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## Criminal Procedure: Trial and Appeal

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# CRIMINAL PROCEDURE: TRIAL AND APPEAL

by

Ronald L. Goranson\*

## I. RIGHT TO COUNSEL

### A. Sixth Amendment Cases

THE United States Supreme Court issued four opinions during the Survey period addressing the protections encompassed by the sixth amendment's guarantee of the right to counsel.<sup>1</sup> In the first case, *Moran v. Burbine*,<sup>2</sup> the police adequately warned the accused Burbine of his fifth amendment rights surrounding interrogation.<sup>3</sup> The police did not tell Burbine that counsel, retained on his behalf by a third party, had tried to contact him. Burbine based his attack on the conviction primarily on fifth amendment grounds, but he also argued that the conduct of the police affected the integrity of the attorney-client relationship, thus violating the sixth amendment's right to counsel clause.<sup>4</sup> Justice O'Connor, writing for the six-to-three majority, rejected the sixth amendment argument by affirming the principle that the right to counsel attaches only after the adversary judicial proceedings have begun.<sup>5</sup>

The bright line approach of *Moran v. Burbine* produced a far different result in the second Supreme Court opinion, *Michigan v. Jackson*.<sup>6</sup> A five-Justice majority decided that an assertion of the right to counsel during arraignment created an absolute bar to subsequent uncounseled, police-initiated interrogation.<sup>7</sup> Mr. Justice Stevens, writing for the majority, stated that once a suspect becomes an accused, the right to counsel is of such importance that police may no longer use means of eliciting information from an uncounseled defendant that may have been proper at an earlier stage. This

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1. The sixth amendment provides: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

2. 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

3. *Miranda v. Arizona*, 384 U.S. 436, 468-70 (1966), imposed on the police an obligation, prior to the initiation of questioning, to fully apprise the suspect in custody of the State's intentions to use his statements to secure a conviction, of his right to remain silent, and to have counsel present.

4. 106 S. Ct. at 1145, 89 L. Ed. 2d at 425.

5. *Id.* at 1145-47, 89 L. Ed. 2d at 425-28 (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

6. 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).

7. *Id.* at 1411, 89 L. Ed. 2d at 642.

rule applies even if the accused waived the right to counsel prior to arraignment and received *Miranda* warnings after arraignment but before giving the statement.<sup>8</sup>

*Moran* and *Jackson* both address the issue of when the accused's right to counsel attaches. The Texas courts have addressed this same issue in four noted cases during the survey period. In *Martinez v. State*<sup>9</sup> the San Antonio court of appeals held that under Texas law the right to counsel does not attach until formal charges are filed.<sup>10</sup> Both the *Martinez* court and the Houston court of appeals, in *Sommermeier v. State*,<sup>11</sup> held that an accused's sixth amendment right to counsel had not yet attached to an accused at the time he was videotaped refusing to take a breath test.<sup>12</sup> *Martinez* was the forerunner of two Texas Court of Criminal Appeals cases addressing the issue of an accused's right to counsel after an arrest for driving while intoxicated but prior to the accused's making the decision to take a breath or blood test.

In *Forte v. State*<sup>13</sup> the Texas Court of Criminal Appeals addressed the issue of when an accused's right to counsel attaches after a driving while intoxicated arrest. Forte had been arrested for driving while intoxicated. At the police station he was given *Miranda* warnings<sup>14</sup> and then was asked if he would take a breath test for alcohol concentration.<sup>15</sup> Forte's request for an attorney was denied and he subsequently took a breath test. The results of the breath test were introduced at his trial. The court of appeals reversed the conviction, holding that the decision to provide a breath sample was a "critical pretrial state" that triggered a limited right to counsel.<sup>16</sup> The court of criminal appeals reversed the court of appeals, holding that the Supreme Court opinions in *United States v. Gouveia*<sup>17</sup> and *Moran v. Burbine*<sup>18</sup> mandate that a "critical stage" entitling an accused to counsel cannot occur prior to initiation of judicial proceedings.<sup>19</sup> The opinion held that Forte's right to counsel did not attach until the time a formal complaint was filed, an event

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8. *Id.* at 1409, 89 L. Ed. 2d at 639-40.

9. 712 S.W.2d 242 (Tex. App.—San Antonio 1986, no pet.).

10. *Id.* at 245. *Martinez* cites *Turner v. State*, 486 S.W.2d 797, 800 (Tex. Crim. App. 1972), as authority, with an *accord* given to *Keys v. State*, 486 S.W.2d 958 (Tex. Crim. App. 1972). *Turner* and *Keys*, however, only considered the applicability of the sixth amendment to a claimed right to counsel.

11. 713 S.W.2d 1833 (Tex. App.—Houston [14th Dist.] 1986, no pet.).

12. *Sommermeier*, 713 S.W.2d at 188; *Martinez*, 721 S.W.2d at 244-45.

13. 686 S.W.2d 744, 754 (Tex. App.—Fort Worth 1985) (opinion on rehearing), *aff'd in part and rev'd in part*, 707 S.W.2d 89 (Tex. Crim. App. 9186) (en banc).

14. See *Miranda v. Arizona*, 384 U.S. 436, 468-70 (1966).

15. 707 S.W.2d at 90. The State's right to demand a breath test is implicitly found in TEX. REV. CIV. STAT. ANN. art. 67011-5 (Vernon Supp. 1987).

16. 686 S.W.2d at 754. Although not specifically mentioning a particular federal or state constitutional provision, the court clearly based the opinion upon the sixth amendment of the United States Constitution, stating that the right to counsel can attach at any stage in which counsel's absence might derogate from the accused's right to a fair trial. *Id.* at 752 (citing *United States v. Wade*, 388 U.S. 218 (19167)).

17. 467 U.S. 180 (1984).

18. 106 S. Ct. 1135, 89 L. Ed. 410 (1986). For a discussion of *Miranda* see *supra* note 3 and accompanying text.

19. 707 S.W.2d at 92.

that occurred after the breath test was offered.<sup>20</sup> The court refused to consider whether Forte's right to counsel under state law had been denied, remanding that issue to the court of appeals.<sup>21</sup>

Later in the term the court of criminal appeals considered the issue again in *McCambridge v. State*<sup>22</sup> with similar results. McCambridge, when requested to take the breath test, repeatedly requested counsel.<sup>23</sup> The court of appeals had rejected McCambridge's argument that he had a limited right to counsel before deciding whether or not to take the breath test.<sup>24</sup> Citing *Forte*, the court of criminal appeals affirmed, since the appellant's sixth amendment right to counsel did not attach until the complaint and information were filed.<sup>25</sup> As in *Forte*, *McCambridge* was remanded to the court of appeals to determine if independent state constitutional authority applied.<sup>26</sup>

McCambridge also contended that the police violated the prophylactic safeguards of *Miranda v. Arizona*<sup>27</sup> and *Edwards v. Arizona*,<sup>28</sup> by continuing to ask for a breath sample despite McCambridge's repeated requests for counsel.<sup>29</sup> Appellant McCambridge recognized that under *South Dakota v. Neville*<sup>30</sup> a person faced with the decision whether to provide a breath or blood sample is not entitled to the prophylactic safeguards of *Miranda*, but argued that since he was given *Miranda* warnings, the police were required to honor his invocation of the rights by requesting counsel.<sup>31</sup> The court of criminal appeals held that nothing existed in the record to indicate that the continued questioning of McCambridge constituted "interrogation" or that the questions resulted in any incriminating response.<sup>32</sup> The opinion by Judge Campell noted that the giving of *Miranda* warnings that do not apply to the decision to take a breath test can cause confusion, but held that the facts of McCambridge's case did not require remedial measures.<sup>33</sup>

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20. *Id.*

21. *Id.* at 92-93.

22. 698 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1985), *vacated*, 712 S.W.2d 499 (Tex. Crim. App. 1986) (en banc).

23. 712 S.W.2d at 501.

24. 698 S.W.2d at 398.

25. 712 S.W.2d at 502. The court of appeals held that appellant's decision to take the test did not constitute a "critical stage." 698 S.W.2d at 394. The court of criminal appeals disagreed with that holding insofar as it implied that a "critical stage" may arise prior to initiation of formal adversary proceedings. 712 S.W.2d at 502 n.11.

26. 712 S.W.2d at 502-03.

27. 384 U.S. 436 (1966).

28. 451 U.S. 477 (1981).

29. 712 S.W.2d at 500.

30. 459 U.S. 553 (1983).

31. 712 S.W.2d at 504.

32. *Id.* at 505.

33. *Id.* at 506.

Not only does the breath testing decision not involve custodial interrogation, it also does not involve the privilege against self-incrimination. A rule that focuses on preventing collection of a breath sample, merely because of a defendant has been informed of his right to have counsel present if he is interrogated, would severely restrict police officers in the pursuit of lawfully collecting evidence of intoxication and, more significantly, do nothing to further protect the privilege against self-incrimination.

In the third Supreme Court case decided during the survey period, *Maine v. Moulton*,<sup>34</sup> the defendant and another were indicted on theft charges and released on bail. The codefendant informed the authorities of Moulton's plan to kill one of the prosecution witnesses. Upon suggestion by the authorities, the codefendant recorded a meeting with Moulton in which Moulton, without an attorney present, made numerous incriminating statements about the pending charges.<sup>35</sup> The five-to-four opinion authored by Justice Brennan held that the admission at trial of the incriminating statements violated Moulton's sixth amendment right to counsel.<sup>36</sup> Once charged, the defendant was entitled to rely on counsel as a medium between him and the prosecution.<sup>37</sup> The right to counsel included the prosecution's affirmative obligation not to circumvent the right by a knowing exploitation of an opportunity to confront the accused without counsel being present.<sup>38</sup> The opinion clearly indicated that the evidence concerning the crime for which the defendant had not been indicted would be admissible at a trial limited to those charges.<sup>39</sup> *Moulton* was somewhat limited by the fourth Supreme Court case, *Kuhlmann v. Wilson*,<sup>40</sup> in which the court permitted "listening post" informants. The court held, in another six-to-three split opinion, that a formally charged defendant who is deliberately placed in a cell with a jailhouse informer "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks" before his sixth amendment right to counsel is violated.<sup>41</sup>

In *State v. Whittemore*<sup>42</sup> a Texas court of appeals affirmed a conviction for aggravated sexual abuse over the appellant's contention that the use of a cellmate informer violated his sixth amendment right to counsel. The cellmate testified that Whittemore made an admission of having sex with the complainant.<sup>43</sup> With no discussion of *Maine v. Moulton*<sup>44</sup> the court of appeals held that a statement made to another inmate that was not the result of "custodial interrogation" is admissible.<sup>45</sup> In *Whittemore* the cellmate previ-

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34. 106 S. Ct. 477, 88 L. Ed. 2d 481 (1986).

35. *Id.* at 481-82, 88 L. Ed. 2d at 489. The idea of killing a witness was discussed briefly and dismissed. *Id.* at 482, 88 L. Ed. 2d at 488.

36. *Id.* at 490, 88 L. Ed. 2d at 498-99. "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." *Id.* at 484, 88 L. Ed. 2d at 492 (quoting *Brewer v. Williams*, 430 U.S. 387, 398 (1977)).

37. *Id.* at 484 n.7, 88 L. Ed. 2d at 496 n.7.

38. *Id.* at 485, 88 L. Ed. 2d at 496.

39. *Id.* at 489, 88 L. Ed. 2d at 498-99.

40. 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986).

41. *Id.* at 2630, 91 L. Ed. at 384-85. Justice Powell, speaking for the majority, noted that the constitutional underpinnings of *Maine v. Moulton*, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1986), *United States v. Henry*, 477 U.S. 264 (1980), and *Massiah v. United States*, 377 U.S. 201 (1963), were concerned with secret interrogation by investigatory techniques equivalent to direct police questioning, not the opportunistic overhearing by an informant of the accused's incriminating statements. 106 S. Ct. at 2629, 91 L. Ed. 2d at 384.

42. 712 S.W.2d 607 (Tex. App.—Beaumont 1986, no pet.).

43. *Id.* at 608.

44. 106 S. Ct. 477, 88 L. Ed. 2d 481 (1986).

45. 712 S.W.2d at 607.

ously had worked as an agent for law enforcement in a drug deal, but was no longer acting in such capacity when Whittemore made the statement.<sup>46</sup>

### B. Right to Self-Representation

The right of an accused to self-representation was recognized in *Faretta v. California*.<sup>47</sup> The court held this right applied to appeals in *Webb v. State*.<sup>48</sup> These opinions set the stage for the appellant's attempts to represent herself on appeal in *Gelabert v. State*.<sup>49</sup> Gelabert originally requested that court-appointed counsel be removed and reluctantly volunteered to represent herself on appeal if she could not find adequate counsel.<sup>50</sup> After the trial court granted the request, the court of appeals remanded for a hearing to determine if Gelabert unconditionally waived counsel.<sup>51</sup> Gelabert then reasserted her desire to represent herself, but cited *McKaskle v. Wiggins*<sup>52</sup> for the appointment of standby counsel. The court of appeals next held that Gelabert had not unconditionally waived her constitutional right to counsel on appeal and abated the appeal for the appointment of counsel.<sup>53</sup> After the appointment of counsel appellant continued to assert her right to self-representation by filing two more pro se motions for self-representation and caused court-appointed counsel to do the same.<sup>54</sup> The court of appeals held that Gelabert intended the motions to obstruct the orderly procedure of the court and to interfere with the fair representation of justice.<sup>55</sup> While the procedural battles were raging, both appellant and her court-appointed counsel filed appellate briefs.<sup>56</sup> The court of appeals based its decision that appellant could not represent herself on her earlier request for standby counsel.<sup>57</sup> Appellant finally won the battle to represent herself<sup>58</sup> when the court of appeals adopted the reasoning of another court of appeals in *Saunders v. State*<sup>59</sup> and held that appellant's request for standby counsel did not make her request for self-representation invalid.<sup>60</sup>

### C. Ineffective Assistance of Counsel at Trial

The factual circumstances in *Nix v. Whiteside*<sup>61</sup> seemed derived from a

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46. *Id.*

47. 422 U.S. 806, 807 (1975); see U.S. CONST. amends. VI, XIV.

48. 533 S.W.2d 780 (Tex. Crim. App. 1979).

49. 712 S.W.2d 813 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

50. *Id.* at 815.

51. *Id.*

52. 465 U.S. 168 (1984).

53. 712 S.W.2d at 815.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. She lost the war when the court of appeals affirmed the conviction. *Id.* at 818.

59. 721 S.W.2d 359 (Tex. App.—Tyler 1985, no pet.). *Saunders* noted that the court of criminal appeals had not clearly interpreted *Faretta*, and then concluded that under *Faretta*, a judge may not deny a defendant's demand for self-representation simply because the record does not establish a valid waiver of counsel. *Id.* at 363.

60. *Id.*

61. 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986).

law school ethics exam. Whiteside, charged with murder, consistently told his appointed counsel that although he never saw a gun in the victim's hand, Whiteside was sure the victim had a gun before he stabbed the victim.<sup>62</sup> Shortly before trial Whiteside told his counsel that he was going to testify that the victim had a metallic object in his hand.<sup>63</sup> Counsel told the accused that only a reasonable belief of the existence of a gun was necessary to establish a self-defense claim.<sup>64</sup> He also told Whiteside that if Whiteside persisted in committing the perjury, he would be required to advise the court of the perjury and would seek to withdraw.<sup>65</sup> Whiteside subsequently testified as to his first version of the facts and was convicted.<sup>66</sup> Whiteside filed a motion for new trial alleging that his counsel's actions deprived him of a fair trial.<sup>67</sup> The Iowa Supreme Court affirmed the conviction.<sup>68</sup> The federal district court affirmed the federal writ of habeas corpus.<sup>69</sup> The Court of Appeals for the Eighth Circuit reversed.<sup>70</sup> The court reasoned that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel.<sup>71</sup> Counsel's admonition that he would inform the court of Whiteside's perjury attempt, therefore, constituted a threat to violate the attorney's duty to preserve client confidences, breaching the standards of effective representation.<sup>72</sup> Chief Justice Burger wrote the unanimous opinion of the Court, reversing the Eighth Circuit and affirming the judgment of conviction. Utilizing accepted standards of ethical conduct,<sup>73</sup> the Court found no failure by trial counsel to adhere to reasonable professional standards that would deprive the client of the sixth amendment right to counsel.<sup>74</sup> In applying the *Strickland* standard,<sup>75</sup> therefore, counsel breached no recognized professional duty and nothing indicated that, but for

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62. *Id.* at 989, 898 L. Ed. 2d at 130-31.

63. *Id.*

64. Counsel testified at the writ of habeas corpus hearing that, as officers of the court, they could not suborn perjury by allowing him to testify falsely. *Id.* at 992, 89 L. Ed. 2d at 1131.

65. *Id.*

66. *Id.*

67. *Id.*

68. *State v. Whiteside*, 273 N.W.2d 468 (Iowa 1978).

69. 106 S. Ct. at 992, 89 L. Ed. 2d at 132.

70. *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984).

71. *Id.* at 1329.

72. *Id.* In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court held that a defendant must show that the attorney's performance fell below an objective standard of reasonably professional judgment, *Id.* at 690, and the existence of a reasonable probability that, but for counsel's deficient performance, the proceeding would have led to a different result. *Id.* at 694. The Court defined reasonable probability as a "probability sufficient to undermine confidence in the outcome." *Id.* at 698; see *Keck, Criminal Procedure: Trial and Appeal, Annual Survey of Texas Law*, 393 Sw. L.J. 495, 497-99 (1985) [hereinafter *Keck, 1985 Annual Survey*].

