SMU | Dedman School of Law

SMU Law Review

Volume 42
Issue 1 *Annual Survey of Texas Law*

Article 21

January 1988

Criminal Procedure: Trial and Appeal

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CRIMINAL PROCEDURE: TRIAL AND APPEAL

by

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I. RIGHT TO COUNSEL

THE United States Supreme Court issued two opinions during the Survey period addressing the protections encompassed by the sixth amendment's guarantee of the right to counsel.[1] One of the cases, *Pennsylvania v. Finley*,[2] concerned counsel's effectiveness in a state collateral review proceeding. In 1967 the Court established, in *Anders v. California*,[3] the procedures that appointed counsel must follow to withdraw from representing an indigent defendant in an appeal as a matter of right when the attorney believes the appeal is frivolous.[4] In *Pennsylvania v. Finley* a six justice majority held that the *Anders* procedures need not be observed in state post-conviction proceedings, even if state law entitled the defendant to appointed counsel.[5] Chief Justice Rehnquist wrote for the majority, stating that *Anders* did not set down an independent constitutional requirement all lawyers must follow in all proceedings.[6] The Chief Justice then stated that *Anders* established a prophylactic framework relevant only when a litigant established a constitutional right to counsel.[7] Chief Justice Rehnquist further asserted that the constitutional right to counsel extended only to the first appeal of right and not further.[8] Accordingly, the Court held that no consitutional right to counsel exists when pursuing a discretionary appeal on direct review, or when pursuing a post-conviction collateral attack, as Finley was attempting.[9]

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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. 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

3. 386 U.S. 738, 744 (1967).

4. In addition to filing a request to withdraw, counsel must file a brief noting any arguable claims. *Id.* The appealing defendant is furnished with a copy of the brief and afforded an opportunity to raise additional points. *Id.* The court must then, after examining all proceedings, determine whether the appeal is wholly frivolous. *Id.*

5. 107 S. Ct. 1990 at 1993, 95 L. Ed. 2d at 545.

6. *Id.*

7. *Id.*

8. *Id.* (citing Ross v. Moffitt, 417 U.S. 600 (1974); Wainwright v. Torna, 455 U.S. 586 (1982); Johnson v. Avery, 393 U.S. 483 (1969)).

9. *Id.*

The second Supreme Court case, *Burger v. Kemp*,[10] produced a long and fact-specific opinion concerning the effectiveness of counsel. Burger's first claim asserted a right to assistance of counsel free from a conflict of interest.[11] Burger based his claim on the fact that Burger's court-appointed trial counsel was in partnership with co-defendant's court-appointed counsel.[12] Claims involving conflicts of interest among trial counsel are not subject to the two-prong *Strickland* analysis,[13] but are subject to the presumed prejudice standard if the defendant demonstrates that the attorney represented conflicting interests that adversely affected the attorney's performance.[14] In a 5-4 decision the Court held that, contrary to showing trial counsel's representation constituted an active representation of competing interests, the joint representation may well have benefited Burger.[15] Burger's second claim of ineffectiveness of counsel alleged a failure to develop and present mitigating evidence at the capital sentencing hearings. The Court analyzed this claim under the *Strickland* two-prong analysis.[16] The Court held that although trial counsel could have made a more thorough investigation, he conducted a sufficient investigation to make a reasonable strategic decision.[17] Burger thus failed to meet the first prong of *Strickland*, which requires that counsel's decisions fall below an objective standard of reasonably professional judgment.[18]

The Texas Court of Criminal Appeals held that trial counsel in *Ex parte Wilson*[19] was ineffective because the attorney failed to convey to his client a plea bargain offer. The *Wilson* court stated that counsel had a duty to disclose all plea bargain offers, and failure to do so constituted conduct falling below an objective standard of reasonableness.[20] Since the defendant testified that he would have accepted the plea bargain offer rather than risk the automatic life sentence, the court held that the defendant met *Strickland*'s second prong by showing a reasonable probability that, but for counsel's

10. 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987).

11. In Glasser v. United States, 315 U.S. 60, 70 (1942), the Court recognized that the sixth amendment right to effective counsel included conflict-free assistance of counsel.

12. Burger's counsel interviewed the co-defendant and assisted in representing the co-defendant, who was tried separately. The attorneys discussed both cases with one another and shared their legal research. *Burger*, 107 S. Ct. at 3119, 97 L. Ed. 2d at 649.

