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Criminal Procedure: Pretrial, Trial and Appeal

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CRIMINAL PROCEDURE: PRETRIAL, TRIAL AND APPEAL

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I. INTRODUCTION

This Article reviews significant decisions of the Texas Court of Criminal Appeals and Texas Courts of Appeals in the area of criminal pretrial, trial, and appellate procedure during the Survey period.

II. PRETRIAL

A. Bail

In *Ex Parte Jones*[1] the appellant argued that he was entitled to have his bail, set by the district court, at $550,000 combined for murder and capital murder charges, reduced to an amount that he could meet, $14,000. Pursuant to his writ of habeas corpus, a hearing was held and the court reduced the bond to $105,000.[2] The appellant utilized article 17.151 of the Texas Code of Criminal Procedure[3] to argue that he must be released on personal bond or a reduced surety bond if the State was not ready for trial within 90 days from the commencement of his detention. The legislative purpose of this article was to assure that an accused would not be held in custody indefinitely while the State was not at least prepared to bring the accused to trial.[4] The court of appeals held that the prosecutor's announcement that the State "has been" ready for trial was not sufficiently definite to show it was ready within the designated time.[5]

The court of criminal appeals acknowledged and distinguished *Meshell v. State*[6] which held the Speedy Trial Act[7] unconstitutional, emphasizing that in this case the only consequence was a salutary one within an accusatory system that embraces the presumption of innocence until an accused is proven otherwise.[8] The basic reasoning was that an accused, incarcerated and as yet untried, should not suffer the incidental punitive effect of incarcer-

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1. 803 S.W.2d 712 (Tex. Crim. App. 1991).
2. *Id.* at 713.
3. TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon Supp. 1992).
4. *Jones*, 803 S.W.2d at 715.
5. *Id* at 717.
6. 739 S.W.2d 246 (Tex. Crim. App. 1987).
7. TEX. CODE CRIM. PROC. ANN. art. 32 A.02 (Vernon 1989)
8. *Jones*, 803 S.W.2d at 716.

ation during any further delay attendant to prosecutorial exigency.[9] The amount of the bond was not solely determined by the ability of the accused to post bond; at the same time, an unprepared prosecutor does not risk having the entire prosecution set aside as would have been the case under the Speedy Trial Act.[10]

Ultimately, the court found on this state of the record that it was not within the trial court's discretion to find that the State was timely ready for trial. The appellant was entitled to "be released either on personal bond or by reducing the amount of bail required."[11] The cause was remanded to the habeas court for further proceedings.

In *Bills v. State*[12] the court upheld the denial of bail under article I, section 11(a) of the Texas Constitution, which provides that a person accused of a felony less than capital, committed while on bail for a prior felony, may be denied bail if the order is issued "within seven calendar days subsequent to the time of incarceration of the accused."[13] The appellant was arrested and incarcerated on April 5, 1990, and the order denying bail issued on April 12, 1990. The appellant began his count as of April 5th, whereas the correct calendar count commenced with the first day after the date of the act, or beginning April 6th. "The established rule in this State . . . is that when time is to be computed from or after a certain day or date, the designated day is to be excluded and the last day of the period is to be included unless a contrary intent is clearly manifested . . . ."[14]

B. Motion To Recuse

A defendant's motion to recuse the presiding judge must be filed at least 10 days before the date set for trial, stating grounds why the judge before whom the case is pending should not sit in the case.[15] The defendant in *DeBlanc v. State*[16] did not timely file his motion to recuse, and thus could not avail himself of article 200(a), section 6, of the Texas Revised Civil Statutes, that provides in part that the "district judge shall request the presiding judge to assign a judge of the Administrative District to hear and assign motions to recuse such district judge from a case pending in his court."[17] The court held that because the defendant failed to comply with the 10-day notice provision of rule 18(a), he was barred from complaining on appeal of the denial of a separate hearing before another judge on the motion to recuse.[18]

In *Cantu v. State*[19] the defendant argued on appeal that first, the trial

9. *Id.*
10. *Id.*
11. *Id.* at 719.
12. 796 S.W.2d 194 (Tex. Crim. App. 1990).
13. *Id.* at 195.
14. Home Ins. Co. v. Rose, 255 S.W.2d 861, 862 (Tex. 1953).
15. TEX. R. CIV. P. 18 (a).
16. 799 S.W.2d 701 (Tex. Crim. App. 1990, *cert. denied*, 111 S. Ct. 2912 (1991).
17. *Id.* at 705.
18. *Id.*
19. 802 S.W.2d 349 (Tex. App.—San Antonio 1990, pet. ref'd).

judge should have recused herself, and second, the trial judge was constitutionally disqualified to hear the case because of her prior attorney-client relationship with the defendant in another matter. On the first point, the court of appeals held the complaint was waived because the appellant voluntarily pled guilty to the offense without benefit of a plea bargain, and thus all non-jurisdictional defects were waived.[20] The court, likewise, did not find the trial judge constitutionally disqualified simply because the judge had represented the defendant on a previous unrelated matter.[21] The court acknowledged that since the judge was a former defense attorney, this case might present a more sensitive situation than if the judge were a former prosecutor. Nonetheless, this should not be an automatic disqualification whenever the attorney-client privilege is asserted. The privilege must first be claimed, and it is waived when the holder of it does not make a timely objection.[22]

C. *Motion To Sever*

In *Wedlow v. State*[23] the defendant was indicted for aggravated robbery and for burglary of a habitation, involving different complainants. After the defendant's motion to sever was overruled, both indictments were tried before the same jury. The court of appeals distinguished the statutory right to severance under section 3.04 of the penal code,[24] relied upon by the parties, from the right to severance when the State decides to prosecute indictments arising out of the same or different criminal episode in a single jury trial, the latter of which applied in this case.[25] The court cited abundant legal authority for the proposition that if a defendant objects to being tried on more than one indictment at the same time before the same jury, the trial court must sever, primarily because of the defendant's valuable right of a trial before an impartial jury guaranteed by article I, section 10 of the Texas Constitution.[26]

The court stated that the trial court's failure to grant the defendant's motion for severance was a procedural error, but one of major consequences.[27]

> Although the error is not in violation of a mandatory statute, it is a pretrial error which permeated the entire trial: how the parties voir dired the jury; the witnesses called by both sides; the testimony elicited from witnesses; the admissibility of evidence; appellant's decision to testify; and even argument at the punishment phase of the trial. The right which is implicated by this error is appellant's constitutional right to a trial before a fair and impartial jury.[28]

The court, citing *Sodipo v. State*[29] held that the error was of a type not

20. *Id.* at 350.
21. *Id.* at 351.
22. *Id.*
23. 807 S.W. 2d 847 (Tex. App.—Dallas 1991, pet. ref'd).
24. TEX. PENAL CODE ANN. § 3.04 (Vernon 1974).
25. *Wedlow*, 807 S.W.2d at 850.
26. *Id.* at 851.
27. *Id.* at 852.
28. *Id.*
29. 815 S.W.2d 551 (Tex. Crim. App. 1990).

subject to a harm analysis. Alternatively, the court did attempt to apply a harm analysis and found that the error affected the integrity of the process leading to the conviction, particularly because it forced the defendant to defend himself against two charges at the same time before the same jury.[30] The court noted that the impact of two indictments, two complainants and two verdicts upon the same jury was unquantifiable.[31] "To many jurors, two complainants are more believable than one. The jury may have believed that if appellant committed one of the offenses, he must have committed the other."[32] Thus, notwithstanding the lack of a harm analysis in the *Anders* brief filed by appellant's counsel, the court of appeals reversed.[33]

D. Charging Instruments

The period reviewed included numerous instances in which appellate courts addressed a myriad of problems associated with indictments.

Courts initially disposed of challenges to charging instruments on procedural grounds. In *Trujillo v. State*[34] the court rejected a challenge to a criminal information which had not been brought to the attention of the court before the trial date as required by the Code of Criminal Procedure.[35] In *Meador v. State*[36] the court easily dispensed with the appellant's motion to quash, finding that it was not even submitted in writing as required by the Code of Criminal Procedure.[37]

Many of the rules maintain their same viability. The indictment must charge an offense in plain and intelligible words with such certainty as to enable the accused to know what he will be called upon to defend against and to enable him to plead any judgment in bar of further prosecution for the same offense. An indictment is generally sufficient if it charges an offense in the terms of the statute.[38] A motion to quash must be granted, however, if the language in the indictment concerning the defendant's conduct is so vague or indefinite as to deny him effective notice of the acts he allegedly committed. The indictment need not plead evidence the State intends to rely upon at trial.[39]

In *Young v. State*[40] the defendant contended that the indictment did not indicate which of the conjunctively alleged theories of aggravated robbery the State intended to rely upon in the prosecution. Distinguishing *Ferguson*

30. *Wedlow*, 807 S.W.2d at 852.
31. *Id.*
32. *Id.*
33. *Id.* at 853.
34. 809 S.W.2d 593 (Tex. App.—San Antonio 1991, no pet.).
35. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1991).
36. Meador v. State, 811 S.W.2d 612 (Tex. App.—Tyler 1989), *aff'd*, 812 S.W.2d 330 (Tex. Crim. App. 1991)
37. TEX. CODE CRIM. PROC. ANN. art. 27.10 (Vernon 1989). *See Meador*, 811 S.W.2d at 615.
38. Clark v. State, 796 S.W.2d 551, 553 (Tex. App.—Dallas 1990, no pet.); Smith v. State, 811 S.W.2d 665 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).
39. Epps v. State, 811 S.W.2d 237, 243 (Tex. App.—Dallas 1991, no pet.)
40. 806 S.W.2d 340 (Tex. App.—Austin 1991, pet. ref'd).

v. State[41] and *Drumm v. State*[42] the court held that the indictment contained only one count charging the appellant with aggravated robbery.[43] An indictment containing two paragraphs, alleging different means by which an offense was committed, under a single statutory theory, was not subject to a motion to quash.[44]

In *Ex Parte Pena*[45] the appellant contested his convictions for burglary of a habitation in aggravated robbery on the basis that they were misjoined in the same indictment in violation of section 3.01 of the Texas Penal Code. While the court recognized that both of these offenses were "offenses against property" under title 7 of the Penal Code, each offense was a distinct statutory offense and thus they could not be joined in the same indictment.[46] Thus, the State could not obtain more than one conviction on the indictment.[47]

The court in *Ex Parte Pena* set out what it denominated as the five predominant methods used in determining which conviction to uphold and which to dismiss, in an attempt to sort out the appropriate relief to be granted the applicant: (1) to choose the offense that the defendant was convicted of first; (2) to affirm the conviction that had the lowest number on the charging instrument; (3) to choose the offense that was alleged first in the indictment; (4) to choose the conviction which had more proof; or (5) to randomly affirm one and dismiss the other conviction.[48] In *Ex Parte Pena* the court ultimately decided that it was an appropriate case for adopting and applying the most serious offense test in determining which conviction to uphold.[49] As the aggravated robbery conviction was the more serious of the two offenses because of the parole considerations, the court affirmed that conviction.[50]

In *Studer v. State*[51] the appellant argued for the first time on appeal that the information alleging indecent exposure was fundamentally defective as it failed to allege the acts relied upon to constitute recklessness in compliance with article 21.15 of the Code of Criminal Procedure.[52] The court analyzed the amendments to article IV, section 12 and article 1.14 and held that the definitions of indictment and information in the Texas Constitution did not require that each constituent element of an offense be alleged to have a valid charging instrument investing the trial court with jurisdiction.[53] Thus, while the information did not allege acts constituting recklessness, generally

41. 622 S.W.2d 846 (Tex. Crim. App. 1980).
42. 560 S.W.2d 944 (Tex. Crim. App. 1977).
43. *Young*, 806 S.W.2d at 343-44.
44. *Id.* at 344.
45. *Ex Parte* Pena, Nos. 71,246, 71,247, 1991 Tex. Crim. App. LEXIS 276 (Tex. Crim. App. Dec. 11, 1991).
46. *Id.* at *3.
47. *Id.*
48. *Id.* at *4-*5.
49. *Id.* at *6.
50. *Id.* at *8.
51. 799 S.W.2d 263 (Tex. Crim. App. 1990).
52. TEX. CODE CRIM. PROC. ANN. art. 21.15 (Vernon 1989)
53. *Studer*, 799 S.W.2d at 272.

a defect of substance, the defendant's failure to object to this defect pretrial waived the error on appeal.[54]

The changes wrought by article 1.14(b) require that exceptions as to form and substance be raised pretrial or otherwise the accused has forfeited his right to raise the objection on appeal or by collateral attack.[55] Judge Miller, writing for the court, emphasized that no longer does the constitution or statutory law require that all elements of the offense be in an indictment.[56]

In *Rodriguez v. State*[57] which involved a conviction for evading arrest, the defendant again complained for the first time on appeal (during oral argument) that the information was fundamentally defective for failing to allege that the defendant knew the peace officer was attempting to arrest him when he fled. Admittedly, the failure of the charging instrument to allege an element of an offense was a substantial defect, but the information was on its face an information which invested the trial court with jurisdiction.[58] The court held that the defendant had waived this defect under article 1.14(b) because of his failure to object before the date on which the trial began.[59]

In *Ex Parte Gibson*[60] the applicant argued that the indictment upon which he was convicted was fundamentally defective for failing to allege the date of the commission of the alleged offense, under the Code of Criminal Procedure.[61] The indictment alleged a date of September 3, but omitted a year. The date of the offense was September 3, 1987. The defendant did not give notice of appeal. Once again, the court, relying on *Studer*[62] emphasized that "if the instrument comes from the grand jury, purports to charge an offense and is facially an indictment, then it is an indictment for purposes of Art. V., § 12(b), and its presentation by a State's attorney invests the trial court with jurisdiction to hear the case."[63] The court concluded that since the defect in the indictment was one of form or substance, and as the applicant failed to object to the defect pretrial, the applicant could not now raise the defect for the first time in this post-conviction proceeding.[64] The court did observe that "[i]n *Studer* . . . we noted that the amendment to Art. 1.14 did not change what constitutes a substance defect but rather only the effect of a substance defect. That is, no longer will an unobjected to substance defect be 'fundamental error.' "[65]

