Criminal Procedure: Trial and Appeal

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CRIMINAL PROCEDURE: TRIAL AND APPEAL

by

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MY mandate as a survey author is to isolate and discuss significant developments relating to the trial and appeal of Texas criminal cases. Perhaps the most significant developments to be discerned transcend the decision of any individual case. As the court of criminal appeals ends its first decade as a discretionary review court, it properly seems less concerned with correcting errors in individual cases and more comfortable limiting itself to the larger issues of criminal procedure. While the court occasionally decides issues that arguably should have been left to the courts of appeals, the judges seem more in harmony with the court's responsibility to address issues of broad scope and to formulate consistent standards for the trial and appeal of criminal cases.

The pervasive underlying concern presently seems to be the reliability of the conviction, as reflected, for example, in the preoccupation with the evidentiary standards on appeal and the concept of harmless error. As the court of criminal appeals (emulating the approach of the Supreme Court of the United States) becomes less and less concerned with particular errors that do not impact on the outcome of a criminal trial, it becomes more concerned generally with the fairness and appearance of fairness in the trial. A harmless error analysis inevitably requires the appellate court to examine both the prosecutor's motives and the overall fairness of the process.

Predictably, as the court of criminal appeals reaches these broader issues, the philosophical or "political" differences of individual judges on the court become apparent. The judges themselves seem increasingly willing to openly acknowledge those differences.[1] A respect for the rule of law requires us to believe that it is the rule of law and not the personal predilections of judges that determine particular results. Judges do not reach results and then reason backwards. One cannot deny, however, that the individual values and beliefs of a judge affect that judge's view of what the law should be and what the law is. The recent changes in the makeup of the court is a significant

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1. *See* Castillo v. State, No. 339-89, 340-89, 341-89, 7 n.6 (Tex. Crim. App., Oct. 31, 1990) (Judge Campbell objecting strenuously to implication of dissenting Judge McCormick that he is "soft" on crime).

development that assuredly will affect the law of criminal procedure in this state.

I. TRIAL

A. *Removal of Counsel*

In two cases the court of criminal appeals defined the authority of a trial judge to remove either the District Attorney or court-appointed defense counsel from a criminal case. In *Stearnes v. Clinton*[2] the court considered the authority of the trial court to remove a court-appointed attorney over the objection of the defendant and the attorney. In *Stearnes*, after the defendant had been indicted for capital murder, the court appointed two attorneys to defend him. The District Attorney's office had a policy that a defense attorney needed permission from the District Attorney's office to interview any of the State's witnesses. Appointed counsel McLarty made a written request to interview the State's key witness, who had previously been in protective custody, but did not receive a response. The witness contacted McLarty, however, and agreed to talk with him. McLarty arranged an interview at the witness's home. During the interview, the witness called the assistant district attorney assigned to the case and decided not to say anything further until the assistant district attorney arrived. When she did arrive, the prosecutor informed McLarty that the interview was over.[3]

At a hearing on the defendant's motion to depose the State's key witness, the trial judge granted the District Attorney's oral motion to remove McLarty and his co-counsel from the case because they had violated the State's policy regarding interviewing a witness. The judge appointed a new attorney to represent the defendant, claiming that McLarty had so antagonized the district attorney's office that he would be unable to get any cooperation from them.[4]

Relying on decisions from the California Supreme Court[5] and the District of Columbia Circuit Court,[6] the Texas court concluded that "the power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at his discretionary whim."[7] So long as a defense attorney acts within legal and ethical boundaries, his loyalty is to his client, not to the agency that pays his fee.[8]

Even though an indigent defendant does not have the right to an attorney of his choice, once an attorney is appointed an attorney-client relationship is established. This attorney-client relationship is entitled to the same protection as the retained counsel relationship.[9] The trial court, however, has the

2. 780 S.W.2d 216 (Tex. Crim. App. 1989).
3. *Id.* at 218.
4. *Id.* at 219.
5. Smith v. Superior Ct. of Los Angeles County, 440 P.2d 65 (1968).
6. Harling v. United States, 387 A.2d 1101 (D.C. Cir. 1978).
7. Stearnes v. Clinton, 780 S.W.2d 216, 223 (Tex. Crim. App. 1989).
8. *Id.* at 222.
9. Harling v. United States, 387 A.2d 1101, 1102 (D.C. Cir. 1978).

power to take appropriate steps to ensure both the integrity of the proceedings and the effectiveness of counsel's representation. Accordingly, the United States Supreme Court has upheld a trial court's refusal to allow dual representation when there was an actual or serious potential for conflict.[10] What is not clear, however, is the court's authority to remove counsel whom the trial judge determines to be acting incompetently. In *Stearnes* McLarty was not removed for incompetence, but for his competence.[11]

Moreover, McLarty had done nothing improper. The District Attorney's local rule for interviewing witnesses was at best "tenuous and in actuality . . . a legal nullity."[12] Such a rule conflicted with principles of fair play and contravened a defense lawyer's duty to ferret out and interview the State's potential witnesses.[13] Faced with the "local rule" and the duty to effectively represent his client, McLarty was between the proverbial "rock and a hard place,"[14] and the course he chose was the right one. The court buttressed its conclusion by observing that to condone removal would encourage other judges to act accordingly and would disrupt the effectiveness and independence of the criminal defense bar.[15] Therefore, short of legal or ethical violations by defense counsel, a trial judge may not remove a validly appointed criminal defense attorney over the objection of that attorney and the defendant.

The focus shifted to prosecutorial removal in *State ex rel. Eidson v. Edwards*.[16] A Taylor County district judge ordered the disqualification of the Taylor County District Attorney and his entire office in a capital murder prosecution.[17] A court-appointed attorney, Ross Adair, represented the defendant Clayton in his capital murder case. Adair interviewed witnesses and had several conferences with the defendant, thereby obtaining confidential, protected information. He also acted as lead counsel at Clayton's examining trial. Adair ended his representation of Clayton when he was appointed County Court at Law Judge. Co-counsel took over Clayton's defense. Following the primary election for the County Court at Law judgeship, Adair resigned that position and sought employment with the district attorney's office. Adair never discussed the Clayton case with anyone in the District Attorney's office, and did not participate in the prosecution in any way. In fact, the District Attorney explicitly told Adair not to discuss the case with anyone in that office nor to allow anyone to discuss it with him. Although finding no impropriety or unethical behavior on the part of Adair, the trial

10. Wheat v. United States, 486 U.S. 153 (1988).

11. Stearnes v. Clinton, 780 S.W.2d 216, 223 (Tex. Crim. App. 1989).

12. *Id.* at 224.

13. *See Ex parte* Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980). *Duffy* held that a defense attorney has a duty to make an independent investigation of the facts and a failure to seek out and interview potential witnesses was ineffective assistance of counsel; *see also* Sullivan v. Fairman, 819 F.2d 1382, 1393 (7th Cir. 1987) (failure to find and interview witnesses identified in police report was ineffective assistance).

14. 780 S.W.2d at 224.

15. *Id.* at 225.

16. 793 S.W.2d 1 (Tex. Crim. App. 1990).

17. *Id.* at 3.

judge, on motion of Clayton's attorney, disqualified the entire office from prosecuting Clayton's case "to avoid the appearance of impropriety."[18]

The court of criminal appeals held that the issue of the court's authority to remove the prosecutor was not moot even though special prosecutors had already been appointed and had obtained a conviction, because the disqualification had continued into the appellate stage and Clayton still had two outstanding indictments in Taylor County.[19] The court concluded that the district attorney's office is constitutionally created and is therefore constitutionally protected.[20] Moreover, the district attorney's office by statute must represent the state in all criminal cases except in the case of actual conflict of interest.[21]

A plurality of the court found that the trial judge had effectively removed the District Attorney from his elected office to the extent of his prosecution of Clayton.[22] Texas recognizes only three causes for removal of a county official, including the District Attorney: 1) incompetency; 2) official misconduct; or, 3) intoxication.[23] Even in those instances, removal can be only after a trial by jury. The trial judge could not remove the District Attorney as none of the three requisite causes were present nor was the District Attorney afforded a trial by jury. If a conflict of interest exists, the District Attorney is obliged to recuse himself, but the trial judge is not under a duty to remove him.[24] Accordingly, the trial court's order was void and mandamus would lie to restore the prosecutor to his office.[25]

The dissenting opinion accused the majority of that which it expressly disclaimed, namely, exempting prosecutors from the Code of Professional Responsibility.[26] The dissent argued that the trial judge had both the authority and discretion to disqualify the District Attorney's office to avoid potential conflicts of interest in violation of the Code of Professional Responsibility.[27] The majority, on the other hand, distinguished district attorney's and private attorneys, noting that a district attorney's job is constitutionally created and protected.[28]

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18. *Id.*

19. *Id.* at 4.

20. *Id.*; TEX. CONST. art. V, § 21.

