or denial of naturalization, if he is not a United States citizen.¹⁶⁰ In *Morales v. State*¹⁶¹ the parties agreed that such an admonishment was not given. The court of criminal appeals reversed, holding that a complete failure to give this admonishment is reversible error.¹⁶² However, the harmless error rule applies. Thus, the fact that the record did not reveal whether the defendant was in fact a United States citizen was immaterial. Substantial compli-

154. *Id.*

155. 869 S.W.2d at 350.

156. TEX. CODE CRIM. PROC. arts. 26.07, 26.08 (Vernon 1989).

157. 864 S.W.2d 539 (Tex. Crim. App. 1993).

158. 874 S.W.2d 662 (Tex. Crim. App. 1993).

159. See TEX. R. CRIM. EVID. 104(a). This holding does not affect an officer's ability to narrate what an informant or eyewitness said to him that furnished probable cause. This is true because whatever was said in such a conversation is not offered to prove that it was the truth, only that the words were spoken and the officer relied on them to form probable cause. Thus, this would not be hearsay.

160. TEX. CODE CRIM. PROC. ANN. art. 26.13(4) (Vernon 1989).

161. 872 S.W.2d 753 (Tex. Crim. App. 1994).

162. *Id.* at 754-55.

ance with the article does not hinge on whether or not the admonishment made a difference to the defendant.

F. MANDAMUS

1. *New Rules Liberalize when an Appellate Court Will Correct a Trial Judge's Ruling by Mandamus*

Under the holding of *Curry v. Gray*¹⁶³ a judge could make a wrong call on a motion (for example, granting a motion when he should have, under established case law, overruled it), and an appellate court would not entertain a writ of mandamus to correct that call. As long as the judge had the authority to make a ruling, the losing party's only recourse was appeal. Now, under *Healey v. McMeans*¹⁶⁴ if there is clear binding precedent contrary to the judge's ruling, mandamus will lie. "Trial judges do not enjoy the freedom to ignore the law."¹⁶⁵ In other words, if the trial judge's ruling on the law is obviously wrong, a writ of mandamus will issue. It is important to note that only the State is able to meet the other prerequisite for a writ of mandamus; there is no adequate remedy at law. The defense, having the right to appeal all rulings, generally will have to wait until the appeal to complain.

G. TRIAL

1. *Jury Selection*

a. *Batson* Error in a Capital Case

The Court of Criminal Appeals held in *Butler v. State*¹⁶⁶ that article 35.261 of the Code of Criminal Procedure does not govern *Batson* error in a capital trial. Therefore, the trial court does not have to dismiss all the jurors summoned if *Batson* error occurs.

b. *Batson* Violation —Disallowing the Strike Is a Proper Remedy

Article 35.261 calls for a dismissal of the panel when a *Batson* defense motion is granted due to the State's exercise of a preemptory strike based upon race. However, in *Curry v. Bowman*,¹⁶⁷ the Court of Criminal Appeals held that another proper remedy would be to disallow the strike and seat the juror if the defense makes their motion under *Batson* rather than under article 35.261.

2. *Claiming Fifth Amendment Privilege not to Testify*

b. Testing Frivolity in an Informant Case

The trial court in *Reese v. State*¹⁶⁸ allowed the State's informant to claim his Fifth Amendment privilege not to testify in the face of an en-

163. 726 S.W.2d 125 (Tex. Crim. App. 1987).

164. 884 S.W.2d 772 (Tex. Crim. App. 1994).

165. *Id.* at 774.

166. 872 S.W.2d 227 (Tex. Crim. App. 1994).

167. 885 S.W.2d 421 (Tex. Crim. App. 1993).

168. 877 S.W.2d 328 (Tex. Crim. App. 1994).

trapment defense during this drug sale case.¹⁶⁹ The defense complained that the court did not conduct a meaningful examination into the legitimacy of the informant's claim of privilege. In fact, the trial judge failed to inquire about the legitimacy of the claim at all; he simply honored the claim when the informant asserted it. The Court of Criminal Appeals, citing with approval the United States Supreme Court's opinion in *Hoffman v. United States*,¹⁷⁰ held that "[t]o sustain the privilege, it need only be evident from the implications or the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."¹⁷¹ In appraising the claim, the trial judge "must be governed . . . by his personal perceptions of the peculiarities of the case" as well as the facts in evidence.¹⁷² This language, of course, highly sanctions the abuse of discretion standard of review for this kind of decision. Still, discretion can be abused. In this case, the informant was so heavily involved in the drug sale that he was considered a state agent and, generally, state agents cannot be prosecuted for crimes sanctioned by police. However, because it is possible that informants may be prosecuted for acts related to the subject offense, the court should still inquire whether an informant's answers are privileged or not privileged and compel questioning and answering in front of the jury in appropriate areas of testimony. Because the judge did not make such an inquiry of the state agent/informant and the defense raised the issue of entrapment, the judge should have allowed the questioning.