13. In Strickland v. Washington, 466 U.S. 668, 690, 694 (1984), the Supreme Court held that a defendant must show that the attorney's performance fell below an objective standard of reasonably professional judgment, and the existence of a reasonable probability that, but for counsel's deficient performance, the proceeding would have led to a different result. The Court defined reasonable probability as a "probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see* Goranson, *Criminal Procedure: Trial and Appeal, Annual Survey of Texas Law* 41 SW. L.J. 529, 534-35 (1987); Keck & Johnson, *Criminal Procedure: Trial and Appeal, Annual Survey of Texas Law*, 40 SW. L.J. 583, 589 (1986); Keck, *Criminal Procedure: Trial and Appeal, Annual Survey of Texas Law*, 39 SW. L.J. 495, 497-99 (1985).

14. *Strickland*, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

15. *Burger*, 107 S. Ct. at 3120, 97 L. Ed. 2d at 650.

16. *Id.* at 3119, 97 L. Ed. 2d at 649-50.

17. *Id.* at 3126, 97 L. Ed. 2d at 657.

18. *Id.*

19. 724 S.W.2d 72, 74 (Tex. Crim. App. 1987) (en banc).

20. *Id.* (citing Johnson v. Duckworth, 793 F.2d 898 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 416 (1986)).

action, the proceeding would have led to a different result.[21]

II. GUILTY PLEAS

Prior Survey reviews concerning guilty pleas have generally concerned enforcement of plea bargains by defendants pursuant to the rationale of *Santobello v. New York*.[22] During the current Survey period, the Supreme Court in *Ricketts v. Adamson*[23] addressed the issue of the defendant's breach of a plea bargain. The state originally charged Adamson with first degree murder. Pursuant to a plea bargain, the state reduced the charge to second degree murder. The basis of the bargain was Adamson's promise to testify against other persons involved in the murder. The agreement specifically provided that if Adamson refused to testify, the agreement was null and void and the original charge would be automatically reinstated. In accordance with the agreement, Adamson testified against the co-defendants, who were convicted of first degree murder. Subsequently, the court reversed the co-defendant's convictions, and Adamson refused to testify at the retrial. The state reinstated its charges against Adamson for first degree murder, and his trial resulted in a death sentence. Adamson claimed that the second prosecution violated the fifth amendment's double jeopardy clause.[24] In a 5-4 opinion, the Supreme Court held that Adamson's breach of the plea bargain agreement removed the double jeopardy bar and permitted prosecution for first degree murder.[25] According to the Court the prosecution is entitled to specific performance of the plea bargain; if refused, the prosecution is entitled to withdraw the plea and reinstate the original charge.[26]

Article 26.13 of the Code of Criminal Procedure[27] provides the statutory requirements for a guilty plea. The legislature amended the statute to provide that admonitions that the state must give to an accused before a guilty plea is accepted can now be given in writing.[28]

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21. *Id.* at 74-75.

22. 404 U.S. 257 (1971). When a prosecutor's promise induces a guilty plea, the promise must be fulfilled. *Id.* at 262; *see* Goranson, *supra* note 13, at 539-42.

23. 107 S. Ct. 2680, 2685-87, 97 L. Ed. 2d 1, 11-13 (1987).

24. The fifth amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . ." U.S. CONST. amend. V.

25. 107 S. Ct. at 2685, 97 L. Ed. 2d at 11.

26. *Id.* at 2686-87, 97 L. Ed. 2d at 12-13; *see* Thi Van Le v. Perkins, 700 S.W.2d 768, 774 (Tex. App.—Austin 1985), *pet. mand. sub nom* Perkins v. Court of Appeals, 738 S.W.2d 276 (Tex. Crim. App. 1987) (en banc) (holding that specific performance is preferred remedy when plea bargain is breached). The Court of Criminal Appeals also stated that a defendant is entitled to specific performance if the agreement can be enforced. *Perkins*, 738 S.W.2d at 283.

27. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 1988).

28. Section d of the statute was amended as follows:

> The court may make the admonitions required by this article either orally or in writing. If the court makes the admonitions in writing, it must receive a statement signed by the defendant and the defendant's attorney that he understands the admonitions and is aware of the consequences of his plea. If the defendant is unable or refuses to sign the statement, the court shall make the admonitions orally.