21. *See* TEX. GOV'T CODE ANN. § 44.321(a) (Vernon 1988) (stating that "the Criminal District Attorney of Taylor County shall perform all the duties in Taylor County required of District Attorneys by general law."); *see also* TEX. CODE CRIM. PROC. ANN. art. 2.02 (Vernon 1989) (providing that each district attorney must represent the state in all criminal matters in its district).

22. Four judges concurred in the result but disagreed that removing a District Attorney from a particular case was tantamount to removal from office. 793 S.W.2d at 7.

23. TEX. LOCAL GOV'T CODE ANN. § 87.013 (Vernon 1988).

24. State *ex rel.* Eidson v. Edwards, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990).

25. *Id.* at 5. The court rejected the reasoning in Sherrod v. Carey, 790 S.W.2d 705, 709 (Tex. App.—Amarillo 1990, no writ), that disqualification of the district attorney was a matter of discretion for the trial court under his duty to ensure due process. 793 S.W.2d at 5-6 n.5.

26. 793 S.W.2d at 10 (Teague, J., dissenting).

27. *Id.*

28. *Id.* at 7.

B. Prosecutional Responsibility

The issue of the proper role and scope of prosecutorial authority is currently popular. The focus of *Barefield v. State*[29] was the scope of prosecutor authority under the separation of powers doctrine.[30] In *Barefield* the defendant was convicted of abduction and murder and sentenced to death.[31] Barefield contended that allowing a prosecutor to determine which cases constituted capital murder violated the separation of powers doctrine. Namely, allowing a prosecutor this power conflicts with the legislature's power to define crimes and to set the penalty range for those crimes. The argument was not unreasonable, given the vague and subjective contours of the doctrine emerging from some of the court's earlier decisions.[32] The court distinguished *Rose v. State*,[33] which involved the legislative branch's abrogation of the executive branch's powers through its creation of a parole law instruction. The court found the State's decision to seek a capital murder conviction not analogous to the legislature's power to define penalty ranges.[34] Accordingly, the separation of powers doctrine was not violated.

In *Ex parte Brandley*[35] the court addressed the prosecution's obligations in the investigation of a case. On habeas a petitioner who had been convicted of capital murder asserted that the State's investigative procedures were so suggestive of his guilt as to create false testimony calculated to manufacture circumstantial evidence against him in violation of his right to due process and a fair trial. The habeas judge agreed with the defendant and found the State's "blind focus" during the investigation ignored leads that were inconsistent with the defendant's involvement in the crime.[36] The court of criminal appeals cited *Foster v. California*[37] for the proposition that the State's investigation may be so improper and suggestive as to lead to a deprivation of the defendant's due process rights.[38] An examination of the totality of the circumstances led a majority of the court to conclude that the cumulative effect of the State's procedures deprived Brandley of due process by suppressing evidence favorable to him and creating false and unreliable testimony.[39]

The majority focused on a number of factors, without holding that any one of them was reversible constitutional error. The officer in charge of the investigation had arrested the defendant janitor at the school where the murder was committed before interviewing any witnesses. The officer took the defendant's co-workers on a "walk-through" of the events on the day of the

29. 784 S.W.2d 38 (Tex. Crim. App. 1989).
30. TEX. CONST. art. II, § 1.
31. 784 S.W.2d at 39.
32. *See* Rose v. State, 752 S.W.2d 529 (Tex. Crim. App. 1987); Meshell v. State, 739 S.W.2d 246 (Tex. Crim. App. 1987).
33. 752 S.W.2d 529 (Tex. Crim. App. 1987).
34. 784 S.W.2d at 46.
35. 781 S.W.2d 886 (Tex. Crim. App. 1989).
36. *Id.* at 887.
37. 394 U.S. 440 (1969).
38. 781 S.W.2d at 891.
39. *Id.* at 894.

crime. The officer was unable from the "walk-through" to elicit any information that might have cast suspicion on the defendant. The chief investigator ignored leads that pointed away from the walk-through version of events and he intimidated and threatened the State's key witness. Finally, the State did not perform tests on blood and hair that were found on the victim and subsequently lost. One should take care not to interpret *Brandley* as imposing a due process duty on the State to conduct any particular kind of investigation or to search for exculpatory evidence. The majority found a violation of due process because of the State's suppression of evidence favorable to the accused and creation by the State of false and inherently unreliable testimony.[40] Two judges rounding out the majority concurred only because the habeas hearing judge specifically found that the State created false testimony.[41] The three dissenting judges, disagreed that anything exculpatory was suppressed or that material false testimony was created.[42]

Duggan v. State[43] involved the State's failure to correct misleading testimony during trial. The defendant was convicted of possession of methamphetamine.[44] At trial, in an attempt to impeach the testimony of two alleged accomplices, defense counsel asked if they had exchanged their testimony for the State's promise of leniency. Both witnesses denied this allegation. At the hearing for a new trial, however, the District Attorney admitted he had agreed to leniency in exchange for the accomplice's testimony.[45] The lack of a formal agreement between the accomplices and the District Attorney led the court of appeals to reject the defendant's claim that the misleading testimony violated his due process and fair trial rights.[46] Citing *Burkhalter v. State*,[47] the court of criminal appeals reversed.[48] The court concluded that "It makes no difference whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal."[49] Because the testimony of the accomplices constituted a misrepresentation to the court, the prosecutor had a constitutionally-mandated duty to correct it.[50] The court characterized the prosecutor as a trustee of the State's interest in providing fair trials. In his "fiduciary" capacity, the prosecutor must ensure that the truth is before the court.[51] The prosecutor need not know the evidence is false; his conduct is gauged objectively according to

40. *Id.*
41. *Id.* at 895.
42. *Id.* at 896, 914-15.
43. 778 S.W.2d 465 (Tex. Crim. App. 1989).
44. *Id.* at 466
45. *Id.* at 467.
46. *Id.* at 468.
47. 493 S.W.2d 214 (Tex. Crim. App. 1973).
48. 778 S.W.2d at 468.
49. *Id.*
50. *Id.*; *see* Williams v. State, 513 S.W.2d 54 (Tex. Crim. App. 1974); Burkhalter v. State, 493 S.W.2d 214 (Tex. Crim. App. 1973); *see also* Mooney v. Holohan, 294 U.S. 103 (1935) (every state must provide corrective judicial process for relief of persons convicted and imprisoned for crime without due process of law).
51. 778 S.W.2d at 468.

what he should have known.[52] The false evidence, if not corrected, could have misled the jury and denied the accused a fair trial.[53]

C. *Effective Assistance of Counsel*

The court of criminal appeals continues to decide numerous allegations of ineffective assistance of counsel. In *Ex parte Walker*[54] a jury convicted Samuel Walker of aggravated robbery and sentenced him to 45 years in prison. Walker contended in a habeas corpus proceeding that he had ineffective assistance of counsel at both the guilt/innocence and penalty stages of his prosecution.[55] The court of criminal appeals reiterated its two differing standards of effective assistance. The proper standard for the guilt-innocence phase is the *Strickland v. Washington*[56] two-pronged test: 1) whether the assistance was reasonably effective from an objective point of view under prevailing professional standards, and 2) if ineffective, whether a reasonable probability exists that the outcome would have been different but for the ineffective assistance.[57] While *Strickland* articulates the standard for the guilt-innocence phase, the *Duffy* standard is applied to review allegedly deficient performance of defense counsel during the punishment phase. The inquiry under *Duffy* focuses on whether, based on the totality of representation, counsel was reasonably likely to render and rendering reasonably effective assistance.[58] Under this standard the complete representation by the attorney of the accused, including pre-trial, trial and sentencing, is nevertheless considered.[59] Applying its dual standard in *Walker*,[60] the court found that counsel's performance was deficient at both stages, but granted relief only on punishment because of the deficient performance at the punishment stage.[61] Although obviously incompetent, counsel's performance at the guilt-innocence stage did not undermine the court's confidence in the outcome under *Strickland*'s second prong because of the overwhelming evidence of guilt.[62] Counsel's deficient representation at the

52. *Id.*

53. 778 S.W.2d at 469. The case was remanded for determination under TEX. R. APP. P. 81(b)(2) whether the failure to correct the false evidence was reversible or harmless error. *Id.* at 470.

54. 777 S.W.2d 427 (Tex. Crim. App. 1989).

55. *Id.* at 428. The trial court found an extensive list of deficiencies at the guilt-innocence stage: 1) failure to notify the court she was not ready for trial despite being aware of the trial date for three months; 2) perfunctory investigation despite access to the State's file; 3) failure to visit the crime scene which was necessary to rebut the State's case on method of entry; 4) failure to object to inadmissible evidence and to file pretrial motions; and 5) opening the door to the admission of extraneous offenses. During the punishment stage, counsel allowed the State to comment on the defendant's failure to testify and failed to object or request a curative instruction and allowed an inadmissible prior conviction to be admitted without objection. *Id.* at 429-30.

56. 466 U.S. 668 (1984).

57. *Id.* at 694.

58. *Ex parte* Cruz, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987).

59. *Ex parte* Walker, 777 S.W.2d 427, 431 (Tex. Crim. App. 1989).

60. 777 S.W.2d 427.

61. *Id.* at 432.