3. Witnesses

a. State's Use of Perjured Testimony and Who Has to Know About It

*Ex parte Castellano*¹⁷³ concerned the tainting of the State's testimony by perjury. The Court of Criminal Appeals took this opportunity to reaffirm several maxims:

1. Due process is violated if the prosecutor knowingly uses perjured material testimony.
2. The knowledge can be either actual or imputed, and imputed knowledge will suffice where actual knowledge is absent.
3. Active or passive use of perjured testimony will suffice to invoke the doctrine.
4. A police officer's knowledge of perjury will be imputed to the prosecutor if the officer is part of the prosecution team, either directly or indirectly because he is acting under color of law.

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

170. 341 U.S. 479 (1951).

171. *Id.* at 486-87.

172. *Id.* at 486.

173. 863 S.W.2d 476 (Tex. Crim. App. 1993).

5. A police officer can be acting “under color of law” even though the officer deviates from prescribed or approved conduct (for example, by helping to fabricate the testimony), by misusing power he possesses solely because he is clothed with that power by the State.¹⁷⁴

In this case, two police officers, while carrying out a private vendetta unrelated to their duties as police officers, framed the defendant for arson. The prosecutor and other police working on the case did not know and would not have condoned this action. Nevertheless, the knowledge of the perjury, known only to the conspiring police officers, was imputed to the State because of the foregoing maxims. However, the perjured testimony must be material and harmful (that is, the court cannot say beyond a reasonable doubt that the perjury did not contribute to the conviction) before a violation of the Due Process Clause is established. In this case, the court held it was material and harmful.¹⁷⁵

4. *Presentation Of Evidence*

- a. Publishing Written Evidence to the Jury after Admission

*Wheatfall v. State*¹⁷⁶ allows an attorney, under the trial judge’s discretion, to read and explain part or all of an exhibit to a jury (or judge) after it has been admitted. Often a party wants the jury to immediately understand the contents and, therefore, the significance of a written exhibit. Rather than have each juror read it and then pass it on to the next juror, the attorney or sponsoring witness often reads selected portions aloud, perhaps with explanatory comments. After this opinion, this practice is perfectly within the trial court’s discretion to allow. The attorney can even add extra explanation and background without it being considered testimony.

5. *Evidence*

- a. Texas Rule of Criminal Evidence 404(b) —Other Crimes, Wrongs or Acts
i. *Identity Under 404(b)*

The intent of Rule 404(b) is to prevent the introduction of evidence to prove the character of a person in order to show that he acted in conformity with that character. It applies equally to evidence of extraneous acts or transactions and to evidence of extraneous offenses. Thus, even though the acts sought to be introduced do not amount to misconduct, their admission is still governed by Rule 404(b). In *Bishop v. State*¹⁷⁷ the State sought to introduce, via an ex-wife, evidence of acts that went to the defendant’s legal, sexual intercourse preferences because the assailant in this sexual assault case had the same preferences. Because identity was

174. *Id.* at 479-84.

175. *Id.* at 486.

176. 882 S.W.2d 829 (Tex. Crim. App. 1994).