TEX. CODE CRIM. PROC. ANN. art. 26.13, § (d) (Vernon Supp. 1988).

III. JURY TRIAL ISSUES

A. Batson v. Kentucky

In 1986, the Supreme Court held in *Batson v. Kentucky*[29] that a prosecutor may not use peremptory strikes solely on the basis of race.[30] In *Griffith v. Kentucky*[31] the Supreme Court held that the *Batson* holding applied retroactively to all cases, state or federal, pending on direct review or not yet final.[32] The Texas Court of Criminal Appeals recognized the *Batson* holding in two cases. In *Keeton v. State*[33] and *Henry v. State*,[34] the Texas trial judges had overruled the defendants' objections to the prosecutors' use of peremptory challenges to members of the voir dire panel sharing the same race as the defendants. The Court of Criminal Appeals remanded each case to the trial court for a factual hearing to determine: (1) whether the defendant was part of a racial group; (2) whether the prosecutor peremptorily struck members of that group; and (3) whether the relevant circumstances raised an inference that the prosecutor struck the members solely because of their race.[35] Upon a proper showing by the defense the burden then shifted to the prosecutor to establish a neutral explanation for the strikes.[36] The court suggested remedies, including installing minority venirepersons on the jury or quashing the panel.[37] The *Keeton* opinion states that the trial judge's decision as to whether a neutral explanation for the use of the peremptory strikes exists should be given great weight on appeal.[38]

B. *Jury Selection in General*

Article 35.11 of the Code of Criminal Procedure[39] requires that the names of prospective jurors be shuffled upon timely request before the commencement of voir dire.[40] Prior case law establishes that the defendant and the prosecutor have the right to see the panel seated before deciding whether to ask for a jury shuffle.[41] In *Williams v. State*[42] the jury panel had been seated and the trial judge had addressed and questioned the panel for thirty minutes. As the trial judge was about to permit the prosecutor to begin voir dire, defense counsel requested a jury shuffle. The trial court denied the request as untimely. The court of criminal appeals reversed, holding that

29. 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 83 (1986).
30. *See* Goranson, *supra* note 13, at 544-46.
31. 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).
32. *Id.* at 710, 93 L. Ed. 2d at 654. The case is also important because it announced a major change in retroactivity analysis. For a discussion of the retroactivity rule *see infra* notes 186-90 and accompanying text.
33. 724 S.W.2d 58 (Tex. Crim. App. 1987) (en banc).
34. 729 S.W.2d 732 (Tex. Crim. App. 1987).
35. *Keeton*, 724 S.W.2d at 65; *Henry*, 729 S.W.2d at 734.
36. *Keeton*, 724 S.W.2d at 65; *Henry*, 729 S.W.2d at 734.
37. *Keeton*, 724 S.W.2d at 65; *Henry*, 729 S.W.2d at 734.
38. *Keeton*, 724 S.W.2d at 64.
39. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon 1966).
40. *Id.*; *see* Alexander v. State, 523 S.W.2d 720, 721 (Tex. Crim. App. 1975).
41. Eldridge v. State, 666 S.W.2d 357, 358-59 (Tex. App.—Dallas 1984).
42. 719 S.W.2d 573 (Tex. Crim. App. 1986) (en banc).

the voir dire begins when the court permits the prosecution to commence voir dire and the prosecutor actually begins the examination.[43]

Article 35.16(a)(5) of the Code of Criminal Procedure[44] provides that a venireperson may be challenged for cause if the venireperson has a mental defect that renders him unfit for jury service.[45] In *Gardner v. State*[46] the court of criminal appeals held that low intelligence could constitute a mental defect rendering a venireperson unfit for jury service. Accordingly, the court permitted the State's challenge to a juror not smart enough to comprehend a juror's function at the punishment phase of a capital murder trial. In a case that could reduce the amount of time required for capital jury selection, the court of criminal appeals in *Barnard v. State*[47] permitted partial group voir dire in a capital case. The trial judge allowed, but did not require, both sides to voir dire the entire panel on general principles of law before beginning individual voir dire. The appellate court held that although article 35.17 of the Code of Criminal Procedure[48] required individual voir dire upon request, the statute did not prohibit a concurrent right of general voir dire.[49] The appellate court did not find error in the trial court's procedure and also validated the procedure as a good idea.[50]