73. 106 S. Ct. at 996, 89 L. Ed. 2d at 135-37. Citing the American Bar Association's MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980) and the more recent MODEL CODE OF PROFESSIONAL CONDUCT Rule 1.2 (1983), the Chief Justice wrote that the ethical standards do not merely authorize disclosure of client perjury, the rules require such disclosure. *Id.* at 995, 89 L. Ed. 2d at 135. The rules also permit withdrawal as an appropriate remedy when the client attempts to commit perjury. *Id.* at 996, 89 L. Ed. 2d at 136.

74. 106 S. Ct. at 997, 89 L. Ed. 2d at 140.

75. See *supra* note 72.

counsel's conduct, the results of the proceeding would have been different.<sup>76</sup> Four members of the Court concurred in the judgment, three of them writing opinions.<sup>77</sup> Each opinion firmly stated that the Chief Justice's opinion had *not* established a national code of legal ethics.<sup>78</sup> The concurring opinion of Justice Blackmun noted that *Whiteside* involved a case in which the accused specifically stated his intent to commit perjury as opposed to a case in which counsel did not believe his client.<sup>79</sup>

As noted above in *Strickland v. Washington*,<sup>80</sup> the Supreme Court established a two-part test to determine the effectiveness of counsel.<sup>81</sup> The test essentially requires that counsel's representation fall below any objective standard of reasonableness and that, but for counsel's deficient performance, the proceeding would have led to a different result.<sup>82</sup> The Texas test prior to *Strickland* required "reasonably effective assistance."<sup>83</sup> As noted in previous Survey articles, this test established a substantial barrier for any convicted defendant.<sup>84</sup>

Notwithstanding the *Strickland* barrier, counsel who fails to conduct an independent investigation of the facts of the case will be deemed deficient. In *Butler v. State*<sup>85</sup> counsel presented the defenses of alibi and mistaken identification.<sup>86</sup> Besides the defendant, counsel called only one witness to support the alibi defense and no eyewitnesses to contradict the complainant's identification.<sup>87</sup> Since witnesses were available on each issue, the court held

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76. 106 S. Ct. at 997, 999, 89 L. Ed. 2d 134, 140-41.

77. Justice Blackman filed an opinion concurring in the judgment, in which Justices Brennan, Marshall, and Stevens joined. *Id.* at 1000-07, 89 L. Ed. 2d at 141-49. Justices Brennan and Stevens also wrote separate concurring opinions. *Id.* at 1000, 1007, 89 L. Ed. 2d at 141, 149-50.

78. Justice Blackman noted that under *Strickland* a court reviewing the effectiveness of counsel should first determine if the accused has been harmed before delving into counsel's performance. *Id.* at 1003, 89 L. Ed. 2d at 143-44. Blackmun suggested three factors to consider when evaluating whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's sixth amendment rights: (1) the attorney's degree of certainty that the proposed testimony is false, (2) the state of the proceedings at which the attorney discovers the plan, and (3) alternative ways the attorney may dissuade his client. Based on the complex interaction of variable factors, a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court is inappropriate. *Id.* at 1006, 89 L. Ed. at 149.

79. *Id.* at 991, 89 L. Ed. 2d at 130=; see *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977), in which counsel violated her client's right to counsel by informing the court that she believed her client intended to commit perjury and threatened to withdraw in the middle of trial, both of which caused the client not to take the stand. The opinion held that attorneys who adopt "the role of the judge or jury to determine the facts," can create a situation in which the accused is deprived of the loyal and zealous advocacy required by the sixth amendment. *Id.* at 122.

80. 466 U.S. 668 (1984).

81. The sixth amendment's right to counsel means the right to the "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

82. For a discussion of the *Strickland* standard see *supra* note 72.

83. *Ex parte Duffy*, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980).

84. See Keck & Johnson, *Criminal Procedures: Trial and Appeal, Annual Survey of Texas Law*, 40 Sw. L.J. 583, 589 (1986) [hereinafter Keck & Johnson, 1986 *Annual Survey*]; Keck, 1985 *Annual Survey, supra* note 72, at 497-99 (1985).

85. 716 S.W.2d 48 (Tex. Crim. App. 1986) (en banc).

86. *Id.* at 54.

87. *Id.* at 55.



that counsel's failure to conduct properly a pre-trial investigation constituted deficient performance under the first part of the *Strickland* test.<sup>88</sup> The appellant's conviction was based solely on the testimony of one eyewitness and the testimony that the jury did not hear consisted of the testimony of two witnesses who said someone other than the appellant committed the robbery, and of a third witness who established the appellant's alibi. The court found the facts "sufficient to undermine confidence in the outcome"<sup>89</sup> and affirmed the court of appeals' reversal of the conviction.<sup>90</sup> The court of criminal appeals limited the opinion to the sixth amendment issues of *Strickland* and did not address the right to counsel provisions of article I, sections 19 and 10 of the Texas Constitution.<sup>91</sup>

The appellant in *Garcia v. State*<sup>92</sup> contended that the trial court erred in admitting prejudicial testimony that was corroborative of the complaining witness.<sup>93</sup> The court rejected these grounds, because the appellant had failed to preserve error properly by a timely trial objection.<sup>94</sup> The court of appeals, however, held that the failure to preserve error was deficient conduct that had an adverse effect upon the defense and reversed the conviction.<sup>95</sup> The same panel of the El Paso court of appeals that decided *Garcia* applied the *Strickland* standard in *Majid v. State*,<sup>96</sup> but held that counsel's negligence in failing to listen to all of a taped inculpatory conversation was an isolated failure that did not present a reasonable probability of a different result had it not occurred.<sup>97</sup> Two cases have addressed the issue of whether the failure to object to improper evidence was evidence of deficient performance. In *Walston v. State*<sup>98</sup> the court of appeals held that defense counsel's failure to object to certain inadmissible evidence was not by itself an indication of ineffective assistance of counsel and affirmed the conviction.<sup>99</sup> The opinion rea-

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88. *Id.* An attorney must acquaint himself with both the law and the facts of a case. An attorney must also fulfill his duty to investigators, associates, and prosecuting attorneys. 716 S.W.2d at 55-56.

89. *See supra* note 72.

90. 716 S.W.2d at 56. The court of appeals decision was unpublished. *See* *Butler v. State*, No. 3-83-133-CR (Tex. App.—Austin, May 9, 1984, no pet.).

91. 716 S.W.2d at 57 n.2. TEX. CONST. art. I, § 10 provides in part: "In all criminal prosecutions the accused shall have . . . the right of being heard by himself or counsel, or both . . ." *Id.* § 19 provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

92. 712 S.W.2d 249 (Tex. App.—El Paso 1986, no pet.).

93. The court had permitted a police officer to testify that in his opinion the complainant child's demeanor indicated that the child was telling the truth. *Id.* at 251. A supervisor for the sexual abuse unit of the department of human resources testified that she had never observed a mother try to get a child to lie fater being sexually abused, which testimony rebutted the defensive theory. *Id.* at 251-52.

94. *Id.* at 251-52.

95. *Id.* at 252; *see* *Crockett v. McCotter*, 796 F.2d 787 (5th Cir. 1986), in which the court held that counsel's failure to object to inadmissible prior convictions constituted deficient performance, but the defendant was not able to show with reasonable probability that the result would have been different. *Id.* at 793.

96. 713 S.W.2d 405 (Tex. App.—El Paso 1986, no pet.).

97. *Id.* at 414.

98. 697 S.W.2d 517 (Tex. App.—San Antonio 1985, pet. ref'd).

99. *Id.* at 519.

soned that counsel's failure to object could be justified as an attempt to minimize the risk of further incriminating evidence.<sup>100</sup> In *Lyons v. McCotter*<sup>101</sup> the federal circuit court of appeals agreed that although counsel could strategically choose not to object to the admission of prejudicial evidence that was arguably inadmissible, no good reason existed for not objecting to the admission of prejudicial evidence that was clearly inadmissible.<sup>102</sup>

A federal habeas corpus proceeding involving a Texas state prisoner emphasized the problem that a defendant faces. In *Martin v. McCotter*<sup>103</sup> the defendant received a life sentence for aggravated robbery.<sup>104</sup> Numerous defense witnesses testified about the defendant's good character and supported his alibi defense during the guilt or innocence stage of the proceedings.<sup>105</sup> The defendant's counsel presented no evidence at the sentencing phase of the trial.<sup>106</sup> After the prosecution made an opening argument at sentencing, defense counsel announced that the defense would present no argument.<sup>107</sup> Martin, the defendant, subsequently was sentenced to life and ultimately brought the habeas corpus action, contending that he was deprived of his right to effective counsel.<sup>108</sup> The circuit court affirmed, concluding first that the decision to forgo argument did not constitute constructive denial of counsel that would render a showing of *Strickland* prejudice unnecessary<sup>109</sup> and second that counsel's silence did not harm the defendant because the facts of the case warranted a life sentence.<sup>110</sup>

The defendant's own actions also may negate the errors of his counsel. In *Duncan v. State*<sup>111</sup> the appellant complained that his trial counsel failed to

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100. *Id.*

101. 770 F.2d 529 (5th Cir. 1985).

102. *Id.* at 534.

103. 796 F.2d 813 (5th Cir. 1986).

104. *Id.* at 815-16.

105. *Id.* at 816.

106. *Id.* at 817. At the federal evidentiary hearing on the writ of habeas corpus, testimony was presented that numerous witnesses existed who were ready to testify as to the defendant's character, but counsel saw no need to present additional evidence since many of the defendant's positive character traits had been presented during the guilt state of the trial. *Id.*

107. *Id.* at 819. By a footnote the opinion detailed counsel's reasoning for waiving argument. First, counsel claimed that defendant had refused to display remorse and did not want to "crawl" to the jury. Second, counsel believed that the jury disliked, disbelieved, and distrusted the defendant and counsel did not want to aggravate the jury by arguing positive traits when the jury was already mad. Third, counsel did not want to act as a "foil" for the prosecution's rebuttal argument. *Id.* at 821 n.2.

108. *Id.* at 816, 819-21.

109. *Id.* at 820. In *United States v. Cronin*, 466 U.S. 648 (1984), the Supreme Court held that some instances exist in which counsel's actions or inactions are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. If, therefore, counsel is denied at a critical stage of the proceedings (the *Maine v. Moulton* situation, see *supra* notes 34-39 and accompanying text), if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, or if an actual conflict of interest exists, prejudice is presumed. *Id.* at 659, 662 n.31.

110. 796 F.2d at 821. Other circuit court opinions have discussed the silent counsel issue. Compare *Warner v. Ford*, 752 F.2d 622, 625 (11th Cir. 1985) (circuit court refused to presume prejudice when counsel had been silent during guilt or innocence stage) with *Martin v. Rose*, 744 F.2d 1245, 1250-51 (6th Cir. 1984) (prejudice presumed when counsel refused to participate in any aspect of trial).

111. 717 S.W.2d 345 (Tex. Crim. App. 1986).

object to the admissibility of oral statements and failed to present an alibi or any other defense.<sup>112</sup> The court of criminal appeals affirmed by holding that the appellant waived the error when he, of his own accord and against counsel's advice, took the stand at the punishment stage and made a judicial confession.<sup>113</sup> The court applied the *Strickland* test and held that a defendant cannot make a claim of ineffectiveness when the defendant preempts his attorney's strategy by insisting that a different defense be followed.<sup>114</sup>

The difficulty that counsel faces in trying to maintain effectiveness is demonstrated in *Barnsworth v. State*,<sup>115</sup> in which counsel permitted the trial court to convince him that the law on a certain issue was settled, whereas the law subsequently changed. The appellants were charged with aggravated robbery, pleaded guilty, and sought probation from the jury.<sup>116</sup> The trial court, relying on a court of appeals decision,<sup>117</sup> held that a jury had no authority to recommend probation in an aggravated robbery case. A court of criminal appeals' decision, however, ultimately disapproved the decision relied on by the trial court.<sup>118</sup> In analyzing the case on the totality of the circumstances, the *Barnsworth* court held that the failure of counsel to request a charge on probation or to object to the change on the ground that it did not contain a charge on probation deprived the defendants of reasonably effective assistance of counsel.<sup>119</sup>

#### D. Ineffective Assistance of Counsel Due to Conflict

In *Lerma v. State*,<sup>120</sup> subject to review during the last Survey,<sup>121</sup> the court held that the failure of the accused or counsel to raise the issue of conflict of interest during the trial waives the error.<sup>122</sup> In *Deloro v. State*<sup>123</sup> the defendant was charged with theft in two separate cases. The defendant used three separate checks to pay his attorneys, who endorsed the checks and deposited them.<sup>124</sup> The complainant allegedly gave the checks, which were the basis of

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112. *Id.* at 346.

113. *Id.* at 347 (citing *Dugger v. State*, 543 S.W.2d 374 (Tex. Crim. App. 1976)).

114. *Id.* at 347-48.

115. 698 S.W.2d 686 (Tex. App.—Tyler 1985, pet. ref'd).

116. *Id.* at 688.

117. *Rivas v. State*, 627 S.W.2d 494 (Tex. App.—San Antonio 1981, pet. ref'd).

118. *May v. State*, 722 S.W.2d 699 (Tex. Crim. App. 1984); see *Keck & Johnson, 1986 Annual Survey*, *supra* note 84, at 591-93.

119. 698 S.W.2d at 690.

120. 679 S.W.2d 488 (Tex. Crim. App. 1984) (opinion on state's motion for rehearing).

121. See *Keck & Johnson 1986 Annual Survey*, *supra* note 84, at 597-98.

122. In *Lerma* a counsel represented two co-defendants, one of whom objected at trial to the joint representation. The other raised the issue for the first time on appeal. Pursuant to *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978), whenever a defendant raises the possibility of conflicting interests, the trial court has an affirmative duty to assure that the joint representation does not violate the sixth amendment right to effective counsel and whenever the trial court improperly requires joint representation over objection, prejudice is presumed and reversal is automatic. *Id.* If no trial objection is made, however, no presumed harm exists. *Culyer v. Sullivan*, 446 U.S. 335, 347 (1980). Thus, in *Lerma*, the defendant who objected received a reversal while his non-objecting co-defendant's case was affirmed. 679 S.W.2d at 494, 497-98.

123. 712 S.W.2d 805 (Tex. App.—Houston [14th Dist.] 1986, no pet.).

124. *Id.* at 806-07.

one of the test cases, to the defendant.<sup>125</sup> The defendant pleaded guilty and received a ten-year deferred adjudication probation.<sup>126</sup> Subsequently the court revoked the defendant's probation, adjudicated him guilty, and sentenced him to prison.<sup>127</sup> He then filed a motion for a new trial alleging the conflict caused by his attorneys' endorsements of the stolen checks.<sup>128</sup> The court of appeals affirmed, noting that any motion made after the trial had ended was untimely.<sup>129</sup>

In *McGuire v. State*<sup>130</sup> one counsel represented six co-defendants.<sup>131</sup> Prior to trial, on the state's motion, the court held a hearing to determine if conflicts of interest existed.<sup>132</sup> Counsel testified that he had explained the possible conflicts to each defendant and that he was of the opinion that no conflict existed.<sup>133</sup> Each co-defendant also stated that a conflict did not exist and that each wished to be represented by the same counsel.<sup>134</sup> After conviction, four of the co-defendants argued that counsel's failure to object to certain evidence and to request limiting instructions constituted an actual conflict that deprived each of effective representation.<sup>135</sup> The court of appeals affirmed, holding that the record did not demonstrate an actual conflict, but did show an overall trial strategy to return verdicts of not guilty for all defendants.<sup>136</sup> The court wrote that an actual conflict in such situations arises when one defendant stands to gain significantly by using tactics damaging to the other co-defendant.<sup>137</sup>

## II. GUILTY PLEAS

During the Survey period Texas courts rendered several opinions concerning the enforcement of plea bargains under the rationale of *Santobello v. New York*.<sup>138</sup> In *Ex parte Reyna*<sup>139</sup> the defendant entered into a plea bargain with the state whereby he would plead guilty to aggravated robbery and the prosecution would recommend a sentence of eighteen years to run concurrently with a previous sentence in Mississippi.<sup>140</sup> Subsequently the defendant learned that the two sentences were not running concurrently and filed a writ of habeas corpus.<sup>141</sup> The court of criminal appeals held that the plea

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125. *Id.* at 807.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 809. The court did state that the issue could be raised by a post-conviction writ of habeas corpus. See TEX. CODE CRIM. PROC. ANN. art. 11.07 § 2 (Vernon Supp. 1987).

130. 707 S.W.2d 223 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd, untimely filed).

131. *Id.* at 228.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 226-29.

136. *Id.* at 229-30.

137. *Id.* at 229 (citing *Gonzales v. State*, 605 S.W.2d 278, 282 (Tex. Crim. App. 1980)).

138. 404 U.S. 257 (1971). When a prosecutor's promise induces a guilty plea, such promise must be fulfilled. *Id.* at 263.

139. 707 S.W.2d 110 (Tex. Crim. App. 1986) (en banc).

140. *Id.* at 110-11.