177. 869 S.W.2d 342 (Tex. Crim. App. 1993).

the key to the probative value of this evidence, the court said that similarity of actions is required.¹⁷⁸ There must be, in other words, a signature apparent when comparing the circumstances. Using an act to prove identity requires a much higher degree of similarity to the circumstances of the charged offense than extraneous acts offered for other purposes such as intent. Furthermore, although *Montgomery v. State*¹⁷⁹ suggested that such evidence would be admissible if relevant, the probative value of the evidence must be weighed against its prejudicial effect. Under the facts of *Bishop*, the prejudicial effect of the evidence was high and its probative value was so low that the trial court abused its discretion in admitting the evidence.

b. Abuse of Discretion in Enforcing "The Rule," Texas Rule of Criminal Evidence 613

In *Davis v. State*¹⁸⁰ the defendant's mother watched a portion of the trial before the defendant's attorney noticed and had her removed from the courtroom. Later, the defense sought to call her as a witness, but she was prevented from testifying by the trial judge when the State reminded the court that "The Rule" had been invoked. The mother had not been sworn at the time she was in the court room, but all parties correctly assumed that the Rule applied anyway. The Court of Criminal Appeals, however, found reversible error. Citing *Webb v. State*¹⁸¹ the court applied a two part test that is used when the Rule has been technically violated. First, did circumstances exist to justify exclusion (other than the technical violation), such as a showing that the defendant knew that the violation was occurring and aided the violation?¹⁸² Second, if not, was the excluded testimony crucial to the defense?¹⁸³ Here, the violation was innocent and the mother possessed crucial testimony; someone else confessed to her that they, and not her son, committed the offense.

c. Texas Rule of Criminal Evidence 613, the "Rule," Is Mandatory, but the Harmless Error Rule Applies

On its face, Rule 613 (the Rule) mandates that the trial court exclude witnesses at the request of a party. The defense in *Moore v. State*¹⁸⁴ made such a request, but the trial judge denied it for purposes of expediency. Accordingly, the judge allowed the State's expert witness to remain in the courtroom and hear the defense's expert witness, and vice-versa. The Court of Criminal Appeals held that the Rule is no longer discretionary; rather, under the 1985 Rules of Criminal Evidence it is mandatory.¹⁸⁵

178. *Id.* at 346.

179. 810 S.W.2d 372 (Tex. Crim. App. 1990).

180. 872 S.W.2d 743 (Tex. Crim. App. 1994).

181. 766 S.W.2d 236 (Tex. Crim. App. 1989).

182. *Id.* at 241.

183. *Id.* at 242.

184. 882 S.W.2d 844 (Tex. Crim. App. 1994).

185. *Id.* at 848.

However, since both experts' opinions were not based on the other's testimony (predictably they disagreed about future dangerousness), the court held beyond a reasonable doubt that each expert's testimony was not affected by the others.¹⁸⁶ The court noted in a footnote, however, that the witness could have remained in the courtroom as a person whose presence was essential to the presentation of a party's cause.¹⁸⁷

d. Admissibility of Expert Testimony under Texas Rule of Criminal Evidence 702

In *Yount v. State*,¹⁸⁸ a sexual child abuse case, the State's expert was asked: how many false accusations have resulted from the hundreds of interviews and examinations of children who claimed to have been sexually abused.¹⁸⁹ Over objection he answered, "very few." The Court of Criminal Appeals held that such testimony is admissible if it is relevant and does not cross the line of actually soliciting a direct opinion on the truthfulness of the child victim. However, expert testimony that a particular witness is truthful is inadmissible on relevancy grounds. Such an opinion from an expert is per se so unreliable that it does not tend to make the existence of a fact in controversy more or less probable. The same rule applies to testimony about the credibility of a class of individuals. Thus, the court held that in this case, the trial court erred in admitting the testimony.¹⁹⁰

e. Hearsay Exceptions: Rule 803(8)(B) — Autopsy Report Is Admissible

*Garcia v. State*¹⁹¹ involved the admission of autopsy reports under the hearsay rule.¹⁹² Rule 803(8)(B) excepts public records, other than those of police officers and other law enforcement personnel, from the hearsay rule if they are from public offices/agencies and set forth matters the office has a duty to report. To begin with, a medical examiner is required in counties of more than one million people and is, therefore, a public agency.¹⁹³ Additionally, medical examiners have a statutory duty to prepare and file several reports,¹⁹⁴ including autopsies.¹⁹⁵ Therefore, autopsies are public records. Finally, medical examiners are not law enforcement personnel. Therefore, the Court of Criminal Appeals held that autopsies are admissible under Rule 803(8)(B).¹⁹⁶

186. *Id.*

187. *Id.*; TEX. R. CRIM. EVID. 613(3).

188. 872 S.W.2d 706 (Tex. Crim. App. 1993).

189. *Id.* at 707.

190. *Id.* at 712.

191. 868 S.W.2d 337 (Tex. Crim. App. 1993).