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54. *Id.* at 273.
55. *Id.*
56. *Id.* at 272.
57. 799 S.W.2d 301 (Tex. Crim. App. 1990).
58. *Id.* at 303.
59. *Id.*
60. 800 S.W.2d 548 (Tex. Crim. App. 1990).
61. TEX. CODE CRIM. PROC. ANN. art. 21.02 (Vernon 1989).
62. *Studer*, 799 S.W.2d at 272.
63. *Gibson*, 800 S.W.2d at 551.
64. *Id.*
65. *Id.*; St. Peter v. State, 811 S.W.2d 729, 730 (Tex. App.—Corpus Christi 1991, no pet.) (argument that indictment for indecency with a child was fundamentally defective for failing to allege that appellant engaged in sexual conduct with a child, when indictment did specify that appellant did "touch the genitals" of the victim, waived because appellant did not object before the date of trial); State v. Oliver, 808 S.W.2d 492, 494 (Tex. Crim. App. 1991) (com-

On the other hand, in several misdemeanor cases, *Studer* was distinguished. In *State v. Edwards*[66] the court held that the misdemeanor theft information was fundamentally defective in that it showed on its face that the limitation period had elapsed before its presentment and it failed to plead facts tolling the statute.[67] "A fundamentally defective information is void, does not effectively invoke the court's jurisdiction over the defendant, and will not support a conviction."[68] The lack of a motion to quash did not waive this fundamental defect.[69]

In *Aguilar v. State*[70] the court held that the discrepancy in dates between the body of the complaint for DWI and the jurat rendered the complaint invalid and vitiated the information.[71] The court distinguished *Studer*,[72] particularly as the defect in the case would not appear on the charging instrument and was not subject to the provisions of article 1.14 of the Code of Criminal Procedure or article V, section 12 of the Texas Constitution.[73] Rather, the defect related to the process by which the charging instrument was generated and therefore related to the jurisdiction of the trial court in the face of a void pleading. The court emphasized:

> In the case of an indictment, the fact that fewer than the required number of grand jurors voted in favor of a true bill, failure of the actual foreman to deliver the bill, forgery of the foreman's signature or even inadvertent signing and returning of a bill in a case not reviewed by the Grand Jury are fundamental defects in the charging instrument process which would vitiate the instrument, vitiate trial court jurisdiction and be subject to first complaint on appeal despite the failure to present objection prior to trial on the merits. The defect in the underlying complaint in this misdemeanor case is analogous to those types of jurisdictional defects.[74]

In several cases, the Texas Court of Criminal Appeals examined the impact of article 28.10 of the Code of Criminal Procedure which provides:

> (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.

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plaint as to narcotic indictments omitting any reference to a culpable mental state waived); Gibson v. State, 803 S.W.2d 316, 317 (Tex. Crim. App. 1991) (complaint in narcotic case that indictment failed to specify the year in which the alleged offense occurred waived). *Ex Parte* Morris, 800 S.W.2d 225, 227 (Tex. Crim. App. 1990) (complaint that forgery indictment omitting allegation that writing purported to be the act of another who "did not authorize the act" was waived by failure to object at trial).

66. 808 S.W.2d 662 (Tex. App.—Tyler 1991, no pet. h.).
67. *Id.* at 664.
68. *Id.*
69. *Id.*
70. 810 S.W.2d 230 (Tex. App.—El Paso 1991, pet. granted).
71. *Id.* at 231.
72. *Studer*, 799 S.W.2d at 272.
73. *Aguilar*, 810 S.W.2d at 231.
74. *Id.* at 232.

(b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.
(c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.[75]

In *Sodipo v. State*[76] prior to jury selection, the prosecutor moved to amend the cause number only in the enhancement paragraph of the indictment, and was permitted to do so over objection that the defendant was entitled to an additional 10 days to prepare for trial.

The court in *Sodipo* held that article 28.10(a) was mandatory in nature and that the court erred in denying the defendant an additional 10 days time.[77] The 10 day requirement "cannot be subjected to a harm analysis in any meaningful manner, because the record will not reveal any concrete data from which an appellate court can meaningfully gauge or quantify the effect of the error."[78]

In *Hillin v. State*[79] the defendant was charged with aggravated assault on a correctional officer in two separate indictments, each of which alleged the defendant committed the offense by causing bodily injury to the victim "by throwing porcelain." The defendant's strategy was to attack the allegation describing the substance utilized to commit the aggravated assault. To counter his strategy, the prosecutor sought to amend the indictments by alleging that the manner and means used to accomplish the aggravated assault was by throwing a commode. Over the defendant's objections, the trial court granted the State's motion to amend and ordered the indictment amended by delineation.[80]

Article 28.10(b) of the Code of Criminal Procedure allows the State to amend the indictment after a trial on the merits has commenced unless the defendant has interposed a timely objection to the attempted amendment. The court emphatically held that if the defendant, after trial on the merits has commenced, interposes a timely objection to the State's proposed amendment, be it to form or substance, such amendment is absolutely prohibited. The court summarily rejected the approach of the court of appeals, which applied a substantial rights analysis under article 28.10(c), prohibiting the State from amending the indictment if such amendment transformed the allegations to additional or different offenses or prejudiced the substantial rights of the defendant.[81]

In *Flowers v. State*[82] the indictment charged the defendant with theft of oil field equipment. At a pretrial hearing, the defendant argued that his motion

75. TEX. CODE CRIM. PROC. ANN.. art. 28.10 (Vernon 1989).
76. 815 S.W.2d 551 (Tex. Crim. App. 1990).
77. *Id.*
78. *Id.*; *see also* Young v. State, 796 S.W.2d 195, 196 (Tex. Crim. App. 1990).
79. 808 S.W.2d 486 (Tex. Crim. App. 1991).
80. *Id.* at 487.
81. *Id.*
82. 815 S.W.2d 724 (Tex. Crim. App. 1991).

to quash the indictment should be granted because the State had failed to allege all of the necessary elements of theft, and specifically how the appropriation was unlawful. Thereafter, the State amended the indictment changing the name of the owner of the property and expanding on a statutory element of culpability tracking section 31.03(b)(3) of the Penal Code.

The court of appeals found that the amendments violated article 28.10(c) of the Code of Criminal Procedure because both changes charged a different offense than that found by the grand jury.[83] The court of criminal appeals held that the additional language tracking the Penal Code provision merely added evidentiary matters but did not change any essential element of the theft; in this case, the change of the owner's name did not allege a different offense.[84] A different offense means a different statutory offense.[85]

However, the court also analyzed the defense objections in terms of whether they did prejudice the substantial rights of the defendant similar to the approach utilized in *Adams v. State*.[86] In this case all of the parties knew that the amendment dealt with the same occurrence of theft as that alleged prior to any amendment and, therefore, there was no prejudice to any substantial rights.

However, the court did observe that:

> [i]t is possible that an amendment such as changing the owner might reflect an entirely different incident as the basis for the allegation. If this were so, the 'substantial rights' provision of Art. 28.10(c) would be implicated to protect the defendant, and the right to indictment by a grand jury under Art. V, § 10 might be implicated. For example, if the record shows that the amendment is made so as to charge a different occurrence or incident than that originally alleged in the indictment, the substantial rights of a defendant would be prejudiced in part because he has been denied any grand jury review of the offense as required by Art. I, Section 10.[87]

Thus, the same argument advanced in *Flowers* might very well be viable in a different context in the future.

The amendments of charging instruments affecting the identity of the victim have been addressed in several other cases. In *Ward v. State*[88] the defendant was charged with burglary of a building. The owner was named as Seth Haller. Before trial, the State filed a written motion to amend the indictment to change the owner's name to Steve Scott. The defendant signed this motion, waiving the additional ten days to prepare for trial and notice of the amendment. While the district court granted the motion and ordered the indictment amended, the State made no changes or interlineations on the indictment itself. On appeal, the defendant argued that because the State failed to physically amend the indictment, it was never amended and thus

83. *Id.* at 726.
84. *Id.* at 731.
85. *Id.* at 730.
86. 707 S.W.2d 900 (Tex. Crim. App. 1986).
87. *Flowers*, 815 S.W.2d at 729.
88. 804 S.W.2d 204 (Tex. App.—Texarkana 1991, pet. granted).

the evidence which showed Steve Scott as the building owner was insufficient to show Seth Haller as the owner, as alleged in the original indictment. The court, on appeal, held that the trial court's order on the motion sufficiently apprised the defendant about that which he was charged and constituted a sufficient order memorializing the substance of the amendment.[89] Thus the amendment was effectively amended. A trial court itself can amend an indictment.[90] Interestingly, the court in *Collins v. State*[91] held the opposite, that is, that an amendment occurs only when an indictment is physically changed.[92]

In *Rose v. State*[93] the defendant was initially indicted for aggravated assault on a correctional officer named Neal. Subsequently, the State amended the indictment by changing the victim's name to Kornacki. The method of injury was also amended from pushing him to pushing him to the floor. On appeal the defendant contended that the amended indictment charged him with an additional or different offense and prejudiced his substantial rights in violation of article 28.10(c) of the Code of Criminal Procedure. The court agreed that the change violated article 28.10(c) and the Texas Constitution's grand jury requirements contained in article I, section 10 and article V, section 12(b).[94] An indictment must allege on its face those facts necessary to show the offense was committed, bar a subsequent prosecution for the same offense and give the defendant notice of exactly what he is charged with.[95] While the original indictment in *Rose* met the certainty requirements of article 21.04 of the Code of Criminal Procedure, a conviction for assaulting the victim Neal would not bar trial on a charge of assaulting the victim Kornacki and, therefore, the amendment changed the offense in violation of article 28.10.[96]

In *Brown v. State*[97] the arson indictment alleged the owner's name to be Yolander Evette Weeks, whereas the proof showed the owner's first name to be Yolanda. After the State rested, appellant's motion for an instructed verdict, based upon the misspelling of the complainant's first name, was denied; the State's oral motion to strike the first name Yolander from the indictment as surplusage was granted.[98] The court's instructions gave the owner's name as Evette Weeks and omitted any instruction on the law of idem sonans. The State's amendment in this case happened after the commencement of the trial and over the defendant's objections. The court held that the decisions of the court in *Hillin v. State*,[99] *State v. Sodipo*,[100] and *Beebe v. State*[101]

89. *Id.* at 206.
90. *Id.*
91. 806 S.W.2d 578 (Tex. App.—Dallas 1991, pet. ref'd).
92. *Id.* at 580.
93. 807 S.W.2d 626 (Tex. App.—Houston [14th Dist.] 1991, no pet.).
94. *Id.* at 629.
95. *Id.*
96. *Id.*
97. No. 1187-90, 1991 Tex. Crim. App. LEXIS 248 (Tex. Crim. App. Nov. 20, 1991).
98. *Id.* at *2.
99. 808 S.W.2d 486 (Tex. Crim. App. 1991).
100. 815 S.W.2d 551 (Tex. Crim. App. 1990).
101. 811 S.W.2d 604 (Tex. Crim. App. 1991).

in the aggregate, "stand unmistakably for the proposition that no breach of article 28.10 should be tolerated in the trial court, regardless of its probable effect on the outcome of trial, and that no speculation about the impact of such an error under Rule 81(b)(2) should be attempted on appeal."[102]

The court in *Brown*, remanded the case to the court of appeals for reconsideration.[103] The court of appeals had originally found the error to be harmless error.[104] The court of criminal appeals, however, observed that upon remand, "it might be well for the court of appeals to consider, if adequately briefed, whether the word "Yolander" was, indeed, surplusage and, if so, whether the removal of surplusage from an indictment constitutes an amendment within the meaning of article 28.10, V.A.C.C.P."[105]

In *State v. Murk*[106] a public lewdness case, the defendant argued that the information was fundamentally defective because it failed to allege a culpable mental state, a defect in substance which existed only because the State amended the information on the date of trial by deleting certain phraseology. Thus, *Murk* was not an article 1.14(b) case (requiring defendant to object before date of trial), but rather was an article 28.10 case (requiring defendant to object to the amendment or waive the error), and thus the court said its decision to grant review under article 1.14(b) grounds was improvident.[107]

The court observed that the action of the State was really not contemplated or addressed by the statute. "While the State is permitted to amend with notice up until the day before trial commences and after the trial commences the statute does not address day of, but before the trial commences .... [t]he State did what was not permitted nor did it follow the mandates of a clear statute."[108] However, the defendant failed to properly object at trial and thus waived the error on appeal.[109]

In *Beebe v. State*[110] the court permitted the State to amend its terroristic threat pleadings, following which the defendant made known to the court that the defendant was entitled to more time to prepare for trial. The court held that the trial court was required to grant the additional time mandated by article 28.10 of the Code of Criminal Procedure upon request.[111]

In *Collins v. State*[112] the State's motion to strike words was granted at a pretrial hearing. The motion was aimed at the aggravated sexual assault conviction alleged in the enhancement paragraph, in order to strike the term aggravated. The defendant objected and requested an additional ten days to prepare his defense under article 27.12 of the Code of Criminal Procedure,

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102. *Brown*, 1991 Tex. Crim. App. LEXIS 248, at *5.
103. *Id.*
104. Brown v. State, 800 S.W.2d 569 (Tex. App.—Dallas 1990) *rev'd*, No. 1187-90, 1991 WL 241689 (Tex. Crim. App. Nov. 20, 1991).
105. *Brown*, 1991 Tex. Crim. App. LEXIS 248, at *2.
106. State v. Murk, 815 S.W.2d 556 (Tex. Crim. App. 1991).
107. *Id.* at 558.
108. *Id.* at 559.
109. *Id.*
110. 811 S.W.2d 604 (Tex. Crim. App. 1991).
111. *Id.* at 606.
112. 806 S.W.2d 578 (Tex. App.—Dallas 1991, pet. ref'd).

which was denied. While the State's motion to amend was granted pretrial, the district court did not physically amend the indictment until before the punishment phase of the trial. The district court recognized the defendant's prior objection, before permitting the actual amendment to be made to the indictment and the court, on appeal, found the defense objection to be sufficient and the reliance by the defendant upon article 27.12 rather than article 28.10 to be inconsequential because both demanded ten days extra preparation time in view of the amendment.[113]

However, in *Trujillo v. State*[114] the court found that the defendant waived any error under article 28.10 of the Code of Criminal Procedure.[115] On the trial date, the State sought to amend the information to correctly reflect the complainant's name by including the last letter of her first name. While the defendant objected to the amendment as contrary to article 28.10, the defendant did not seek ten days to respond to the amended information.