IV. PROCEDURAL ASPECTS OF TRIAL

A. Confrontation

The Supreme Court again paid considerable attention to the confrontation clause[51] of the sixth amendment.[52] The Court decided five cases addressing confrontation clause issues, two of which dealt with variations on the fact situation presented in *Bruton v. United States*.[53] *Bruton* held that a non-testifying co-defendant's confession implicating another defendant may not be introduced at the joint trial of the two defendants unless the confession is edited to eliminate all references to the defendant.[54] In a later Supreme Court case four justices suggested that if the co-defendant's confession interlocked with a confession given by the defendant the *Bruton* problem would disappear.[55] During this term, in *Cruz v. New York*,[56] the Supreme Court repudiated the plurality's suggestion and held that the interlocking confession doctrine violated *Bruton*. The majority opinion written by Justice

43. *Id.* at 577.
44. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(5) (Vernon Supp. 1988).
45. *Id.*
46. 730 S.W.2d 675, 695 (Tex. Crim. App. 1987) (en banc) (specifically disclaiming that low apparent intelligence is a per se ground for challenge).
47. 730 S.W.2d 703, 715 (Tex. Crim. App. 1987) (en banc).
48. TEX. CODE CRIM. PROC. ANN. art. 35.17 (Vernon Supp. 1988).
49. 730 S.W.2d at 715-16.
50. *Id.*
51. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.
52. *See* Goranson, *supra* note 13, at 549-52.
53. 391 U.S. 123 (1968).
54. *Id.* at 134, n.10.
55. Parker v. Randolph, 442 U.S. 62, 75 (1979).
56. 107 S. Ct. 1714, 1719, 95 L. Ed. 2d 162, 172 (1987).

Scalia held that *Bruton* was concerned with the likelihood a jury would obey a court's instruction to disregard a non-testifying co-defendant's confession in deciding the defendant's guilt.[57] Justice Scalia further opined that the interlocking nature of confessions pertained to the confessions' reliability and not to the harmfulness of the co-defendant's confession to the defendant's case.[58] Since *Bruton* was based upon the harmfulness issue and not the reliability issue, Justice Scalia asserted that the introduction of the co-defendant's unedited confession in Cruz' trial constituted constitutional error.[59] A decision rendered on the same day as *Cruz* demonstrated the Court's reluctance to expand *Bruton*. In *Richardson v. Marsh*[60] the Court held that the admission of a co-defendant's confession edited to remove all reference to the existence of the non-confessing defendant is not barred by *Bruton*, even if the defendant is linked to the confession by other evidence, so long as the court instructs the jury not to consider the confession against the defendant.[61]

The Supreme Court thwarted a defendant's attempt to use the confrontation clause to force disclosure of records for impeachment purposes in *Pennsylvania v. Ritchie*.[62] Ritchie, charged with sexually assaulting his minor daughter, sought access to state maintained records concerning her for impeachment purposes. The trial court did not permit disclosure. The Pennsylvania Supreme Court held that under both the confrontation clause and the compulsory process clause,[63] the trial court should have allowed the defense counsel to examine the records.[64] The Supreme Court avoided the compulsory process claim, noting that the Court has handled similar discovery claims pursuant to the broader protections of the fourteenth amendment's due process clause.[65] Employing a *Brady*[66] analysis, the Court required the trial court to inspect the questionable evidence and determine whether there was a reasonable likelihood that the result of the trial would have been different if the evidence had been disclosed to the defense.[67] The Supreme Court stated that recognition of the confrontation clause claim

57. *Id.* at 1718-19, 95 L. Ed. 2d at 171.

58. *Id.* at 1719, 95 L. Ed. 2d at 171.

59. *Id.*, 95 L. Ed. 2d at 172.

60. 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).

61. *Id.* at 1708, 95 L. Ed. 2d at 186-87. The other evidence in this case was the defendant's own testimony. The Court remanded the case to determine whether trial counsel's failure to object to the prosecutor's argument urging the jury to use the confession in evaluating the defendant's testimony could serve as a basis for relief. *Id.* at 1709, 95 L. Ed. at 188.

62. 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

63. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, ..." U.S. CONST. amend. VI.