192. TEX. R. CRIM. EVID. 802.

193. TEX. CODE CRIM. PROC. ANN. art. 49.25, § 1 (Vernon Supp. 1995).

194. *Id.* §§ 6 & 9.

195. *Id.* art. 49.24, § 11.

196. 868 S.W.2d at 342.

f. Amount of Corroboration Necessary for Admission of a Rule 803(24) Statement (Declaration Against Penal Interests)

In *Davis v. State*¹⁹⁷ a friend of the defendant told the defendant's mother that he, not the defendant, had sold the drugs. When the mother tried to testify to this, the trial court sustained the State's hearsay objection. The Court of Criminal Appeals reversed, noting that the statement obviously was a statement against penal interests, since it admitted a crime and no circumstances existed (such as immunity) that would negate the conclusion that a reasonable man would not have made the statement unless he believed it to be true.¹⁹⁸

Still, Texas Rule of Evidence 803(24) requires corroboration if the statement is to be admissible as an exception to the hearsay rule. The test for corroboration is that all corroborating and non-corroborating circumstances must be considered together to determine if the evidence of corroborating circumstances *clearly* indicates the trustworthiness of the statement against penal interests. In making such a determination, the trial judge must not weigh the credibility of the witnesses, but take their testimony as true. Here, under the facts of the case, the circumstances clearly indicated trustworthiness. Four alibi witnesses were presented, as well as a fifth witness who said the friend was the one who sold the drugs.

g. Dying Declarations under Rule 804(b)(2)

Prior to the adoption of Texas Rule of Criminal Evidence 804(b)(2), a declarant's hearsay statements could be admitted as dying declarations if evidence existed that the decedent believed at the time he made the statement that (1) death was imminent and (2) there was no hope of recovery.¹⁹⁹ Rule 804(b)(2) has dropped the latter requirement. It provides for admission of a deceased's statement, concerning the cause or circumstances of what he believed to be his impending death, so long as he believed his death was imminent.²⁰⁰ In *Burks v. State*²⁰¹ a doctor testified that, at the time the deceased statement's were made, there was a chance the deceased would recover. The doctor was wrong, of course. However, the Court of Criminal Appeals held that the State no longer has a burden to prove the deceased held out no hope of recovery and now only has to prove that the deceased believed his death was imminent.²⁰² This burden was satisfied by statements of the deceased such as "I am dying" and "[t]hey hit me in my heart."²⁰³

197. 872 S.W.2d 743 (Tex. Crim. App. 1994).

198. *Id.* at 747.

199. TEX. CODE CRIM. PROC. ANN. art. 38.20 (Vernon 1979) (now TEX. RULE CRIM. EVID. 804(b)(2)).

200. TEX. R. CRIM. EVID. 804(b)(2).

201. 876 S.W.2d 877. (Tex. Crim. App. 1994).

202. *Id.* at 901.

203. *Id.* at 902.

h. Authentication of Video Tape under Rule 901

Texas Rule of Criminal Evidence 901, entitled Requirement of Authentication or Identification, now governs the admissibility of video tapes. The rule is satisfied by any evidence "sufficient to support a finding that the matter in question is what its proponent claims"²⁰⁴ (that is, testimony by a witness with personal knowledge).

In *Kephart v. State*,²⁰⁵ the State attempted to verify a video tape by calling the officer who seized it from one of the defendants. The tape depicted several people using drugs. The officer was able to testify only that this was the tape he took from a defendant's video camera and that the defendant appeared to be depicted on the tape. He had no personal knowledge of where or when the tape had been made and could not state that it depicted the actual scene or event at the time it occurred. Noting that video tapes can easily be altered (for example, timing), the court held that the officer's testimony was wholly insufficient to authenticate the tape and, thus, could not provide a predicate for the tape's admissibility.²⁰⁶ This is not to say that only a witness who was present when a video tape was made can authenticate it, but the authenticating witness must be able to say that the video accurately depicts the scene in question. In other words, the video is pictorial testimony of the witness' testimony. Thus, if the officer had been to the defendant's home, he could view, for the first time, a video of that home and say that the video accurately depicts the home. A home is static, however, while a scene portraying people is not.²⁰⁷

6. Jury Instructions

a. Must Limit the Definitions of Culpable Mental States Where Appropriate

In *Cook v. State*,²⁰⁸ a murder case, the defense requested that the definitions of "intentionally" and "knowingly," given in the abstract portion of the charge to the jury, be limited "to the result of the offense only," since murder is a result-type crime (that is, the defendant must intentionally or knowingly cause the result).²⁰⁹ Citing numerous cases requiring that the Penal Code definitions of the culpable mental states in result-type offenses be limited to one of their component parts (either the nature of conduct, the circumstances surrounding conduct or the result of conduct), the court reaffirmed the rule and overruled prior language to

204. TEX. R. CRIM. EVID. 901(a).

205. 875 S.W.2d 319 (Tex. Crim. App. 1994).