The court reviewed a number of instances in which the defendant filed exceptions to the charging instruments. In *Swope v. State*[116] the court considered the question of whether a defendant who was indicted only as a party to the commission of an offense (in this case, theft by deception) committed by another, was entitled to notice of the manner and means of the acts which he allegedly committed which allegedly subjected him to party responsibility. The court held that under section 7.02 of the Penal Code, sufficient notice to prepare a defense is given to a party to an offense by allegations of the underlying offense itself, and the facts which make a person criminally responsible for the conduct of another are evidentiary and need not be pled in the indictment.[117]

However, in *State v. Carter*[118] the court held that the defendant's motion to quash the information on the ground that it failed to provide adequate notice of the offense charged should have been granted.[119] The information alleged in part that the defendant "did . . . unlawfully while intoxicated, drive and operate a motor vehicle in a public place," but did not specify what definition of intoxicated the prosecutor would rely on at trial.[120] A charging instrument must, in the face of a motion to quash, allege specifically which definitions of intoxicated the State will prove at trial (the one under article 6701 l-1(a)(2)(A) or under article 6701 l-1 (a)(2)(B)).[121] Once again, the court applied the principle that even though an act or omission by an accused is statutorily defined, if that definition provided for more than one manner or means to commit that act or omission, upon timely request, the State must allege the particular manner or means it seeks to establish, in

113. *Id.* at 580.
114. 809 S.W.2d 593 (Tex. App.—San Antonio 1991, no pet.).
115. *Id.* at 595.
116. 805 S.W.2d 442 (Tex. Crim. App. 1991).
117. *Id.* at 444-45.
118. 810 S.W.2d 197 (Tex. Crim. App. 1991).
119. *Id.* at 200.
120. *Id.* at 198.
121. *Id.* at 200.

order to convey adequate notice from which the accused may prepare his defense.[122]

In *Fullbright v. State*[123] the defendant was indicted for aggravated robbery in each case, and each indictment contained an enhancement paragraph alleging a prior conviction for aggravated assault with a deadly weapon, using the same case number. The defendant filed a motion to quash the enhancement allegation, arguing that the conviction was void because the court-ordered probation, given in the case, was not authorized for the offense of aggravated assault with a deadly weapon. The court found the defect rendered the sentence void, and applied the harmless error analysis pursuant to Rule 81(b)(2) of the Texas Rules of Appellate Procedure.[124] In *Harris v. State*[125] the court ultimately held that based upon the testimony of the witnesses, the arguments of counsel making reference to this prior conviction, as well as the jury's review of the pen packet and the finding of the enhancement allegation as true, the court was unable to conclude beyond a reasonable doubt that the error did not contribute to the punishment assessed.[126] However, as the error was committed in the punishment phase, only a new punishment hearing was required under article 44.29(b).[127]

Finally, the matter of sufficient notice as to the finding of a deadly weapon was addressed in *Powell v. State*.[128] The defendant in *Powell* was charged as a party to the offense of aggravated robbery. In part, the indictment alleged that the defendant requested and attempted to induce someone other than himself to use and exhibit a deadly weapon. At the close of the evidence, during the punishment stage, the court made an affirmative finding of the use of a deadly weapon. This issue was not submitted to the jury at the guilt/innocence phase of the trial. The court held that as an affirmative finding of the use or exhibition of a deadly weapon could not apply to a party of an offense unless he personally utilized the weapon, the allegations in the indictment were insufficient to provide adequate notice.[129] Although the defendant did not lodge an objection when the court made its ruling, the court concluded that there were some errors so egregious that an *Almanza* review[130] cannot save them.[131] The court found the defendant did not waive the issue on appeal.[132]

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122. *Id.* at 199. *See* TEX. CONST. art. I, § 10. *See also* Ferguson v. State, 622 S.W.2d 846 (Tex. Crim. App. 1981); Sullivan v. State, 817 S.W.2d 344 (Tex. Crim. App. 1991).

123. 818 S.W.2d 808 (Tex. Crim. App. 1991).

124. *Id.* at *5.

125. Harris v. State, 790 S.W.2d 568 (Tex. Crim. App. 1989)

126. *Id.* at 589.

127. *Id.*

128. 808 S.W.2d 102 (Tex. App.—El Paso 1990, no pet.).

129. *Id.* at 104.

130. *See* Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1985)(whether the lack of notice so infected the procedure as to render it unfair).

131. *Powell*, 808 S.W.2d at 105.

132. *Id.*

E. Double Jeopardy

The constitutional protections against double jeopardy provide protection against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and, (3) multiple punishments for the same offense.[133] It is well settled that the successful appeal of a judgment of conviction on any ground other than the insufficiency of the evidence to support the verdict poses a bar to further prosecution on the same charge.[134]

In *Blakely v. State*[135] the court observed that *Blockburger v. United States*[136] addresses the multiple punishments component of double jeopardy whereas *Grady v. Corbin*[137] addresses the multiple prosecutions component.

Blockburger set out the test as follows:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[138]

In *Grady v. Corbin* a motorist under the influence of alcohol caused an accident in which another person was killed. After the motorist was convicted of DWI, the State prosecuted for vehicular manslaughter. DWI was a lesser included offense of vehicular manslaughter and therefore the defendant argued that this second prosecution violated his Fifth Amendment right to be free from double jeopardy.

In *Grady* the Supreme court initially applied the *Blockburger* test.[139] The court noted that if the application of the test revealed that the offenses had identical statutory elements or that one was a lesser included offense of the other, then the inquiry should cease and the subsequent prosecution was barred.[140] As the DWI and vehicular manslaughter each had a unique element, they were not the same offense under the *Blockburger* analysis.

The Supreme Court next held that when a person is subjected to successive prosecutions, the subsequent prosecution and conviction must do more than merely survive the *Blockburger* test.[141]

The court specifically held that:

> As we suggested in *Vitale*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an 'actual evidence' or 'same evidence' test.

133. *Ex Parte* Fortune, 797 S.W.2d 929 (Tex. Crim. App. 1990); Illinois v. Vitale, 447 U.S. 410 (1980).

134. Harris v. State, 738 S.W.2d 207 (Tex. Crim. App. 1986), *cert. denied*, Harris v. Texas, 484 U.S. 872 (1987).; Montana v. Hall, 481 U.S. 400 (1987)(per curiam).

135. 814 S.W.2d 433 (Tex. App.—Austin 1991, pet. ref'd).

136. 284 U.S. 299 (1932).

137. 110 S. Ct. 2084 (1990).

138. *Blockburger*, 284 U.S. at 304.

139. *Grady*, 110 S. Ct. at 2090.

140. *Id.*

141. *Id.* at 2093.

> The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct.[142]

In *State v. Comerford*[143] the court emphasized that the test in *Grady v. Corbin*[144] "require[d] the reviewing court to look to the 'underlying conduct' to determine whether: (1) this is conduct constituting an offense; (2) the defendant has already been prosecuted for this offense; and (3) this 'criminal conduct' will be used to establish an essential element of the offense charged at the subsequent prosecution. 'Only if the conduct meets all three parts of this test will the latter prosecution be barred by double jeopardy.' "[145]

The court in *Grady* concluded that the State, largely in view of its admission that it would depend on the same conduct in a subsequent trial, was barred from trying *Corbin* on the felony indictments after being adjudicated guilty on the misdemeanor charges arising out of the same accident.[146] However, the court also indicated that this holding would not prevent a successive prosecution on the felony charges if the bill of particulars showed that the State would not rely on proving the conduct for which Corbin had already been convicted.[147]

The defendant in *Ex Parte Fortune*[148] was convicted in a single trial on two counts under one indictment for the offenses of burglary of a habitation with intent to commit sexual assault and aggravated sexual assault.[149] A jury set punishment at fifteen years imprisonment on the burglary conviction and thirty years on the sexual assault conviction. The burglary conviction was affirmed but the sexual assault conviction was reversed on double jeopardy grounds.[150] Subsequently, the defendant was reindicted and he pled guilty to the aggravated sexual assault case pursuant to a plea bargain. There was no direct appeal. In this case, the defendant contended there was a violation of the double jeopardy clause because of this reindictment and conviction, after the initial reversal. The court stated that the defendant's slate was wiped clean by the court's finding that the indictment was fatally flawed as to a portion of the pleading.[151] The court held that the double jeopardy clause presented no bar for the government's retrial of the defendant who was successful in setting aside this first conviction because of an error in the proceedings leading to the first conviction.[152] *Grady v. Corbin* was distinguished because in the instant case, the conviction was earlier re-

142. *Id.*
143. 812 S.W.2d 668 (Tex. App.—Amarillo 1991, no pet.).
144. *Grady*, 110 S. Ct. at 2093.
145. *Comerford*, 812 S.W.2d at 669 (quoting *Ex Parte* Ramos, 806 S.W.2d 845, 847 (Tex. Crim. App. 1991)).
146. *Grady*, 110 S. Ct. at 2094.
147. *Id.*
148. 797 S.W.2d 929 (Tex. Crim. App. 1990).
149. *Id.* at 930.
150. Fortune v. State, 699 S.W.2d 706 (Tex. App.—Beaumont 1985), *aff'd*, 745 S.W.2d 364 (Tex. Crim. App. 1988).
151. *Ex Parte* Fortune, 797 S.W.2d 929 (Tex. Crim. App. 1990).
152. *Id.* at 936.

versed at the appellate level.[153]

In *Sanchez v. State*[154] the court reiterated that the Fifth Amendment's double jeopardy clause did not prohibit the defendant's prosecution in one trial for aggravated kidnapping and aggravated robbery charged in two indictments because the clause only applied to successive prosecutions, not to a single prosecution for multiple offenses.[155] Defendants may be prosecuted in a single trial for as many offenses as are committed in a criminal episode.[156]

In a jury trial, jeopardy attaches when the jury is impaneled and sworn.[157] Once double jeopardy does attach, the defendant possesses a valued right to have his guilt or innocence determined before the first trier of fact.[158] An exception to this rule exists if the defendant consents to a retrial, or if a retrial before a new jury is mandated by some form of manifest necessity.[159]

In *State v. Torres*[160] the court held that in bench trials, jeopardy attaches when both sides have announced ready and the defendant has pled to the charging instruments, under the Texas Constitution article I, section 14.[161]

In *Ex Parte Hubbard*[162] after a jury was selected, sworn in and impaneled for trial, the defendant made an oral motion to compel the State to elect between the counts in the indictment based upon misjoinder of the offenses of burglary of a habitation and burglary of a motor vehicle. The State, acknowledging that the counts may have been misjoined, wanted to proceed with the evidence and then make its selection when the charge was given to the jury; but it requested that the jury be dismissed as the jury had been told of the two offenses during voir dire. The defendant objected to any mistrial because the jury was impaneled and he was ready to proceed. The court granted the defendant's first motion to compel the State to elect a count, and at the same time, granted the State's motion to dismiss so that the trial could be reset.[163] After the court granted a mistrial, the jury was dismissed.

The issue before the court in *Hubbard* was "whether a mistrial declaration, over objection, after the jury is sworn, bars retrial of both offenses when defendant has asked for an election by the State of the offense on which it is to proceed."[164] The court initially observed that the defendant in *Hubbard* had followed the correct procedure in making a motion to elect the count upon which the State would proceed.[165] In *Fortune* the court held that when the State violated the misjoinder rule by alleging different offenses in

153. *Id. See* Lockhart v. Nelson, 109 S. Ct. 285 (1988).
154. 813 S.W.2d 610 (Tex. App.—Houston [1st. Dist.] 1991, pet. ref'd).
155. *Id.* at 612-13.
156. *Id.* at 613.
157. Crist v. Bretz, 437 U.S. 28, 31 (1978); Torres v. State, 614 S.W.2d 436, 441 (Tex. Crim. App. 1981).
158. *Torres*, 614 S.W.2d at 441.
159. *Id.*
160. 805 S.W.2d 418 (Tex. Crim. App. 1991).
161. *Id.* at 421.
162. 798 S.W.2d 798 (Tex. Crim. App. 1990).
163. *Id.* at 799.
164. *Id.*
165. *Id.* at 800 (citing Fortune v. State, 745 S.W.2d 364 (Tex. Crim. App. 1988)).

the same indictment, the defendant basically had three options.[166] The defendant could object to the charging instrument on the ground that the State had misjoined the offenses. The court should then grant the motion to quash or could force the State to elect the offense upon which it would proceed.[167] The second option was to forego the motion to quash and file a motion requesting that the State be made to elect the count upon which it would proceed. The trial court should grant the motion if the State has misjoined offenses.[168] The State must make the election by the end of the State's case and before the defense begins to present evidence. The third option was to make no motion to quash or objection and urge the error on appeal.[169]

In *Hubbard*[170] the State never made an election as to which count it would proceed and evidence was not presented on either count. The trial was over before it began when the jury was dismissed by the court.[171] In this situation, the offenses must be treated the same. Thus, the State was barred from prosecuting either offense contained in the indictment.[172]

F. Motion To Shuffle

Notwithstanding the clear provisions of article 35.11 of the Code of Criminal Procedure,[173] which gives the defendant an absolute right to a jury shuffle, the denial of this right was litigated in *Scott v. State*.[174] The defendant filed a timely motion to shuffle. The trial court directed the bailiff to shuffle the information cards without request from either the State or the defendant; the defendant's request was brought up only just prior to the State's commencement of the voir dire examination. The court emphasized that even had the defendant's request been before the trial judge when the bailiff shuffled the cards, this type shuffle of did not satisfy the defense request because the defendant had the right to see the jury panel seated, in the proper sequence, before he decided whether to exercise his right to shuffle.[175] In *Scott* the defendant was denied an opportunity to see the panelist seated in sequence before he exercised his right to a shuffle and thus the judgment was reversed.[176]

In *Urbano v. State*[177] the defendant tried to mix apples and oranges when the defendant complained that a *Batson* hearing[178] should have been conducted following the State's request for a jury shuffle. However, the court was not inclined to expand the *Batson* holding to this extent, particularly

166. *Fortune*, 745 S.W.2d at 368.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Hubbard*, 798 S.W.2d at 798.
171. *Id.* at 800.
172. *Id.*
173. TEX. CODE CRIM. PROC. ANN. art 35.11 (Vernon 1989)
174. 805 S.W.2d 612 (Tex. App.—Austin 1991, no pet.)
175. *Id.* at 614.
176. *Id.*
177. 808 S.W.2d 519 (Tex. App.—Houston [14th Dist.] 1991, no pet.).
178. Batson v. Kentucky, 476 U.S. 79 (1986).

because the defendant had the absolute right to demand the jury be reshuffled after being brought into the court room and failed to do so.[179]

III. TRIAL

A. Guilty Pleas

This period saw several cases revolving around complaints that a plea bargain agreement was not honored after the defendant entered his plea of guilty before the court.