141. *Id.* at 111.

bargain was unenforceable and that the defendant was entitled to withdraw his plea of guilty.<sup>142</sup>

In *Thi Van Le v. Perkins*<sup>143</sup> the defendant pleaded guilty to a murder charge in exchange for a recommended maximum sentence of twenty-five years.<sup>144</sup> An explicit understanding existed that the trial court could give a lesser sentence after examining the presentence report.<sup>145</sup> After studying the presentence report the trial court struck the plea bargain, stating that the court had accepted it based upon a mistaken belief as to the defendant's complicity.<sup>146</sup> The defendant then filed an application for mandamus, demanding specific performance of the plea bargain agreement.<sup>147</sup> The Austin court of appeals held that the trial judge bound himself to assess punishment at imprisonment for no more than twenty-five years when he unconditionally accepted the plea bargain agreement.<sup>148</sup> The court of appeals then held that an appellate court may direct a trial court by mandamus to enter a particular judgment if it is the only proper judgment that can be rendered in the circumstances.<sup>149</sup> The court further found that the defendant had no other adequate remedy other than specific performance of the plea bargain.<sup>150</sup>

Whether or not *Thi Van Le* withstands review by the court of criminal appeals,<sup>151</sup> certain portions of the opinion are noteworthy. First, the case specifically held that "where the plea of guilty is voluntarily made and specific performance is practical, specific performance is the preferred remedy when the plea bargain agreement is breached."<sup>152</sup> Second, the case specifically held that once the trial court accepts the plea bargain, the trial court is bound.<sup>153</sup> This second holding needs to be compared with *West v. State*,<sup>154</sup> in which the court of criminal appeals reached a different result as to the finality of the plea proceeding. In *West* the defendant pleaded guilty before the court with no plea bargain to the offense of aggravated rape.<sup>155</sup> Before the entry of the plea counsel filed an application for probation.<sup>156</sup> After

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142. *Id.* See also *infra* note 152 and accompanying text.

143. 700 S.W.2d 768 (Tex. Crim. App.—Austin 1985, no pet.).

144. *Id.* at 770-72.

145. *Id.*

146. *Id.* at 773.

147. *Id.*

148. *Id.* at 775.

149. *Id.* 775-76 (citing *Thomason v. Seale*, 122 Tex. 160, 53 S.W.2d 764 (1932); *Vance v. Routt*, 572 S.W.2d 903 (Tex. Crim. App. 1978); and 373 TEX. JUR. 2D *Mandamus* § 48 (1962)). Two requirements necessary to issue a writ of mandamus are: (1) the act sought to be compelled is ministerial as distinguished from discretionary, and (2) the petitioner has no other adequate remedy at law. *Ordunez v. Bean*, 579 S.W.2d 911, 913 (Tex. Crim. App. 1979).

150. 700 S.W.2d at 776.

151. The trial court and the prosecutor's office filed a motion for leave to file a mandamus action against the court of appeals, contending that the court of appeals' mandamus is improper, both procedurally and substantively. See *Perkins v. Court of Appeals*, 706 S.W.2d 320, 321 (Tex. Crim. App. 1986).

152. 700 S.W.2d at 774 (citing *McFadden v. State*, 544 S.W.2d 159 (Tex. Crim. App. 1976)).

153. 700 S.W.2d at 774.

154. 702 S.W.2d 629 (Tex. Crim. App. 1986).

155. *Id.* at 631.

156. *Id.*

pleading guilty evidence was presented on the issue of probation.<sup>157</sup> The court found the defendant guilty and ordered a presentence investigation.<sup>158</sup> When the proceedings resumed, more evidence was offered and defense counsel argued for deferred adjudication.<sup>159</sup> After the trial court assessed a twenty-five year sentence the defendant's counsel filed an appeal claiming that the plea of guilty was involuntary because defense counsel had incorrectly advised the defendant that he was eligible for probation.<sup>160</sup> The ultimate issue, therefore, became whether the trial court's finding of guilt precluded the trial court's consideration of deferred adjudication, since that was the only probation for which the defendant was eligible.<sup>161</sup> The court of criminal appeals held that, since the trial judge did not enter a written judgment until the day he assessed the sentence, his oral finding of guilt on the day the defendant pleaded did not divest the court of the power to grant deferred adjudication.<sup>162</sup> Thus, if the *West* opinion is applied to the *Thi Van Le* factual situation, the plea bargain would not be binding until the written judgment is entered.<sup>163</sup>

The circumstances in *Ex parte Adams*<sup>164</sup> showed that a defendant should not surmise that a plea bargain continues from one plea to another. Adams originally pleaded guilty and was given a forty-year sentence with an agreement that if the co-defendants got less time, he would be brought back and given the same sentence as the co-defendants.<sup>165</sup> Subsequently the court granted a motion for new trial, and appellant pleaded guilty in return for an agreed sentence of twenty-five years incarceration.<sup>166</sup> Adams surmised that the offer from the first plea to limit his sentence to those of the co-defendants carried over because his counsel stated: "I wasn't going to let you get the bad end of the deal."<sup>167</sup> After the co-defendants received probated sentences Adams brought a writ of habeas corpus to enforce the plea bargain he thought existed, forming the issue as a deprivation of his right to effective assistance of counsel.<sup>168</sup> The court of criminal appeals rejected the contention and held that an accused cannot surmise as to the contents of a plea bargain.<sup>169</sup>

The mixture of two lines of cases resulted in the recognition of new law in

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157. *Id.*

158. *Id.* at 632.

159. *Id.* Deferred adjudication is a form of sentence in which the defendant is placed on probation but not formally found guilty. See TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3d (Vernon Supp. 1987).

160. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1)(C) (Vernon Supp. 1987), which excludes probation as a possible punishment for aggravated sexual assault.

161. 702 S.W.2d at 634.

162. *Id.*

163. See *Ex parte Williams*, 637 S.W.2d 943, 947 (Tex. Crim. App.) (en banc) (agreement held to be operative when court announces it will accept agreement), *cert. denied*, 462 U.S. 1108 (1982).

164. 707 S.W.2d 646 (Tex. Crim. App. 1986) (en banc).

165. *Id.* at 647.

166. *Id.*

167. *Id.* at 648.

168. *Id.*

169. *Id.*

*Shannon v. State*.<sup>170</sup> Shannon originally had been charged with delivery of over 400 grams of diazepam, but pleaded guilty to the reduced charge of possession of over 400 grams of the controlled substance, with the prosecution recommending a two-year sentence.<sup>171</sup> Later the court in *Ex parte Crisp*<sup>172</sup> held that the controlled substance law upon which the prosecution and plea were based was unconstitutional.<sup>173</sup> The court of appeals in an unpublished opinion<sup>174</sup> reversed the conviction and remanded the case for reassessment of punishment only.<sup>175</sup> The state sought review to determine what the appropriate remedy should be for an unenforceable plea bargain.<sup>176</sup> The court of appeals, in holding that appellant was entitled to resentencing, relied on precedent establishing that when an error relates to punishment only and the punishment was assessed by the court, a defendant is entitled to resentencing and not a retrial.<sup>177</sup> The court of criminal appeals noted that in applying the above principle of law, the opinions had never differentiated negotiated guilty pleas from not guilty pleas or unnegotiated guilty pleas.<sup>178</sup> The court of criminal appeals then held that the general principle would not apply in negotiated plea cases, but that henceforth, when a defendant successfully challenged a plea bargained conviction, the appropriate remedy is specific performance of the plea if possible. If such specific performance is not possible, the proper remedy is withdrawal of the plea, with both parties returning to their original position.<sup>179</sup>

As noted in the last Survey,<sup>180</sup> *Morgan v. State*<sup>181</sup> radically altered prior law concerning the appeal of pretrial rulings in cases in which the defendant pleaded guilty pursuant to a plea bargain. Prior to *Morgan* the law had long been that a person could not appeal an adverse ruling on a pretrial matter if

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170. 708 S.W.2d 850 (Tex. Crim. App. 1986) (en banc).

171. *Id.* at 851.

172. 643 S.W.2d 487 (Tex. App.—Austin), *aff'd*, 661 S.W.2d 944 (Tex. Crim. App. 1983)(en banc).

173. *Id.* at 492. *Crisp* held that the statute creating the amendments to the law was unconstitutional because of a defect in the title of the bill. Rather than dismissing the cause, however, the case held that the law in effect before the amendment was passed was still in effect. *Id.* As relevant to *Shannon*, before the amendment possession of diazepam was punishable as a misdemeanor, but delivery was punishable as a felony.

174. *Shannon v. State*, No. 05-83-00191-CR (Tex. App.—Dallas, Jan. 30, 1984) (unpublished opinion).

175. 708 S.W.2d at 851.

176. *Id.*

177. *Id.* at 851-52.

178. *Id.* at 852.

179. *Id.* Judge Clinton dissented, noting that the state did not have the constitutional right to be returned to its original position if the plea bargain failed. *Id.* at 853. He stressed that the principle benefit to the state in a plea bargain was the waiver of the jury trial. The state had no right to contest any sentence the court gave. *Id.* He also noted that even if the state elected to prosecute the defendant on the felony delivery charge, the punishment would still be limited to two years under the rationale of *Blackledge v. Perry*, 417 U.S. 21 (1974). 708 S.W.2d at 854. *Blackledge* held that the trial court cannot generally assess a greater punishment on a retrial after the defendant successfully appeals except for identifiable conduct occurring after the original sentence. 417 U.S. 21, 28-29 (1974).

180. See Keck & Johnson, 1986 *Annual Survey*, *supra* note 84, at 608-09.

181. 656 S.W.2d 171 (Tex. App.—San Antonio 1983), *remanded*, 688 S.W.2d 504 (Tex. Crim. App. 1985) (en banc).

he pleaded guilty to the offense, since the plea waived all nonjurisdictional defects.<sup>182</sup> The legislature amended article 44.02 of the Code of Criminal Procedure to permit a defendant who pleaded guilty or nolo contendere pursuant to a plea bargain to appeal the pretrial rulings of the court.<sup>183</sup> Nonetheless, if the accused entered a judicial confession when making the plea of guilty, he still could not appeal pretrial decisions, since the judicial confession was held to waive all nonjurisdictional errors.<sup>184</sup> The appellate courts then became clogged with cases in which the defendant had been advised he could appeal otherwise preserved pretrial issues, but whose convictions were affirmed because of the procedure used to plead guilty in plea bargain cases.<sup>185</sup> In most of these cases, the court held the plea to be involuntary, thus permitting the defendant to withdraw his plea of guilty and plead anew.<sup>186</sup> In *Morgan* the court of criminal appeals held that article 44.02 allowed appellate review on the merits of the appeal even if the defendant pleaded guilty and made a judicial confession.<sup>187</sup> The foregoing brings us to *Ex parte Stansberg*,<sup>188</sup> in which the defendant pleaded guilty pursuant to a plea bargain and attempted to appeal a search issue. His original appeal was affirmed in an unreported per curiam decision because the judicial confession negated the search issue.<sup>189</sup> Stansberg then filed a writ of habeas corpus alleging that his plea was involuntary. The court of criminal appeals first granted the writ, which would have permitted Stansberg to withdraw his plea. After the state filed a motion for rehearing, however, the court decided *Morgan*. On the motion for rehearing, the court, rather than allowing the defendant to withdraw his appeal, considered the original appeal on the merits.<sup>190</sup> The writ of habeas corpus, therefore, was transformed into the original appeal, which was affirmed.<sup>191</sup> The court of criminal appeals also stressed in *Moraquez v. State*<sup>192</sup> that the *Morgan* rules do not apply to jury trials in which the plea was not guilty or the plea was guilty but no plea bargain existed.<sup>193</sup>

During the Survey period the courts decided several cases concerning the admonishments required before a defendant could make a plea of guilty. In *Ex parte Williams*<sup>194</sup> the court of criminal appeals held that the trial court does not have the duty to admonish the defendant on the availability of pro-

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182. For a discussion of the prior law see Presiding Judge Onion's dissent. 688 S.W.2d at 511.

183. TEX. CODE. CRIM. PROC. ANN. art. 44.02 (Vernon 1979).

184. *Haney v. State*, 588 S.W.2d 913, 915 (Tex. Crim. App. 1979).

185. See *Mooney v. State*, 615 S.W.2d 776, 778 (Tex. Crim. App. 1981); *Wooten v. State*, 612 S.W.2d 561, 563 (Tex. Crim. App. 1981).

186. See *Mooney*, 615 S.W.2d at 778; *Wooten*, 612 S.W.2d at 564.

187. 688 S.W.2d at 507.

188. 702 S.W.2d 643 (Tex. Crim. App. 1986) (en banc).

189. *Id.* at 644.

190. *Id.* at 645.

191. *Id.* at 645-49.

192. 701 S.W.2d 902 (Tex. Crim. App. 1986) (en banc).

193. *Id.* at 905.

194. 692 S.W.2d 545 (Tex. App.—Houston [14th Dist.] 1985), *rel. granted*, 704 S.W.2d 773 (Tex. Crim. App. 1986) (en banc).



bation.<sup>195</sup> If the judge, however, undertakes to explain the law of probation, the court must provide accurate information.<sup>196</sup> Further, if the trial court provides inaccurate information misleading to the defendant, he is entitled to withdraw his plea.<sup>197</sup> In *Johnson v. State*<sup>198</sup> the court held that the failure to admonish on the limited right of appeal is of no consequence.<sup>199</sup> In *Gonzales v. State*,<sup>200</sup> however, the failure to admonish as to the range of punishment constituted reversible error.<sup>201</sup>

Another "range of punishment" case could have far-reaching impact. In *McMillan v. State*<sup>202</sup> the court convicted the defendant of the misdemeanor offense of driving while intoxicated. Article 26.13 of the Code of Criminal Procedure provides that before a court may accept a plea of guilty, it must give the accused certain admonishments, including the range of punishment.<sup>203</sup> The statute does not apply, however, in misdemeanor cases.<sup>204</sup> The Dallas court of appeals held that due process of law required that an affirmative showing must exist in the record that the accused knew the range of punishment applicable in misdemeanor cases in which imprisonment can be imposed.<sup>205</sup>

### III. JURY TRIAL ISSUES

#### A. *Batson v. Kentucky*

Although disclaiming any intention of announcing a new principle of substantive constitutional law, the Supreme Court in *Batson v. Kentucky*<sup>206</sup> moved strongly to ensure jury participation for racial minorities. In 1965 the Supreme Court held in *Swain v. Alabama*<sup>207</sup> that a prosecutor's deliberate exclusion of jurors on account of race violated the equal protection clause of the United States Constitution.<sup>208</sup> Nonetheless, the Court affirmed the lower court decision because, even though the prosecutor struck all of the black persons on the jury, Swain had not proved "purposeful discrimination."<sup>209</sup> Lower courts applying *Swain* held that proof of repeated striking of minorities over a number of cases would be required to show a constitu-

195. 704 S.W.2d at 776.

196. *Id.* at 776-77.

197. *Id.* at 777-78.

198. 712 S.W.2d 565 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

199. *Id.* at 568.

200. 712 S.W.2d 834 (Tex. App.—Houston [14th Dist.] 1986, no pet.).

201. *Id.* at 835 (citing *McDade v. State*, 562 S.W.2d 487 (Tex. Crim. App. 1978)). In *Gonzalez* the court advised the defendant of the penalty range after the plea was taken. If the trial court had offered to allow the defendant to withdraw his plea at that time, no harm would have been shown. See *Hardman v. State*, 614 S.W.2d 123, 126 (Tex. Crim. App. 1981).

202. 703 S.W.2d 341 (Tex. App.—Dallas 1986, no pet.).

203. See TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Pam. Supp. 1987).

204. 703 S.W.2d at 343 (citing *McGuire v. State*, 617 S.W.2d 259 (Tex. Crim. App. 1981)).

205. 703 S.W.2d at 344. The opinion was based on both the fourteenth amendment to the United States Constitution and art. 1, § 19 of the Texas Constitution. *Id.* at 345.

206. 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

207. 380 U.S. 202 (1965).

208. *Id.* at 226-27. U.S. CONST. amend. XIV, § 1 provides: "[N]or shall any State . . . deny to any person . . . the equal protection of the laws."

209. 380 U.S. at 222-24.

tional violation.<sup>210</sup> *Batson* rejected that interpretation of *Swain* as placing an impossible burden on the defendant.<sup>211</sup> The Court stated a new procedure in which the defendant must first show that he is a member of a cognizable racial group and that the prosecutor used peremptory challenges to remove members of that group from the jury.<sup>212</sup> The defendant may rely on the fact that the use of peremptory challenges to select a jury permits discrimination by those who wish to discriminate.<sup>213</sup> Finally, the defendant must show that the exclusion of minorities and other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude venirepersons on account of their race.<sup>214</sup> If the defendant makes a prima facie showing, the burden shifts to the prosecution to come forward with a neutral explanation.<sup>215</sup>

After deciding *Batson* the Court was quick to determine the issue of retroactivity, granting oral arguments for the 1986 term on whether *Batson* should be given retroactive effect in cases pending on direct appeal.<sup>216</sup> The Court also rendered a per curiam opinion in *Allen v. Hardy*,<sup>217</sup> which held that *Batson* would not be given retroactive application on collateral review of convictions that became final before April 30, 1986, the date *Batson* was announced.<sup>218</sup> The Fifth Circuit held in *Esquivel v. McCotter*<sup>219</sup> that *Batson* would be given prospective application only in federal habeas corpus proceedings.<sup>220</sup>

At least one Texas appellate court considered the *Batson* issue during the Survey period. In *Williams v. State*<sup>221</sup> a court of appeals held that the defendant waived the error by not objecting to the state's peremptory strikes after the state had exercised them or to the composition of the jury after the parties had selected it.<sup>222</sup> The proper time to raise the issue was after the

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210. 106 S. Ct. at 1720 n.16, 90 L. Ed. 2d at 84-85 n.16.

211. *Id.* at 1720-21, 90 L. Ed. 2d at 84-85.

212. *Id.* at 1723, 90 L. Ed. 2d at 87.

213. *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559 (1953)).

214. *Id.*, 90 L. Ed. 2d at 87-88. Illustrative examples were given: "For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Id.*

215. *Id.*, 90 L. Ed. 2d at 88. The Court emphasized that although the reason does not rise to the level of a challenge for cause, it may not be based on the assumption or intuitive judgment that the person challenged would be partial to the defendant because of their shared race. *Id.*

216. See *Brown v. United States*, 106 S. Ct. 2275, 90 L. Ed. 2d 718 (1986); *Griffith v. Kentucky*, 106 S. Ct. 2274, 90 L. Ed. 2d 717-18 (1986).