206. *Id.* at 322.

207. See *Stapleton v. State*, 868 S.W.2d 781 (Tex. Crim. App. 1993) (electronic recordings are also governed by Rule 901). Note also that Rule 803(6), the business records exception to the hearsay rule, may be used where applicable to admit video or electronic recordings (e.g. security cameras).

208. 884 S.W.2d 485 (Tex. Crim. App. 1994).

209. *Id.* at 486. This case gives an excellent recapitulation of the concept of *mens rea* and the culpable mental states in the Penal Code.

the contrary.²¹⁰ Therefore, in all result-type offenses (such as murder, injury to a child, and injury to the elderly), the trial judge should limit the general definition of the applicable culpable mental states to the result of the conduct. A failure to do so results in charge error and harm will be decided under *Almanza v. State*.²¹¹ The “some harm” test will apply if there is an objection, and the “egregious harm” test will apply if there is no objection.

7. Jury Deliberations

a. Reading Testimony to the Jury — How Much Should You Read?

Texas Code of Criminal Procedure article 36.28 instructs the trial judge to read only the portion of the testimony that is in dispute.²¹² In *Brown v. State*²¹³ the jury note asked who a particular witness said was in the bathroom. Over a general objection that too much was being read, the trial judge not only read the testimony about who was in the bathroom, but also who shot whom. To do otherwise would have meant cutting and pasting testimony. The Court of Criminal Appeals said that although some questions and answers did not show who was in the bathroom (rather the questions went to other matters like who was shooting), those parts were arguably necessary to put the purely germane questions and answers in context.²¹⁴ Therefore, it was proper.²¹⁵

b. Reading Testimony to the Jury — Should You?

In *State v. Moore*²¹⁶ an insistent jury kept requesting that the court read the testimony of a particular witness. The defendant objected because the jury notes did not explicitly demonstrate that a disagreement existed. Article 36.28 of the Code of Criminal Procedure provides that a reading may be done “if the jury disagree[s].”²¹⁷ The Court of Criminal Appeals stated that a simple request for reading of testimony does not reflect, implicitly or otherwise, disagreement. A trial judge may inform the jury of this rule, however, and if the jury then complies with article 36.28, the reading can commence. In this case, the defendant’s objection should have been sustained.

210. *Id.* at 486-89.

211. 686 S.W.2d 157 (Tex. Crim. App. 1984).

212. TEX. CODE CRIM. PROC. ANN. art. 36.28 (Vernon 1981).

213. 870 S.W.2d 53 (Tex. Crim. App. 1994).

214. *Id.* at 56.

215. If the defendant had objected to specific questions and answers being read back (separate objection for each question and answer), one at a time, in which he felt exceeded the bounds of the jury’s request, a more detailed analysis would have been applied to the trial judge’s actions. But here, the lump sum of the testimony read to the jury either answered the question or put the answers in context.

216. 874 S.W.2d 671 (Tex. Crim. App. 1994).

217. TEX. CODE CRIM. PROC. ANN. art 36.28 (Vernon 1981).

8. *Specific Crimes and Specialty Law*

a. Trespassing Indictment — Alleging “Owner” instead of “Of Another” Is Sufficient

The State in *Arnold v. State*²¹⁸ pleaded that the defendant entered or remained (that is, trespassed) on property owned by a named individual. The trespassing statute, of course, uses the wording “entered or remained on property of another.”²¹⁹ The Court of Criminal Appeals said that alleging “owner” is sufficient and the State may prove ownership by proving a greater right to possession.²²⁰ This effectively solves some proof problems in the “of another” pleadings where, as here, the property was a federal courthouse which is, in a sense, owned by all of its citizens.