62. *Id.* at 430.

punishment, including her responsibility for the admission of three otherwise inadmissible extraneous aggravated robberies, however, did not meet the *Duffy* standard of "reasonably effective" representation.[63]

In *Ex parte Cruz*[64] the court justified the use of a separate standard of effectiveness for the punishment stage in a non-capital case by referring to language in *Strickland* in which the Supreme Court limited its holding to punishment in *capital* cases.[65] The irony is that the Texas court applied a standard developed in a capital case that it concedes it may now apply only in non-capital cases, and then only at the sentencing stage. Such an approach presumably is not unconstitutional, if the *Duffy* standard is to be regarded as more stringent than the *Strickland* formulation.[66] It is doubtful, however, that the results of many cases including *Walker* would be different even if the *Strickland* formulation were applied across the board and it makes little sense to perpetuate the vague standard of *Duffy* in any event.

In *Ex parte Dietzman*[67] the defendant claimed ineffective assistance of counsel in the conduct of his appeal. The defendant argued that counsel had: 1) failed to designate where in the record the bases of his points on appeal were located; 2) failed to perfect a bill of exception for testimony of a missing witness; and 3) failed to properly preserve objections by raising different objections on appeal than at trial. The defendant requested an out-of-time appeal as he was denied effective assistance of counsel on appeal.[68] Defense counsel responded to the defendant's allegations of ineffective assistance by first arguing that he did not properly designate the record because that was a job for the court reporter and clerk according to local rules. Second, he argued that he did not perfect a bill of exception for the missing witness because he did not know what that witness would say. Third, he argued that he did not cite to the record, "because he assumed the Court of

63. It is obvious from the court's opinion that Judge Duncan did not like the "prejudice" prong of *Strickland* because its application is "at best problematical" and "requires us to play a speculative game with a retrospective focus." 777 S.W.2d at 430. It seems equally obvious, however, that even the *Duffy* standard applied by the court in *Walker* also has an outcome focus, as evidenced by Judge Duncan's emphasis on the "impact" of counsel's performance on the sentence itself.

The court also set aside the punishment in *Ex parte* Walker, 794 S.W.2d 36 (Tex. Crim. App. 1990), in which the ineffective assistance was the failure to timely file a motion electing jury assessment of punishment. Although occurring during voir dire, the ineffectiveness was characterized as relating to punishment, calling for application of the *Duffy* standard. *Id.* at 36. Four dissenting judges believed that a "single mistake" by an otherwise diligent attorney did not make the "total representation" ineffective. *Id.* at 38. The majority, on the other hand, saw counsel's failure to carry out the defendant's choice to have the jury set punishment as analogous to not advising the defendant of the advantage of doing so (here, the judge's reputation for harsh sentences). *Id.* at 37. The split court attests that even the *Duffy* standard is not easily applied.

64. 739 S.W.2d 53 (Tex. Crim. App. 1987).

65. *Id.* at 57.

66. *See Ex parte* Walker, 777 S.W.2d 427, 482 (Tex. Crim. App. 1989). *But cf. Ex parte* Walker, 794 S.W.2d, at 37 (McCormick, J., dissenting).

67. 790 S.W.2d 305 (Tex. Crim. App. 1990)(per curiam).

68. *See* Evitts v. Lucey, 469 U.S. 387 (1985); Ward v. State, 740 S.W.2d 794 (Tex. Crim. App. 1987) (defendant entitled to effective counsel on appeal).

Criminal Appeals would read the record."[69] Finally, he could not explain why his objections on appeal did not conform to those he raised at trial. The court held these responses to be inadequate to address the allegations made by the defendant and found counsel ineffective.[70] Accordingly, the defendant was entitled to an out-of-time appeal.[71]

In *Ex parte Welborn*[72] a habeas corpus petitioner previously convicted of attempting to acquire a controlled substance by fraud was found to have been denied effective assistance of counsel.[73] Among counsel's failures found *in toto* to constitute ineffectiveness were: failure to voir dire the jury on the law of parties, failure to interview any of the State's potential witnesses, failure to object to the sheriff's testimony of defendant's being under the influence of a controlled substance, failure to object to hearsay contained in an offense report and a pen packet, and failure to investigate the possible jury misconduct of which counsel was informed (a juror allegedly had stated that the jury had discussed the parole law). His failure to interview any of the State's witnesses led to his being "surprised" by the sheriff's testimony concerning key out-of-court admissions by the defendant. Counsel admitted that he would have advised applicant to take the five-year plea offer by the State had he known of the out-of-court statement. Although counsel's failure to object to evidence was cited by the court as part of the mix of representation falling below an objective standard of reasonableness, the court cited specifically the failure to investigate possible jury misconduct and the failure to interview the State's potential witnesses as evidence that was "sufficient to undermine confidence in the outcome."[74] There is a suggestion in the case, however, that failure to make timely objections cannot be justified by a mere claim of trial strategy. Absent evidence to the contrary, the court could find that the State's case had not been put to the "adversarial testing process" required by *Strickland*.[75]

Co-counsel can claim on defendant's behalf that leading trial counsel's performance was ineffective and subject to review under the *Strickland* standard.[76] An interesting question that has been avoided so far is whether counsel on appeal can claim that he himself was ineffective as trial counsel. The failure to object properly at trial will preclude the appellate court's consideration of the merits of a defendant's claimed error. In such instances, the only avenue of relief is a claim that the failure to preserve the error was ineffectiveness.[77] Counsel claiming that he or she was ineffective may on its face seem inappropriate, but will the mere fact that appellate counsel is the

69. 790 S.W.2d at 306.
70. *Id.*
71. *Id.*
72. 785 S.W.2d 391 (Tex. Crim. App. 1990).
73. *Id.* at 396.
74. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).
75. *Id.* at 395.
76. Paulsel v. State, 784 S.W.2d 417, 418 (Tex. Crim. App. 1990).
77. Of course, a single failure to preserve error likely will not constitute ineffective assistance if the representation is otherwise adequate. *See supra* note 58.

same attorney who tried the case in trial court excuse raising a colorable claim of ineffectiveness?

The court of criminal appeals has held that a defendant has ten additional days to prepare his case under Texas Code of Criminal Procedure article 28.10 whenever a charging instrument is amended, regardless of the nature of the amendment.[78] In *Sodipo v. State*[79] the State amended the indictment before jury selection to change the cause number in the enhancement paragraph. The trial court denied the defense's request for an additional ten days to prepare for trial. The court of criminal appeals rejected the lower court's determination that since the only function of the enhancement paragraph was to provide notice of the prior conviction, the trial court did not err.[80] The court found nothing in the legislative history of article 28.10 to support the State's theory that some amendments are to be regarded as trivial for purposes of the statute. Moreover, as a mandatory statute, its violation was not subject to harmless error analysis. In *Rent v. State*[81] the *Sodipo* rule was held equally applicable to the amendment of an information.

D. Guilty Pleas

Former Texas Code of Criminal Procedure article 44.02, the substance of which is now contained in Texas Rule of Appellate Procedure 40(b)(1), has had a checkered and confused history. These provisions allow a defendant making a bargained guilty plea to preserve an adverse ruling on a pretrial motion to suppress evidence that ordinarily would be waived by the plea.[82] The obvious purpose is to encourage guilty pleas in cases in which the only contested issue is a matter raised by pre-trial motion. Formerly, the court of criminal appeals had held that any impropriety in the ruling concerning evidence would in effect be harmless error if the defendant made a judicial admission of guilt.[83] In a later case the court found that the policy underlying the rule would be better served by not regarding the judicial confession as a bar to consideration on appeal of the adverse ruling on the pretrial motion.[84] Finally, in *Johnson v. State*[85] the court held that reversal because of trial error was not required if the plea was supported by evidence "independent of the judicial confession and the tainted evidence."[86] *Johnson* was recently overruled by *McKenna v. State*[87] in which the court held that if the objected-to evidence is "instrumental in" or was somehow "used" in securing the conviction, the appellate court must reach the merits of the appeal.[88]

78. *See* Sodipo v. State, No. 1390-88 (Tex. Crim. App., Sept. 12, 1990) (not yet reported).
79. *Id.*
80. *Id.*
81. No. 1090-89 (Tex. Crim. App., Sept. 12, 1990) (not yet reported) (per curiam).
82. TEX. R. APP. P. 40(b).
83. Brewster v. State, 606 S.W.2d 325, 328 (Tex. Crim. App. 1980).
84. Morgan v. State, 688 S.W.2d 504, 507 (Tex. Crim. App. 1985).
85. 722 S.W.2d 417 (Tex. Crim. App. 1986).
86. *Id.* at 423-24.
87. 780 S.W.2d 797 (Tex. Crim. App. 1989).
88. *Id.* at 799. The court relied on Kraft v. State, 762 S.W.2d 612 (Tex. Crim. App. 1988).