217. 106 S. Ct. 2878, 92 L. Ed. 2d 199 (1986).

218. *Id.* at 2881, 92 L. Ed. 2d at 205-06. The Court defined "final" to mean "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed." *Id.* at 2880 n.1, 92 L. Ed. 2d at 204 n.1.

219. 791 F.2d 350 (5th Cir. 1986).

220. *Id.* at 352-53. In *Esquivel* the federal district court had stayed the defendant's execution pending a hearing on the *Batson* issue. The circuit court vacated the lower court's order. *Id.* at 353.

221. 712 S.W.2d 835 (Tex. App.—Corpus Christi 1986, no pet.).

222. *Id.* at 840.

preemptory strikes were recorded but before the jury was sworn.<sup>223</sup> The court also discussed the issue on the merits and held that the defendant did not raise a prima facie case of discrimination.<sup>224</sup> The court noted that the prosecutor only struck two of the three blacks on the jury panel, that both the victim and the defendant were black, and that the racial composition of the jury was almost identical to the racial composition of the county.<sup>225</sup>

### B. Jury Selection in Capital Cases

The Supreme Court removed one of the last two major issues left in capital cases in *Lockhart v. McCree*.<sup>226</sup> The state charged and convicted McCree of capital felony murder but sentenced him to life imprisonment. McCree sought federal habeas corpus relief, contending that the "death qualification" process of removing those jurors who could not assess the death penalty violated his sixth and fourteenth amendment rights to have guilt determined by an impartial jury selected from a representative cross-section of the community.<sup>227</sup> In effect, McCree contended, the *Witherspoon*<sup>228</sup> jury selection process created a guilty prone jury. The federal district court<sup>229</sup> and circuit court of appeals<sup>230</sup> found in the petitioner's favor. The Supreme Court reversed the lower courts, holding that despite data indicating that the "death qualification" of juries produces juries more prone to convict, the constitution does not prohibit removing prospective jurors whose beliefs regarding the death penalty would substantially impair or prevent the per-

223. *Id.*

224. *Id.* at 841.

225. *Id.* at 842. The court of appeals did note that not all of the minorities need be struck, but that the striking of a disproportionate number so as to render minority representation impotent could be enough to make the prima facie showing. *Id.* at 841. The court also delineated four factors derived from *People v. Wheeler*, 22 Cal. 3d 258, 280-81, 583 P.2d 748, 764 (Cal. 1978), in evaluating *Batson* claims:

- 1) whether the state struck all or most of the group members or used a disproportionate number of its strikes against group members; 2) whether the struck jurors shared only one characteristic (group membership) and were otherwise heterogeneous; 3) whether the prosecutor had engaged the struck jurors in 'more than desultory *voir dire*,' or had even questioned them at all; and
- 4) whether the crime involved was interracial.

*Williams*, 712 S.W.2d at 841-42.

226. 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). The issue still remaining concerns the constitutionality of the death penalty practice, with opponents of the death penalty contending that capital cases in which the victim is Caucasian result in an abnormally higher percentage of death sentences than if the victim is non-Caucasian. See *Hitchcock v. Wainwright*, 106 S. Ct. 288, 90 L. Ed. 2d 976 (1986) (granting petition); *McClesky v. Kemp*, 106 S. Ct. 1331, 92 L. Ed. 2d 737 (1986) (granting petition). Both cases were argued before the Court on October 15, 1986. See *Hitchcock v. Wainwright*, 40 Crim. L. Rep. (BNA) 4062 (Oct. 22, 1986); *McClesky v. Kemp*, 40 Crim. L. Rep. (BNA) 4061 (Oct. 22, 1986).

227. 106 S. Ct. at 1761, 90 L. Ed. 2d at 143-44.

228. *Witherspoon v. Illinois*, 391 U.S. 510 (1968), which held that a prospective juror could not be excluded for cause if the juror generally opposed the death penalty, but could be if the juror made it unmistakably clear that he/she would automatically vote against capital punishment without regard to the evidence or that the juror's belief concerning capital punishment "would prevent [a juror] from making an impartial decision as to the defendant's *guilt*." *Id.* at 522-23 n.21 (emphasis in original).

229. See *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983).

230. *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985) (en banc).

formance of their duties as jurors at the sentencing stage of the trial.<sup>231</sup>

In prior cases involving victims and defendants of different races, the Court had refused to adopt a per se rule permitting the defense to insist that jurors be questioned about racial bias.<sup>232</sup> In *Turner v. Murray*,<sup>233</sup> however, the Court decided that the rules are different if the crime is a capital offense. In such cases the accused has a constitutional right<sup>234</sup> to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias upon request.<sup>235</sup> The decision effectively created a per se rule for capital cases instead of the fact-finding required in noncapital cases.<sup>236</sup> The Court, however, did not reverse the conviction. Instead the Court remanded the cause for a new sentencing hearing, because the Court held that racial prejudices were less likely to affect a guilt determination, which is less subjective.<sup>237</sup>

### C. Jury Selection in General

Statutes requiring that jurors speak and understand English and that a jury be composed wholly of United States citizens withstood constitutional attack in *Acen v. Massachusetts*.<sup>238</sup> The defendant argued that the statutes violated the sixth amendment's fair cross-section requirement<sup>239</sup> and the fourteenth amendment's equal protection clause.<sup>240</sup> The Court, however, rejected the arguments by dismissing the appeal for want of a substantial federal question.<sup>241</sup>

Attempts by trial courts to put time limits on voir dire examination con-

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231. 106 S. Ct. at 1770, 90 L. Ed. 2d at 154-55. The opinion held that the fair cross-section requirements apply to jury panels or venires, and not to the jury actually chosen to hear the case. *Id.* at 1766, 90 L. Ed. 2d at 149. As to McCree's argument that because all jurors are predisposed towards one result or another a constitutionally impartial jury may only be acquired by balancing the various predispositions of the individual jurors, the Court held that an impartial jury consists only of jurors who will conscientiously apply the law and find the facts. *Id.* at 1770, 90 L. Ed. 2d at 154-5.

232. See *Ristaino v. Ross*, 424 U.S. 589 (1976), and *Ham v. South Carolina*, 409 U.S. 524 (1973), in which the request for voir dire on racial bias must be honored only if the facts indicated a significant likelihood that, without such questioning, a biased jury might be selected. 424 U.S. at 596; 409 U.S. at 527. The opinions also noted that difference in race between accused and victim alone would not constitute a special circumstance. 424 U.S. at 597; 409 U.S. at 526-27.

233. 106 S. Ct. at 1683, 90 L. Ed. 2d 27 (1986).

234. The constitutional right to an impartial jury pursuant to the sixth and fourteenth amendments to the United States Constitution. *Id.* at 1688 n.9, 90 L. Ed. 2d at 36-37 n.9 (citing *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976)).

235. 106 S. Ct. at 1688, 90 L. Ed. 2d at 37.

236. *Id.* at 1688, 90 L. Ed. 2d at 37.

237. *Id.* at 1688-89, 90 L. Ed. 2d at 37-38. The opinion's distinction between capital sentencing and fact finding is consistent with the opinion in *Lockhart v. McCree*, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). In *Witherspoon* and *Turner*, which concerned capital sentencing, special rules were devised; in *McCree*, however, no need to fashion special rules existed when the jury function was the determination of guilt or innocence.

238. 106 S. Ct. 2269, 90 L. Ed. 2d 714 (1986).

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

240. *Id.* amend. XIV § 1.

241. 106 S. Ct. at 2269, 90 L. Ed. 2d at 714.

tinues to be the subject of appellate review. The court in *Sinegal v. State*<sup>242</sup> summarized the current law governing the defendant who raises the issue on appeal. The defendant must show: (1) that he did not attempt to prolong the voir dire examination by asking irrelevant or repetitious questions; (2) that the questions he sought to ask are set out in a bill of exceptions and are proper questions; and (3) that he was not permitted to examine panel members who actually served on the jury.<sup>243</sup>

The court in *Smith v. State*<sup>244</sup> reversed a murder conviction because the trial court refused to allow defense counsel to question the venirepersons concerning the defense of insanity and the purpose of punishment.<sup>245</sup> The opinion held that a question on voir dire is proper if it relates to the ability of a juror to consider a defense.<sup>246</sup> If the trial court prevents the asking of a proper question, then the court has prevented the intelligent use of the peremptory challenges and created the presumption of harm.<sup>247</sup> In *Santana v. State*<sup>248</sup> the court found error when the lower court prevented counsel in a capital case from voir dire questioning on the lesser included offense of murder, since the defendant would have the right to challenge for cause anyone who could not consider the minimum punishment for murder.<sup>249</sup> Since the evidence at trial did not raise the issue of the existence of the lesser included offense, however, no harm was shown.<sup>250</sup>

In *Bell v. State*<sup>251</sup> the court of criminal appeals reviewed the steps necessary to preserve jury selection error. First, if the trial court erroneously overrules a defendant's challenge for cause, the defendant must show: (a) an exhaustion of his peremptory challenges, (b) a denial of a request for additional challenges, and (c) the seating of a juror whom the defendant would have peremptorily struck. Second, if the trial court erroneously grants a state challenge for cause, thereby excluding a qualified juror, the defendant

242. 712 S.W.2d 605 (Tex. App.—Beaumont 1986, no pet.).

243. *Id.* at 606 (citing *Ratliff v. State*, 690 S.W.2d 597 (Tex. Crim. App. 1985) (en banc)); see *Keck & Johnson, 1986 Annual Survey*, *supra* note 84, at 619.

244. 667 S.W.2d 836 (Tex. App.—Dallas 1984), *rev'd*, 703 S.W.2d 641 (Tex. Crim. App. 1986) (en banc).

245. 703 S.W.2d at 644-45. The case was cited shortly after John Hinkley's trial for the attempted assassination of President Reagan. See *United States v. Hinkley*, 672 F.2d 115 (D.C. Cir. 1982). One venireperson specifically referred to Hinkley's case. The defendant sought to determine what some of the jurors had read about the insanity defense and what some of the jurors had learned of the case through pretrial publicity. 703 S.W.2d at 644.

246. 703 S.W.2d at 644.

247. *Id.* at 643 (citing *Powell v. State*, 631 S.W.2d 169, 169-70 (Tex. Crim. App. 1982); *Smith v. State*, 513 S.W.2d 823, 826 (Tex. Crim. App. 1974); *Mathis v. State*, 576 S.W.2d 835, 837 (Tex. Crim. App. 1959)).

248. 714 S.W.2d 1 (Tex. Crim. App. 1986) (en banc).

249. *Id.* at 10.

250. Unlike in *Smith*, the *Santana* court did not discuss the use of peremptory challenges. Judge Miller's concurring opinion cautioned trial courts that the appellate distinction between error and reversible error should not be a factor in the trial court's decision. He noted that a proper voir dire question should be allowed regardless of opposing counsel's belief that the issue will not arise during trial. *Id.* at 15 (Miller, J., concurring).

251. 707 S.W.2d 52 (Tex. Crim. App. 1986) (en banc). The opinion was originally published in the advance sheets, but was withdrawn from the bound volume of the *Southwestern Reporter* because of a late motion for rehearing. See Editor's Note, 707 S.W.2d at 77.

must show that the state exhausted all of its peremptory challenges. An exception to this rule exists in capital cases in which the procedure of exercising peremptory challenges after each venireperson is questioned alleviates this requirement. Third, if the judge *sua sponte* excuses a juror who is subject to challenge for cause for a reason that may be waived,<sup>252</sup> the defendant must object and show harm by proving that he was tried by a jury to which he had legitimate objection. Fourth, if the judge *sua sponte* excuses a qualified juror, the defendant must object and show that the state exhausted all of its peremptory challenges. This rule applies even in capital cases.

#### IV. PROCEDURAL ASPECTS OF TRIAL

Since no Survey article on the subject of criminal procedure can hope to discuss all the rulings and other trial procedures, this section will discuss significant rulings that directly implicate constitutional issues or specific evidentiary rules contained in the Texas Code of Criminal Procedure. The court of criminal appeals adopted the Texas Rules of Criminal Evidence effective September 1, 1986.<sup>253</sup> This Article will not attempt to identify all of the challenges caused by the new rules of criminal evidence, reserving that task for another time. The Article, however, will identify several areas in which the court of criminal appeals acted prematurely<sup>254</sup> and either changed an evidentiary rule or began using the new rules before the effective date.

##### A. Confrontation and Impeachment

During the Survey period the Supreme Court decided several cases concerning violation of the confrontation clause<sup>255</sup> of the Sixth Amendment to the United States Constitution. In *Delaware v. Fensterer*<sup>256</sup> the defendant was charged with murdering his fiancée by strangling her with a cat leash. An expert witness testified that hairs found on the leash had come from the victim and had been forcibly removed from her head, but the witness was unable to give the basis for his conclusion. The Delaware Supreme Court reversed, stating that the witness's inability to recall the basis for his opinion deprived the accused of his sixth amendment confrontation rights.<sup>257</sup> The Supreme Court summarily reversed, stating that the right of confrontation only guarantees the opportunity for effective cross-examination, and does

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252. See TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(1), (5)-11 (Vernon's Pam. Supp. 1987).

253. VERNON'S TEXAS STATUTES AND CODES ANNOTATED: INTERIM ANNOTATION SERVICE No. 1, at 386-414 (April 1986); see also TEX. R. CRIM. EVID. (Vernon Pam. 1986).

254. See *Chambers v. State*, 711 S.W.2d 240, 248-49 (Tex. Crim. App. 1986) (Onion, J., dissenting): "[T]he majority, in an anticipatory mood, rushes forward to beat any adoption of the proposed criminal rules of evidence . . . and declares that unobjected to hearsay testimony does have probative value. So much for attempts to gain early credit." For a discussion of *Chambers* see *infra* notes 531-36 and accompanying text.

255. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

256. 106 S. Ct. 292, 89 L. Ed. 2d 15 (1985).

257. *Fensterer v. State*, 493 A.2d 959 (Del. 1985) *rev'd* 106 S. Ct. 292, 89 L. Ed. 2d 15 (1985).

not guarantee that the cross-examination would be effective.<sup>258</sup> In *Delaware v. Van Arsdall*<sup>259</sup> the defendant was convicted of murder. The state dropped unrelated misdemeanor charges against one of the prosecution witnesses in exchange for his testimony. The trial court prohibited the defense from cross-examining the witness regarding the bargain. The Delaware Supreme Court reversed, concluding that a blanket prohibition against exploring the potential bias of a witness was per se error that precluded any examination of whether the error actually prejudiced the defendant.<sup>260</sup> The United States Supreme Court held that although the cutting off of all questions that might have established bias violated an accused's sixth amendment right to confront the witnesses against him, the harmless error analysis established in *Chapman v. California*<sup>261</sup> was the proper standard to use in determining if a reversal was appropriate.<sup>262</sup>

In an opinion that appears to be contrary to *Van Arsdall*<sup>263</sup> the court of criminal appeals affirmed the aggravated kidnapping conviction in *Carmona v. State*<sup>264</sup> in which the trial court refused to permit cross-examination of a state witness on pending burglary charges. The court held, in a five-to-four opinion, that the confrontation clause was not offended.<sup>265</sup> The court reasoned that the defendant had been afforded a thorough and effective cross-examination and the bias and prejudice of the witness was patently obvious to the jury.<sup>266</sup>

In *Lee v. Illinois*<sup>267</sup> two co-defendants were charged with committing murder. They were jointly tried and did not testify. The trial court relied on portions of one co-defendant's confession in order to find the other co-de-

258. 106 S. Ct. at 294-95, 89 L. Ed. 2d at 21.

259. 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

260. *Van Arsdall v. State*, 486 A.2d 1 (Del. 1984).

261. 386 U.S. 18, 24 (1967) (certain constitutional errors may be harmless if reviewing court may confidently say, on the whole record, that constitutional error was harmless beyond reasonable doubt).

262. 106 S. Ct. at 1438, 89 L. Ed. at 675.

263. In *Van Arsdall*, Mr. Justice Rehnquist stated:

In this case, however, the trial court prohibited *all* inquiry into the possibility that [the witness] would be biased . . . . By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause.

. . . . We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." . . . . Respondent has met that burden here: A reasonable jury might have received a significantly different impression of [the witness's] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.

*Id.* at 1435-36, 89 L. Ed. 2d at 674 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

264. 698 S.W.2d 100 (Tex. Crim. App. 1985).

265. *Id.* at 104.

266. *Id.*

267. 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986).

fendant, Lee, guilty. The Supreme Court reversed the conviction, finding that the reliance on the confession violated Lee's right to confrontation.<sup>268</sup> The Court found that the truth-finding function of the confrontation clause was threatened when an accomplice's confession is sought to be introduced against a defendant without the benefit of cross-examination, since such a confession is hearsay and an accomplice has a strong motive to implicate the defendant and exonerate himself.<sup>269</sup> The opinion held that an accomplice's confession that incriminates a defendant is presumptively unreliable, and that the facts surrounding the confession in this case did not bear sufficient indicia of reliability to rebut the presumption of unreliability.<sup>270</sup>

In *United States v. Inadi*<sup>271</sup> the Supreme Court held that the confrontation clause did not require a showing of unavailability as a condition to the admission of out-of-court statements of a nontestifying co-conspirator.<sup>272</sup> Rather, the prosecutor must meet the requirements of rule 801(d)(2)(E)<sup>273</sup> of the Federal Rules of Evidence.<sup>274</sup> This rule is identical to rule 801(e)(2)(E) of the new Texas Rules of Criminal Evidence.<sup>275</sup>

*Sanchez v. State*<sup>276</sup> is an example of a situation in which the Texas constitution was given a stricter interpretation than the federal Constitution. Sanchez testified that he killed the deceased because he thought the deceased was reaching for a weapon. The court allowed the prosecution to introduce testimony for impeachment purposes that Sanchez neglected to tell the police this story after arrest. The court of criminal appeals held that impeachment by silence after arrest was improper under article 1, section 10 of the Texas Constitution.<sup>277</sup> Judge Miller, writing for the court (with one concurring opinion, one judge concurring in the result, and four dissenting judges), also held that impeachment by post-arrest silence is improper from an evidentiary standpoint since its meaning is inherently ambiguous as opposed to clearly contrary to the position later taken at trial.<sup>278</sup>

The driving while intoxicated conviction in *Hammitt v. State*<sup>279</sup> was reversed when the court permitted the prosecution to impeach the defendant with a prior criminal mischief conviction. Hammitt, when asked on direct: "Is that the only time you have been arrested for public intoxication?", an-

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268. *Id.* at 2065-66, 90 L. Ed. 2d at 515.