64. Commonwealth v. Ritchie, 509 Pa. 357, 367, 502 A.2d 148, 153 (1985).

65. Pennsylvania v. Ritchie, 107 S. Ct. at 1001, 94 L. Ed. 2d at 56. The fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

66. Pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963), the prosecution has the obligation to disclose "evidence in its possession that is both favorable to the accused and material to guilt or punishment." *See also* United States v. Agurs, 427 U.S. 97 (1976).

67. 107 S. Ct. at 1001, 94 L. Ed. 2d at 57 (citing United States v. Bagley, 473 U.S. 667, 682 (1985)).

would effectively create a new constitutionally compelled rule of pre-trial discovery.[68] After concluding that nothing in the case law supported Ritchie's argument, the Court stated that "the right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."[69]

Last term the Supreme Court held that a non-testifying conspirator's out-of-court statement satisfying Federal Rule of Evidence 801(d)(2)(E)[70] may be admitted without showing the conspirator's unavailability.[71] This term in *Bourjaily v. United States*[72] the Court held that a trial court may consider a hearsay statement in making a preliminary factual determination required by Rule 803 as to whether the alleged conspiracy existed and whether the statement was made in the course of and in furtherance of the conspiracy. The opinion by Chief Justice Rehnquist noted that a literal interpretation of the confrontation clause might bar the use of any out-of-court statements when the declarant was unavailable.[73] The Court explicitly rejected that view in *Ohio v. Roberts*.[74] In an attempt to harmonize the confrontation clause goal of limiting the types of evidence a court may receive against a defendant with the public policy interest in accurate factfinding, the Court required both a showing of unavailability and an independent showing of indications of reliability surrounding the out-of-court declaration.[75] The Court noted, however, that courts need not perform such an inquiry when the evidence falls under a well established hearsay exception.[76] The Court further asserted that the co-conspirator exception to the hearsay rule was sufficiently rooted in our jurisprudence that a trial court need not independently inquire into the reliability of the statements.[77]

In *Kentucky v. Stincer*[78] the Court held that a defendant lacks an absolute right under either the confrontation clause or the due process clause to be present at a pre-trial hearing to determine the competency of the minor complaining witnesses, at least as long as the defendant's counsel was permitted to attend. The 6-3 majority opinion by Justice Blackmun noted that confrontation clause cases either involve admissions of out-of-court statements or restrictions on cross-examination, both of which indicate that the purpose of the confrontation clause is to ensure a defendant the opportunity to cross-examine the witness.[79] Justice Blackmun reasoned that since the

68. *Id.* at 999, 94 L. Ed. 2d at 54.
69. *Id.*
70. The rule provides, "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . (E) a statement by a coconspirator [*sic*] of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d).
71. United States v. Inadi, 475 U.S. 387 (1986).
72. 107 S. Ct. 2775, 2780, 97 L. Ed. 2d 144, 154 (1987).
73. *Id.* at 2782, 97 L. Ed. 2d at 157.
74. 448 U.S. 56, 63 (1980).
75. *Bourjaily*, 107 S. Ct. at 2782, 97 L. Ed. 2d at 157 (citing Ohio v. Roberts, 448 U.S. at 65-66).
76. *Id.* at 2783, 97 L. Ed. 2d at 157 (citing Ohio v. Roberts, 448 U.S. at 66).
77. *Id.*, 97 L. Ed. 2d at 158.
78. 107 S. Ct. 2658, 2666, 96 L. Ed. 2d 631, 646-47 (1987).
79. *Id.* at 2663-64, 96 L. Ed. 2d at 642-43.

witnesses' competency hearing did not involve any of the matters in issue at trial and because many of the questions asked at the hearing were asked during the trial, the defendant failed to establish a violation of the defendant's confrontation rights.[80] The Court recognized the due process right of a defendant to be present whenever his presence has a reasonably substantial relation to his opportunity to defend fully against the charge.[81] Because the defendant failed to show that the defendant's presence would have contributed to a more reliable competence determination, the Court also rejected his due process claim.[82]