The court rejected an approach that would require the appellate court to determine the extent to which the trial judge's ruling contributed to the conviction and instead held that any contribution was sufficient.[89]

In *McKenna*, since the State preserved the option of using the objected-to evidence and the defendant did not stipulate and consent to the other evidence of guilt until his motion to suppress was denied, the tainted evidence was regarded as having contributed "in some measure to the State's leverage in the plea bargaining process."[90] *McKenna* appears to eliminate the possibility that an adverse ruling on the motion to suppress will be regarded as harmless when the defendant pleads guilty after the ruling was made.[91] One might well ask why the court did not simply rule that the reviewing court must always reach the merits of the pretrial motion.

E. Jury Selection

The court of criminal appeals continues to flesh out the procedure for making a *Batson*[92] claim of unconstitutional use of peremptory challenges by the State to strike venirepersons solely because of race. In *Dewberry v. State*[93] the court concluded that use of ten strikes to exclude five of six blacks from the jury established a prima facie case of discrimination, because under *Batson* a "pattern" of strikes can give rise to an inference of discrimination.[94] When the defendant makes a prima facie case for discrimination,

89. *Id.*

90. *Id.* at 800 (quoting Kraft v. State, 762 S.W.2d at 614 (Tex. Crim. App. 1988)).

91. An exception might be a stipulation by the State before the defendant pleads that it will not use the evidence despite its being ruled admissible by the court, a sort of *post hoc* confession of error. In any event, an abundance of caution suggests that defense counsel make clear on the record that the decision to plead is based on the adverse ruling on the pretrial motion. Moreover, defense counsel must not overlook the procedural requirements for the appeal. Jones v. State, No. 0038-89 (Tex. Crim. App. Sept. 26, 1990), illustrates a potential trap for the defendant seeking to appeal after a guilty plea as authorized under Texas Rule of Appellate Procedure 49(b)(1). TEX. R. APP. P. 49(b)(1). (Note that an acronym sometimes used for the Texas Rules of Appellate Procedure is "TRAP.") The rule requires that the notice of appeal after a bargained plea must state either that the trial court granted permission to appeal or that the matter was raised by pretrial motion. In *Jones* the original notice of appeal filed by the defendant specified nothing other than notice of appeal was given. When the defect in the notice was pointed out, counsel filed an amended notice specifying the matters raised in his pretrial motion to quash and stated that permission was given by the trial court to appeal. Counsel, however, did not request an extension of time to file under Texas Rule of Appellate Procedure 41(b)(2). The court of appeals held that Texas Rule of Appellate Procedure 83 gave it power to allow defendant "a reasonable time to correct or amend" the defect but the court of criminal appeals disagreed. It held, in a 5-4 decision, that rule 83 could not be used to cure a defect in the notice of appeal under rule 40(b)(1). Counsel must utilize rule 41(b)(1) for an extension of time to file a proper notice of appeal.

92. Batson v. Kentucky, 476 U.S. 79 (1986). In Seubert v. State, 787 S.W.2d 68 (Tex. Crim. App. 1990), the court applied Holland v. Illinois, 110 S. Ct. 803 (1990), and held that the Sixth Amendment right to venire selected from a fair cross-section of the community was not violated by the use of peremptories to exclude members of a certain distinctive group. But three judges in *Seubert* emphasized that five concurring and dissenting Supreme Court Justices in *Holland* apparently would allow a non-minority to raise a *Batson* challenge. 787 S.W.2d at 72. This issue is pending before the Supreme Court. Powers v. Ohio, *cert. granted*, 110 S. Ct. 1109 (1990).

93. 776 S.W.2d 589 (Tex. Crim. App. 1989).

94. *Id.* at 591.

the prosecutor must provide more than merely neutral explanations. Instead, according to the court of criminal appeals in *Whitsey v. State*,[95] the prosecutor must give a "clear and reasonably specific" explanation of "legitimate reasons" for the peremptory challenges.[96]

In *Keeton v. State*[97] a case decided a year before *Whitsey*, the court purported to reject a "clearly erroneous" standard of review.[98] The *Whitsey* plurality, however, openly embraced that standard of review, claiming through Judge Miller, that it was similar in effect to the *Keeton* standard.[99] Judge McCormick, in his dissent, feared the plurality's version of the "clearly erroneous" standard in this context meant a reweighing of the evidence and a de novo determination of whether the strike was racially motivated.[100] The real impact of *Whitsey* is the affirmance of what seems clear in *Batson*: there must be something to review, that is, there must be a "plausible" basis on the record for the challenge.

The untimeliness of a *Batson* motion or the failure to make out a prima facie case of racial discrimination may be waived by the State.[101] In *Salazar v. State*[102] the court emphasized as it had in *Dewberry v. State*[103] the analogous factual inquiry in Title VII discrimination cases. If the State has properly responded as if the defendant had made out a prima facie case of discrimination, whether the defendant did so or not is irrelevant.[104] If the State has not properly responded, the issue as to whether the defendant has made out a prima facie case is subject to appellate review.[105]

F. Evidence

Because the Texas Rules of Criminal Evidence are four years old, a number of cases involving the interpretation of those rules are reaching the Texas appellate courts. The admissibility of expert testimony under Texas Rule of Criminal Evidence 702 has been and will be a frequently litigated issue. In *Duckett v. State*[106] the court of criminal appeals noted that under the new rule, expert testimony is not excluded merely because it encompasses or embraces an "ultimate" issue or fact.[107] The test is whether "the

95. 796 S.W.2d 707 (Tex. Crim. App. 1989).
96. *Id.* at 713 (quoting *Batson* at 98 n.20).
97. 749 S.W.2d 861 (Tex. Crim. App. 1988).
98. *Id.* at 870.
99. 796 S.W.2d at 726.
100. *Id.* at 741, 743 (McCormick, J., dissenting). The clearly erroneous standard, like the *Keeton* standard, purports to defer to the trial judge's finding, but the standard is not deferential enough for Judge McCormick. On the other hand, it is too deferential for concurring Judge Teague, who would require that the reasons for challenge found by a trial court to be race-neutral be supported by a preponderance of the evidence. *Id.* at 728, 735 (Teague, J. concurring).
101. Cooper v. State, 791 S.W.2d 80 (Tex. Crim. App. 1990).
102. 795 S.W.2d 187 (Tex. Crim. App. 1990).
103. 776 S.W.2d 589 (Tex. Crim. App. 1989).
104. 795 S.W.2d at 192.
105. *Id.*
106. 797 S.W.2d 906 (Tex. Crim. App. 1990).
107. *Id.* at 914.

expert's testimony, if believed, will assist an untrained layman trier of fact to understand the evidence or determine a fact in issue . . . and whether it is otherwise admissible under general rules of relevant admissibility."[108] In *Duckett* the State presented an expert in child sexual abuse investigations to testify concerning the "Child Sexual Abuse Syndrome" which helps explain a child's seemingly contradictory conduct after abuse has allegedly occurred. The defense had effectively impeached the child complainant's testimony by showing differences between her courtroom testimony and earlier videotaped statements. The court ruled that the expert testimony was admissible even though the testimony embraced the issue of the complainant's credibility.[109] The witness did not cross the line between *assisting* the trier of fact and *replacing* the trier of fact as decision maker because the testimony "was in the nature of background rehabilitative evidence."[110]

The fear expressed in Judge Teague's dissenting opinion that Texas trial courts are now wide open to "snake oil peddlers" disguised as experts[111] may be overstated but the scope of admissible expert testimony undoubtedly has been expanded by the new rules.[112] In *Pierce v. State*,[113] for example, the court held that it was not error to exclude expert testimony on the risks of misidentification but the court expressly stated that "we do not hold that expert testimony concerning eyewitnesses should be excluded in *all* cases . . . ."[114] The court suggests a different result or at least a harder case if the expert in *Pierce* had "fit" his testimony to the testimony of the witnesses in the case rather than testifying generally concerning the inherent unreliability of eyewitness identification.[115]

In *Spence v. State*[116] the court ruled that bite mark evidence — comparison through an expert of the defendant's bite pattern with bite marks on victim's body — was admissible.[117] The court noted that the data base was presently insufficient to conclude that each individual's dentition was unique, but that there was unanimous agreement among adontologists that "if even one point of dissimilarity is found between the suspect's dentition and the bite mark then it may be said with certainty that the suspect did not make the bite mark [and]. . . that suspect may be eliminated."[118] There also is disagreement among the experts on the exact number of similarities

108. *Id.*
109. *Id.* at 915.
110. *Id.* at 920.
111. *Id.* at 921.
112. In Hopkins v. State, 480 S.W.2d 212 (Tex. Crim. App. 1972), a pre-rule 702 case relied on by the court of appeals in *Duckett*, the court of criminal appeals upheld the exclusion of psychiatric testimony to impeach the credibility of a State's witness. The court of criminal appeals justified the *Hopkins* exclusion as not inconsistent with its admission of the expert testimony in *Duckett* because the psychiatric evidence in *Hopkins* would not "assist" the jury. *Duckett*, 797 S.W. 2d at 911.
113. 777 S.W.2d 399 (Tex. Crim. App. 1989).
114. *Id.* at 416 n.5.
115. *Id.* at 415-16.
116. 795 S.W.2d 743 (Tex. Crim. App. 1990).
117. *Id.* at 750-52.
118. *Id.* at 751.