269. *Id.* at 2063, 90 L. Ed. 2d at 527.

270. *Id.* at 2063-65, 90 L. Ed. 2d at 527-30.

271. 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986).

272. *Id.* at 1122, 89 L. Ed. 2d at 390-91.

273. FED. R. EVID. 801(d)(2)(E) provides: "(d) Statements which are not hearsay. A statement is not hearsay if—. . . (2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

274. 106 S. Ct. at 1123, 89 L. Ed. 2d at 391.

275. TEX. R. CRIM. EVID. 801(e)(2)(E), *supra* note 253.

276. 622 S.W.2d 491 (Tex. App.)—Corpus Christi (1981), *rev'd*, 707 S.W.2d 575 (Tex. Crim. App. 1986) (en banc).

277. 707 S.W.2d at 580. TEX. CONST. art. I, § 10 provides: "In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself . . ."

278. 707 S.W.2d at 582.

279. 713 S.W.2d 102 (Tex. Crim. App. 1986) (en banc).



swered in the affirmative.<sup>280</sup> The state sought to characterize the question and answer as insinuating that the defendant had never been in trouble. After the court noted the rule "that when an accused testifies gratuitously as to some matter that is irrelevant or collateral to the proceeding, as with any other witness he may be impeached by a showing that he has lied or is in error,"<sup>281</sup> the court held that proof of a criminal mischief conviction did not impeach his statement that the only time he had been convicted for public intoxication was in January 1983.<sup>282</sup>

The court of appeals cases concerned the ability of a party to impeach one's own witness. In *Markle v. State*<sup>283</sup> the court held that foreknowledge of a witness's change in testimony precludes impeachment of a witness called by the party.<sup>284</sup> In *Pitts v. State*<sup>285</sup> the defendant established that his own witness's testimony was unexpected and was injurious to his case, thereby obtaining a reversal.<sup>286</sup> The impeachment of one's own witness is one of the areas in which the new rules of evidence institute substantive change. Rule 607 now provides that the "credibility of a witness may be attacked by any party, including the party calling him."<sup>287</sup>

### B. Extraneous Offenses

One of the most troubling areas facing trial courts concerns the admissibility of extraneous offenses. Although a well-established and fundamental principal exists that an accused must be tried only for the offense charged and not for being a criminal generally,<sup>288</sup> equally established corollaries to the general rule exist permitting evidence of extraneous offenses.<sup>289</sup> The tension between the rule and its many corollaries leads to the large number of cases on this subject reaching the appellate courts, and consistency in rulings is not always the case. The court of criminal appeals in *Templin v. State*<sup>290</sup> stated that the admissibility of evidence as to prior misconduct is not subject to a definite test; rather the court must balance two variable factors: (1) the relation of the prior conduct to the alleged offense; and (2) the probative value of the evidence compared to its prejudicial effect.<sup>291</sup> The two-part

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280. *Id.* at 104.

281. *Id.* at 105.

282. *Id.* at 107.

283. 715 S.W.2d 113 (Tex. App.—Texarkana 1986, no pet.).

284. *Id.* at 115.

285. 712 S.W.2d 563 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

286. *Id.* at 564-65.

287. TEX. R. CRIM. EVID. 607, *supra* note 253.

288. See *Williams v. State*, 662 S.W.2d 344 (Tex. Crim. App. 1983) (en banc); *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App. 1972); 3 R. RAY, TEXAS LAW OF EVIDENCE § 1521 (Texas Practice 3d ed. 1980).

289. See *Plante v. State*, 674 S.W.2d 368 (Tex. App.—Dallas 1984), *rev'd*, 692 S.W.2d 487 (Tex. Crim. App. 1985) (en banc); *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App. 1972).

290. 677 S.W.2d 541 (Tex. App.—Eastland 1983), *rev'd*, 711 S.W.2d 30 (Tex. Crim. App. 1986) (en banc).

291. 711 S.W.2d at 33 (citing *Plante v. State*, 674 S.W.2d 368, 372 (Tex. App.—Dallas 1984), *rev'd*, 692 S.W.2d 487 (Tex. Crim. App. 1985) (en banc); *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983) (en banc); *Murphy v. State*, 587 S.W.2d 718, 722 (Tex. Crim. App. 1979)).

evaluation is left to the trial judge, and his decision will not be disturbed absent a clear abuse of discretion.<sup>292</sup> In *Templin* the court convicted the defendant of murdering his wife by electrocution. The prosecution introduced testimony that the defendant, when he was a child, told three of his relatives that he electrocuted dogs and cats. The court of criminal appeals held that the testimony was relevant<sup>293</sup> and that the state's argument was all the more compelling because the prosecution was based entirely on circumstantial evidence.<sup>294</sup> Nonetheless, because of the relative youth of the defendant at the time of the acts of misconduct and because the prejudicial and inflammatory nature of the evidence was so great as to outweigh its probative value, the court of criminal appeals reversed the conviction.<sup>295</sup> A similar result was reached in *Clark v. State*.<sup>296</sup> The State introduced testimony that the defendant, accused of forgery, had also forged checks of a former employer. The prosecution argued that since it was relying upon circumstantial evidence, it was entitled to introduce the extrinsic evidence to prove the defendant's intent and motive to commit theft as well as a common system, scheme, or plan.<sup>297</sup> The opinion first stated that the state cannot offer evidence of nonrelated offenses to prove an element of the offense if the prosecution has other evidence establishing the element that the defendant does not contest.<sup>298</sup> If the defense cross-examination goes to the heart of the prosecution's evidence, the evidence is contested.<sup>299</sup> If the cross-examination, however, only suggests the possibility that the appellant did not commit the offense, tangentially challenging the issue of identity, the state's evidence is not contested, and evidence of extraneous matters is not admissible.<sup>300</sup>

In *Ostos v. State*<sup>301</sup> the court of appeals reversed a voluntary manslaughter conviction because the state introduced testimony from a police officer that he arrested the defendant after a high speed chase on an extraneous matter and that the defendant threatened the officer.<sup>302</sup> The prosecution offered evidence to rebut defense testimony that the defendant enjoyed a good reputation for being peaceful and law-abiding. In reversing, the court of appeals

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292. 711 S.W.2d at 33.

293. *Id.* The court found the testimony to be relevant to show knowledge of how electricity works, to identify the defendant as a person who in the past habitually caused death by electrocution, and to rebut the defense of accident.

294. The opinion made clear that the fact that the case was based on circumstantial evidence would no longer cause it to be evaluated under a different standard than a direct evidence case. *Id.* at 33. See also *Carlsen v. State*, 654 S.W.2d 444 (Tex. Crim. App. 1983) (en banc) (standard for review of sufficiency of evidence is same in both direct and circumstantial evidence cases); (citing *Griffin v. State*, 614 S.W.2d 155 (Tex. Crim. App. 1981).

295. 711 S.W.2d at 33-34.

296. No. 508-84 (Tex. Crim. App. Oct. 15, 1986) (not yet reported). *Clark* was a 5-4 decision with two judges concurring in the results.

297. *Id.*, slip op. at 3.

298. *Id.*, slip op. at 3-4 (citing several cases, including *Morgan v. State*, 692 S.W.2d 877 (Tex. Crim. App. 1985) (en banc).

299. *Id.*, slip op. at 4 (quoting *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App. 1972).

300. *Id.*, slip op. at 4.

301. 713 S.W.2d 402 (Tex. App.—El Paso 1986, no pet.).

302. *Id.* at 403.

affirmed application of the rule excluding unrelated offenses unless a clear exception exists.<sup>303</sup> In *Escort v. State*<sup>304</sup> the defendant alleged self-defense to the charge of murdering her husband. The court permitted the prosecution to offer testimony that the defendant served a sentence in the penitentiary for killing a previous husband.<sup>305</sup> The court of appeals first noted that since no testimony was admitted on the circumstances of the killing of defendant's first spouse, the extraneous offense was not relevant.<sup>306</sup> Further, the court held that introduction of the extraneous offense was unnecessary.<sup>307</sup> Since the jury assessed a maximum penalty, the court of appeals reversed the conviction.<sup>308</sup>

### C. Witnesses

The court of criminal appeals avoided deciding whether hypnotically induced testimony is admissible in Texas state courts by holding in *Vester v. State*<sup>309</sup> that such testimony was harmless because it was cumulative of admissible identification testimony.<sup>310</sup> Judge Clinton's concurring opinion analyzed in detail the admissibility of such hypnotically induced testimony.<sup>311</sup> His conclusion, though, was that the major objections to the hypnotically induced testimony were not preserved and, therefore, not before the court.<sup>312</sup> The core issue of admissibility of such testimony was also presented to the Tyler court of appeals in *Gaudette v. State*,<sup>313</sup> but that court also sidestepped the issue by holding that an independent basis for the in-court identification other than the hypnotic session existed.<sup>314</sup> In addition, the circumstances surrounding the identification were not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification at trial.<sup>315</sup>

Two other cases were decided during the Survey period concerning wit-

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303. *Id.* at 404.

304. 713 S.W.2d at 733 (Tex. App.—Corpus Christi 1986, no pet.).

305. *Id.* at 735.

306. *Id.* at 737.

307. *Id.*

308. *Id.* at 739.

309. 684 S.W.2d 715 (Tex. App.—Austin 1984), *aff'd* 713 S.W.2d 920 (Tex. Crim. App. 1986) (en banc).

310. 713 S.W.2d at 924. The court held that a sufficient "independent origin" of the in-court identification existed so that the hypnotic session was not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *Id.*

311. *Id.* at 924-39 (Clinton, J., concurring). On the issue of hypnotically induced testimony see Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 332-34 (1980); Mickenberg, *Mesmerizing Justice: The Use of Hypnotically-Induced Testimony in Criminal Trials*, 34 SYRACUSE L. REV. 927, 951-52 (1983); Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT. J. CLINICAL EXPERIMENTAL HYPNOSIS 311 (1979); Note: *Hypnotically Enhanced Testimony in Criminal Trials: Current Trends and Rationales*, 19 HOUS. L. REV. 765, 774-77 (1982).

312. 713 S.W.2d at 937.

313. 713 S.W.2d 206 (Tex. App.—Tyler 1986, no pet.).

314. *Id.* at 210.

315. *Id.* at 211.

nesses. In *Villarreal v. State*<sup>316</sup> the court of criminal appeals held that an eleven-year-old juvenile could not be an accomplice as a matter of law since the witness could not be prosecuted as an adult.<sup>317</sup> In *Archer v. State*<sup>318</sup> the court of criminal appeals revised the test to determine whether a violation of "the rule" results in harm.<sup>319</sup> Now, the test is (1) did the witness actually hear the testimony or confer with another witness without court permission and (2) did the witness give testimony that corroborated another witness for the prosecution or contradicted defensive testimony.<sup>320</sup>

#### D. Exclusion of Testimony

In *Crane v. Kentucky*<sup>321</sup> the petitioner attempted to introduce testimony at his trial describing the length and manner of interrogation resulting in his confession. Petitioner hoped to show, because of the way the confession was made, that the confession was unworthy of belief. The trial court had previously determined the confession was voluntary. The trial court and the Kentucky Supreme Court held that the testimony was excludable, stating that the testimony was only admissible on the issue of voluntariness.<sup>322</sup> The United States Supreme Court, in a unanimous opinion by Justice O'Connor, held that the exclusion of the testimony deprived the accused of his fundamental constitutional right, whether under the due process clause of the fourteenth amendment or the compulsory process or confrontation clauses of the sixth amendment, to a fair opportunity to present a defense.<sup>323</sup>

316. 685 S.W.2d 449 (Tex. App.—San Antonio 1985), *aff'd*, 708 S.W.2d 845 (Tex. Crim. App. 1986) (en banc).

317. 708 S.W.2d at 848. An "accomplice witness" is one who has participated before, during, or after the commission of a crime, and "one is not an 'accomplice witness' who cannot be prosecuted for the offense with which the accused is charged." *Id.* at 847 (citing several cases, including *Harris v. State*, 645 S.W.2d 447 (Tex. Crim. App. 1983) (en banc). For a discussion of the accomplice witness rule see *infra* notes 398-408.

318. 703 S.W.2d 664 (Tex. Crim. App. 1986) (en banc).

319. TEX. CODE CRIM. PROC. ANN. art. 36.03 (Vernon 1981) reads in part:

At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by another witness in the cause. This is termed placing witness under the rule.

The prior test was established in *Haas v. State*, 498 S.W.2d 206 (Tex. Crim. App. 1973): (1) did the witness actually hear testimony of the other, and (2) did the witness's testimony contradict the testimony of the witness he actually heard. *Id.* at 210.

320. 703 S.W.2d at 666-67.

321. 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

322. *Crane v. Commonwealth*, 690 S.W.2d 753, 754 (Ky. 1985).

323. The opinion stated:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485 . . . ; cf. *Strickland v. Washington*, 466 U.S. at 688, 684-685 . . . (1984). ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment."). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 . . . (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 . . . (1914). That opportunity would be an empty one if the state were

The defendant in *Kirby v. State*<sup>324</sup> sought to introduce the results of a blood test in a DWI prosecution, but the trial court sustained the state's objection for failure to maintain an adequate chain of custody.<sup>325</sup> The court of appeals reversed, noting that the objections went to the weight of the proffered testimony, not the admissibility.<sup>326</sup>

### E. Bolstering

In *Graham v. State*<sup>327</sup> the defendant agreed to take a breath test after being arrested for DWI, but no qualified operator for the intoxilyzer could be found. At Graham's trial, however, the court permitted the arresting officer, who by his own admission was not a qualified operator of the breath test device, to testify that he had seen persons who were less intoxicated than the defendant fail the test.<sup>328</sup> The court of criminal appeals reversed, holding that since the officer was not a qualified intoxilyzer operator he was not qualified to express an opinion comparing the defendant with others.<sup>329</sup> In *Campbell v. State*<sup>330</sup> the court convicted the defendant of murder. The prosecution based its case on the testimony of Jackson, who, besides testifying that she was paid \$400 after identifying the defendant, was thoroughly impeached. The court permitted the state to offer a police officer's testimony about three prior consistent statements given by Jackson. The opinion of the court of criminal appeals reviewed the law concerning prior consistent statements, compared it with the new rules of criminal evidence and the Federal Rules of Evidence, and concluded that the new rules of evidence on the subject, although appearing to be different at first glance, are actually the same.<sup>331</sup> The court in *Rains v. State*<sup>332</sup> cited the old rule as follows:

It is well settled that where a witness has been impeached by showing that he made other and different statements in regard to the matter than those testified to by him on the trial, he can be supported by showing that he made similar statements to those testified to by him recently after the occurrence. However, if the supporting statement was made

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permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656 . . . (1984).

*Id.* at 2146-47, 90 L. Ed. 2d at 645.

324. 713 S.W.2d 221 (Tex. App.—El Paso 1986, no pet.).

325. The State's specific objections were: (1) the sample was not given an identification number from the inception, (2) the vial was not given a security seal after the blood sample was drawn, (3) it bore an unrelated label indicating possible prior contamination, and (4) the custodial chain as broken during the defendant's incarceration (the jailer kept the sample until the defendant was released). *Id.* at 222.

326. *Id.*

327. 665 S.W.2d 832 (Tex. App.—Dallas 1984), *rev'd*, 710 S.W.2d 588 (Tex. Crim. App. 1986) (en banc).

328. *Id.* at 590-91.

329. *Id.* at 591-92.

330. 718 S.W.2d 712 (Tex. Crim. App. 1986).

331. *Id.* at 715-17.

332. 140 Tex. Crim. 548, 551, 146 S.W.2d 176, 178 (1940).

after a motive or inducement existed to fabricate, the supporting statement is then inadmissible.<sup>333</sup>

Rule 801(e)(1) of the new rules of criminal evidence concerns a witness's prior consistent statement and provides such statements are not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . ."<sup>334</sup> The opinion noted that the new rule of evidence contained no requirement that the prior consistent statement be made before the time when the motive to fabricate arose.<sup>335</sup> The Federal Rules of Evidence on the point have been interpreted to require that the consistent statement be made prior to the time a motive to fabricate existed.<sup>336</sup> The opinion in *Campbell*, therefore, held that the Texas rule will also include the requirement.<sup>337</sup>

#### F. Other Cases Involving Trial Procedure

At the cost of thirty days in jail, seven persons in *Ex parte Krupps*<sup>338</sup> learned that when the bailiff cries, "All rise," before the judge enters the courtroom, the trial court is serious. In *Krupps*, a five-to-four decision with two judges concurring in the results, the court of criminal appeals denied writ of habeas corpus contesting the contempt citations, holding that refusal to rise when the judge enters a courtroom was a proper ground for criminal contempt.<sup>339</sup>

The defendant in *Holbrook v. Flynn*<sup>340</sup> contended that the presence of four uniformed state troopers sitting in the first row of the spectators' section deprived him of his right to a fair trial. The Supreme Court stated that whenever a courtroom arrangement is challenged as inherently prejudicial, the question is not whether the jurors articulated a consciousness of some prejudicial effect, but whether an unjustifiable risk of prejudice existed.<sup>341</sup> The Court then held that under the circumstances of the multi-defendant

333. *Id.* (citing *Browney v. State*, 128 Tex. Crim. 81, 88-89, 79 S.W.2d 311, 3135 (1934)).