In *Long v. State*[83] the Texas Court of Criminal Appeals cited violations of the federal and state confrontation[84] and due process[85] clauses in holding section 2 of article 38.071[86] of the Code of Criminal Procedure unconstitutional. The statute permitted the use as evidence of the *ex parte* videotaping of a child victim in sexual abuse cases.[87] Furthermore, the statute required the child to attend the trial, authorized the defendant to call the child witness to the stand as the sole method of exercising his right to cross-examine, and alternatively authorized the prosecution to call the child and have the testimony repeated in front of the jury before cross-examination.[88] The lengthy and detailed opinion written by Judge Duncan first traced the history of both the federal and state confrontation clauses and concluded that meaningful confrontation requires the opportunity for contemporaneous cross-examination.[89] Since the statute failed to provide for contemporaneous cross-examination, it failed to meet constitutional confrontation standards.[90] The court in *Long* also held that the procedure suggested by the statute significantly altered accepted trial procedures by permitting the prosecution to present its case-in-chief twice and thereby bolster its position.[91] According to the court, the statute exchanged fairness for an advantage through duplication of evidence, which violated due process.[92]

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80. *Id.* at 2666, 96 L. Ed. 646-47.

81. *Id.* at 2667, 96 L. Ed. 2d at 647 (citing Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934)).

82. *Id.* at 2668, 96 L. Ed. 2d at 648.

83. 742 S.W.2d 302 (Tex. Crim. App. 1987) (reh'g pend.).

84. U.S. CONST. amend. VI, TEX. CONST. art. I, § 10.

85. U.S. CONST. amend. VI, TEX. CONST. art. I, § 19.

86. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon Supp. 1987).

87. *Id.*

88. *Id.*

89. *Long*, 742 S.W.2d at 318. Judge Duncan, in reaching the conclusion that both confrontation clauses were violated, stated: "a statute that is not individualized to a particular prosecution and on its face and in its operation assumes that confrontation in a particular class of cases will produce unnecessary trauma is constitutionally unacceptable." *Id.* at 317.

90. *Id.* at 321.

91. *Id.* at 322. The prosecution first introduced the tape of the witness and then called her as a witness in rebuttal. *Id.* at 304.

92. *Id.* at 322 (citing Hulin v. State, 438 S.W.2d 551 (Tex. Crim. App. 1969)). The opinion did not address sections 3 and 4 of the statute, which permit court-ordered videotaping on a case by case basis and with contemporaneous cross-examination. *See* TEX. CODE CRIM. PROC. ANN. art. 38.071, §§ 3-4 (Vernon Supp. 1987). These statutes should be read, however, in conjunction with the "presence of the defendant" due process issue discussed in *Kentucky v. Stincer*. *See supra* notes 78-82 and accompanying text.

Effective October 20, 1987 the legislature significantly amended article 38.071 of the Code of Criminal Procedure.[93] The statute as amended, however, does not address the issues raised by *Long*. In particular, the amended statute permits the admission of an *ex parte* recorded oral statement of a child victim of sexual abuse taken before indictment or the filing of a complaint.[94] Passed before the *Long* opinion was rendered, the amendment permits defense counsel to submit written interrogatories to the child.[95] The amended statute also includes provisions that permit videotaping the child's testimony and exclude the defendant from the room, but permit the defendant to "communicate contemporaneously with his attorney during periods of recess or by audio contact . . . ."[96] The amendments to the statute adopted by the 1987 legislature simply do not address the contemporaneous cross-examination requirement established by *Long*. Accordingly the statute remains suspect on constitutional grounds.

B. Opening Statements

In 1987, the Legislature amended article 36.01 of the Code of Criminal Procedure.[97] The amendment permits defense counsel to make an opening statement immediately after the prosecutor's opening statement.[98] The amendment applies to cases in which the indictment is read on or after September 1, 1987.

C. Extraneous Offenses

As last year's Survey indicated, the question of the admissibility of extraneous offenses is one of the more troubling problems facing trial courts.[99]

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93. TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1988).

94. *Id.* Section 2(a) provides:

> The recording of an oral statement of the child made before the indictment is returned or the complaint has been filed is admissible into evidence if the court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter.

Id. § 2(a).

95. *Id.* Sections 2(b) and (c) provide:

> (b) If a recording is made under Subsection (a) of this section and after an indictment is returned or a complaint has been filed, by motion of the attorney representing the state or the attorney representing the defendant and on the approval of the court, both attorneys may propound written interrogatories that shall be presented by the same neutral individual who made the initial inquiries, if possible, and recorded under the same or similar circumstances of the original recording with the time and date of the inquiry clearly indicated in the recording. (c) A recording made under Subsection (a) of this section is not admissible into evidence unless a recording made under Subsection (b) is admitted at the same time if a recording under Subsection (b) was requested prior to time of trial.