In *Ex Parte Bittikoffer*[180] the defendant pled guilty to four separate felonies. The plea bargain agreement called for the defendant to complete the special alternative to incarceration program (the Texas Department of Criminal Justice's boot camp program), after which the defendant was to be placed on probation. The defendant successfully completed his program but the trial court lost jurisdiction and could not administer the rest of the plea agreement. The defendant sought to have his guilty pleas set aside. The district court found that the loss of jurisdiction was not the fault of the defendant or his attorney and that the defendant's guilty plea was involuntary because the terms of the plea bargain agreement could not be fulfilled.[181] The State agreed that the relief sought was proper. Thus, the judgments and sentences were vacated and the causes remanded to the district court.[182]

In *Gibson v. State*[183] the defendant sought dismissal of the indictment in his second case. When the defendant pled guilty in his first felony case pursuant to a written plea bargain agreement with the prosecutor, he did so in exchange for "40 years TDC, no finding of use or exhibition of a deadly weapon; Dismiss (cause number) 15,653-A".[184] The second case was never dismissed. On the contrary, the defendant was tried and found guilty and sentence was set at twenty years imprisonment and a fine. The defendant challenged that conviction based upon breach of the plea bargain agreement.[185] The court held that when a guilty plea rests to any significant degree on a promise of the prosecutor, such that it can be said that the promise is part of the inducement or consideration for the plea of guilty, the due process clause of the fourteenth amendment requires that such promise be fulfilled.[186] If the prosecutor does not carry out his side of the bargain, the defendant is entitled to have the agreement specifically performed or the plea withdrawn, which ever remedy is most appropriate.[187] In this case, as the defendant had served a substantial portion of the sentence imposed under the guilty plea, the only appropriate remedy was specific performance.[188]

179. *Urbano*, 808 S.W.2d at 520.
180. 802 S.W.2d 701 (Tex. Crim. App. 1991).
181. *Id.* at 702.
182. *Id.*
183. 803 S.W.2d 316 (Tex. Crim. App. 1991).
184. *Id.* at 317.
185. *Id.* (citing Santobello v. New York, 404 U.S. 257 (1971)).
186. *Id.* at 318.
187. *Id.*
188. *Id.*

In *Heath v. State*[189] the defendant pled guilty to aggravated robbery and was placed on ten years probation pursuant to a plea bargain agreement. Subsequently, the State moved to revoke the probated sentence, and following a hearing, the district court revoked the probation and sentenced the defendant to eight years imprisonment. The court thoroughly discussed the State's estoppel theory based in a trilogy of cases beginning with *Popham v. State*[190] and overruled *Popham* and its progeny.[191] The court found the sentence, not authorized by law, to be void and held that in plea bargain situations where specific performance is not an alternative, the only remedy is to order the plea withdrawn and to return the parties, including the State, to their original positions.[192]

A somewhat different scenario was presented in *Levy v. State*[193] wherein the defendant, without benefit of a plea bargain, pled guilty to aggravated sexual assault. The court found the defendant guilty and set punishment at six years imprisonment, then probated the sentence.[194] At a subsequent probation revocation hearing, the court sentenced the defendant to six years imprisonment. On appeal, the defendant argued that the district court erred in revoking his probation because he should have never been granted probation for his aggravated sexual assault conviction, as he was not eligible for court ordered probation under article 42.12 section 3(g)(a)(1)(C). Noting that a defect which renders a sentence void may be raised at any time, the court held that in cases where a defendant enters a guilty plea, or a plea of nolo contendere without the benefit of a plea bargain agreement with the State, and the trial judge assesses a punishment unauthorized by law, the appropriate remedy is to allow the finding of guilt to remain and to remand the case to the trial court for the proper assessment of punishment.[195]

In *Lemmons v. State*[196] the defendant, pursuant to a plea bargain, pled guilty to DWI and was sentenced to jail and a fine. The trial court denied the defendant's motion to suppress, which was the subject matter of this appeal. The court of appeals noted that the defendant pled guilty and that no evidence was introduced supporting the plea. The court held, in part, that the defendant failed to present a record which showed that the evidence sought to be suppressed was later used to determine his guilt and therefore, the error was waived; however, because the plea of guilty was found to be conditioned on the defendant's being able to appeal, the plea was found to be involuntary.[197]

The Court of Criminal Appeals in *Lemmons*[198] determined that Rule 40(b)(1) of the Texas Rules of Appellate Procedure did not preclude appeal

189. 817 S.W.2d 335 (Tex. Crim. App. 1991).
190. 228 S.W.2d 857 (Tex. Crim. App. 1950).
191. *Heath*, 817 S.W.2d at 339.
192. *Id.*; Shannon v. State, 708 S.W.2d 850, 852 (Tex. Crim. App. 1986).
193. Levy v. State, 818 S.W.2d 801 (Tex. Crim. App. 1991).
194. *Id.* at *1.
195. *Id.* at *3.
196. 818 S.W.2d 58 (Tex. Crim. App. 1991).
197. *Id.* at 59.
198. *Id.*

from the denial of pretrial motions prior to the entry of a negotiated plea in misdemeanor cases and that the "particularized 'extra notice' requirement" of Rule 40(b)(1) applied only to felony cases.[199] The court reversed and remanded to the court of appeals for consideration of the motion to suppress point contention.[200]

B. Jury Selection

In *Nunfio v. State*[201] the court addressed the propriety of denying the defendant the right to question the jury panel as to whether they could be fair and impartial if the victim was a nun. Without question, both the State and the defense believed the evidence which showed that the victim of an aggravated sexual assault was a nun. The State filed a motion in limine which the trial court granted, directing the defendant not to discuss the occupation or vocation of the victim. After the motion was granted, the defendant specifically asked: "Can I use a hypothetical fact situation, if the victim is a nun, could they be fair and impartial?" The trial court refused to allow the question.[202]

The court observed that the question which the defendant posed sought to determine potential bias or prejudice in favor of the victim by virtue of her vocation.[203] The court observed that similar inquiries had been held to be proper in *Abron v. State*[204] and *Hernandez v. State*.[205]

The court held that "error in the denial of a proper question which prevents the intelligent exercise of one's peremptory challenges constitutes an abuse of discretion and is not subject to a harm analysis under Rule 81(b)(2)."[206]

In *Cadoree v. State*[207] defense counsel posed to the jury panel the following question, to which the State's objection was sustained: "Our hypothetical bar and you know that there is a gun up on the shelf. Do you think it could be — somebody could strike that person from the rear to keep them from getting that gun or weapon as acting in self-defense?"[208] The court held that while the question was in proper form, the question improperly "sought to commit prospective jurors to the particular facts of this case. That is, whether a person can act in self-defense by shooting someone in the back. Indeed, this was the ultimate issue in the case."[209] The court emphasized that while courts should permit questions designed to determine a ju-

199. *Id.*
200. *Id.*
201. 808 S.W.2d 482 (Tex. Crim. App. 1991).
202. *Id.* at 484.
203. *Id.*
204. 523 S.W.2d 405 (Tex. Crim. App. 1975)(whether it would make a difference that the black defendant was accused of raping a white victim).
205. 508 S.W.2d 853 (Tex. Crim. App. 1974)(could jurors believe a police officer might lie under oath).
206. *Nunfio*, 808 S.W.2d at 485.
207. 810 S.W.2d 786 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).
208. *Id.* at 788.
209. *Id.* at 789.

ror's views and sentiments on various social and moral subjects, courts do not permit a hypothetical case to be submitted nor allow questions designed to bring out the juror's views on the case at trial.[210]

C. Opening Statement

The court of appeals revisited the apparently troublesome question concerning the right of a defendant to make an opening statement in *Arriaga v. State*.[211] At the conclusion of the State's opening argument, the defense counsel asked to make an opening statement, which the trial court denied. At the conclusion of the State's evidence, defense counsel waived making an opening argument. Reviewing the defendant's right to make an opening statement under article 36.01 of the Code of Criminal Procedure in view of the harmless error rule, the court noted that the focus of the procedural provision was not whether a defendant may make an opening statement but rather when the statement may be made.[212] The choice is solely that of the defendant; the trial court has no discretion in the matter. The court held that because the defendant was not able to have the jury evaluate the State's evidence in the context of the defense position as that evidence was being heard, and as the defendant was not able to have the jury relate the defense cross-examination of the State's witnesses to the overall defense posture as the cross-examination was being conducted, the State failed to show, beyond a reasonable doubt, that the error did not contribute to the conviction.[213]

D. Jury Participation

In two recent cases, the subject of jury note taking was considered. In *Hubbard v. State*[214] after jury selection and prior to the beginning of evidence, the trial court provided notebooks to the jurors and instructed the jurors that they would be allowed to take notes if they chose, and permitted the notebooks to be taken into the jury room during deliberations. The defendant did not object to the use of the notebooks during the trial but did object to the notebooks being utilized during jury deliberations.

The court in *Hubbard* cited *Hollins v. State*[215] for the proposition that the Texas Criminal Appeals has simply declined to lay down any hard and fast rule on this subject.[216] The court ultimately concluded that the jury notes per se were not viewed as injecting additional evidence outside the record, and the court found no harm in the jury's having and using them during deliberations.[217]

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210. *Id.*
211. 804 S.W.2d 271 (Tex. App.—San Antonio 1991, pet. ref'd).
212. *Id.* at 273.
213. *Id.* at 276.
214. 809 S.W.2d 316 (Tex. App.—Ft. Worth 1991, pet. granted), *overruled by* Grunsfeld v. State, 813 S.W.2d 158 (Tex. App.—Dallas 1991, pet. granted).
215. 571 S.W.2d 873, 881 (Tex. Crim. App. 1978).
216. *Hubbard*, 809 S.W.2d at 320.
217. *Id.* at 321.

The decision in *Williams v. State*[218] likewise recognized that there was no Texas case holding "that permitting jurors to take notes or to use those notes during their deliberations is proper or that such practice results in error."[219] The court actually commended the practice, stating that if note taking by jurors would assist them, the practice should be permitted under appropriate conditions and admonitions.[220] The court, in addition, suggested that the trial court instruct the jury that jurors' notes are not to be considered as evidence and that in the event of disagreement, the jury should request the disputed testimony be read from the official record.[221] The court found very tenuous any preference for reliance based upon the memory of a juror over what a juror writes on a piece of paper.

On March 28, 1991, the Houston court of appeals delivered two very interesting opinions dealing with jury questioning of a witness. In *Buchanan v. State*[222] after a witness was questioned by the respective attorneys, the trial court asked the jurors if they had any questions to ask the witness and had the jurors write down those questions. After the jury was retired to the jury room, the judge read the questions and allowed the respective attorneys to lodge any objections as to hearsay, relevancy, etc. The only objection made by defense counsel was to the entire process. The jury then returned to the courtroom and the judge asked the witness the questions tendered and then permitted counsel to ask any follow-up questions desired. The court held that the defendant was afforded great procedural protection in the manner in which the questioning was conducted and that no harm was shown.[223] The procedure followed was certainly consistent with the rules in Texas governing the mode and order of interrogation of witnesses and presentation of evidence.[224]

In *Allen v. State*[225] the court first observed that article 36.01 of the Code of Criminal Procedure did not provide for or permit questioning by jurors of the witnesses, but also did not necessarily present a comprehensive list of all events which may occur during a trial.[226] The general rule in most other jurisdictions is that it is within the trial court's discretion to permit this type of practice.[227] Because of the carefully structured procedure followed in the case, the court found no abuse of discretion in permitting jury questioning.[228]

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218. 814 S.W.2d 163 (Tex. App.—Houston [14th Dist.] 1991, pet. granted).
219. *Id.* at 164 (discussing Hollins v. State, 571 S.W.2d 873 (Tex. Crim. App. 1978)).
220. *Id.* at 166.
221. *Id.*
222. 807 S.W.2d 644 (Tex. App.—Houston [14th Dist.] 1991, pet. granted).
223. *Id.* at 646.
224. *Id.*
225. 807 S.W.2d 639 (Tex. App.—Houston [14th Dist.] 1991, pet. granted).
226. *Id.* at 640.
227. *Id.* at 641.
228. *Id.* at 642.