334. TEX. R. CRIM. EVID. 801 (e)(1), *supra* note 253.

335. 718 S.W.2d at 715.

336. *United States v. Quinto*, 582 F.2d 224, 233 (2d Cir. 1978) (interpreting Federal Rule of Evidence 801(d)(1)(B)).

337. 718 S.W.2d at 717. The concurring opinion of Judge Teague criticized the use of the new rules of evidence to cases tried before these rules were effective. *Id.* (Teague, J., concurring).

338. 712 S.W.2d 144 (Tex. Crim. App. 1986) (en banc), *application for stay of enforcement of order of confinement granted*, 107 S. Ct. 641 (1986).

339. *Id.* at 150-51. No law exists in Texas providing that everyone must stand when the judge enters the courtroom. The opinion was based on the common law, which allows a conviction for contempt under the notion of disrespect to the court. *Id.* at 150 n.9 ("A direct refusal to rise upon the judge's entrance interrupts the normal proceedings of the court, disregards the formality and seriousness of the court's function, and directly conflicts with the 'imperative need of the community in having an established forum. . . .'" *Id.* at 150-51 (citing *United States v. Snider*, 502 F.2d 645, 665 (4th Cir. 1974) (Widener, J., dissenting)).

340. 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

341. *Id.* at 1347, 89 L. Ed. 2d at 535.

trial the risk of prejudice was not constitutionally significant.<sup>342</sup>

The Texarkana court of appeals considered in *Woods v. State*<sup>343</sup> whether a child witness was competent to testify when the child's testimony was presented by video tape and the child was not sworn in as a witness.<sup>344</sup> The defendants contended that the testimony of the victim was insufficient to support their convictions because no formal oath was administered before the video taped interview. The court held that a child is competent to testify if she understands what it means to tell the truth and that she is under an obligation to testify truthfully.<sup>345</sup>

Article 1.15 of the Code of Criminal Procedure establishes the mechanics for a stipulation of evidence in a trial before the court.<sup>346</sup> In *Lopez v. State*<sup>347</sup> the defendant and his attorney signed the stipulation, but the trial judge did not sign it. The court held that the absence of the trial judge's signature from a stipulation of evidence constituted a violation of article 1.15's requirement that the trial court approve the stipulation in writing and was fundamental error requiring reversal.<sup>348</sup> The court reached a similar

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342. *Id.* at 1348, 89 L. Ed. 2d at 536.

343. 713 S.W.2d 173 (Tex. App.—Texarkana 1986, no pet.).

344. TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1987), which provides for the videotaping of child witnesses in sexual abuse cases, has been held unconstitutional on confrontation grounds. *See Long v. State*, 694 S.W.2d 185, 187-93 (Tex. App.—Dallas 1985, no pet.) (section 2 of act unconstitutional); *Powell v. State*, 694 S.W.2d 416, 417 (Tex. App.—Dallas 1985, no pet.) (sections 4 and 5 of statute unconstitutional); *see also Whittmore v. State*, 712 S.W.2d 607 (Tex. App.—Beaumont 1986 no pet.) (statute constitutional); *Jolly v. State*, 681 S.W.2d 689 (Tex. App.—Houston [14th Dist.] 1984, no pet.) (same). All four cases are based on the confrontation clauses of the federal and state constitutions. *See U.S. CONST.* amend. VI; *TEX. CONST.* art. I, § 10.

345. 713 S.W.2d at 174.

346. TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon 1977) provides:

No person can be convicted of a felony except upon the verdict of a jury . . . unless in felony cases . . . the defendant . . . has . . . waived his right of trial by jury . . . ; provided, however, that it shall be necessary . . . to introduce evidence . . . showing the guilt of the defendant . . . . The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation . . . or . . . affidavits, written statements fo witnesses, and any other documentary evidence . . . . Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause.

347. 708 S.W.2d 446 (Tex. Crim. App. 1986).

348. *Id.* at 448-49. The opinion specifically held that the error could be raised for the first time on a petition for discretionary review. *Id.* at 448 (citing *Valdez v. State*, 555 S.W.2d 463, 464 (Tex. Crim. App. 1977); *Rodrigues v. State*, 534 S.W.2d 335, 336 (Tex. Crim. App. 1976)). TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon 1977) allows a defendant to waive trial by jury, but states that the waiver must be in writing and signed by the defendant, his attorney, the attorney for the state, and be approved by the judge. Unlike article 1.15 cases, however, the court of criminal appeals has held in *Vega v. State*, 707 S.W.2d 557, 559 (Tex. Crim. App. 1986) (on state's motion for rehearing) (en banc) that, absent an affirmative showing to the contrary, the presumption of regularity of the judgment controls. That is to say, a defendant must make an affirmative showing that he did not execute a written waiver of trial by jury by bill of exception or by objection in the record. *See also Romero v. State*, 712 S.W.2d 636, 638-39 (Tex. App.—Beaumont 1986, no pet.), which holds that if the judgment does not indicate that the right to a jury trial was waived, the presumption of regularity will not save the conviction.

result in *Messer v. State*.<sup>349</sup> The court, however, did not find the error to be fundamental; instead the court held that without the stipulation no evidence existed to support the conviction.<sup>350</sup> The court, therefore, reversed the conviction.<sup>351</sup>

The final case in this section concerns the discretionary power that the court has in controlling the examination of witnesses. In *Bradeen v. State*<sup>352</sup> the court of appeals held that the trial court had the discretion to allow redirect examination to exceed the scope of the cross-examination.<sup>353</sup>

## V. THE TRIAL COURT'S CHARGE TO THE JURY AND JURY NOTES

### A. Presumptions

As noted last year,<sup>354</sup> the Supreme Court in *Francis v. Franklin*<sup>355</sup> left open the question of whether an erroneous charge that shifts the burden of persuasion to the defendant on an essential element of the offense can ever be harmless error. In *Rose v. Clark*<sup>356</sup> the defendant claimed insanity, thereby contesting the malice element of the offense charged. The judge instructed the jury that "if the State has proven beyond a reasonable . . . doubt that a killing has occurred, then it is presumed that the killing was done maliciously."<sup>357</sup> The circuit court of appeals held the instruction was unconstitutional pursuant to *Sandstrom v. Montana*<sup>358</sup> and that since the defendant contested malice, the error could not be harmless despite the substantial evidence of guilt.<sup>359</sup> The Court indicated that the list of constitutional errors that can never be considered harmless is quite short,<sup>360</sup> and held that if the basic rights to the assistance of counsel and trial by an impartial adjudicator are provided, a presumption exists that the harmless error standard should be applied in determining if any error constitutes reversible error.<sup>361</sup> The Court then held the *Chapman* harmless error standard<sup>362</sup> applied and remanded to the circuit court for the determination if the error was harmless beyond a reasonable doubt.<sup>363</sup> Mr. Justice Stevens, in a concurring opinion, criticized the majority's equation of fundamental fairness with trial accu-

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349. No. 570-84 (Tex. Crim. App. Sept. 17, 1986) (not yet reported).

350. *Id.*

351. *Id.*

352. 711 S.W.2d 263 (Tex. App.—Dallas 1986, no pet.).

353. *Id.* at 265.

354. See Keck & Johnson, *1986 Annual Survey*, *supra* note 84, at 631-32.

355. 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

356. 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

357. *Id.* at 3104, 92 L. Ed. 2d at 468 (omission in original).

358. 442 U.S. 510 (1979). *Sandstrom* held that a jury instruction creating a presumption that has the effect of either eliminating intent as an issue, or of shifting the burden of proof as to intent to the defendant, violates due process. *Id.* at 524.

359. *Cf.* Clark v. Rose, 762 F.2d 1006 (6th Cir. 1985) (decision without published opinion).

360. 106 S. Ct. at 3106, 92 L. Ed. at 470. The list was comprised of the introduction of a coerced confession, the complete denial of the right to counsel, adjudication by a biased judge or jury, and the directing of a verdict for the prosecution.

361. *Id.* at 3107, 92 L. Ed. 2d at 471.

362. *Chapman v. California*, 386 U.S. 18, 24 (1967). For a discussion of the *Chapman* standard see *supra* note 261.

363. 106 S. Ct. at 3109, 92 L. Ed. 2d at 474.



racy, insisting that concerns about reliability and accuracy are not the only considerations in determining the applicability of the harmless error analysis.<sup>364</sup>

### B. *Culpable Mental States, Causation, and Other Statutory Requirements*

In *Alvarado v. State*<sup>365</sup> the defendant was charged with injury to a child in violation of section 22.04 of the Penal Code.<sup>366</sup> The defendant submitted requested jury instructions limiting the definitions of the culpable mental states to that which relates only to the result of the conduct.<sup>367</sup> The trial court's refusal to limit the definitions of the culpable mental states was held to be error. The court of criminal appeals held that the statutory definitions in chapter 6 of the Penal Code deal with the nature of conduct, the circumstances surrounding conduct and the result of conduct.<sup>368</sup> Further, under *Beggs v. State*,<sup>369</sup> the statute applicable to an injury to a child focuses on the result of the suspect's conduct.<sup>370</sup> The requested limiting instructions, therefore, were proper and should have been given.<sup>371</sup> The expanded definition of the culpable mental states permitted the jury to convict upon a theory not alleged in the statute or indictment.<sup>372</sup>

In *Robbins v. State*<sup>373</sup> and *Crabb v. State*<sup>374</sup> the court of criminal appeals considered the problems raised by concurrent causations to alleged criminal conduct. In *Robbins* the defendant was charged with involuntary manslaughter by driving while intoxicated. Robbins defended by saying that the accident was caused by exhaustion as opposed to intoxication. The court instructed the jury that if they found that the defendant was intoxicated, they must also find that "such intoxication, if any, caused the . . . death . . . or contributed to cause same."<sup>375</sup> The defendant objected because the

364. 106 S. Ct. at 3111-12, 92 L. Ed. 2d at 476-78.

365. 704 S.W.2d 36 (Tex. Crim. App. 1985) (en banc).

366. TEX. PENAL CODE ANN. § 22.04 (Vernon Supp. 1987) provides: "A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct that causes bodily injury . . . to a child . . ."

367. 704 S.W.2d at 37. TEX. PENAL CODE ANN. § 6.03(a), (b) (Vernon 1974) defines culpable mental state as follows:

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or of circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

368. 704 S.W.2d at 38 (citing *Graham v. State*, 557 S.W.2d 99 (Tex. Crim. App. 1983); *Lugo v. State*, 650 S.W.2d 72 (Tex. Crim. App. 1983) (en banc) (Clinton, J., concurring opinion)).

369. 597 S.W.2d 375 (Tex. Crim. App. 1980).

370. *Id.* at 377.

371. *Id.* at 379-80.

372. 704 S.W.2d at 39-40.

373. 717 S.W.2d 348 (Tex. Crim. App. 1986).

374. 717 S.W.2d 353 (Tex. Crim. App. 1986).

375. 717 S.W.2d at 350.

phrase "contributed to cause same" lessened the state's burden of proof.<sup>376</sup> The court of criminal appeals held that, although no charge on causation was necessary, if the trial court gave such an instruction, the charge must be proper.<sup>377</sup> The use of the term "contributed" without any restriction on degree of contribution was error since it authorized the jury to convict under a lesser standard than required by section 6.04(a) of the Penal Code.<sup>378</sup> The degree of contribution of both causes makes a difference because if the concurrent cause is clearly sufficient and the conduct of the defendant clearly insufficient to produce the result, the jury is not entitled to convict.<sup>379</sup> The court remanded the cause to the court of appeals to review harm in accordance with the *Almanza*<sup>380</sup> standard.<sup>381</sup> The court of criminal appeals rendered a similar result in *Crabb*.<sup>382</sup>

Concerning the rule of law that a defendant is entitled to an affirmative defensive instruction on every such issue raised by the evidence, *Sanders v. State*<sup>383</sup> held that after enactment of the 1974 Penal Code the rule applied only to the defenses listed in the Penal Code. In *Thomas v. State*<sup>384</sup> the court held the renunciation defense provided in section 15.04 of the Penal Code<sup>385</sup> was available as an affirmative defense even if the defendant committed the completed offense of attempt, as defined in section 15.01 of the Penal Code.<sup>386</sup> Finally, in concluding this section, *MacDougall v. State*<sup>387</sup> held that although an indictment does not have to define the term "deception" in a theft case, the definition must be given in the jury instructions if theft by deception was a theory of prosecution and the defense requested the instruction.<sup>388</sup>

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376. *Id.*

377. *Id.* at 351.

378. *Id.* at 352. TEX. PENAL CODE ANN. § 6.04(a) (Vernon 1974) provides: "A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient."

379. 717 S.W.2d at 352.

380. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (if a correct special request or proper objection to the trial court's charge was made, a showing of "some harm" will result in reversal).

381. 717 S.W.2d at 353.

382. 717 S.W.2d at 355.

383. 707 S.W.2d 78 (Tex. Crim. App. 1986 (en banc)).

384. 708 S.W.2d 861 (Tex. Crim. App. 1986) (en banc).

385. TEX. PENAL CODE ANN. § 15.04(a) (Vernon 1974) provides:

It is an affirmative defense to prosecution under Section 15.01 of this code that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid commission of the offense, by taking further affirmative action that prevented the commission.

386. *Id.* § 15.01 (Vernon Supp. 1987) states: "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."

387. 702 S.W.2d 650 (Tex. Crim. App. 1986) (en banc).

388. *Id.* at 652.

### C. Lesser Included Offenses

In *Royster v. State*<sup>389</sup> the court of criminal appeals enunciated a two-part test to determine whether a charge on a lesser included offense was required. First, the lesser included offense must be included within the proof necessary to establish the offense charged; second, the record must contain some evidence that if the defendant is guilty, he is guilty only of the lesser offense.<sup>390</sup> In *Carter v. State*<sup>391</sup> the defendant was charged with an aggravated sexual assault. He contended that the court should have instructed the jury on a lesser offense of sexual assault. The court of appeals held that testimony by the complainant that she did not believe any particular act of appellant caused her to fear for her life did not show that she was not in fear for her life.<sup>392</sup> The court then noted that only when conflicting evidence concerning an element of the greater offense not an element of the lesser offense exists that a charge on the lesser offense must be given.<sup>393</sup>

The court of criminal appeals in *Ojeda v. State*<sup>394</sup> held that the defendant was not entitled to a charge on the lesser included offense of voluntary manslaughter when being tried for murder.<sup>395</sup> The court recognized that a charge on the lesser included offense is required if evidence from any source raises the issue, regardless of the credibility or whether it is controverted or conflicts with other evidence, but held that since no direct evidence<sup>396</sup> existed as to the defendant's apparent frame of mind at the time of the incident, the lesser offense was not raised. Judge Clinton dissented saying that the requirement for direct evidence was an "unconscionable usurpation of the jury's prerogative."<sup>397</sup>

### D. Accomplices and Parties

In *Ross v. State*<sup>398</sup> the Dallas court of appeals first summarized the accomplice witness rule.<sup>399</sup> The court then held that a person whose participation amounted to nothing more than mere presence, who did nothing to

389. 622 S.W.2d 442 (Tex. Crim. App. 1981).

390. *Id.* at 446-47.

391. 713 S.W.2d 442 (Tex. App.—Fort Worth 1986, no pet.).

392. *Id.* at 448.

393. *Id.*

394. 712 S.W.2d 742 (Tex. Crim. App. 1986) (en banc).

395. *Id.* at 744.

396. The evidence presented on objective recitation of the facts; that defendant was hit and he responded. There was no evidence that he was cool and collected or enraged at being hit and seeing his girlfriend hit. *Id.* at 744.

397. *Id.* at 745 (Clinton, J., dissenting opinion).

398. 715 S.W.2d 55 (Tex. App.—Dallas 1986, no pet.).

399. The opinion stated:

1) An accomplice witness is one who has participated with another before, during or after commission of a crime. 2) Whether an individual is an accomplice depends on whether the individual, acting with intent to promote or assist in the commission of the crime, solicits, encourages, directs, aids, or attempts to aid in commission of the offense. 3) The test to determine whether a witness is an accomplice is whether a prosecution will lie against him under the indictment by which the accused was charged. 4) Where there is a conflict in the evidence, the court should charge the jury on whether the witness was an accom-

assist or encourage the offense, who took no affirmative steps to conceal the fruits of the crime or participants, or whose actions did not further the offense in any way or frustrate the investigation, was not an accomplice as a matter of law and no jury instruction was necessary.<sup>400</sup> *Burns v. State*<sup>401</sup> addressed the problem of accomplice testimony corroborated only by the defendant's confession. The jury had been instructed on voluntariness of the confession and on the accomplice witness rule, which requires corroboration, but, over objection, left the question of whether the witness was an accomplice to the jury. The court of criminal appeals reversed, holding that since the co-indictee was an accomplice as a matter of law he had to be corroborated.<sup>402</sup> Since the jury could have found the confession involuntary, and thus not capable of corroborating the accomplice's testimony, and could have found the co-indictee not to be an accomplice, the defendant may have been convicted upon the uncorroborated testimony of an accomplice.<sup>403</sup> Since the defense had submitted a proper requested instruction and shown some harm under *Almanza*<sup>404</sup> reversal was required.<sup>405</sup>

In capital cases a special rule required that, upon request, the jury must be instructed that the accomplice witness's testimony must be corroborated as to the specific elements that make the offense a capital case.<sup>406</sup> That rule was expressly overruled in *Holladay v. State*.<sup>407</sup> The court of criminal appeals held that in capital cases involving accomplice witness testimony, upon request, the trial court must instruct the jury that the accomplice witness testimony must be corroborated with evidence tending to connect the accused to the offense, but no longer needs to be corroborated as to both the murder and the act raising the murder to capital offense status.<sup>408</sup>

With reference to the law of parties,<sup>409</sup> the San Antonio court of appeals in *Gordon v. State*<sup>410</sup> held that a jury charge on parties does not have to specifically identify the parties acting with the accused when applying the

plice as a matter of fact. 5) A witness is not an accomplice solely by virtue of presence at the scene of the crime or merely for failing to disclose the offense.