Id. § 2(b), (c).

96. *Id.* at § 4(a).

97. TEX. CODE CRIM. PROC. ANN. art. 36.01(b) (Vernon Supp. 1988).

98. *Id.* Article 36.01 was amended by adding the following language: "(b) The defendant's counsel may make the opening statement for the defendant immediately after the attorney representing the State makes the opening statement for the State . . . ." *Id.*

99. *See* Goranson, *supra* note 13, at 552-54.

The court of criminal appeals in *Templin v. State*[100] stated that the admissibility of evidence of prior misconduct is not subject to a definite test, and the court must balance the relation of the prior conduct to the alleged offense against the probative value of the evidence compared to its prejudicial effect. The two-part evaluation is generally left to the trial judge, and his decision will not be disturbed absent a clear abuse of discretion.[101] Under prior case law, a recognized exception to the extraneous offense rule applied in child sex abuse cases. Specifically, prior sex abuse episodes between the defendant and the complainant were admissible once the defendant denied the act or undermined the complainant's credibility.[102] A line of cases allowed admission of prior extraneous sexual offenses between the accused and other victims.[103] In *Boutwell v. State*,[104] a 5-4 decision with three separate concurring opinions and one concurrence in the result, the court of criminal appeals held that admitting extraneous sexual offenses involving other victims amounted to saying "once a sex offender, always a sex offender." The court then held that extraneous offenses not related to the specific offense alleged or to any aspect of the alibi defense are not admissible.[105]

D. The Defendant's Right to Testify

In *Rock v. Arkansas*[106] the defendant had been charged in the shooting death of her husband. After a hypnotic session she recalled that her finger had not been on the trigger, which indicated the gun may have been defective. The trial court refused to admit the hypnotically refreshed testimony. The Arkansas Supreme Court affirmed and adopted a per se rule against the admission of hypnotically refreshed testimony.[107] A 5-4 majority of the Supreme Court ruled that a per se rule excluding the hypnotically refreshed testimony of criminal defendants violated the constitutional right to testify on one's own behalf.[108] *Rock v. Arkansas* is the first case involving hypnosis reviewed by the Supreme Court. The Court specifically declined to decide the admissibility of testimony by previously hypnotized witnesses other than the defendant.[109] The Court based the defendant's constitutional right to

100. 711 S.W.2d 30, 33 (Tex. Crim. App. 1986) (en banc) (citing Plante v. State, 692 S.W.2d 487 (Tex. Crim. App. 1985) (en banc); Williams v. State, 662 S.W.2d 344 (Tex. Crim. App. 1983) (en banc); Murphy v. State, 587 S.W.2d 718 (Tex Crim. App. 1979)).

101. 711 S.W.2d at 33.

102. *See* Morgan v. State, 692 S.W.2d 877 (Tex. Crim. App. 1985) (extraneous acts admissable on the issue of intent); Wingo v. State, 89 Tex. Crim. 162, 229 S.W. 858 (1921).

103. *See* McDonald v. State, 513 S.W.2d 44 (Tex. Crim. App. 1974); Johnston v. State, 418 S.W.2d 522 (Tex. Crim. App. 1967). Both cases were overruled by Boutwell v. State, 719 S.W.2d 164, 179 (Tex. Crim. App. 1986).

104. 719 S.W.2d 164, 179 (Tex. Crim. App. 1986).

105. *Id.* at 180.

106. 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

107. Rock v. State, 288 Ark. 566, 573, 708 S.W.2d 78, 81 (1986), *vacated*, Rock v. Arkansas, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

108. 107 S. Ct. at 2714-15, 97 L. Ed. 2d at 53.