b. “Voluntary” under section 6.01(a) of the Penal Code Relates only to Physical Actions

Section 6.01(a) of the Penal Code states that a person commits an offense “only if he voluntarily engages in conduct.”²²¹ In *Alford v. State*²²² the court held that the word “voluntary” does not encompass any type of mental element in the nature of free will concept, but rather relates only to a physical element.²²³ Accidental acts, omissions or possessions are therefore covered, but nothing broader (such as things done under duress or coercion). According to the court, dictionary definitions that mentally equate voluntary with intentional are broader than the legislature intended when it wrote section 6.01(a).²²⁴

c. DWI Roadblocks Are per se Unconstitutional

The Court of Criminal Appeals held in *Holt v. State*²²⁵ that, until the legislature implements a statewide policy/plan sanctioning police roadblocks set up for the purpose of detecting driving while intoxicated offenses, such roadblocks violate the Fourth Amendment of the United States Constitution.²²⁶ Whether they offend the Texas Constitution and whether legislative sanction would cure such an offense are questions left unanswered because they were not reached by the court. This 6-3 decision is likely headed for the United States Supreme Court because it interprets *Michigan Dept. of State Police v. Sitz*.²²⁷

218. 867 S.W.2d 378 (Tex. Crim. App. 1993).

219. *Id.*

220. *Id.* at 379.

221. *Id.*

222. 866 S.W.2d 619 (Tex. Crim. App. 1993).

223. *Id.* at 624.

224. *Id.*

225. 887 S.W.2d 16 (Tex. Crim. App. 1994).

226. *Id.* at 19.

227. 496 U.S. 444 (1990).

d. Crimes of Omission — Duty to Act in a Cohabitation Abuse Situation

The defendant in *Hawkins v. State*²²⁸ lived with his girlfriend and her infant son. The girlfriend, on three different occasions, picked the baby up by its clothing and threw or dropped him onto a couch or bed. The defendant boyfriend did not remove the little boy from the mother after the third occasion. Therefore, in a prosecution for the fourth occasion (the mother swung the child around by its heels and its head struck the furniture once, causing injury), the boyfriend was convicted of injury to a child because he failed to remove the child from the presence of its abusive mother.

The Court of Criminal Appeals found that under Texas Penal Code section 22.04(b)(2), a person who assumes “care, custody, or control of a child” becomes subject to the “intentionally, knowingly, or recklessly, by omission, causes to a child . . . injury” language of the statute.²²⁹ Ignoring the lower court of appeals and the dissent’s finding that the defendant had no legal means to remove the child from its mother in this situation, the court found the evidence sufficient to convict the defendant because he had assumed “care, custody, or control of” the infant by cohabitating with its mother.²³⁰

e. DWI — HGN Test Approved for Use in Court

The “Horizontal Gaze Nystagmus test,” or HGN test, is now a valid test and admissible under Texas Rule of Criminal Evidence 702 and *Emerson v. State*.²³¹ The Court of Criminal Appeals took judicial notice of the general validity of the HGN test and the theory upon which it is based. The dissenting opinions (this was a 5-4 case) noted that this represented a quantum leap in judicial notice taking.²³² Pronouncing that the test is a reliable indicator of intoxication, the court approved of its use in this case because the administering officer qualified as an expert on the HGN test (specifically concerning its administration and technique).²³³ A police officer qualifies as an expert by receiving a certificate from the state. Still, the test has yet to be correlated to the blood alcohol content in a particular case.

H. POST TRIAL

I. Appeals

a. Appeal after Guilty Plea in a Negotiated (Plea Bargained) Case

In a plea in which the judge follows the plea bargain, Texas Rule of Appellate Procedure 40(b)(1) prohibits appeal of nonjurisdictional de-

228. No. 954-93, 1994 WL 274413 (Tex. Crim. App. 1994).

229. *Id.* at *1.

230. *Id.* at *5.

231. 880 S.W.2d 759 (Tex. Crim. App. 1994).

232. *Id.* at 770-71 (Clinton, J., dissenting); *id.* at 772 (Baird, J., dissenting).