*Id.* at 57.

400. *Id.*

401. 703 S.W.2d 649 (Tex. Crim. App. 1985) (en banc).

402. *Id.* at 652.

403. *Id.*

404. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). For a discussion of the *Almanza* rule see *supra* note 380.

405. 703 S.W.2d at 362.

406. *County v. State*, 668 S.W.2d 708, 710-11 (Tex. Crim. App. 1984) (en banc); *Fortenberry v. State*, 579 S.W.2d 482, 486 (Tex. Crim. App. 1979).

407. 682 S.W.2d 434 (Tex. App.—Houston [1st Dist.] 1984), *rev'd*, 709 S.W.2d 194 (Tex. Crim. App. 1986) (en banc).

408. 709 S.W.2d at 199-202.

409. TEX. PENAL CODE ANN. § 7.01(a) (Vernon 1974) provides: "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." Criminal responsibility, is defined in part as "if . . . acting with intent to promote or assist the commission of the offense, [a person] solicits, encourages, directs, aids or attempts to aid the other person to commit the offense." *Id.* § 7.02(a)(3).

410. 714 S.W.2d 76 (Tex. App.—San Antonio 1986, no pet.).

law to the facts.<sup>411</sup>

### E. Comments on the Weight of the Evidence

In *Drewett v. State*<sup>412</sup> the county did not videotape the defendant after her DWI arrest as required by statute.<sup>413</sup> The trial court instructed the jury that they could not consider the lack of videotape as either evidence or nonevidence of intoxication. The statute requiring the videotape specifically provided that the failure to videotape was admissible at trial.<sup>414</sup> The court of criminal appeals reversed, holding the instruction was a comment on the weight of the evidence, which deprived the defendant of his right to comment on admissible evidence.<sup>415</sup> The decision in *Browning v. State*<sup>416</sup> dealt with numerous legal axioms erroneously labeled presumptions.<sup>417</sup> The opinion held that the instruction to the jury on evidentiary presumptions was a comment on the weight of the evidence except for those labeled in the Penal Code.<sup>418</sup> The court reasoned that the axioms were not evidentiary presumptions, but were only permissible inferences that allow a finding of sufficiency on appeal or in a motion for instructed verdict.<sup>419</sup>

### F. Charges on Punishment

The Dallas court of appeals reversed a DWI conviction in *Martinez v. State*.<sup>420</sup> The jury charge on punishment filed to inform the jury that they could probate either jail time or fine without probating both. Since the defendant was denied the opportunity to have the jury consider the whole range of punishment, and the jury did not probate either the jail sentence or the fine, he showed egregious harm under *Almanza*<sup>421</sup> and was entitled to a reversal even though the defendant did not raise an objection at the trial court.<sup>422</sup> In *Cane v. State*<sup>423</sup> the court of criminal appeals held that it was within the trial court's discretion to charge the jury on punishments on the objectives of the Penal Code;<sup>424</sup> however, the trial court should have charged

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411. *Id.* at 77.

412. 686 S.W.2d 298 (Tex. App.—Houston [14th Dist.] 1981), *rev'd*, 704 S.W.2d 43 (Tex. Crim. App. 1986).

413. See TEX. REV. CIV. STAT. ANN. art. 67011-1 (Vernon Supp. 1987) and TEX. PENAL CODE ANN. § 19.05 (Vernon Supp. 1987) (both quoting Tex. S.B. 303, 68th Leg. (1983)).

414. TEX. REV. CIV. STAT. ANN. art. 67011-1 (Vernon Supp. 1987); TEX. PENAL CODE ANN. § 19.05 (Vernon Supp. 1987).

415. 704 S.W.2d at 45.

416. 720 S.W.2d 504 (Tex. Crim. App. Sept. 17, 1986).

417. *Id.* at 507. For example, the court cited axioms such as the intent to commit theft is presumed from nighttime entry and guilt of theft is presumed from unexplained recent possession of stolen property.

418. *Id.* at 507-08.

419. *Id.*

420. 714 S.W.2d 42 (Tex. App.—Dallas 1986, no pet.).

421. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

422. 714 S.W. 2d at 44.

423. 698 S.W.2d 366 (Tex. App.—Beaumont 1984), *rev'd*, 698 S.W.2d 138 (Tex. Crim. App. 1985) (en banc).

424. TEX. PENAL CODE ANN. § 1.02 (Vernon 1974) (provides that the purposes of the code are:

on all six objectives, not just the first three.<sup>425</sup>

### G. *Almanza and Fundamental Error*

The *Almanza*<sup>426</sup> tests for determining reversible error did result in a number of reversals. As noted earlier in *Martinez v. State*,<sup>427</sup> the failure to charge the jury on the whole range of punishment resulted in fundamental reversible error when the accused did not receive the minimum punishment.<sup>428</sup> In *Castillo-Fuentes v. State*,<sup>429</sup> a murder case, the court held the failure to negate "sudden passion"<sup>430</sup> to be fundamental reversible error since voluntary manslaughter was the primary defense.<sup>431</sup> *Castillo-Fuentes* must be compared with *Lawrence v. State*<sup>432</sup> in which the failure to negate sudden passion was not reversible error because the voluntary manslaughter issue was held to be incidental to the theory of defense.<sup>433</sup> The court held the punishment charge in *Ellis v. State*<sup>434</sup> to be fundamental reversible error because it erroneously told the jury that the judge could impose only nine of the fourteen conditions of probation permitted by statute<sup>435</sup> and it erroneously stated that the trial judge could not add other conditions of proba-

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(1) to insure the public safety through: (A) the deterrent influence of the penalties hereinafter provided; (B) the rehabilitation of those convicted of violations of this code; and (C) such punishment as may be necessary to prevent likely recurrence of criminal behavior;

(2) by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;

(3) to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders;

(4) to safeguard conduct that is without guilt from condemnation as criminal;

(5) to guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses; and

(6) to define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.

425. 698 S.W.2d at 140-41.

426. 645 S.W.2d 885 (Tex. App.—Fort Worth 1983), *rev'd*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (en banc). In *Almanza*, the court adopted a two-prong test for analyzing error contained in a trial court's charge to the jury. If the error is considered ordinary reversible error, an objection or requested instruction is necessary to preserve the error, but only some harm is necessary to cause a reversal. If no objection or requested instruction was filed, the error must be fundamental, and only error so egregious and harmful so as to deprive the accused of a fair trial will result in a reversal. See Keck, 1985 *Annual Survey*, *supra* note 72, 634-36.

427. *Martinez v. State*, 714 S.W.2d (Tex. App.—Dallas 1986, no pet.).

428. See *supra* text accompanying notes 420-22.

429. 707 S.W.2d 559 (Tex. Crim. App. 1986) (en banc).

430. *Cobarrubio v. State*, 675 S.W.2d 749, 751 (Tex. Crim. App. 1983) (en banc) (requires the negation of sudden passion if the issue is raised by the evidence before a jury is allowed to return a verdict of guilty to the offense of murder).

431. 707 S.W.2d at 562.

432. 699 S.W.2d 229 (Tex. App.—Austin 1983), *rev'd*, 700 S.W.2d 208 (Tex. Crim. App. 1986) (en banc).

433. 700 S.W.2d at 212.

434. 723 S.W.2d 671 (Tex. Crim. App. 1986) (en banc).

435. See TEX. CODE CRIM. PROC. ANN. art. 42.12 § 6 (Vernon Supp. 1987).

tion.<sup>436</sup> The egregious harm was shown because the only issue involved in the guilty plea to a jury was that of the suitability of probation.<sup>437</sup> The murder conviction in *Holley v. State*<sup>438</sup> was reversed because the charge permitted the jury to convict on an uncharged theory of felony murder; recklessly committing or attempting to commit injury to a child which resulted in death.<sup>439</sup> Although other cases involved fundamental error/egregious error, the above cases indicate that fundamentally erroneous charges are still causing reversals when the instruction permits a conviction for uncharged conduct and evidence indicates the uncharged conduct, when the instruction affects the range of punishment, or when the instruction affects a defensive theory supported by the evidence.

#### H. Reading Testimony After a Jury Note

In *Jones v. State*<sup>440</sup> the court of criminal appeals held that the trial court must go beyond the literal interpretation of the jury note and give it a realistic interpretation, regardless of the statutory admonition in article 36.28 of the Code of Criminal Procedure.<sup>441</sup> Article 36.28 limits the jury note to "that part of such witness testimony or the particular point in dispute, and no other."<sup>442</sup> When both direct examination and cross-examination exists on a point in dispute defined in the jury note, therefore, both must be read back to the jury.<sup>443</sup>

### VI. PROSECUTORIAL ARGUMENT

As noted in the previous Survey,<sup>444</sup> claims that prosecutors exceeded the bounds of proper jury argument form the basis of many appeals in criminal cases. Two court of appeals decisions bear on issues that will probably be recurring problems as opposed to situational losses of perspective involved in most of the argument cases. In *Davis v. State*<sup>445</sup> the prosecutor commented on the new law concerning the jury instruction on parole.<sup>446</sup> The statute also expressly forbids consideration by the jury of the manner in which the

436. *Id.*

437. 723 S.W.2d at 673.

438. 713 S.W.2d 381 (Tex. App.—Amarillo 1986, no pet.).

439. *Id.* at 384.

440. 680 S.W.2d 25 (Tex. App.—Houston [1st Dist.] 1984), *rev'd*, 706 S.W.2d 664 (Tex. Crim. App. 1986) (en banc).

441. 706 S.W.2d at 668.

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

443. 706 S.W.2d at 668.

444. See Keck & Johnson, 1986 Annual Survey, *supra* note 84, at 641.

445. 712 S.W.2d 827 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

446. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a) (Vernon Supp. 1987) provides that the jury shall be instructed:

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-third of the sentence imposed or 20 years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than six year, he must serve at least two years

parole law may apply.<sup>447</sup> The prosecutor argued: “[The charge] says if you . . . sentence him to six years in the penitentiary, he is guaranteed to serve two. That’s what it says. Multiply about ten, what does it mean? You assess a 60 year sentence.”<sup>448</sup> The jury assessed a sixty-year sentence. The court of appeals affirmed, noting that the argument came perilously close to error, but did not cross the line into impermissible comment.<sup>449</sup> In *Gaddis v. State*<sup>450</sup> the prosecutor argued in a DWI case where the accused refused a breath test: “You know why he refuses? Because if he blows in the machine, the game is over.”<sup>451</sup> The court of appeals reversed, stating that the state may not suggest in final argument that evidence, which was not present at trial, provides additional grounds for finding the accused guilty.<sup>452</sup>

## VII. PUNISHMENT AND SENTENCING

### A. Judicial Vindictiveness

In *Pearce v. North Carolina*<sup>453</sup> the Supreme Court confronted the “judicial vindictiveness” that can appear to motivate a judge to impose a higher sentence on a retrial when the defendant successfully appealed. *Pearce* recognized a presumption of vindictiveness when a harsher sentence is assessed the second time around.<sup>454</sup> In order to rebut the presumption, the trial court must justify the harsher sentence with objective information concerning the defendant’s conduct subsequent to the original sentencing proceeding.<sup>455</sup> The Supreme Court’s opinion in *Texas v. McCullough*<sup>456</sup> severely limited *Pearce*. First, the Court held that the *Pearce* presumption did not arise when the sentencing court itself sets the stage for the retrial by granting

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before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

447. *Id.*

448. 712 S.W.2d at 828.

449. *Id.* at 829.

450. 714 S.W.2d 458 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

451. *Id.* at 459.

452. *Id.* at 460. In an interesting test to determine harm, the court held that the prejudicial effect of the argument outweighed its probative value. *Id.* This test is the same as that to determine admissibility of extraneous offenses, *Templin v. State*, 711 S.W.2d 30, 33 (Tex. Crim. App. 1986) (en banc), and is the rule to determine admissibility of evidence under the new rules of criminal evidence. See TEX. R. CRIM. EVID. 403, *supra* note 253. The problem with the test is that argument is not supposed to have probative value in itself. See *Todd v. State*, 598 S.W.2d 286, 296-97 (Tex. Crim. App. 1980) (argument may be (1) summation of evidence, (2) reasonable deduction from evidence, (3) answer to opposing counsel, and (4) plea for law enforcement).

453. 395 U.S. 711 (1969).

454. *Id.* at 725-26.

455. *Id.* at 276.

456. 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986).



a motion for new trial.<sup>457</sup> Second, the Court deemed the presumption not applicable when a jury imposed the first sentence but a judge imposed the second sentence.<sup>458</sup> Finally, *McCullough* made clear that information not presented at the first trial is admissible to refute the presumption of vindictiveness.<sup>459</sup>

### B. Other Supreme Court Cases Concerning Punishment and Sentencing

The Supreme Court also decided, in *Ford v. Wainwright*,<sup>460</sup> that the eighth amendment<sup>461</sup> prohibits a state from inflicting the death penalty upon a prisoner who is insane.<sup>462</sup> A plurality of the Court also held that the state must establish a procedure to determine post-trial insanity that provides the condemned the opportunity to be heard,<sup>463</sup> the opportunity to clarify or challenge the state's experts or methods,<sup>464</sup> and the right for judicial review.<sup>465</sup> In *Skipper v. South Carolina*<sup>466</sup> the Court reversed a death sentence because the defendant was prohibited from offering mitigating testimony that he had adjusted well to incarceration. The Court held that its prior opinions in *Lockett v. Ohio*<sup>467</sup> and *Eddings v. Oklahoma*<sup>468</sup> gave the defendant the right to give the jury all relevant evidence in mitigation of punishment.

### C. Affirmative Finding that a Deadly Weapon Was Used or Exhibited

As noted in the last Survey,<sup>469</sup> an affirmative finding by the trier of fact that a defendant used or exhibited a deadly weapon critically affects the eligibility for probation and service of the sentence. *Polk v. State*<sup>470</sup> established the ways in which an affirmative finding may be made when the jury is the trier of facts.<sup>471</sup> In *Fann v. State*<sup>472</sup> the court of criminal appeals held that when the punishment hearing is held before the trial judge, the judge is the

457. *Id.* at 979, 89 L. Ed. 2d at 111.

458. *Id.* at 980, 89 L. Ed. 2d at 111.

459. *Id.* at 982, 89 L. Ed. 2d at 113-14.

460. 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

461. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

462. 106 S. Ct. at 2602, 91 L. Ed. 2d at 346.

463. *Id.* at 2604-05, 91 L. Ed. 2d at 345.

464. *Id.* at 2605, 91 L. Ed. 2d at 350.

465. *Id.*

466. 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

467. 438 U.S. 586 (1978).

468. 455 U.S. 104 (1982).

469. See Keck & Johnson, *1986 Annual Survey*, *supra* note 84, at 647-48.

470. 693 S.W.2d 391 (Tex. Crim. App. 1985) (en banc).

471. The opinion stated that an affirmative finding in such circumstances could be made if: (1) the jury returns a verdict of guilty as charged in the indictment and the indictment specifically alleges the use or exhibition of a deadly weapon or firearm; (2) the jury returns a verdict of guilty as charged in the indictment and the indictment, rather than using the nomenclature "deadly weapon," specifies a weapon such as a pistol or other type of firearm that is per se a deadly weapon; or (3) the jury answers affirmatively a special issue regarding the defendant's use or exhibition of a deadly weapon or firearm. 693 S.W.2d at 394; *see also* Campbell v. State, No. 69,620 (Tex. Crim. App. Sept. 17, 1986) (not yet reported) (if jury finds defendant guilty as charged in indictment and indictment alleges handgun was used, affirmative finding exists).

472. 702 S.W.2d 602 (Tex. Crim. App. 1985) (en banc) (on state's motion for rehearing).

trier of facts as to punishment issues and has the authority to make the affirmative finding.<sup>473</sup>

Article 42.12 of the Code of Criminal Procedure<sup>474</sup> provides that a trial court can make restitution a condition of probation. Nowhere in the statutory language does the legislature say that restitution is made only to victims of the crime. In *Jones v. State*,<sup>475</sup> therefore, the Tyler court of appeals upheld restitution for the benefit of an insurance company that had paid the complaining witness.<sup>476</sup> The opinion noted that the only limitation on restitution is the due process requirement that the amount be just.<sup>477</sup>

In a case somewhat similar to *Thi Van Le v. Perkins*<sup>478</sup> the trial court originally granted an accused's application for probation in *Romero v. State*<sup>479</sup> and then later revoked the probation and assessed a two-year sentence. The court based the revocation on the fact that the defendant refused to sign the probation order. The appellate court noted that article 42.12 of the Code of Criminal Procedure<sup>480</sup> does not require the defendant to sign the probation order, and held that after the first sentence was imposed, the trial court was without power to vacate the sentence and order a new sentence.<sup>481</sup>

The final case in this section concerns good time credits and jail terms ordered as a condition of probation.<sup>482</sup> In *Ex parte Cruthirds*<sup>483</sup> the court of criminal appeals held that good time credits<sup>484</sup> only apply to sentences, not to periods of confinement that are conditions of probation.<sup>485</sup>

### VIII. PROCEDURAL ASPECTS OF APPEAL

Just as the adoption of the rules of criminal evidence during the last two months of the Survey period created problems with surveying the procedural aspects of trial,<sup>486</sup> the adoption of the Texas Rules of Appellate Procedure<sup>487</sup> has created a significant change in the procedural aspects of appeal. The quantity and quality of the changes are of much significance as to be the subject of a law review article alone and are beyond the scope of this Survey.