needed to make a positive identification. The court found, however, that "bite mark evidence has received sufficient general acceptance by recognized experts in the field of forensic odontology that it is unnecessary for us to consider the applicability of the *Frye* test to this cause."[119] The court must have been saying that because the technique has received general acceptance in the relevant scientific community (forensic odontology), it need not consider whether some standard other than the *Frye* standard of general acceptance is applicable under the Texas Rules of Criminal Evidence to determine the admissibility of expert testimony. The court may directly confront that issue, however, in the context of DNA fingerprinting, the highly-publicized and controversial technology that involves comparison of minute tissue samples by genetic probes. Review has been granted in a case in which an appeals court held the evidence was inadmissible under the *Frye* test,[120] presumably to resolve the conflict in the courts of appeal. The Fort Worth Court of Appeals has held that DNA evidence is admissible under the general test of relevancy in which the degree of acceptance accorded a scientific technique goes to weight and credibility, not admissibility.[121]

Under the common law "voucher rule," the State was bound by exculpatory testimony elicited from its witnesses on direct examination. In *Russeau v. State*[122] the court of criminal appeals held that the voucher rule had been overruled by Rule of Criminal Evidence 607 which provides in part that the credibility of a witness may be attacked by any party, including the party calling that witness.[123] Because the Texas rule is identical to the federal rule, the court of criminal appeals deemed persuasive the advisory committee's note to the federal rule.[124] The note specifically stated that the rule was designed to abandon the rule against impeaching one's own witness as based on the false premise that a party has a "free choice" in selecting witnesses.[125]

A ruling by the court concerning reputation testimony under Texas Rule of Criminal Evidence 405 has been negated by amendment. In *Hernandez v. State*[126] the court of criminal appeals determined that Rule 405 was an outgrowth of prior case law requiring that a witness giving an opinion of the defendant's character based on knowledge of the defendant's reputation must first have been "substantially familiar" with that reputation.[127] Accordingly, the State's witnesses could not give their conclusions about a defendant's reputation when those conclusions were based on conversations with others about the defendant's prior acts and not on discussions with others about his reputation. The proviso at issue in *Hernandez* has been

119. *Id.* at 752.
120. Glover v. State, 787 S.W.2d 544 (Tex. App.—Dallas 1990, pet. granted).
121. Kelly v. State, 792 S.W.2d 579, 584 (Tex. App.—Fort Worth 1990, pet. granted).
122. 785 S.W.2d 387 (Tex. Crim. App. 1990).
123. *Id.* at 390. The court of criminal appeals suggested in several opinions and several courts of appeal had specifically held that rule 607 had effectively overruled the voucher rule. *Id.*
124. *Id.*
125. *Id.*
126. 800 S.W.2d 523 (Tex. Crim. App. 1990) (per curiam).
127. *Id.* at 525.

reworded and now requires that a character witness concerning an accused need only be "familiar" before the date of the offense with either the reputation of the accused or with the facts on which the opinion is based.[128] Presumably, under amended rule 405, neither reputation nor opinion testimony can be based on specific acts, but the long-term observation contemplated by the prior rule is eliminated.

As a general rule, a prosecutor cannot call a witness for the sole purpose of having that witness invoke the fifth amendment privilege not to testify. Noting an exception when "the prosecutor's case would be seriously prejudiced by a failure to offer him as a witness," the court in *Coffey v. State*[129] upheld the prosecutor's action in calling a witness who had been granted use immunity when the prosecutor knew the witness would invoke the privilege notwithstanding the immunity. The rationale of the court was that since the witness had no valid basis for refusing to testify, it was not error for the jury to hear the witness invoke it.[130] In his concurring opinion, Judge Miller stated that he could see little difference in impact on the jury of invocation of an invalid as opposed to valid claim of privilege.[131] While the majority acknowledged that the jury could draw a negative inference, it held that the defendant was not unfairly prejudiced.[132] The message of *Coffey* apparently is that the State has a right to have a witness who has been granted immunity invoke the privilege before a jury unless the record reflects that the prosecutor has in some way tried to "make hay" out of the witness doing so. Also, the prosecutor apparently is not required to show need as a predicate; the burden is on the defense to show unfairness.

In *Leal v. State*[133] a tape-recorded conversation between the defendant and an alleged murder co-conspirator cooperating with the State was admitted into evidence without it being translated from Spanish to English by a sworn interpreter. (It was not clear who actually prepared the transcript.)[134] Regarding the admissibility of a tape recording of a conversation in a foreign language as a question of first impression in Texas, the court held that such a tape may be admissible but admissibility is to be judged under Texas Code of Criminal Procedure, article 38.30.[135] On motion or objection, article 38.30 requires a sworn interpreter to translate the conversation.[136]

In *Spence v. State*[137] the court looked to its earlier decision of *Zani v. State*[138] and upheld admission of testimony from a State's witness who had

128. Order adopting Amendments to Texas Rules of Criminal Evidence, 53 Tex. B.J. 919 (Sept. 1990).
129. 796 S.W.2d 175, 178 (Tex. Crim. App. 1990) (quoting United States v. Vandeti, 623 F.2d 1144) (6th Cir. 1980)).
130. *Id.* at 179.
131. *Id.* at 180 (Miller, J., concurring).
132. *Id.*
133. 782 S.W.2d 844 (Tex. Crim. App. 1989).
134. *Id.* at 847 n.4.
135. *Id.* at 849.
136. TEX. CODE CRIM. PROC. ANN. art. 38.30 (Vernon Supp. 1989).
137. 795 S.W.2d 743 (Tex. Crim. App. 1990).
138. 758 S.W.2d 233 (Tex. Crim. App. 1988).

been hypnotized by a Texas Ranger before trial. Apparently, if the trial judge considers the dangers of hypnosis as cited in *Zani* as well as the factors set out in *Zani* affecting trustworthiness, he will be presumed to have properly admitted the evidence assuming that he had some knowledge of the expertise and qualifications of the hypnotist conducting the session.[139] Confrontation is not denied by admitting the testimony of the witness who underwent pretrial hypnosis, even if the witness can recall something at trial that he could not remember before trial, because that fact can be brought out on cross-examination.[140]

Under Texas Code of Criminal Procedure, article 38.072,[141] a statement by a child sex offense victim twelve years old or under that first describes the offense (an "outcry" statement) is admissible through the person to whom it was made as an exception to the hearsay rule.[142] The statute's constitutionality was sustained in *Buckley v. State*[143] in which the defendant's adult daughter was allowed to testify about the victim's outcry statement. The victim later was called by the State and the defendant was allowed to cross-examine but defense counsel did not question her about the outcry statement then nor when she was later recalled by the defendant. Admitting the outcry statement was held not to violate the right of confrontation under either the federal or state constitutions because the child was available for cross-examination at trial.[144] Belated cross-examination can be a constitutionally adequate substitute for contemporaneous cross-examination. Only if the opportunity for full and effective cross-examination is not possible at trial will particularized showings of necessity and indicia of reliability be required as a predicate for the outcry statement's admission.

The court of criminal appeals revisited the companion provision of Texas Code of Criminal Procedure, article 38.071, dealing with the admissibility generally of child sexual offense victim's statements and the presentation of the child's testimony at trial.[145] In *Briggs v. State*[146] a videotaped interview with a twelve-year-old victim of an alleged sexual assault was admitted under the former article 38.071, section 2. The child appeared as a witness

139. Spence v. State, 795 S.W.2d 743, 756 (Tex. Crim. App. 1990).

140. *Id.* at 757 (citing United States v. Owens, 484 U.S. 554 (1988)).

141. TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 1989).

142. Villalon v. State, 791 S.W.2d 130, 135 (Tex. Crim. App. 1990). The court of criminal appeals in Garcia v. State, 792 S.W.2d 88 (Tex. Crim. App. 1990), dealt with who is an "outcry witness" under the statute. A seven-year-old complainant told her teacher that she was having problems at home after the teacher had talked to the class about sexual abuse. At the defendant's trial for indecency with a child and aggravated sexual assault, a child protection specialist from the Texas Department of Human Services was allowed to testify concerning the details of statements made to him by the complainant concerning the offense. The trial court was held not to have abused its discretion in ruling the DHS specialist was the "outcry witness" as the "first person . . . other than the defendant, to whom the child made a statement about the offense." The record's failure to reflect what the complainant told her teacher left nothing more than a "general allusion" to the offense rather than a statement "that in some discernable manner describes the alleged offense." *Id.* at 91.

143. 786 S.W.2d 357 (Tex. Crim. App. 1990).

144. *Id.* at 360-61.

145. TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1989).

146. 789 S.W.2d 918 (Tex. Crim. App. 1990).

for the state at trial and was cross-examined by the defendant. Defense counsel did not object on constitutional grounds to the admission of the videotape but the court of appeals nevertheless reversed on the basis of *Long v. State*,[147] which held that the former article 38.071, section 2, was facially unconstitutional.[148] The court of criminal appeals concluded that the appeals court was correct in holding that the defendant need not object to preserve a claim under a facially unconstitutional statute. Further, the court admitted it was wrong in *Long* to hold the statute facially unconstitutional.[149] Therefore, the defendant's failure to object waived his claim of error.[150] *Briggs* is significant because of the court of criminal appeal's belated recognition of the qualified nature of the right of confrontation that had been earlier acknowledged in *Buckley*. The court emphasized that admissibility of pretrial videotapes depends essentially on whether the defendant is afforded a "full and effective cross-examination."[151] On the merits, *Briggs*' confrontation rights probably were not violated.

One may surmise that the court in *Briggs* was tidying up the setting for its ultimate consideration of the constitutionality of the new article 38.071. Just after *Briggs* was handed down, the Supreme Court of the United States decided that confrontation was adequately protected in a closed-circuit presentation of a child victim's testimony under a Maryland statutory procedure in which the child was subject to cross-examination and was seen and heard by the defendant.[152] The right to face-to-face confrontation, similar to the right to cross-examination, is not absolute, and may be limited to the extent specifically found necessary by the trial court to protect the child from the trauma of testifying in the presence of the defendant.[153]

G. Jury Charge

Jurors may not always understand their instructions, but they do try. Criminal juries may be predisposed to convict, but the jurors take their oaths to apply the law seriously and will require proof beyond a reasonable doubt as they perceive it. Accordingly, counsel should not underestimate the importance of the jury charge.

In a recent case, the jury charge by the terms of its application paragraph required the State to prove defendant's participation in an offense of attempting to obtain drugs by forgery both as a party and as the actor who actually presented the forged writing.[154] The failure of the evidence to show even possession of the forged writing by the defendant made the evidence

147. 742 S.W.2d 302 (Tex. Crim. App. 1987), *discussed in* Schmolesky, *Trial and Appellate Criminal Procedure*, Annual Survey of Texas Law, 44 Sw. L. J. 601, 632-33 (1990).

148. 742 S.W.2d at 323.

149. 789 S.W.2d at 921.

150. *Id.* at 924.

151. *Id.* at 922.

152. Maryland v. Craig, 110 S. Ct. 3157 (1990).

153. *Id.* at 3167.

154. Nickerson v. State 782 S.W. 2d 887, 891-92 (Tex. Crim. App. 1990).

insufficient to support the conviction under the charge given.[155] Even if the matter required to be proven in the charge is surplusage because it does not describe or explain an essential element of the offense, failure to prove the matter beyond a reasonable doubt will result in an acquittal.[156]

Defense counsel should be careful that the jury charge accurately reflects the applicable law. Confusion still prevails concerning penal code definitions, particularly the relationship between culpable mental states in offense definitions and the elements of the offense. For example, in *Haggins v. State*,[157] a conviction arising out of an injury to a child was reversed because a convoluted jury charge allowed the jury to convict without finding a culpable mental state as to the result of injury to the child. Of course, counsel must object to the charge given or request a proper charge to preserve the claim of error. Even if counsel does preserve the error, the defective instruction will be subject to the *Almanza*[158] harm analysis. Chances are, however, that an improper definition of the offense in the jury instructions will be reversible as an error calculated to prejudice the defendant.[159]

H. Sentencing

As noted in last year's survey,[160] the new Texas Code of Criminal Procedure, article 37.07, section 3a, has injected an element of uncertainty into the scope of permissible evidence at non-capital sentencing. On its face, the language appears to expand the range of admissible evidence. But the open-ended standard of relevance requires the courts or the legislature to establish what forms of evidence may be considered.[161]

A case under the prior statute illustrates the problem with the vague standard of relevance. In *Miller-El v. State*[162] the jury sentenced the defendant to separate life sentences after convicting her as a party with her husband to the offenses of murder and attempted murder. The court of criminal appeals held that evidence concerning the victim's medical condition and prognosis was admissible at the punishment stage of defendant's trial.[163] That evidence included the future loss of bladder and bowel control, sexual and pro-

155. *Id.*

156. *See* Arceneaux v. State, No. 1092-87 (Tex. Crim. App. Oct. 24, 1990) (instruction required State to prove exhibit introduced by State was cocaine when it was only the package that contained cocaine).

157. 785 S.W.2d 827 (Tex. Crim. App. 1990) (per curiam).

158. Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1985), *cert. denied*, 107 S.Ct. 1901 (1987).

159. *See* White v. State, 779 S.W.2d 809, 828 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2575 (1990). Although error to refuse a requested instruction on the failure of the defendant to testify at the punishment stage, it was harmless in view of the evidence at both the guilt/innocence and punishment stages: "we cannot say the trial court's failure to give the requested charge was calculated to injure the rights of the defendant" nor that it "contributed to the jury's answers to the special issues." *Id.*

160. Schmolesky, *Trial and Appellate Criminal Procedure, Annual Survey of Texas Law*, 44 Sw. L.J. 601, 607-08 (1990).

161. *Id.* at 608.

162. 782 S.W.2d 892 (Tex. Crim. App. 1990), *rev'd on other grounds*, 790 S.W.2d 351 (Tex. App.—Dallas 1990).

163. *Id.* at 893.

creative functions, and possibly the ability even to use a wheelchair. Under the test of relevancy applied at the guilt/innocence stage, however, the court would not admit evidence of the victim's future hardships as a paraplegic. But the issue at the punishment stage of a non-capital case under the-then article 37.07, section 3(a), is a matter of policy, not of factual relevance, according to Judge Clinton.[164] Because the legislature has not set a coherent policy, the court has had to fill the "policy void"[165] by including evidence of the circumstances of the offense and the particular circumstances of defendant within the proper range of admissible evidence. Judge Clinton then concluded that the extent of injury, including anticipated future injury was a circumstance of the offense.[166]

In *Miller-El* Judge Clinton distinguished *Booth v. Maryland*,[167] in which the United States Supreme Court held that a "victim impact statement" (VIS) was inadmissible at capital sentencing.[168] The VIS contained information related to the impact on the family of the victim's death and the personal characteristics of the victim. The Court considered the information inflammatory and likely to distract the jury from relevant evidence when reaching a verdict.[169] The information was immaterial to the defendant's culpability and carried with it the risk the jury would impose the death sentence because of irrelevant factors beyond the defendant's knowledge when he acted.[170] Judge Clinton concluded that the future injuries in *Miller-El* were not unrelated to the defendant's blameworthiness.[171] Apparently, because the defendant intended or should have anticipated the victim's death (seemingly obvious if she were properly convicted of attempted murder), the future injuries could be "rationally attributed" to the defendant. Moreover, Judge Clinton concluded that preventing the jury from hearing evidence of the victim's future hardships would be tantamount to precluding retribution as a factor for the jury's consideration when assessing punishment.[172]

A more satisfactory approach to *Booth* would have been simply to conclude that the future injuries of the victim were a direct circumstance of the crime, distinguishing the evidence in *Booth* of impact on family and characteristics of the victim. In *Booth* the key factor was that the VIS evidence could improperly influence the jury's decision on imposing the death sentence.[173] In *Miller-El* the defendant obviously contemplated the death of the victim, but can it reasonably be concluded that she was aware of the risk of future pain and suffering? Judge Clinton's reference to retribution may sug-

164. *Id.* at 896.
165. *Id.*
166. *Id.*
167. 482 U.S. 486 (1987).
168. *Id.* at 509.
169. *Id.* at 508.
170. *Id.* at 504.
171. *Miller-El*, 782 S.W.2d at 896.
172. *Id.* at 892, 897.
173. "Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Booth v. Maryland, 482 U.S. 496, 505 (1987).

gest that the nature of the crime itself may be considered apart from the state of mind of the offender.

What is relevant at sentencing should arise in a number of other contexts. The extent to which unadjudicated offenses can be proved up by the State at the penalty stage to establish the defendant's character, for example, divided the Beaumont Court of Appeals in *Huggins v. State*.[174] The State had introduced at the penalty stage of the defendant's murder prosecution several instances of his petty theft and one instance of unauthorized use of and damage to an automobile. The majority concluded that the amended article 37.07, section 3a, had overruled the holding of *Murphy v. State*[175] that unadjudicated offenses were not part of the admissible prior criminal record of the defendant.[176] The majority interpreted the legislative intent behind amended article 37.07, section 3a as allowing for admission of evidence of unadjudicated offenses at the trial court's discretion.[177] Justice Burgess agreed with the result, but in a concurring opinion argued that retaining the language "prior criminal record" would have been unnecessary had the legislature not intended any limitation on the offenses to be admitted.[178] In deciding this and other issues under the new statute, the court of criminal appeals likely will have to elaborate on the purposes of punishment because the issue is no longer one of policy but of relevancy.