233. *Id.* at 769.

fects or non-pretrial motion rulings unless the judge permits the appeal. In *Davis v. State*²³⁴ the defendant attempted to appeal sufficiency, which was a nonjurisdictional error that occurred after the entry of the guilty plea. The Court of Criminal Appeals said that, under prior case law and according to plain language, Rule 40(b)(1) covers all nonjurisdictional errors that occur before and after the plea, as well as any type of error occurring prior to the plea.²³⁵ Thus, sufficiency cannot be appealed without the judge's permission.²³⁶

b. Appeal of Errors Committed after the Entry of a Non-Negotiated Plea

The defendant in *Jack v. State*²³⁷ pleaded guilty to the court, and the State put on two witnesses to testify about extraneous offenses. There was no plea agreement. When the judge gave the defendant sixty years, the defendant took offense and appealed, complaining of the two witnesses' testimony. The court of appeals said that the "*Helms*"²³⁸ rule applied and that all nonjurisdictional defects were waived by the plea.²³⁹ The Court of Criminal Appeals reversed, saying that only nonjurisdictional errors occurring before entry of a negotiated guilty plea are waived under *Helms*.²⁴⁰ There is no such jurisdictional bar to appealing matters following a non-negotiated guilty plea.²⁴¹

c. Appellate Result when Court Reporter Has Destroyed Notes after Three Years

The defendant in *Kirby v. State*²⁴² appealed when his deferred adjudication probation was revoked three years and ten days after it was given. Predictably, there were no reporter's notes available on appeal because they had been destroyed pursuant to Texas Government Code section 52.046(a)(4), which only requires a reporter to keep notes for three years from the date on which they were taken.²⁴³ The Court of Criminal Appeals held that under Texas Rule of Appellate Procedure 50(e), a defendant is entitled to a new trial if the notes have been "lost or destroyed

234. 870 S.W.2d 43 (Tex. Crim. App. 1994).

235. *Id.* at 45.

236. *See also* *Lyon v. State*, 872 S.W.2d 732 (Tex. Crim. App. 1994).

237. 871 S.W.2d 741 (Tex. Crim. App. 1994).

238. *Helms v. State*, 484 S.W.2d 925 (Tex. Crim. App. 1972).

239. *Jack v. State*, No. A14-92-00685-CR, 1993 WL 93500 (Tex. App.—Houston [14th Dist.], Apr. 1, 1993), *rev'd*, 871 S.W.2d 741 (Tex. Crim. App. 1994).

240. *Jack*, 871 S.W.2d at 742.

241. Note that appeals of negotiated pleas are governed by TEX. R. APP. P. 40(b)(1), which allows appeals only with the trial court's permission, except for written pre-trial matters. Thus, in a negotiated plea, errors occurring at or after the entry of the plea cannot be appealed absent the trial court's permission.

242. 883 S.W.2d 669 (Tex. Crim. App. 1994).

243. TEX. GOV'T CODE ANN. § 52.046(a)(4) (Vernon 1988).

without appellant's fault."²⁴⁴ Consequently, the defendant received a new trial.²⁴⁵

2. Probation

a. Specificity Necessary when Ordering Community Service

When the court gave the defendant in *Lemon v. State*²⁴⁶ ten years probation, it ordered six hundred hours of community service "as directed by the Adult Probation Officer."²⁴⁷ The Court of Criminal Appeals first recited that Texas Code of Criminal Procedure article 42.12, sections 11(a)(10) and 17(a) require that a program of community service be "designated" by the court and "named in the court's order."²⁴⁸ Then, recognizing that section 10(d) allows probation officers to transfer probationers to a different program within the probation program, provided that the judge gives the officer such blanket power, the court held that the initial order granting probation must, under the plain wording of the code, designate a specific community service program or project.²⁴⁹ Thus, the order in this case was an improper delegation of the trial court's responsibility in imposing conditions of probation.

3. Restitution

a. Restitution to Victims not Named in Indictment Under Article 42.12, Section 11

The Court of Criminal Appeals held in *Martin v. State*²⁵⁰ that only the victim named in the indictment may be awarded restitution. Other victims who were defrauded or injured in the same scheme may not be included in the restitution order.

4. Article 11.07 Habeas Corpus

a. Cognizability of Claims

Texas Code of Criminal Procedure, article 1.13, requires that a jury waiver be signed by the defendant.²⁵¹ The defendant in *Ex parte Sadberry*²⁵² did not and waited until after his appeal to raise this issue via habeas corpus. The court said that such an allegation is not cognizable (i.e. will not be entertained) because it involves a procedural irregularity

244. *Id.* at 670.