E. Violation of "The Rule"

In *Gordon v. State*[229] the defendant invoked "the rule" at the beginning of trial and the witnesses were appropriately instructed.[230] During the trial, the defendant objected to certain testimony because two State's witnesses had been seen communicating. The court noted that the purpose of "the rule" was to prevent corroboration, contradiction and the influencing of witnesses.[231] Thus, if a violation was shown, the court must determine if the violation resulted in harm.[232] No such harm was shown in *Gordon*.[233]

In *Davis v. State*[234] the issue concerned the disqualification of a defense witness, and any possible conflict with the defendant's constitutional right to have witnesses testify in his defense, as guaranteed by article I, sections 10 & 19 of the Texas Constitution and the Fourteenth Amendment to the United States Constitution. The Court of Criminal Appeals granted the petition for discretionary review and subsequently vacated the judgments of the court of appeals and remanded the cases to the court of appeals for consideration of the defendant's point of error number two, which was unrelated to the subject matter cited herein.[235] The court of appeals, on original submission, had overruled point of error number two on procedural grounds. The court of appeals relied upon the two prong test for appellate review enunciated in *Webb v. State*,[236] in determining whether a trial court has properly exercised its discretion in excluding the testimony of a witness who violates "the rule."

In *Davis*[237] the court reiterated that where the rule has been violated and the witness disqualified, the appellate court must determine: (1) whether there were particular circumstances, other than the mere fact of the violation, which would tend to show the defendant or his counsel consented, procured, or otherwise had knowledge of the witness' presence in the courtroom, as well as knowledge of the content of that witness' testimony; and (2) if no particular circumstances existed to justify disqualification, was the excluded testimony crucial to the defense? The court found that the defendant failed in his burden of proving both provisions had been established.

F. The Court's Charge

Numerous decisions concerned various types of error in the court's instructions to the jury. The first decision, *Geesa v. State*,[238] takes up where *Hankins v. State*[239] left off about a decade ago. *Hankins* eliminated the ne-

229. 796 S.W.2d 319 (Tex. App.—Austin 1990, pet. ref'd).
230. *See* TEX. CODE CRIM. PROC. ANN. art. 36.06 (Vernon 1981).
231. *Gordon*, 796 S.W.2d at 323.
232. *Id.*
233. *Id.*
234. 814 S.W.2d 159, *vacated and remanded*, 817 S.W.2d 345 (Tex. Crim. App. 1991).
235. Davis v. State, 817 S.W.2d 345, 346 (Tex. Crim. App. 1991).
236. 766 S.W.2d 236 (Tex. Crim. App. 1989).
237. Davis v. State, 814 S.W.2d at 161.
238. No. 290-90, 1991 Tex. Crim. App. LEXIS 240 (Tex. Crim. App. Nov. 6, 1991).
239. 646 S.W.2d 191 (Tex. Crim. App. 1983) (opinion on rehearing).

cessity of ever submitting a circumstantial evidence charge to the jury.[240] In *Geesa* the court dispensed with the "reasonable-hypothesis-of-innocence analytical construct" utilized in the review of circumstantial evidence cases, in an opinion for the court carefully crafted by Judge Maloney.[241]

The court recognized the necessity of a full definitional instruction to the jury on reasonable doubt as previously urged by Judges Miller, Onion, and Clinton in their individual opinions in *Hankins*. The court expressly adopted the following instruction on reasonable doubt and held that this instruction must be submitted to the jury in all criminal cases, even in the absence of an objection or a request by the State or the defendant, whether the evidence be circumstantial or direct:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.
>
> It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecutions proof excludes all "reasonable doubt" concerning the defendant's guilt.
>
> A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.
>
> Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.
>
> In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not guilty."[242]

The court adopted the limited prospectivity rule and held that the application of this definitional instruction on reasonable doubt would be limited "to the case at bar and all cases tried hereafter."[243]

The court addressed the consequences of a defense request for a lesser included offense instruction in *State v. Lee*.[244] The defendant, tried for murder, was convicted of voluntary manslaughter and sentenced to 10 years im-

240. *Id.* at 195-96.
241. *Gessa*, No. 290-90, 1991 Tex. Crim. App. LEXIS 240, at *2.
242. *Id.* at *22.
243. *Id.* at *25-34.
244. 818 S.W.2d 778 (Tex. Crim. App. 1991).

prisonment. At trial the defendant submitted a requested instruction on voluntary manslaughter which was substantially included in the instructions. The court of appeals agreed with appellant's challenge to the sufficiency of the evidence, holding that there was no evidence which would tend to support a finding of sudden passion and thus ordered the entry of a judgment of acquittal.[245] The Texas Court of Criminal Appeals in *Lee* ultimately held that by invoking the benefit of the lesser included offense charged at trial in not objecting to its submission to the jury, and in fact requesting that such instructions be included, the defendant is estopped from then complaining on appeal that the evidence failed to establish all of the elements of that lesser offense.[246]

The court found an instruction given a co-defendant naming the defendant as an accomplice as a matter of law tantamount to a constitutionally prohibited directed verdict for the State in *Selman v. State*.[247] The defendant *Selman* and co-defendant were tried for conspiring to commit capital murder and sentenced to 25 years imprisonment. The defendant pled not guilty and testified in his own defense, whereas co-defendant invoked his 5th Amendment right not to testify. Over defendant *Selman*'s objections, co-defendant requested that the court instruct the jury, in the charge on co-defendant's guilt or innocence, that the defendant's testimony required corroboration because the defendant was an accomplice as a matter of law.

Initially, the court noted that the co-defendant was not entitled to an accomplice witness instruction as the defendant was not formally a witness in the co-defendant's case because he was not called by the State or by the co-defendant; the defendant testified only in his own behalf.[248] The court also observed that the general rule enunciated in *Almanza v. State*,[249] was not appropriate in this case because the defendant did not object to error in his own charge but only objected to the instruction in his co-defendant's charge.[250] Nonetheless, the defendant properly preserved the error for appeal when he objected to the instruction and complained on appeal that this instruction was a prejudicial comment on the weight of the evidence in violation of the Code of Criminal Procedure.[251] The court held that the defendant was injured when the same jury that was to determine his guilt or innocence heard the trial court describe him as an accomplice as a matter of law.[252] In this joint trial setting, obviously if the jury found the co-defendant guilty of the charged offense, the very same jury following these instructions would have to irrebuttably conclude that the defendant was also guilty

245. *Id.* at 778.
246. *Id.* at 781.
247. 807 S.W.2d 310, 312-13 (Tex. Crim. App. 1991).
248. *Id.* at 311-12.
249. 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (opinion on State's motion for rehearing) (when an error in a jury charge is preserved by a timely objection, reversal is required if the error caused some harm to the accused).
250. *Selman*, 807 S.W.2d at 312.
251. *Id.*; TEX. CODE CRIM. PROC. ANN. art. 38.05 (Vernon 1981).
252. *Selman*, 807 S.W.2d at 312.

because he was an accomplice as a matter of law.[253]

Inaction on the part of the State with respect to the correct submission of the law in the court's instructions inured to the benefit of the defendant in *Arceneaux v. State*.[254] The district court, in a delivery of cocaine case, instructed the jury that it must find the exhibit introduced by the State to be cocaine before convicting the defendant. The referenced exhibit was merely the empty envelope from which the drug had been removed for testing purposes. The court rejected the State's argument that the language in the complained of instruction was merely surplusage, a concept which cannot logically be extended to that portion of the jury charge which authorizes a conviction.[255] The court emphasized:

> Under the *Ortega*, rationale, the litmus test is not whether an instruction concerns an "element" of proof. Instead, the appellate court must look to the charge to determine whether the part at issue is one which "authorizes a conviction". If that question is answered in the affirmative, the particular portion of the charge at issue is not "surplusage". While it will usually follow that authorization for conviction appears in the application paragraph of a typical instruction, wording of the other abstract portion of the charge may also authorize the trier of fact to reach or not reach the ultimate issue in a case.[256]

Similarly, in *Warren v. State*[257] the theft indictment alleged four items of personal property as having been taken in the conjunctive and then in the court's charge the jury was instructed to find the defendant guilty if the jury found the defendant appropriated all four items. The charge should have alleged the items in the disjunctive. By not objecting to the charge, the State unnecessarily assumed the burden of proving the defendant appropriated all the items in the application paragraph of the court's instructions, and failing to so prove as to one of the items, the evidence was insufficient as a matter of law.[258]

The court also chided the State for not preserving its own position. The State, in view of the court's instruction, was put to the burden of either objecting to the instruction, requesting a modification of the one submitted, or proving the substantive fact therein. Based upon the prosecutor's inaction, the State was held to a higher level of proof than necessary and the burden not being met in this case, the judgment of conviction had to be reversed and the judgment of acquittal entered.[259]

In *Walker v. State*[260] the defendant was convicted of burglary based upon circumstantial evidence. The indictment alleged the defendant committed the offense as a primary actor. The charge included an abstract instruction on the law of parties. While the application paragraph tracked the language

253. *Id.* at 313.
254. 803 S.W.2d 267 (Tex. Crim. App. 1990).
255. *Id.* at 271.
256. *Id.*
257. 810 S.W.2d 202 (Tex. Crim. App. 1991).
258. *Id.* at 204.
259. *Id.*
260. No. 896-89, 1991 Tex. Crim. App. LEXIS 185 (Tex. Crim. App. Sept. 18, 1991).

of the indictment, it did not include any reference to the immediately proceeding general parties instruction. The court held that in view of these instructions the evidence did not exclude the reasonable hypotheses that the defendant was guilty only as a party.[261]

In *Mitchell v. State*[262] the court found that the trial court reversibly erred in denying the defendant's request for a charge on criminal trespass. The complainant discovered the defendant early in the morning standing in his attached carport, reaching into an enclosed tool cabinet. The defendant claimed to be the victim of a theft, chasing the thief into the complainant's yard, and into the complainant's open garage where he thought the thief might be hiding. The defendant reached for the crowbar to defend himself should he find the thief hiding in the darkness. The court held the defendant's testimony alone was sufficient to raise the issue of the lesser included offense of criminal trespass.[263] Some harm was suffered by the defendant under *Almanza v. State*[264] as the jury was not allowed to consider the lesser included offense in conjunction with the charge of burglary of a habitation.[265]

In *Abdnor v. State*[266] the court found that the trial court erred in failing to give a limiting instruction on evidence of an extraneous offense. The State's witness was impeached by the defendant by virtue of a prior inconsistent statement. The State attempted to rehabilitate the witness and in so doing developed evidence of extraneous offenses, over the defendant's objections. The court noted that while such evidence may have been admissible for the limited purpose of explaining the witness' prior inconsistent statement, where evidence is admissible for a limited purpose and the court admits it without limitation, the party opposing the evidence has the burden of requesting a limiting instruction.[267] The trial court erroneously denied the defendant's request; thus, the court remanded to the court of appeals for a harm analysis.[268]

The court held that the district court's instructions on self-defense unduly restricted that defense in *Ellis v. State*.[269] When evidence is introduced that the victim verbally threatened the defendant and that the defendant may have acted in self-defense, a self-defense instruction should not be restricted to only the acts of the victim; verbal threats should be included as well.[270]

In *Saunders v. State*[271] the court found egregious harm in the failure of

261. *Id.* at *5.
262. 807 S.W.2d 740 (Tex. Crim. App 1991).
263. *Id.* at 742.
264. 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (opinion on rehearing).
265. Mitchell v. State, 807 S.W.2d at 742. *See also* Harvard v. State, 800 S.W.2d 195 (Tex. Crim. App. 1990) (conviction of capital murder reversed because voluntary manslaughter instruction denied).
266. 808 S.W.2d 476 (Tex. Crim. App. 1991).
267. *Id.* at 478.
268. *Id.* As the case was tried before the effective date of TEX. R. CRIM. EVID. 105(a), the analysis did not encompass that Rule.
269. Ellis v. State, 811 S.W.2d 99 (Tex. Crim. App. 1991).
270. *Id.* at 101.
271. 817 S.W.2d 688 (Tex. Crim. App. 1991).

the court's instructions to include an instruction that a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed. No objection was lodged by the defendant at trial to the absence of this instruction.