II. APPEAL

A. Standard of Review

The court of criminal appeals continued to apply its reasonable hypothesis theory in reviewing circumstantial evidence cases: the evidence must exclude to a moral certainty every reasonable hypothesis other than the defendant's guilt.[179] In *Jackson v. Virginia*[180] the Supreme Court established the constitutional standard for determining the sufficiency of evidence on review.[181] The court of criminal appeals has claimed that the *Jackson* standard is the single standard used in all cases. The reasonable hypothesis theory in circumstantial evidence cases has been characterized as "an analytical construct" consistent with *Jackson* rather than being a separate standard.[182] The court could adopt the rational hypothesis test as a separate standard which exceeds the due process minimum rational juror test of *Jackson*. In-

174. 795 S.W.2d 909 (Tex. App.—Beaumont 1990, pet. ref'd).
175. 777 S.W.2d 44 (Tex. Crim. App. 1988).
176. *Id.* at 50.
177. *Huggins*, 795 S.W. 2d at 911. The statute provides for "any matter the court deems relevant to sentencing, including the prior criminal record . . . ." TEX. CRIM. PROC. CODE ANN. art. 37.07, § 3a (Vernon Supp. 1989).
178. Huggins, 795 S.W.2d at 912 (Burgess, J. concurring).
179. *See* Skelton v. State, 795 S.W.2d 162, 167 (Tex. Crim. App. 1989), *cert. denied*, 111 S.Ct. 210 (1990).
180. 443 U.S. 307 (1979).
181. The Court expressed the standard as whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original).
182. Butler v. State, 769 S.W.2d 234, 238 n.1 (Tex. Crim. App. 1989).

stead, however, the court chooses to pretend that the reasonable hypothesis theory may be rationalized within the *Jackson* formula. The rationale is that if there is a rational inference other than guilt possible from the evidence, a finding of guilt is not a rational finding. This is legal sophistry. It is no wonder, then, that the court of criminal appeals has granted review in several cases to reconsider the standard of review in circumstantial evidence cases.[183]

Whether the reasonable hypothesis test is merely an analytical construct or a different standard, it clearly makes a difference, particularly in "affirmative link" proof of possession cases such as *Skelton v. State*.[184] The jury in *Skelton* convicted the defendant of capital murder in the death of a man against whom the defendant had made threats. Two weeks after the defendant's threats the man was killed by a blast from a bomb placed under his pickup truck. The evidence showed the defendant in possession of dynamite and magnets of the type used in the bombing. Because no evidence connected the defendant with the actual placing of the bomb nor showed he procured another to place it, the hypothesis that someone else committed the crime was not excluded. Of course, if the hypothesis of innocence claimed by the defendant is implausible and incompatible with the other evidence, as it was in *Willis v. State*,[185] the conviction will be affirmed. Similarly, in *Williams v. State*[186] the court of criminal appeals upheld the defendant's conviction of possession of cocaine over a claim of insufficiency of evidence.[187] The defendant had been arrested and placed in the back seat of a police patrol car. The court of criminal appeals reversed the court of appeals holding that the evidence was insufficient to show the defendant was the person who deposited rocks of cocaine found in the back seat of the patrol car.[188] The police testimony that the defendant was the only person in the back seat of the car since the shift began, when they had searched the police car and found the area behind the back seat clean, excluded any reasonable hypothesis except that of guilt. Any possibility that someone other than the defendant had placed the cocaine in the back seat or that the officers had planted it was unreasonable, even though the officers failed to discover any cocaine on the defendant's person when they conducted the pat-down search.[189]

In *Meraz v. State*[190] the court of criminal appeals held that under the article V, section 6, of the Texas Constitution, the courts of appeal have exclusive jurisdiction to resolve questions of whether the great weight and preponderance of the evidence supports a jury verdict.[191] The court thereby rejected the standard it had fabricated from the "rational juror" test of *Jack-*

183. Allen v. State, 786 S.W.2d 738 (Tex. App.—Fort Worth 1989, pet. granted) and McCarty v. State, 788 S.W.2d 213 (Tex. App.—Fort Worth 1990, pet. granted).
184. 795 S.W.2d 162 (Tex. Crim. App. 1989).
185. 785 S.W.2d 378, 382 (Tex. Crim. App. 1989), *cert. denied*, 111 S.Ct. 279 (1990).
186. 784 S.W.2d 428 (Tex. Crim. App. 1990).
187. *Id.*
188. *Id.* at 430.
189. *Id.*
190. 785 S.W.2d 146 (Tex. Crim. App. 1990).
191. *Id.* at 154. The standard of review is "whether after considering all the evidence rele-

son v. Virginia: whether any rational trier of fact could have found the defendant failed to prove his defense by a preponderance of the evidence. Under the rejected standard, if the prosecution presented any evidence to rebut the defense, a court of appeals would never overturn a jury finding that the defense was not proved. Thus, in *Meraz* the court of criminal appeals held that the court of appeals applied the correct standard when it reversed the conviction because the competency jury's finding that the defendant was competent to stand trial was against the great weight and preponderance of the evidence.[192] Relying on *Tibbs v. Florida*[193] the court held that remand to the trial court was proper because the appeals court finding did not amount to an acquittal which would bar retrial.[194]

B. Harmless Error

The harmless error concept is addressed frequently in Texas criminal appellate courts decision. The Texas Court of Criminal Appeals has grappled with the meaning and application of this concept as codified in Texas Rule of Appellate Procedure 81(b)(2). The rule as stated is essentially a codification of the harmless error rule applied by the United States Supreme Court to constitutional errors.[195] The Texas rule, however, applies to non-constitutional errors as well. To be classified as harmless under the rule, it must be proven by the State "beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment."[196]

The court of criminal appeals has taken steps to clear up the confusion as to the application of the rule which has been characterized as "in a developmental, if [not] (sic) dynamic stage."[197] The rule applies generally to all errors, but not errors in the jury charge that do not implicate constitutional rights.[198] Accordingly, the rule applies to jury argument error[199] and to the

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vant to the issue at hand, the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust." *Id.* at 155.

192. *See* Patel v. State, 787 S.W.2d 410, 411 (Tex. Crim. App. 1990) (applying *Meraz* to the defense of insanity).

193. 457 U.S. 31, 37 (1987) (holding that reversal for "insufficient evidence" will bar retrial but reversal on the basis of "weight of evidence" will not).

194. Of course, a finding of incompetency, unlike insanity, would not implicate the Double Jeopardy clause anyway because it would be the result of a civil rather than criminal proceeding. *See* Meraz v. State, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990).

195. Bennett v. State, 766 S.W.2d 227 (Tex. Crim. App. 1989), *cert. denied*, 109 S.Ct. 3229 (1989).

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

197. Whiting v. State, 797 S.W.2d 45, 49 n.5 (Tex. Crim. App. 1990).

198. Belyeu v. State, 791 S.W.2d 66, 75 (Tex. Crim. App. 1989) (involving "antiparties" charge at punishment stage of death penalty case).

199. Whiting v. State, 797 S.W.2d 45, 49 (Tex. Crim. App. 1990); Haynie v. State, 751 S.W.2d 878 (Tex. Crim. App. 1988). Madden v. State, 799 S.W.2d 683 (Tex. Crim. App. 1990), is an example of an extravagant application of harmless error to jury argument. The prosecutor's argument that there was "only one person here that knows why" someone who had killed two people would sign his own name to the couple's stolen credit card obviously was an improper comment on the defendant's failure to testify. The error was found harmless in part because the argument anticipated defense counsel's argument that asked the jury why a guilty person would do that. The "anticipated argument" rationale assumes the defense would have made the argument notwithstanding the prosecutor's comments. But it ignores the possi-

parole law charge held unconstitutional in *Arnold v. State*.[200] An important exception to application of harmless error is the violation of a mandatory statute. For example, in *Hernandez v. State*,[201] the court of criminal appeals held that Texas Rule of Appellate Procedure 53(j)(2) required the trial court to fulfill an indigent appellant's request to include in the record on appeal the voir dire examination of prospective jurors who were successfully challenged for cause or were the subject of agreed challenges.[202] The court justified the mandatory nature of the rule because the harmless error analysis would necessarily imply a colorable need requirement that appellate counsel, who had not tried the case, could not demonstrate. Care should be taken, however, not to regard a statute as mandatory simply because of obligatory language. In *Roberts v. State*[203] three co-defendants who had been severed for trial agreed on an order of trial that was ignored by the trial court despite the language of Texas Code of Criminal Procedure, article 36.10, which appears to give severed co-defendants the absolute right to so agree. The court of criminal appeals rejected the State's argument that violation of article 36.10 would never be disadvantageous to an accused, because there may be situations in which a co-defendant may have material evidence that will not be available unless that co-defendant is tried first and acquitted.[204] In *Roberts*, however, there was no evidence that the defendant who was tried first was harmed; one co-defendant did not invoke the Fifth Amendment privilege and testified favorably, and the other was not called, probably because he could be impeached by prior offenses. Acknowledging that predecessor versions of article 36.10 had been regarded as mandatory, the court noted some recent slippage and reluctance to reverse simply because of a violation.[205] Apparently because the sole purpose of the statute is to ensure that another's testimony is available, being tried first cannot harm the defendant who is not deprived of that testimony. Thus, although a violation of article 36.10 may be harmless, it would rarely be harmless beyond a reasonable doubt where the co-defendants do not testify.[206] In that instance, the court could not assess the impact of not having the testimony.