473. *Id.* at 604-05.

474. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6(a)(8) (Vernon Supp. 1987).

475. 713 S.W.2d 696 (Tex. App.—Tyler 1986, no pet.).

476. *Id.* at 797 (citing *Flores v. State*, 513 S.W.2d 66 (Tex. Crim. App. 1974) (payment of restitution to insurance company implicitly approved)).

477. *Id.*

478. 700 S.W.2d 768 (Tex. Crim. App.—Austin 1985, no pet.).

479. 712 S.W.2d 636 (Tex. App.—Beaumont 1986, no pet.).

480. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6 (Vernon Supp. 1987).

481. 712 S.W.2d at 638.

482. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6b(c) (Vernon Supp. 1987) (requiring court to order jail sentence of not less than 120 days if probation is granted to defendant convicted of involuntary manslaughter caused while operating a motor vehicle while intoxicated); see TEX. PENAL CODE ANN. § 19.05(a)(2) (Vernon 1974).

483. 697 S.W.2d 845 (Tex. App.—Houston [1st Dist.] 1985), *aff'd*, 712 S.W.2d 749 (Tex. Crim. App. 1986) (en banc).

484. TEX. REV. CIV. STAT. ANN. art. 5118(a) (Vernon Pam. Supp. 1987).

485. 712 S.W.2d at 753.

486. See *supra* notes 253-54 and accompanying text.

487. VERNON'S TEXAS STATUTES AND CODES ANNOTATED: INTERIM ANNOTATION SERVICE NO. 1, at 326-86 (April 1986); see also TEX. R. APP. P. (Vernon Special Pam. 1987).

This Article will attempt to identify the major developments during the Survey period that the new rules do not change.<sup>488</sup>

### A. Appellate Jurisdiction

In *Morris v. State*<sup>489</sup> the defendant pleaded guilty pursuant to a plea bargain and gave notice of appeal to contest an adverse ruling on a pretrial motion.<sup>490</sup> On appeal the only issue raised was the insufficiency of the evidence to support the plea of guilty. Under the statutory authority for such appeals,<sup>491</sup> the defendant can appeal only those matters raised by adverse pretrial rulings. The court dismissed the appeal for want of jurisdiction.<sup>492</sup> In *Dorsey v. State*<sup>493</sup> the Fort Worth court of appeals reviewed the requirements for appealing a conviction in which the defendant pleaded guilty pursuant to a plea bargain. In order to invoke appellate jurisdiction the appellant must show: (1) the existence of a plea bargain; (2) punishment assessed by the trial court within the recommendation of the prosecutor and agreement by the appellant; and (3) the basis of the appellate ground of error being the denial of a written pretrial motion or the trial court giving permission to pursue an appeal.<sup>494</sup> Oral notices of appeal are no longer permitted under the new rules.<sup>495</sup>

### B. Preservation of Error

*Moosavi v. State*<sup>496</sup> involved the attempt by a defendant to preserve error when the trial court excluded proffered testimony. Defense counsel briefly stated into the record what he expected the excluded testimony to prove.<sup>497</sup> The court of appeals held that the defendant did not preserve error because the record did not show the specific *questions* and answers.<sup>498</sup> The court of criminal appeals reversed, holding that article 40.09, section 6(d)(1) of the Code of Criminal Procedure only requires a concise statement of what the excluded evidence would show.<sup>499</sup> As noted in *Casares v. State*,<sup>500</sup> however, if no offer of proof is made, nothing is preserved for appellate purposes.

488. See Fitzgerald, *Criminal Appellate Practice: State of Texas*, in STATE BAR OF TEXAS, ADVANCED CRIMINAL LAW COURSE § N (August 1986) for a detailed analysis of the new appellate rules.

489. No. 197-84 (Tex. Crim. App. Apr. 30, 1986) (not yet reported) (rehearing pending).

490. See TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979).

491. *Id.*

492. No. 197-84, slip op. at 5.

493. 713 S.W.2d 431 (Tex. App.—Fort Worth 1986, no pet.).

494. *Id.* at 432 (citing Galitz v. State, 617 S.W.2d 949 (Tex. Crim. App. 1981 (en banc))).

495. TEX. R. APP. P. 30(b)(1), *supra* note 487.

496. 671 S.W.2d 572 (Tex. App.—Dallas 1985), *rev'd*, 711 S.W.2d 53 (Tex. Crim. App. 1986) (en banc).

497. 711 S.W.2d at 54.

498. 671 S.W.2d at 574-75.

499. 711 S.W.2d at 55. The opinion stated: "In a case . . . where the question itself is not objectionable but, rather the expected testimonial response, it serves no purpose to require an offer of proof to contain the questions to be asked. This is especially true where the subject matter of the question is evident." 711 S.W.2d at 56. Article 40.09 of the Code of Criminal Procedure was repealed with the adoption of the new appellate rules, with rule 50 of those rules replacing the statute. See TEX. R. APP. P. 50, *supra* note 487.

Because of the numerous cases that have held the defendant did not properly preserve error the rest of this section summarizes briefly some of the proper rules applicable in preserving error. Objections must be made each time allegedly improper questions are asked, or answers or arguments are made.<sup>501</sup> The objection at trial must comport with the complaint raised on appeal.<sup>502</sup> Error is not preserved unless the defendant obtains an adverse ruling.<sup>503</sup> The appellant bears the burden to develop the appellate record to show reversible error.<sup>504</sup> The appellate courts have the power to review only grounds of error raised by the defendant's brief and unassigned error that should be reviewed in the interests of justice.<sup>505</sup>

### C. The Record on Appeal

*Abdnor v. State*,<sup>506</sup> noted in the last Survey,<sup>507</sup> was a court of appeals decision that held that an appellant who failed to testify at his indigency hearing did not make a prima facie case of indigency, and was not entitled to a transcript at county expense.<sup>508</sup> The court of criminal appeals reversed and remanded, holding that a defendant need not testify if he can prove indigency by other witnesses.<sup>509</sup> In this case the defendant's father and legal guardian showed firsthand knowledge of the defendant's financial condition, the evidence was uncontroverted, and no further evidence was required.<sup>510</sup>

The court of criminal appeals held in *Farris v. State*<sup>511</sup> that an attempt by the trial court to supplement a record after the appellate record had been filed in the court of appeals was invalid.<sup>512</sup> The court further held that new

500. 712 S.W.2d 818, 821 (Tex. App.—Houston [1st Dist.] 1986, no pet.). See also *McKibbon v. State*, 714 S.W.2d 70, 71 (Tex. App.—San Antonio 1986, no pet.).

501. *Johnson v. State*, 713 S.W.2d 741, 745 (Tex. App.—Dallas 1986, no pet.).

502. *Gonzales v. State*, 714 S.W.2d 19, 21 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

503. *Parker v. State*, 713 S.W.2d 386, 390 (Tex. App.—Corpus Christi 1986, no pet.).

504. *Id.* at 391.

505. *Koffel v. State*, 714 S.W.2d 151, 153 (Tex. App.—Fort Worth 1986, no pet.) (citing TEX. CODE CRIM. PROC. ANN. art. 40.09 (Vernon 1979)). The opinion incorrectly referred to a section of the Code of Criminal Procedure that had been repealed prior to 1981 and a search of the old and new rules of appellate procedure do not show that the provision for review "in the interests of justice" have been retained. *Lopez v. State*, 708 S.W.2d 446, 448-49 (Tex. Crim. App. 1986) and *Carter v. State*, 656 S.W.2d 468, 468 (Tex. Crim. App. 1983), however, both hold that all appellate courts have the jurisdiction to review unassigned error.

506. 687 S.W.2d 14 (Tex. App.—Dallas 1984), *rev'd*, 712 S.W.2d 136 (Tex. Crim. App. 1986). This case was not the first time the issue of this defendant's status as an indigent had been litigated. See *Abdnor v. State*, 635 S.W.2d 864 (Tex. App.—Dallas 1982), *aff'd*, 653 S.W.2d 793 (Tex. Crim. App. 1983) (en banc). The court of criminal appeals expressly disapproved the court of appeals' determination that the appellant must testify, and may not call witnesses in his behalf, at an indigency hearing. 653 S.W.2d at 794 n.2.

507. See *Keck & Johnson, 1986 Annual Survey, supra* note 84, at 671.

508. See Tex. Code Crim. Proc. Ann. art. 40.09(5) (Vernon 1979), then in effect, which provided that the transcripts of those appellants determined to be indigent are to be paid for out of the general fund of the county in which the offense was alleged to have been committed. The statute has been repealed and is replaced by rule 43(j) of the new appellate rules. TEX. R. APP. P. 43(j), *supra* note 487.

509. 712 S.W.2d at 143.

510. *Id.* at 138.

511. 676 S.W.2d 674 (Tex. App.—Houston [1st Dist.], *rev'd*, 712 S.W.2d 512 (Tex. Crim. App. 1986) (en banc).

512. 712 S.W.2d at 514. Several months after the appellate record was filed, testimony was

evidence developed subsequent to any proceedings surrounding a defendant's trial does not constitute part of a defendant's record within the meaning "record on appeal."<sup>513</sup>

#### D. *Bail Pending Appeal*

Article 44.04 of the Code of Criminal Procedure<sup>514</sup> authorizes denial of bail only if good cause exists to believe that one convicted of a felony offense will not appear when his conviction becomes final or is likely to commit another offense while on bail. The *Hunter v. State*<sup>515</sup> and *Ex parte Shockley*<sup>516</sup> decisions both held that even if not required by the statute, due process does require that the trial judge give notice and hold a hearing before denying bond or raising bond pending appeal. In some limited situations a defendant may be entitled to bond even after incarceration. In *Ex Parte Curry*<sup>517</sup> the defendant withdrew her notice of appeal and began her prison sentence. She was later released on parole. Subsequently, a nunc pro tunc order was entered indicating that she had used a deadly weapon in the commission of the offense, thus delaying the parole eligibility date.<sup>518</sup> When she sought to appeal the nunc pro tunc order the trial court denied her request for bail pending appeal. The court of appeals held that, since Curry had the right to appeal the nunc pro tunc order, she was entitled to bail.<sup>519</sup>

#### E. *Petitions for Discretionary Review*

In a significant opinion the court of criminal appeals in *Degrate v. State*<sup>520</sup> refused a petition because it did not set forth the reasons why the court should consider the case.<sup>521</sup> Appellant had presented several grounds for error, which were an exact duplication of the grounds presented to the court of appeals. The petition was held not to follow the requirements of rule 304(d) of the post-trial and appellate rules,<sup>522</sup> which require the petition to state the reasons, as identified in rule 302(c) of the same rules,<sup>523</sup> for grant-

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presented in a wholly unconnected case that showed the prosecution had withheld evidence at Farris's trial of promises made to an accomplice regarding leniency in exchange for testimony. The trial court tried to supplement the appellate record with this testimony.

513. *Id.* at 515.

514. TEX. CODE CRIM. PROC. ANN. art. 44.04 (Vernon 1986).

515. No. 770-85 (Tex. Crim. App. Oct. 23, 1985) (not yet reported).

516. 683 S.W.2d 493 (Tex. App.—Dallas 1985), *rev'd*, 717 S.W.2d 922, 923 (Tex. Crim. App. 1986) (en banc).

517. 712 S.W.2d 878 (Tex. App.—Austin 1986, no pet.).

518. *Id.* at 879 (citing TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(b) (Vernon Supp. 1987)).

519. *Id.* at 880-81 (citing *Shaw v. State*, 539 S.W.2d 887 (Tex. Crim. App. 1976), as authority for right to appeal, and TEX. CODE CRIM. PROC. ANN. art. 44.04 (Vernon Supp. 1987) and *Ex parte Davis*, 574 S.W.2d 166 (Tex. Crim. App. 1978), as authority for right to bail pending appeal).

520. 712 S.W.2d 755 (Tex. Crim. App. 1986) (en banc).

521. *Id.* at 757.

522. TEX. R. CRIM. APP. P. 304(d)(5) (Vernon 1948), now TEX. R. APP. P. 202(d)(5), *supra* note 487.

523. TEX. R. CRIM. APP. P. 302(c) (Vernon 1948), now TEX. R. APP. P. 200 (c), *supra* note 487. Both provide:

ing review.<sup>524</sup> The emphasis was on the importance to the jurisprudence of the state and not the effect on the parties. The court stated that "[t]he assertion that the court of appeals was in error as to some point of law, standing alone, may be insufficient to require further review."<sup>525</sup>

#### F. Test for Sufficiency on Appeal

Two opinions by the court of criminal appeals created new law concerning the tests for sufficiency of evidence on appeal. The first case involves the proper appellate standard for determining whether sufficient evidence exists to support a jury's implicit rejection of an affirmative defense. In *Van Guilder v. State*<sup>526</sup> the court held that the appellate court

must review the evidence on the affirmative defense by looking at the evidence in the light most favorable to the implicit finding by the jury with respect to such affirmative defense and then determine, by examining all the evidence concerning the affirmative defense, if any rational trier of fact could have found that the defendant failed to prove his defense by a preponderance of the evidence.<sup>527</sup>

The *Van Guilder* court found that, because the evidence of insanity was so great and because the state offered no evidence to rebut the defensive theory, no rational trier of fact could have found that the defense was not proved by a preponderance of the evidence.<sup>528</sup> The opinion in *Schuessler v. State*<sup>529</sup> indicates how little evidence is needed to convince the hypothetical rational trier of fact. *Schuessler* also involved overwhelming uncontradicted evidence that the defendant had a mental illness. The state's expert, however, challenged the reliability of retroactive diagnosis: the process of examining a

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In determining whether to grant or deny discretionary review, the following, while neither controlling nor fully measuring the Court of Criminal Appeals' discretion, indicates the character of reasons that will be considered:

(1) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;

(2) Where a court of appeals has decided an important question of state or federal law which has not been, but should be, settled by the Court of Criminal Appeals;

(3) Where a court of appeals has decided an important question of state or federal law in conflict with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States;

(4) Where a court of appeals has declared unconstitutional, or appears to have misconstrued, a statute, rule, regulation, or ordinance;

(5) Where the justices of the court of appeals have disagreed upon a material question of law necessary to its decision; and

(6) Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

524. 712 S.W.2d at 756-57.

525. *Id.* at 756.

526. 674 S.W.2d 915 (Tex. App.—San Antonio 1984), *aff'd*, 709 S.W.2d 178 (Tex. Crim. App. 1986) (en banc).

527. 709 S.W.2d at 181.

528. *Id.* at 183.

529. 647 S.W.2d 742 (Tex. App.—El Paso 1983), *rev'd*, 719 S.W.2d 320 (Tex. Crim. App. 1986).

patient and then determining that he suffered a specific ailment at a time prior to the examination. Additionally, lay witnesses testified about the defendant's conduct while in jail. This testimony, although not contradicting the defendant's expert witnesses, was sufficient for the court to hold that a rational trier of fact could have found that the defendant failed to prove the defense of insanity by a preponderance of evidence.<sup>530</sup>

The second significant case involving appellate standards of sufficiency of evidence is *Chambers v. State*.<sup>531</sup> *Chambers* abolished two established rules. First, the court abandoned the long standing practice of disregarding inadmissible hearsay in determining evidentiary sufficiency on appeal.<sup>532</sup> The court then considered another long-standing rule that in a weak circumstantial evidence case in which the record shows not only that other testimony was available, which would have cast additional light on the facts, but also that the prosecution did not introduce the evidence or satisfactorily account for its failure to do so, the appellate court must hold the evidence insufficient.<sup>533</sup> Holding the standard of a "weak circumstantial evidence case" to be inconsistent with those cases that held the standard of review for sufficiency of evidence cases to be the same in both direct and circumstantial evidence cases,<sup>534</sup> and stemming from the untenable presumption that the state's failure to produce and failure to account for nonproduction of available testimony creates reasonable doubt as a matter of law, the opinion stated<sup>535</sup> that henceforth the proper standard for review in all cases was that established in *Jackson v. Virginia*.<sup>536</sup>

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530. 719 S.W.2d at 330. The depth of analysis needed to understand *Van Guilder* and *Schuessler* is far greater than permitted in a survey of law article. The reader is invited to read Judge Clinton's dissent in *Schuessler*, *id.* at 330-32, and the court of appeals decision in *Meraz v. State*, 714 S.W.2d 108 (Tex. App.—El Paso 1986, no pet.) (finding of competency held to be against great weight and preponderance of evidence, a test apparently rejected in *Van Guilder*).

531. 711 S.W.2d 240 (Tex. Crim. App. 1986) (en banc).

532. *Id.* at 245-47, reversing *Alvarado v. State*, 632 S.W.2d 608 (Tex. Crim. App. 1982), and *Gutierrez v. State*, 628 S.W.2d 57 (Tex. Crim. App. 1980), specifically, and inferentially all similar cases from *Belverman v. State*, 16 Tex. 131 (Tex. 1856), through *Gardner v. State*, 699 S.W.2d 831 (Tex. Crim. App. 1985) (en banc).

533. See *Cruz v. State*, 482 S.W.2d 264, 266-67 (Tex. Crim. App. 1972); *Ysasaga v. State*, 444 S.W.2d 305, 309 (Tex. Crim. App. 1969).

534. See *Carlsen v. State*, 654 S.W.2d 444 (Tex. Crim. App. 1983) (en banc).

535. 711 S.W.2d at 251.

536. 443 U.S. 307, 319 (1979) (whether after viewing all evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of offense beyond a reasonable doubt.).