Initially, the court reemphasized that whether the court was searching for some error preserved by objection at trial or for egregious error urged for the first time on appeal, its approach to an assessment of its harmful impact would be the same:

> In both situations the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of trial as a whole.[272]

On the basis of the record in *Saunders* the appellate review "must inquire whether jurors would have found the corroborating evidence so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive."[273] The court concluded that the evidence taken as a whole did not have a strong tendency "to connect appellant with the commission of arson or with a criminal conspiracy."[274] The court held that failure to instruct the jury of the need to corroborate the accomplice's testimony was critical to the outcome in the case and effectively denied the defendant a fair trial.[275]

In *Miller v. State*[276] the district court denied the defendant's requested instruction on mistake of fact. The State's evidence showed that the defendant, while baby-sitting an infant, kidnapped the infant. The defendant offered evidence to show that she had never been in the infant's home and that she had taken custody of the infant, believing the child belonged to a friend's daughter who wanted to give the child up for adoption after birth. The court of appeals held that the defendant was not entitled to the requested instruction because the "defensive theory merely negated an element of the offense."[277]

The Court of Criminal Appeals held that when a defendant "creates an issue of mistaken belief as to the culpable mental element of the offense, he is entitled to a defensive instruction of 'mistake of fact.' "[278] The court stated that the defendant "was harmed in not having her requested instruction submitted to the jury to guide it in its determination of guilt."[279] The court also noted that the jury instruction given permitted a jury to convict the defendant of kidnapping if the jury believed the defendant's restraint of the infant was without the mother's acquiescence even if it believed the defendant's

272. *Id.* at 690 (quoting Almanza v. State, 686 S.W.2d at 171).
273. *Id.* at 692.
274. *Id.*
275. *Id.* at 693.
276. 815 S.W.2d 582 (Tex. Crim. App. 1991).
277. Miller v. State, 755 S.W.2d 214 (Tex. App.—Dallas 1988).
278. Miller v. State, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991)
279. *Id.*

mistake of fact defense. "The defendant's requested mistake of fact instruction would have properly precluded the jury from such a conviction."[280]

G. *Procedure In Capital Cases*

Significant amendments were made to Code of Criminal Procedure article 37.071, which governs the procedure to be followed in all death penalty cases.[281] Section 2 provides that in the sentencing procedure proceeding, "evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty."[282] At the conclusion of the evidence, the trial court must submit two special issues:

> (1) [W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under §§ 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.[283]

Section 2 also provides that the State is required to prove each issue submitted beyond a reasonable doubt.[284] The jury must return a special verdict of yes or no on each issue submitted.[285]

The court must also instruct the jury that in deliberating on these two issues, the jury must consider "all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty."[286] In the event that the jury returns an affirmative finding to each of the two special issues, the trial court must instruct the jury, and the jury must answer the following issue:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[287]

The court must charge the jury that in answering this special issue, the jury must answer the issue either yes or no; they jury may not answer the

280. *Id.*
281. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1981).
282. *Id.* § 2(a).
283. *Id.* § 2(b).
284. *Id.* § 2(c).
285. *Id.*
286. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d).
287. *Id.* § 2(e)

issue no unless it agrees unanimously and may not answer the issue yes unless ten or more jurors agree.[288] Further, the jury need not agree on what particular evidence supports an affirmative finding on the issue.[289] The jury must consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.[290]

If the jury ultimately returns an affirmative finding on each of the first two special issues submitted and a negative finding on the third issue, the trial court must sentence the defendant to death.[291] If the jury returns a negative finding on either of the first two issues or an affirmative finding on the last special issue or is unable to answer any issue submitted, the court must sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.[292]

IV. THE APPEAL

A. Motion For New Trial

Texas Rule of Appellate Procedure 31 provides that the motion for new trial, if filed, must be filed within at least thirty days after the date sentence is imposed or suspended in open court.[293] In *Hamilton v. State*[294] the defendant filed a general motion for new trial within the first thirty day period, but only after the motion was overruled as a matter of law, seventy-five days after sentencing, did the defendant file an amended motion based upon newly discovered evidence. After a hearing, the district court denied the amended motion.[295] The court of appeals held that after the seventy-five day period expired, the trial court lost its jurisdiction to deal with the defendant's motion for new trial.[296] The court of appeals further stated, "Amended motions that are untimely cannot form the basis of appellate review."[297]

In *Fowler v. State*[298] the defendant filed a motion for new trial between the date the court of appeals issued an opinion affirming the conviction and the date the mandate was issued. For some reason the trial court heard the motion and denied it. The defendant filed notice of appeal from this trial court's order denying the motion. Subsequently, the clerk of the court of appeals notified the defendant that the trial transcript did not appear to contain any appealable order. The court distinguished *Whitmore v. State*[299] stating that the Code of Criminal Procedure effective at the time *Whitmore*

288. *Id.* § 2(f).
289. *Id.*
290. *Id.*
291. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g).
292. *Id.*
293. TEX. R. APP. P. 31.
294. 804 S.W.2d 171 (Tex. App.—Ft. Worth 1991, pet. ref'd).
295. *Id.* at 174.
296. *Id. See* TEX. R. APP. P. 31(e)(1).
297. *Hamilton*, 804 S.W.2d at 174.
298. 803 S.W.2d 848 (Tex. App.—Corpus Christi 1991, no pet. h.).
299. 570 S.W.2d 889 (Tex. Crim. App. 1977).

was tried provided that the trial court could grant a new trial after the appellate briefs were filed but under the current appellate rules, a trial court had no jurisdiction to consider an untimely filed motion for new trial.[300] Further, the trial court was without jurisdiction to rule on a motion for new trial after the expiration of seventy-five days from the date on which sentence was imposed.[301]

In *Port v. State*[302] the defendant filed his motion for leave to file a first amended motion for new trial and motion in arrest of judgment fifty-nine days after sentencing, well after the thirty day deadline for filing. The court emphasized that the appellate rules make no provision for the late filing or amendment of a motion for new trial or a motion in arrest of judgment, even with leave of court.[303] The court stated:

> The right to move for new trial or to amend a motion for new trial is purely statutory. The remedy must be pursued in the manner prescribed by the statute. The statutory provisions are mandatory and exclusive and must be complied with in all respects, and the court, in exercising its particular authority, is a court of limited jurisdiction. When there is no jurisdiction, the power of the court to act is as absent as if it did not exist . . . These principles apply with equal force to appellant's motion and arrest of judgment.[304]

In *Port* the court also addressed the argument based upon *Whitmore*.[305] The court stated that *Whitmore* stood for the proposition that an untimely motion for new trial may be considered when an accused's fundamental constitutional right is in conflict with a valid procedural rule, but noted that in that type of situation, the defendant must show good cause for his late filing, not accomplished in this case.[306]

In *Meriwether v. State*[307] the court held that the district court was required to hold a hearing on the defendant's motion for new trial based upon newly discovered evidence prior to denying the motion, in a situation where the defendant's motion and affidavit were sufficient to demonstrate existence of reasonable grounds to believe there might be newly discovered evidence.[308] The court cited *McIntire v. State*[309] for the proposition that a defendant need not establish a prima facie case in order to be entitled to a hearing on his motion; the affidavit is sufficient if it demonstrates the existence of "reasonable grounds."[310]

In *Cox v. State*[311] the court reviewed a situation in which the thirty day period from the date of sentencing expired while the defendant was not rep-

300. *Fowler*, 803 S.W.2d at 849.
301. *Id.*
302. 798 S.W.2d 839 (Tex. App.—Austin 1990, pet. ref'd).
303. *Id.* at 846.
304. *Id.* at 846-47.
305. Whitmore v. State, 570 S.W.2d 889 (Tex. Crim. App. 1977).
306. *Port*, 798 S.W.2d at 847.
307. 814 S.W.2d 557 (Tex. App.—Beaumont 1991, no pet. h.).
308. *Id.* at 558.
309. 698 S.W.2d 652 (Tex. Crim. App. 1985).
310. *Meriwether*, 814 S.W.2d at 558.
311. 797 S.W.2d 958 (Tex. App.—Houston [1st Dist.] 1990, no pet.).

resented by counsel. The court started the appellate time clock over again in order to afford the defendant an opportunity to file a motion for new trial while represented by counsel.[312]

The complaint of jury misconduct was a major complaint in the motions for new trial reviewed on appeal. In *Matthews v. State*[313] the court reviewed the proper manner to preserve error reflected by jury misconduct. The defendant should file a motion for new trial accompanied by affidavits of a juror or jurors or other person in a position to know the facts in support of the allegation of jury misconduct.[314] If the motion for new trial requires proof of facts extrinsic to the appellate record, the motion itself must be verified, but a prison or jail inmate's unsworn writing, subscribed as to the truth of the declarations, may be used in lieu of a written sworn declaration, verification, certificate, oath or affidavit.[315]

In *Shields v. State*[316] the court reversed the conviction based upon jury misconduct which involved the voting for harsher punishment because of a misstatement of the law concerning parole.[317] The court noted that Texas Rule of Criminal Evidence 606(b) was not applicable because this case preceded the effective date of the rule, September 1, 1986.[318] The court cautioned that the rule did not lend itself to an easy application because of the "apparent contradiction between the first and second parts of the rule. When would a matter that influenced a juror to assent to or dissent from a verdict not be a matter relevant to the validity of that verdict?"[319]

In *State v. Hernandez*[320] a juror's affidavit and testimony at the motion for new trial hearing showed that the jury made an agreement with regard to punishment in order to get one or more jurors to change their votes from not guilty to guilty. The State appealed the trial court's order granting the defendant's motion for new trial. The State argued that the juror's entire testimony was inadmissible under Texas Rule of Criminal Evidence 606(b). The appellate court, however, found that the State had made no such objection to the juror's testimony at the motion for new trial hearing; thus, error was not preserved for review.[321]

The court in *Brown v. State*[322] found the affidavit in support of the motion for new trial, deficient because it failed to demonstrate reasonable grounds for believing jury misconduct actually occurred.[323] The affidavit referred to how a juror felt that the jury used the defendant's failure to testify in his own

312. *Id.* at 958.
313. 803 S.W.2d 347 (Tex. App.—Houston [14th Dist.] 1990, no pet.).
314. *Id.* at 350.
315. TEX. CIV. PRAC. & REM. CODE ANN. §§ 132.00-.003 (Vernon Supp. 1986).
316. Shields v. State, 809 S.W.2d 230 (Tex. Crim. App. 1991).
317. *Id.* at 232-33.
318. *Id.* at 233-34.
319. *Id.* (referring to Judge Teague's concurring and dissenting opinion in Rose v. State, 752 S.W.2d 529, 541-44).
320. 801 S.W.2d 8 (Tex. App.—Tyler 1990, no pet.)
321. *Id.* at 10.
322. 804 S.W.2d 566 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd).
323. *Id.* at 569.

behalf against him but also reflected that the subject was never actually discussed. The court spoke to the application of Texas Rule of Criminal Evidence 606(b): "A matter is relevant to the validity of the verdict or indictment if it concerns an overt act which constitutes jury misconduct under [Texas Rule of Appellate Procedure] 30(b) . . ."[324] A jury's discussion of a defendant's failure to testify would certainly constitute an overt act of misconduct but such discussion did not occur in the case.[325] The court, thus, found the affidavit insufficient and no error in the refusal of the trial court to conduct a hearing on the motion.[326]

Similarly, in *Goldstein v. State*[327] the court acknowledged a juror could testify as to overt acts of jury misconduct under the rule, but evidence of the mental processes of jurors was clearly not admissible evidence as a juror could not impeach his own verdict.[328] In *Goldstein* the defendant complained that the court sustained many of the State's objections during the motion for new trial hearing. The appellate court essentially found that the record did disclose juror responses to most of the queries propounded by the defendant during the hearing and that no reversible error was shown.[329]

In *Chew v. State*[330] a different sort of jury misconduct, that is, other evidence received by the jury during deliberations, was proved during the motion for new trial hearing. One of the jurors told the jury, among other things, that the defendant was on parole and had escaped from jail and that he had another charge of rape against him. There was also discussion as to how long the defendant would serve in prison. The court, thus, found that the trial court abused its discretion in overruling the defense motion for new trial.[331]

In *Thomas v. State*[332] the uncontroverted evidence at the motion for new trial hearing showed that a person who had served on the jury had been charged with two theft offenses and, thus, was disqualified as a matter of law from jury service. Although asked concerning this subject matter, the juror failed to disclose the information. A person under indictment or other legal accusation for theft or any felony is absolutely disqualified for jury service.[333] If upon a motion for new trial, it is shown that a juror impaneled was disqualified, a new trial must be ordered, without regard to a showing of injury or probable injury or of consent or waiver.[334] Thus, where a juror may merely be subject to a challenge for cause, the defendant must show harm to his case; but when a juror is absolutely disqualified, no showing of

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324. *Id.*
325. *Id.*
326. *Id.*
327. 803 S.W.2d 777 (Tex. App.—Dallas 1991, pet. ref'd).
328. *Id.* at 798.
329. *Id.*
330. 804 S.W.2d 633 (Tex. App.—San Antonio 1991, pet. ref'd).
331. *Id.* at 639.
332. 796 S.W.2d 196 (Tex. Crim. App. 1990)
333. TEX. CODE CRIM. PROC. ANN. arts. 35.16, 35.19 (Vernon 1981).
334. *Thomas*, 796 S.W.2d at 197-98.

harm is necessary.[335] Accordingly, the trial court erred in overruling the defendant's motion for new trial.[336]

In *Greenwood v. State*[337] the defendant became somewhat creative in his motion for new trial. The majority of the motion for new trial complained of jury misconduct and in support of his complaints on appeal, the defendant proceeded on a limited appeal under Texas Rule of Appellate Procedure 53(d). The defendant brought forward only the transcript and a portion of the testimony from the motion for new trial and he designated the points of error he would rely on for appeal. His contentions were overruled on appeal.[338] The defendant then contended that there was insufficient evidence in the record to support his conviction for misdemeanor assault and that the State should be penalized for not designating and bringing forward the balance of any relevant statement of facts from the trial. While the argument was intriguing, the court ultimately held that a defendant must bring forward the entire record if the defendant wishes to urge an insufficient evidence point of error.[339]

B. Right To Counsel

In *Huff v. State*[340] the defendant, after being convicted of possession of marijuana, appealed to the court of appeals which overruled all contentions except a claim that the trial court should have held a hearing on the defendant's competency to stand trial. The court of appeals abated the appeal and remanded for a retrospective trial on the issue of the defendant's competency. After remand, the court of appeals reviewed the evidence developed at the competency hearing and found it sufficient to support the jury verdict finding the defendant competent. The defendant, pro se, filed a petition for discretionary review arguing that he had been denied his right to counsel on appeal because the court of appeals had summarily reviewed the record of the competency hearing without requiring a brief be filed or inquiring why no brief had been filed in the appeal, under Texas Rule of Appellate Procedure 74 (l)(2). The Court of Criminal Appeals held that a defendant, whose appeal is abated and remanded for a retrospective competency hearing, is entitled to appeal and to representation by counsel on appeal for issues related to the retrospective competency hearing.[341] The case was thus remanded to the court of appeals to determine if the defendant desired the assistance of counsel.[342]

C. The Notice of Appeal

An incredibly skewed Appellate scenario was presented in *Charles v.*

335. *Id.* at 199.
336. *Id.*
337. 802 S.W.2d 10 (Tex. App.—Houston [14th Dist.] 1990, pet. granted).
338. *Id.* at 12.
339. *Id.* at 13.
340. 807 S.W.2d 325 (Tex. Crim. App. 1991).
341. *Id.* at 326.
342. *Id.* at 327.