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bility that defense counsel made the argument only because he was compelled to do so by the prosecutor's comments. *Madden* also illustrates the recurring irony of the harmless error doctrine that the more capable a defense attorney is, the less likely any error will be found prejudicial.

200. 786 S.W.2d 295, 297 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 110 (1990).

201. 785 S.W.2d 825 (Tex. Crim. App. 1990) (per curiam).

202. The court relied on McGee v. State, 711 S.W.2d 257, 258 (Tex. Crim. App. 1986), *aff'd*, 774 S.W.2d 229 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 1535 (1990) (holding that TEX. R. APP. P. 53(j)(2)'s predecessor, TEX. CODE CRIM. PROC. art. 40.09(5), was mandatory).

203. 784 S.W.2d 430 (Tex. Crim. App. 1990).

204. *Id.* at 435.

205. *Id.* at 437. Of course, the conditions for application of the mandatory statute must be met before reversal is automatic. Davis v. State, 782 S.W.2d 211 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2193 (1990), held that a demand for a jury shuffle was not made timely in a capital case in which the judge first questions the panel. In this case, counsel made his motion after the trial court had conducted its initial examination. In non-capital cases, the motion would have to be made before the State initiated questioning.

206. *See* Roberts v. State, 784 S.W. 2d 430, 438 (Tex. Crim. App. 1990).

Although appellant does not have the burden to demonstrate harm attending trial error,[207] aside from that rare situation in which the claimed error cannot be harmless,[208] counsel should anticipate a harmless error argument by the State. The court of criminal appeals recently has attempted to set out a workable standard for making the harmless error determination. *Harris v. State*[209] set out general guidelines for making the harmless error analysis, and *Arnold v. State*[210] considered specifically the analysis to be applied in the context of parole law instructions.

In *Harris* the court noted that the role of the appellate court in conducting a harmless error analysis is not to determine how it would have decided the case, but to determine whether the error affected the conviction or punishment.[211] An overwhelming evidence of guilt test is an erroneous standard because rule 81(b)(2) clearly focuses on the error itself and not on the weight of the untainted evidence.[212] The court acknowledged, however, that it was impossible to measure the effect of the error without also considering the other evidence properly before the court. The properly admitted evidence is not to be weighed alone or tested to determine whether it is cumulative with the erroneous evidence.[213] The proper focus of the weight of untainted evidence of guilt in the harmless error analysis is an assessment of whether "overwhelming evidence dissipates the error's effect upon the jury's function in determining the facts so that it did not contribute to the verdict."[214]

Recognizing the subjective nature of Rule 81(b)(2), the court set out a basic framework for appellate courts to consider in applying the rule, while noting that the main concern of the reviewing court should be the integrity of the criminal justice process and a defendant's right to a fair trial.[215] The factors set out in *Harris* to assess the effect of the error include: 1) the source and nature of the error; 2) the extent to which the state used the error throughout the course of the trial; 3) the probable collateral implications of the error; 4) the probable weight a juror would put on such an error; and 5) the likelihood that a finding of harmlessness would encourage the State to repeat the error with impunity.[216]

These factors should be applied within a two-step framework: 1) isolate the error and its effects; and 2) ask whether a rational trier of fact "might have reached a different result if the error and its effects had not resulted."[217] Applying that analysis, the court found harmless the erroneous

207. *Id.* at 437 n.2.
208. *See* Russell v. State, 790 S.W.2d 655 (Tex. Crim. App. 1990) (harmless error analysis inapplicable to State's failure to meet its burden of proof of proving finality of a conviction as a predicate for enhancement).
209. 790 S.W.2d 568 (Tex. Crim. App. 1989).
210. 786 S.W.2d 295 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 110 (1990).
211. 790 S.W.2d at 585.
212. *Id.* at 585, n.16.
213. *Id.* at 586.
214. *Id.* at 587.
215. *Id.* at 587-88.
216. *Id.* at 587.
217. *Id.* at 588.

admission of two extraneous incidents of theft and robbery in a homicide prosecution.[218] The absence of any attempt by the State to taint the trial process, only passing reference to the robbery after the murder, and the existence of other overwhelming evidence all demonstrated that "the probable impact of this error on the jury was minimal, if any."[219] Thus, despite purporting to adopt an impact-on-the-jury test of harmless error, the court instead embraces the same impact-on-result test it disavows.

In the context of the parole law instruction that was, but is not now unconstitutional,[220] the court of criminal appeals has concluded that it can do no better than a factorial test of harmless error in which "no specific weight [is] attached to each factor nor is the presence or absence of any one factor determinative."[221] In *Arnold v. State*[222] the court of criminal appeals set out the nine factors: 1) whether parole law or good time credits were discussed during voir dire; 2) the nature of allusions, if any, to parole or good time in jury argument; 3) whether the jury sent notes to the judge during deliberations concerning parole or good time laws; 4) the actual sentence assessed in light of the facts of the case, including whether the sentence was divisible by three, implying reference to advice in the charge concerning parole eligibility after service of one-third of the sentence; 5) an affirmative finding in the judgment of the use of a deadly weapon; 6) the facts of the case; 7) prior criminal record of the defendant; 8) whether curative instructions other than the ineffectual one in the statute itself were given; and 9) whether defense counsel objected to the parole law instruction.[223]

Elaborating on these factors, the *Arnold* court noted that the presumption that juries will follow curative instructions was offset by the opposing presumption under rule 81(b)(2) of harm from an error.[224] To prevent shifting of the State's burden of proof under rule 81(b)(2), the court concluded that the rule's presumption would prevail.[225] Accordingly, unless the State has met its burden of proof that the error did not contribute to the conviction or punishment, the curative instruction could not be considered. The court further noted that the heinous nature of the crime is a factor that "like beauty, is in the eyes of the beholder,"[226] and should not in itself be assumed to underlay any severe sentence.

Application of the *Arnold* factorial test has not been easy in practice. Its subjective and uncertain application has often caused the court of criminal

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218. *Id.*

219. *Id.*

220. *See* Schmolesky, *Trial and Appellate Criminal Procedure*, Annual Survey of Texas Law, 44 Sw. L.J. 601, 622-28 (1990).

221. Sato v. State, 797 S.W.2d 37, 38 (Tex. Crim. App. 1990).

222. 786 S.W.2d 295, 300 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 110 (1990).

223. This list of *Arnold* factors is outlined in Brown v. State, 798 S.W.2d 284, 285 (Tex. Crim. App. 1990).

224. Arnold v. State, 786 S.W.2d 295, 310-11 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 110 (1990).

225. *Id.* at 311.

226. *Id.*

appeals to split.[227] If applied strictly, the harmless error formulation would seldom render the error harmless.[228] The State would be required literally to prove a negative, namely, that the erroneous instruction did not contribute to the sentence. In other words, the jury may have heard the instruction but, despite their oath to follow the law, they may have ignored it. As a practical matter, there is considerable pressure to affirm the sentence if the error probably did not contribute, or at least did not contribute significantly to the verdict. The most telling factors emerging from the cases in making that determination are the extent to which the prosecutor referred to parole in voir dire or closing argument[229] and the length of the sentence relative to the facts.[230]

227. *See, e.g.*, Brown v. State, 798 S.W. 2d 284 (Tex. Crim. App. 1990) (two judges dissenting); Sato v. State, 797 S.W. 2d 37 (Tex. Crim. App. 1990) (5 to 4 decision); Bugarin v. State; 789 S.W. 2d 594 (Tex. Crim. App. 1990) (three judges dissenting).

228. In fact, strict application could result in harmless error only if the defendant received the minimum sentence. *See* Tollett v. State, 799 S.W.2d 256, 260 (Tex. Crim. App. 1990).

229. *See, e.g.*, Brown v. State, 798 S.W.2d 284, 289 (Tex. Crim. App. 1990) (prosecutor's mention of parole was arguably neutral and fleeting); Johnson v. State, 797 S.W. 2d 658, 661 (Tex. Crim. App. 1990) (prosecutor's argument "pointedly directed the jury's consideration to calculating the effect of the parole law and good conduct time"); Sato v. State, 797 S.W. 2d 37, 38 (Tex. Crim. App. 1990) (prosecutor's reference was not at a strategic place but in the middle of an argument for a deserved sentence); Onumonu v. State, 787 S.W. 2d 958, 960 (Tex. Crim. App. 1990) (argument pointed directly to jury consideration of parole); Newton v. State, 784 S.W. 2d, 689, 691 n.2 (Tex. Crim. App. 1990) (minimal reference to parole in voir dire or closing argument).

230. *See* Brown v. State, 798 S.W. 2d 284, 290 (Tex.Crim. App. 1990) ("mid-range sentence despite such egregious facts" and "not readily divisible by three"); Sato v. State, 797 S.W. 2d 37, 39 (Tex. Crim. App. 1990) ("sentence here is in accord with the facts" and not evenly divisible by three).