245. Under current law, a defendant must appeal a deferred adjudication probation when it is imposed, not when it is revoked as was the law in this case. Consequently, while this situation should not arise for deferred adjudications given after November of 1987 (the effective date of the current law), this holding is still applicable to situations where an out of time appeal is granted in, for example, a writ of habeas corpus.

246. 861 S.W.2d 249 (Tex. Crim. App. 1993).

247. *Id.*

248. *Id.* at 250.

249. *Id.* at 251.

250. 874 S.W.2d 674 (Tex. Crim. App. 1994).

251. TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon Supp. 1995).

252. 864 S.W.2d 541 (Tex. Crim. App. 1993).

and is not "a question of constitutional dimension."²⁵³ The record was clear that the defendant was orally admonished at the trial of his right to a jury, and he orally waived it.

I. SELECTED U.S. SUPREME COURT CASES

1. *Batson Extended to the State's Use of Preemptory Strikes in Criminal Matters*

In the now-famous opinion of *J.E.B. v. Alabama*,²⁵⁴ the Court extended its decision in *Batson v. Kentucky*²⁵⁵ to a State's use of preemptory strikes based on gender. Although this case involved a civil paternity and child support suit, the holding directly affects trials of criminal matters.

On behalf of the mother of a minor child, the State filed a complaint for paternity and child support against the petitioner. A panel of thirty-six jurors was selected — twelve males and twenty-four females. After challenges for cause, ten of the remaining thirty-three jurors were male. The State used nine of its ten preemptory strikes to remove male jurors. The petitioner, in turn, used all but one of his strikes to remove female jurors. Consequently, the trial court empaneled an all-female jury.

Analogizing from *Batson*, the petitioner complained that the State's strikes were exercised solely based on gender, in violation of the Equal Protection Clause of the Fourteenth Amendment. After a historical look at female discrimination in the court system, Justice Blackmun, speaking for a majority of the Court, agreed with the petitioner in that a state's use of gender-based strikes violates the Equal Protection Clause.²⁵⁶

Since the issue was not before the Court in this case, the Court left open whether this decision is limited to the *government's* use of gender-based preemptory strikes. Justice O'Connor, in her concurrence, believes that its decision should be limited to the government.²⁵⁷ However, she possessed little confidence that the Court would do so based on the previous holdings that have extended *Batson* to nongovernmental litigants.²⁵⁸

2. *Failure to Instruct Jury on the Unavailability of Parole in the Penalty Phase of a Capital Murder Trial Was Error when State Law in Fact Prohibited Parole*

The petitioner in *Simmons v. South Carolina*²⁵⁹ was convicted of the murder of an elderly woman. Because of the unique nature of his mental disorder, both prosecution and defense witnesses testified, at the penalty

253. *Id.* at 543.

254. 114 S. Ct. 1419 (1994).

255. 476 U.S. 79 (1986).

256. *J.E.B.*, 114 S. Ct. at 1430.

257. *Id.* at 1431 (O'Connor, J., concurring).

258. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (private civil litigants are state actors when exercising preemptory strikes); *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (holding that criminal defendants are state actors).

259. 114 S. Ct. 2187 (1994).

phase, that the petitioner only posed a future threat to elderly women. Therefore, he would not pose a future threat to society, as long as he remained in prison. Due to previous convictions, the petitioner was ineligible for parole, work release or supervised furlough under South Carolina law and would actually spend the natural balance of his life in prison. Because of the public's misunderstanding of the actual length of a life sentence and the fact that defense counsel was unable to voir dire the jurors on their interpretation of the term, defense counsel requested an instruction be given that, in this case, life meant life. The trial court refused the instruction, and the petitioner was sentenced to death.

The Supreme Court held that when a state relies on evidence of future dangerousness, but fails to inform the jury on the unavailability of parole, a defendant is denied due process.²⁶⁰ "[P]etitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death."²⁶¹ The Court further held that the ultimate instruction given in this case (that life imprisonment should be understood in its plain and ordinary meaning) did not, in substance satisfy the petitioner's request for a charge on parole inability because such an instruction does nothing to dispel the misunderstanding reasonable jurors may have regarding the particular way that a state defines life imprisonment.²⁶²

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260. *Id.* at 2192-93.

261. *Id.* at 2194.

262. *Id.* at 2197.