State[343] involving a late court appointment of counsel, a late notice of appeal, and an untimely extension motion. For our purposes, the court simply held that a late notice of appeal may be deemed timely and would invoke a court of appeal's jurisdiction to entertain the appeal if (1) it is filed within fifteen days of the last day allowed for filing; (2) a motion for extension of time reasonably explaining the need for the extension is filed in the court of appeals within fifteen days of the last day allowed for filing the notice of appeal; and (3) the court of appeals grants the motion for extension of time.[344]

The court in *Charles* emphasized that without a timely motion for extension of time to file the notice of appeal, the appellate court lacked jurisdiction. Texas Rule of Appellate Procedure 83,[345] may not be used to cure a jurisdictional defect, and Rule 2(b)[346] may not be used to create jurisdiction where none exists. Thus, if the motion for extension of time was not filed within the fifteen days required by Rule 41(b)(2), the court of appeals lacked jurisdiction to invoke Rule 2(b).[347]

In *Petty v. State*[348] the defendant moved for a judgment of acquittal at the close of the defense case as the indictment failed to allege an offense in violation of the laws of the State of Texas. Upon the State's motion, the trial court signed an order dismissing the indictment pursuant to Code of Criminal Procedure article 36.11. The defendant appealed that order, contending that the trial court erred in dismissing the indictment charging aggravated sexual assault of a child because the indictment allegedly did sufficiently set forth the lesser included offense of indecency with a child. The court, relying exclusively on federal authority, held that an order dismissing an indictment was not an order from which the defendant could appeal and therefore dismissed the appeal for want of jurisdiction.[349]

The Texas Court of Criminal Appeals dealt a devastating blow to the defendant in *Jones v. State*[350] which involved an appeal following a negotiated plea of guilty under Rule 40 (b)(1).[351] The defendant attempted to appeal the trial court's action on a motion to quash but failed to state in the notice of appeal that the trial court had granted permission to appeal or to specify that the motion to quash had been raised on a written motion pretrial. The court held that if the defendant wished to "appeal a matter which is non-jurisdictional in nature or occurred prior to the entry of his plea, then he must conform to the requirements of the statute and include within his notice what the grounds of appeal are and the fact that he has received the permission of the trial court to appeal those matters."[352]

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343. 809 S.W.2d 574 (Tex. App.—San Antonio 1991, no pet. h.).
344. *Id.* at 576.
345. TEX. R. APP. P. 83.
346. *Id.* 2(b).
347. *Charles*, 809 S.W.2d at 576.
348. 800 S.W.2d 582 (Tex. App.—Tyler 1990, no pet. h.).
349. *Id.* at 583-84.
350. 796 S.W.2d 183 (Tex. Crim. App. 1990).
351. TEX. R. APP. P. 40(b)(1).
352. *Jones*, 796 S.W.2d at 186. The court, citing Jones v. State, reached the same result in

In *State v. Rosenbaum*[353] the Court of Criminal Appeals addressed the apparent inconsistency between Code of Criminal Procedure article 44.01(d)[354] and Texas Rule of Appellate Procedure 41(b)(1),[355] as to when the State must file its notice of appeal from a trial court's order. The court held that the "appellate timetable for the State under article 44.01(d) begins running from the date the trial judge signs his or her order."[356]

In *Sanchez v. State*[357] the court found the State's notice of appeal to be sufficient because it was brought by and through the Criminal District Attorney of Victoria County, even though it was signed by an assistant criminal district attorney.[358] The State was not so fortunate in *State v. Lauber*[359] a case in which the written notice of appeal was brought by and through the assistant district attorney and the notice was signed by the assistant district attorney, thus failing to comply with Code of Criminal Procedure article 44.01(i).[360] The State's appeal was thus dismissed for want of jurisdiction.[361]

A very significant decision was rendered with respect to the defendant's right to appeal from the decision granting deferred adjudication in *Dillehey v. State*.[362] The court held that because of an amendment to Code of Criminal Procedure article 44.01(j),[363] a defendant may now appeal under article 44.02[364] after receiving deferred adjudication probation.[365]

In *Marquez v. State*[366] the defendant chose a fortuitous time to escape from custody. The defendant was convicted of burglary and sentenced to ten years imprisonment, whereupon he escaped. Notice of appeal was filed after he absconded and the transcript was filed after he had been returned to custody. Thus, there was not a pending appeal at the time of his escape and the statute providing for dismissal of an appeal if a defendant escaped custody pending the appeal was not applicable.[367]

D. Indigency Status

In *Skidmore v. State*[368] the trial court heard evidence on the defendant's pauper's oath on appeal and ruled the defendant was not indigent. The de-

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Berrios-Torres v. State, 802 S.W.2d 91 (Tex. App.—Austin 1990, no pet.). *See also* Wilson v. State, 811 S.W.2d 700 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

353. 318 S.W.2d 393 (Tex. Crim. App. 1991).
354. TEX. CODE CRIM. PROC. ANN. art. 44.01(d) (Vernon 1981).
355. TEX. R. APP. P. 41(b)(1).
356. *Rosenbaum*, 818 S.W.2d at 403.
357. 800 S.W.2d 292 (Tex. App.—Corpus Christi 1990, pet. granted).
358. *Id.* at 299.
359. 810 S.W.2d 455 (Tex. App.—Corpus Christi 1991, no pet.h.).
360. *Id.* at 456.
361. *Id.*
362. 815 S.W.2d 623 (Tex. Crim. App. 1991).
363. TEX. CODE CRIM. PROC. ANN. art. 44.01(j) (Vernon 1981).
364. *Id.* art. 44.02.
365. *Dillehey*, 815 S.W.2d at 626.
366. 795 S.W.2d 345 (Tex. App.—Waco 1990, no. pet.).
367. *Id.* at 347.
368. 808 SW.2d 708 (Tex. App.—Texarkana 1991, no pet.).

fendant testified that while he was employed at the time of trial, after his conviction, he was suspended without pay and then fired, that he had sought employment but could not find work at any rate of pay, had filed bankruptcy, and that his house was to be sold by the bank. Although he received over $800.00 a month as unemployment compensation, he was unable to meet his financial obligations or pay for his statement of facts which would cost about $2,500.00. The State put on no witnesses and offered no evidence to rebut the defendant's claim of indigency.

The court in *Skidmore* recited the factors to be considered in determining whether a defendant is indigent: the nature of his employment, the amount of his earnings and expenses, and his ability to secure a bond and retain counsel.[369] The defendant made out a prima facie showing of indigency, and thus, the trial court abused its discretion in determining the defendant was not indigent.[370]

The court of appeals rejected the State's contention that the defendant did not timely file his motion and request for a hearing and, therefore, did not exercise due diligence in asserting his indigency.[371] The State did not make this assertion at the time of the hearing or oppose the defendant's request on that basis at that time; therefore, the State waived this argument.[372]

The defendant in *Taylor v. State*[373] was not as fortunate. While the defendant's affidavit recited that he was unemployed and did not own any cash, real estate, stocks, bonds, notes, automobiles or other valuable property or have checking or savings accounts, other evidence showed he owned a 1984 Grand Prix auto and a pendant with a heavy gold chain. There was no testimony regarding any attempts to sell these items and no evidence as to the value of the automobile or whether its value was greater than any amount owed on it. The defendant did not testify at the hearing but did offer testimony from relatives. The court of appeals affirmed, holding that the defendant did not present a prima facie showing of his indigency.[374]

E. The Appellate Record

The court of appeals in *O'Neal v. State*[375] reemphasized that the defendant will forfeit his right to complain about the sufficiency of the evidence unless he requests and obtains a complete statement of facts of the trial.[376] As the court stated in *Epps v. State*,[377] before complaint may be made to the appellate court as to an incomplete appellate record, the defendant must demonstrate that a timely written request for the statement of facts on appeal was made to the official court reporter designating the portion of evi-

369. *Id.* at 710.
370. *Id.*
371. *Id.*
372. *Id.*
373. 799 S.W.2d 445 (Tex. App.—Houston [1st Dist.] 1990, no pet.).
374. *Id.* at 447.
375. 811 S.W.2d 219 (Tex. App.—Dallas 1991, pet. granted).
376. *Id.* at 221.
377. 809 S.W.2d 770 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

dence and other proceedings desired.[378] This rule likewise applies to the State. In *State v. Pope*[379] the State's appeal was dismissed for want of prosecution because neither the transcript nor a motion for extension of time for filing the record had been filed with the clerk of the court of appeals.[380]

The defendant in *Peeples v. State*[381] was granted a new trial simply because the court reporter, through no fault of the defendant, could not furnish a complete record.[382] Apparently the defendant was tried and convicted in the early eighties, was not afforded an appeal or counsel and when he was afforded an out-of-time appeal, the court reporter could not furnish a complete record. The defendant in *Emery v. State*[383] likewise benefitted when, after timely filing a designation of appellate record, he was not afforded a complete record because certain pretrial hearings were either lost or destroyed through no fault of the defendant. The *Emery* decision stressed the importance of filing a designation of record on appeal. The court specifically stated that "where a court reporter does record a proceeding, regardless of who prompted the transcription, appellant is entitled to have such included on appeal, as long as he files a timely designation of record on appeal."[384]

In *Stacy v. State*[385] the court reiterated the rule established in *State v. Daniels*[386] that under Texas Rule of Appellate Procedure 54(b), the State shall have 120 days from the date of an order granting a defendant's motion for new trial to file the statement of facts for appeal.[387]

Finally, several cases dealt with appeals from adjudications of guilt, based upon prior pleas of guilty or no contest.[388] In each instance, the courts noted that there was a clear difference between an ordinary probation revocation and an adjudication of guilt. In the former, the defendant had the right to appeal after he received probation; whereas in a deferred adjudication case, the defendant had a right to appeal the original plea hearing only after guilt had been adjudicated.[389]

Presumably these cases would be decided differently henceforth, in view of the decision in *Dillehey v. State*.[390] The *Dillehey* decision held that because of an amendment to Code of Criminal Procedure article 44.01(j), a defendant may now appeal from deferred adjudication type probation under article 44.02.[391] Thus, there is no longer any difference between an ordinary proba-

378. *Id.* at 772.
379. 800 S.W.2d 954 (Tex. App.—Austin 1990, no pet.).
380. *Id.* at 955.
381. 799 S.W.2d 489 (Tex. App.—Beaumont 1990, no pet.).
382. *Id.* at 492.
383. 800 S.W.2d 530 (Tex. Crim. App. 1990).
384. *Id.* at 535.
385. No. 1070-90 to 1075-90, 1991 Tex. Crim. App. LEXIS 242 (Tex. Crim. App. Nov. 13, 1991).
386. 806 S.W.2d 838 (Tex. Crim. App. 1991).
387. *Stacy*, No. 1070-90 to 1075-90, 1991 Tex. Crim. App. LEXIS 242, at *4.
388. Martinez v. State, 807 S.W.2d 105 (Tex. App.—Amarillo 1990, no pet.); *McLennan*, 796 S.W.2d 324 (Tex. App.—San Antonio 1990, pet. ref'd).
389. *Martinez*, 802 S.W.2d at 106; *McLennan*, 796 S.W.2d at 326.
390. 815 S.W.2d 623 (Tex. Crim. App. 1991).
391. *Id.* at 626.

tion revocation and deferred adjudication of guilt. If the defendant cannot produce an appellate record in either instance, it is highly unlikely that the defendant will benefit therefrom in the future.

F. The State's Appeal

In *Armstrong v. State*[392] the decision bore good news and bad news for the State. The defendant, convicted of burglary in a trial before the court, plead not true to the second enhancement paragraph and true to the third paragraph of the indictment. The trial court excluded the State's proof as to the second paragraph based upon challenges to various provisions of the Dallas County Magistrates Act.[393] The court set punishment at twenty years confinement. Both the defendant and the State appealed; the court of appeals affirmed.[394]

The State's petition for discretionary review was granted to determine whether the trial court's finding that evidence of a prior conviction was inadmissible was appealable under Code of Criminal Procedure article 44.01(c). This article provides that the State is entitled to appeal a ruling on a question of law if the defendant is convicted and appeals the judgment.[395] The court held that because the defendant was convicted and was appealing, and because the issue of whether the prior conviction alleged for enhancement was void was a question of law, the State's cross-appeal had merit, and the State could bring the issue on appeal.[396]

The bad news: because the defendant was denied relief on direct appeal and there could be no retrial, the State could not attempt to try the defendant as a habitual criminal in this case by an allegation of the same or a different prior conviction.[397] The court cited *Sanabria v. United States*[398] for the proposition that a "judgment of acquittal, however erroneous, bars further prosecution on any aspect . . . and hence bars appellate review of the trial court's error".[399] Thus, any opinion of the court of appeals deciding the validity of the judgment in the enhancement allegations of the second paragraph would be advisory, and the Texas Court of Criminal Appeals and the court of appeals are without authority to render advisory opinions, although the court did note that the court of criminal appeals had authority to answer certified questions of law under Texas Rule of Appellate Procedure 214.[400]

In *State v. Moreno*[401] the trial court granted the defendant's motion to quash the prostitution information on the ground that the term agree should

392. 805 S.W.2d 791 (Tex. Crim. App. 1991).
393. Dallas County Magistrate's Act, TEX. GOV'T. CODE ANN. § 54.501 (Vernon 1988).
394. *Armstrong*, 805 S.W.2d at 794.
395. *Id.* at 793.
396. *Id.*
397. *Id.*
398. 437 U.S. 54 (1978).
399. *Armstrong*, 805 S.W.2d at 794 (quoting Sanabria v. United States, 437 U.S. at 69).
400. *Id.* at 794 n.4.
401. 807 S.W.2d 327 (Tex. Crim. App. 1991).

have been defined in greater detail. The court order read that the "defendant's Motion to Quash is hereby Granted, the Complaint and Information are hereby quashed."[402] The defendant contested the State's right to appeal because it still had the right to amend the information. The court of appeals agreed. The Court of Criminal Appeals initially cited Code of Criminal Procedure article 44.01 for the proposition that the State is entitled to appeal from a trial court's order in a criminal case if such order "dismisses an indictment," and thus, the issue is the meaning of the term" dismisses."[403] The court held that the State had the power to appeal from any trial court order concerning an indictment or information, and the court of appeals has the jurisdiction to address the merits of the appeal from that order, whenever the order effectively terminates the prosecution in favor of the defendant.[404] The court further held that the trial court 'effectively terminates' the prosecution against the accused whenever the effect of its order forces any alteration of the indictment or information before the trial on the merits and the State is not willing to comply with that order."[405] The courts stressed that the appellate court, in order to determine its jurisdiction, must always look to the effect of any orders concerning an indictment or information, and not simply to what the trial court or the parties at trial have labeled such orders.[406]

In *State v. Monroe*[407] the defendant filed a pretrial motion to suppress evidence of unadjudicated offenses pending against him, which was granted by the trial court. During the State's appeal, the defendant claimed that in reality it was a motion in limine. The court of appeals disagreed, finding that under Code of Criminal Procedure article 44.01(a)(5), the State is entitled to appeal an order of the trial court if the order grants a motion to suppress evidence, if jeopardy has not attached in the case.[408]

The court of appeals in *State v. Crawford*[409] ordered the State's appeal dismissed for failure to prosecute after the court concluded that the State had abandoned the appeal by the prosecutor's failure to file a brief after a substantial period of time without seeking an extension.[410]

Finally, in *State v. Welch*[411] the court dismissed the State's appeal, holding that the trial court's judgment of acquittal was not appealable.[412] Essentially, the defendant appeared for trial and announced ready; the State announced not ready because of the absence of a witness and orally moved for a continuance, which was denied. The prosecutor read the information

402. *Id.* at 328.
403. *Id.* at 329.
404. *Id.* at 334.
405. *Id.*
406. *Moreno*, 807 S.W.2d at 332-33. *See also* State v. Eaves, 800 S.W.2d 220 (Tex. Crim. App. 1990).
407. 813 S.W.2d 701 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd).
408. *Id.* at 703.
409. 807 S.W.2d 892 (Tex. App.—Houston [1st Dist.] 1991, no pet.).
410. *Id.* at 893.
411. 810 S.W.2d 13 (Tex. App.—Amarillo 1991, no pet.).
412. *Id.* at 16.

and a plea of not guilty was entered. When the State presented no witnesses, the defendant moved for an instructed verdict of not guilty. The trial court's order recited that the defendant's motion for instructed verdict was granted and that the case was dismissed with prejudice.

The State claimed on appeal that the court's action was in reality a dismissal and, thus, appealable. The court held that the controlling factor in the trial court's action was an intent to find the defendant not guilty and its order was sufficient to do so.[413] Thus, the court had no jurisdiction to entertain the appeal and dismissed it for want of jurisdiction.[414]

In *State v. Young*[415] the defendant and others were charged with bribery. The defendant filed an application for writ of habeas corpus alleging the grand jury had been discharged before the indictment returned. Following a hearing, the trial court issued the writ and ordered the indictment dismissed. The court in *Young* stated that even if the trial court had failed to order dismissal of the indictment pending against the defendant and had merely granted relief on the application for writ of habeas corpus, the Court of Criminal Appeals would still find such to be an appealable order.[416] The court held that the trial court's order granting the application effectively terminated the proceeding and therefore it was an appealable order.[417]

G. The Brief On Appeal

Several decisions revisited aspects of appellate briefs. The court in *Hawkins v. State*[418] found that the appellant's brief totally failed to inform the court of appeals how the trial court erred in denying him relief or harming him.[419] The court cited Texas Rule of Appellate Procedure 74(f) which requires that the argument of a point of error must include such discussion of the facts and the authorities relied upon as may be required to maintain the point at issue.[420] Thus, the court of appeals refused to review the matter complained of by the appellant.[421] On another occasion, the court of appeals reemphasized that "[m]ere assertions in a brief not supported by evidence in a record will not be considered on appeal."[422]

The Texas Court of Criminal Appeals criticized various intermediate decisions on several occasions. In *Davis v. State*[423] the court reversed the court of appeals holding that the appellant had not cited any place in the record where his voir dire was limited.[424] The court emphasized that "the courts of

413. *Id.*
414. *Id.*
415. 810 S.W.2d 221 (Tex. Crim. App. 1991).
416. *Id.* at 223.
417. *Id.*
418. 807 S.W.2d 874 (Tex. App.—Beaumont 1991, pet. ref'd).
419. *Id.* at 875.
420. *Id.*
421. *Id.*
422. Switzer v. State, 809 S.W.2d 781, 783 (Tex. App.—Houston [14th Dist.] 1991, no pet. h.).
423. 817 S.W.2d 345 (Tex. Crim. App. 1991).
424. *Id.* at 346.

appeals ought not dismiss a point of error out of hand when there is substantial compliance with the rules."[425]

In *Imo v. State*[426] the court of appeals upheld a search based upon the federal good faith exception but did not decide whether the defective warrant required suppression under Code of Criminal Procedure article 38.23, holding that the Texas Constitution provided no basis for excluding evidence and because the appellant did not cite article 38.23; thus, the Code of Criminal Procedure was not raised.[427] The Court of Criminal Appeals, acknowledging that the appellant did not specifically cite to article 38.23 in the appellate brief, recognized that the appellant did cite to the record where appellant requested the evidence be suppressed pursuant to the Code of Criminal Procedure. As the appellant raised both Texas constitutional and statutory law at trial, the provisions of article 38.23 were automatically invoked.[428] On appeal the appellant argued State constitutional grounds, which was sufficient to adequately raise the issue of suppression under state law for purposes of appeal.[429] The court held that the appellant substantially complied with the rules such that the court of appeals should have addressed the contention raised in the point of error which was necessary to the disposition of the appeal.[430]

The court found a lapse in strategy on the part of the State in *Boulden v. State*.[431] The court recited the evidence at length and agreed with the State that the evidence was sufficient to sustain the judgment of conviction.[432] The court, however, noted that the court of appeal's decision had also found reversible error on a point upon which the State did not seek review.[433] Thus, while the judgment of acquittal was reversed and reformed, the court of appeals decision reversing the judgment of conviction was ultimately affirmed.[434]

A very significant development in the standard of review was enunciated in *Saxton v. State*.[435] The court held that in resolving the sufficiency of the evidence issue where defensive evidence was presented, the appellate court must determine "[w]hether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable

425. *Id. see also* Morales v. State, NO. 1172-91, 1991 Tex. Crim. App. LEXIS 269 (Tex. Crim. App. Dec. 11, 1991).

426. 816 S.W.2d 474 (Tex. App.—Texarkana 1991), *vacated*, No. 1101-91, 1991 Tex. Crim. App. LEXIS 283 (Tex. Crim. App. Dec. 11, 1991).

427. *Imo*, 816 S.W.2d at 479-80.

428. Imo v. State, No. 1101-91, 1991 WL 258860 at *1 (Tex. Crim. App. Dec. 11, 1991).

429. *Id.*

430. *Id.*; *see also* Davis v. State, 817 S.W.2d 345 (Tex. Crim. App. 1991) (court of appeals should have addressed defendant's point of error where defendant substantially complied with requirements).

431. 810 S.W.2d 204 (Tex. Crim. App. 1991).

432. *Id.* at 207.

433. *Id.*

434. *Id.*

435. 804 S.W.2d 910 (Tex. Crim. App. 1991).

doubt."[436]

H. The Petition For Discretionary Review

Effective September 12, 1991, the Court of Criminal Appeals adopted the following provision applicable to petitions for discretionary review:

> *Statement regarding oral argument.* Counsel shall include in the petition a short statement of the reasons why oral arguments would be helpful in the event the petition is granted, or a statement that oral argument is waived. If a reply or cross-petition is filed, counsel shall likewise include a statement of why oral agruments should or need not be had. The court will accord these statements due, not controlling, weight in determining whether oral arguments will be heard in the case.[437]

The Court of Criminal Appeals also amended Texas Rule of Appellate Procedure 220 as follows:

> Oral argument will be permitted only on those causes designated by the Court of Criminal Appeals. Notification of such designation will be issued by the Clerk of the Court of Criminal Appeals along with notification of submission of the cause. Should counsel in a not so designated cause desire oral argument, they may petition the Court of Criminal Appeals within 30 days of submission notification. Said peition should contain specific reasons why oral argument is desired. The clerk is directed to use all reasonable diligence to notify counsel of record of settings, but failure to receive notice will not necessarily prevent submission of the cause on the day it is set.[438]

These two amendments lend considerable organization and efficiency to the submission of cases before the Court of Criminal Appeals. The first amendment requires the petitioning party to demonstrate why oral argument would be helpful or why it should be dispensed with by the court. The second amendment makes it clear that the Court of Criminal Appeals will designate those cases it deems important and significant enough to schedule for oral argument. The court has thus taken steps to manage its own calander, yet has left room for counsel to protest the decision to eliminate oral argument.

I. Pro Se Representation

Several cases delt with the defendant's right to represent himself, either at trial are on appeal. The following decisions are representative. In *Burgess and Archie v. State*[439] the defendant *Archie* pled guilty to possession of cocaine and punishment, enhanced, was set at thirty years. The defendant in *Archie* on appeal contended that he neither waived counsel nor invoked his right to self-representation but only asserted that he did not want to be represented by the particular lawyer that was appointed to his case. When the

436. *Id.* at 914.
437. TEX. R. APP. 202(d)(2).
438. TEX. R. APP. P. 220.
439. 816 S.W.2d 424 (Tex. Crim. App. 1991).

defendant in *Archie* appeared for pretrial motions and trial, the trial court had already dismissed the first court appointed attorney and replaced him with a second attorney. The defendant demanded, by motion, that the second attorney be dismissed, after a motion to suppress hearing. The defendant asserted that his family had hired counsel, which fact was proved untrue the following day when the case was called for trial. The court gave certain admonishments to the defendant who then moved for a continuance which was overruled. The court offered to let the second attorney remain as standby counsel, which was refused to counsel was excused. The defendant proceeded to plead guilty pursuant to a plea agreement with the State, and in this case, contended that he was only given a Hobson's choice between going to trial with unacceptable appointed counsel and self-representation, and thus, the waiver of counsel was involuntary.

The court first observed that the decision as to self-representation must be intelligently made as required by *Faretta v. California*:[440]

> "The Court made no inquiry into the appellant's age, educational background, legal experience, knowledge of the rule of evidence and trial procedure nor was the appellant more aware of the dangers and disadvantage of self-representation. Insured, the record fails to demonstrate that the appellant's choice to represent himself was made with his 'eyes open.'[441]

It is only required that the record "contain proper and sufficient admonishments concerning pro se representation and any necessary inquires of the defendant in order to enable the trial court to make an assessment of his knowing exercise of the right to defend himself."[442] There is no need for the trial court to follow any formulaic questioning or particular script.[443] Certainly, a defendant may not request for a change in counsel in order to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.[444]

The court recognized three options available to a trial court when confronted with an accused who makes an eleventh hour request for change of counsel.

> First, at its discretion the court can appoint, or allow the accused to retain, new counsel. Second, should the trial court deny new counsel, and the accused unequivocally assert his right to self-representation under *Faretta*, persisting in that assertion after proper admonishment, the court *must* allow the accused to represent himself. Third, unless the trial court allows new counsel, it must compel an accused who will not waive counsel and does not assert his right to self-representation to proceed to trial with the lawyer he has, whether he wants to or not.[445]

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440. 422 U.S. 806 (1975).

441. *Burgess and Archie*, 816 S.W.2d at 428 (quoting Faretta v. California, 422 U.S. 806 (1975)).

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.* at 428-29 (emphasis in original).

The court found nothing unfair in putting the accused to this choice, as long as the trial court is satisfied he is competent to make it, and that he does so informed and with eyes open.[446]

The second issue presented was whether the trial court erred in failing to require written waiver of counsel pursuant to Code of Criminal Procedure Article 1.051(g). The court held that when an accused affirmatively asserts his right to self-representation under *Faretta*, a written waiver of the right to counsel is not required under the statute.[447]

In *Ex Parte Davis*[448] the court once again recognized that the right of an accused to reject the services of counsel and represent himself extends to the appellate process, but the right of self-representation and choice of counsel cannot be used as subterfuge for the delay of orderly procedure in the courts, or to interfere with the fair administration of justice.[449] Likewise, an indigent's displeasure with appointed counsel is a matter which must timely be brought to the court's attention.[450]

Because of inaction on the part of the first court-appointed attorney, at the defendant's request, a second attorney was appointed and filed an appellate brief. The defendant disagreed with the grounds of error raised and filed a motion in the court of appeals asking permission to file a pro se supplemental brief. The motion was denied, but the appellant nevertheless filed a pro se brief in the court of appeals which he requested be considered in lieu of the brief submitted by his counsel. The court of appeals refused to consider this brief, stating that it would amount to hybrid representation and affirmed the defendant's conviction. No petition for discretionary review was filed.

The defendant filed a post conviction writ of habeas corpus, asserting among other things that he was denied his right to self-representation. The court ordered an evidentiary hearings to be held concerning this point. At the close of the hearing, the trial judge attempted to admonish the defendant on the disadvantages of proceedings pro se, and stated in part that the court was not exactly certain as to some of the pitfalls of self-representation. The Texas Court of Criminal Appeals held that the defendant was not adequately admonished so as to knowingly and intentionally waive his right to representation on appeal.[451] The relief was granted to the entent that should the defendant wish, after proper admonishments, to represent himself, the court of appeals was directed to consider his brief on appeal.[452]

446. *Burgess and Archie*, 816 S.W.2d at 429.
447. *Id.*
448. 818 S.W.2d 64 (Tex. Crim. App. 1991).
449. *Id.* at 65.
450. *Id.*
451. *Id.* at 67-68.
452. *Id.* at 68.