109. *Id.* at 2714, 97 L. Ed. 2d at 52; *see* Vester v. State, 713 S.W.2d 920, 923 (Tex. Crim. App. 1986). In *Vester* the Texas Court of Criminal Appeals side-stepped the issue of admissibility of hypnotically induced testimony by holding that the complaining witness's testimony concerning the identification of the accused was based on facts other than the hypnotically

testify on the fourteenth amendment's guarantee of compulsory process and right to personally make one's own defense and the fifth amendment's privilege against self-incrimination.[110] Writing for the majority, Justice Blackmun specifically noted that a state may not use rules of witness competency and rules of evidence to prevent the admission of relevant testimony.[111] The Court remanded the case to the trial court because the prosecution failed to submit sufficient justification to exclude all of defendant's the post-hypnosis testimony.[112]

E. Evidentiary Matters

In *Powell v. State*,[113] a capital murder case, the trial court with the defense attorney's permission ordered psychiatric examinations of the defendant for sanity and competency. Based on the results of the examinations the jury rejected the defense of insanity. At the punishment stage, the doctors testified on the issue of future dangerousness, although the prosecution failed to give the defendant or his counsel notice that a determination of future dangerousness would form part of the original examination. The defense attorney made a trial objection based on *Estelle v. Smith*.[114] The court of criminal appeals affirmed admission of the testimony, holding that when the defendant introduced testimony from any mental health expert to prove insanity, he waived his fifth amendment privilege.[115] Judge McCormick's opinion also noted that the sole purpose in the *Smith* requirement of notice to counsel was to permit counsel to consult with the defendant about his fifth amendment rights before deciding whether to answer future dangerousness questions.[116] The court reasoned that since the defendant has waived his fifth amendment rights the prosecution's failure to give notice produced no reversible sixth amendment violation.[117]

The court of criminal appeals reviewed the case law concerning third party guilt in *Erwin v. State*.[118] The *Erwin* court recognized two rules. The first rule permits the defendant to introduce evidence that identifies a state's

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induced facts. *Id.* at 923. Thus, the testimony hypnotically induced was cumulative of already reliable identification testimony. For a review of the law concerning hypnotically induced testimony see Judge Clinton's concurring opinion in *Vester*. *Id.* at 924-29.

110. Rock v. Arkansas, 107 S. Ct. at 2709, 97 L. Ed. 2d at 46. The Court held in Harris v. New York, 401 U.S. 222, 230 (1971), that the fifth amendment privilege against self-incrimination guarantees the right " 'to remain silent unless he chooses to speak in the *unfettered* exercise of his own will' . . . . The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege." *Id.*. at 230 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

111. Rock v. Arkansas, 107 S. Ct. at 2710-11, 97 L. Ed. 2d at 47-48 (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967)).

112. *Id.* at 2714-15, 97 L. Ed. 2d at 52-53.

113. 742 S.W.2d 353 (Tex. Crim. App. 1987).

114. 451 U.S. 454, 471, 473-74 (1981) (requiring warnings to accused pursuant to fifth amendment and notice to his counsel pursuant to sixth amendment before mental examinations are permitted).

115. *Powell*, 742 S.W.2d at 358.

116. *Id.*

117. *Id.*

118. 729 S.W.2d 709 (Tex. Crim. App. 1987).

witness as the perpetrator of the offense.[119] Derived from the absent party line of cases, the second rule permits the defendant to introduce evidence tending to establish that a non-prosecution witness committed the offense, but only if the prosecution's case relies on circumstantial evidence.[120]

In 1983 the Supreme Court held that refusal to submit to a lawfully requested chemical breath test did not constitute a compelled communication and therefore, was admissible against a fifth amendment self-incrimination claim.[121] A state defendant's claim that the admission of his refusal to take a chemical breath test violated the Texas constitutional self-incrimination privilege[122] was considered in *Thomas v. State*.[123] The Texas Court of Criminal Appeals held that neither language differences nor policy considerations dictated a broader meaning of compulsion under the state constitution and followed the reasoning of the Supreme Court.[124]

The *Gaskin*[125] rule compels the prosecution to tender a witness's written statement for purposes of cross-examination. In *Cullen v. State*[126] the court of criminal appeals held that the *Gaskin* rule required the prosecution to produce tape-recorded statements and transcripts of tape-recorded statements made by testifying witnesses. In *Cullen* the prosecutor taped a pretrial interview with a prosecution witness. The court of criminal appeals held that the trial court had a duty to inspect the recording *in camera* to determine whether the recording was a discoverable statement by the witness or the non-discoverable work product of the prosecutor.[127] On review of the tape, the court found it to be the prosecutor's work product and, therefore, not discoverable.[128]

V. THE TRIAL COURT'S CHARGE TO THE JURY

Any review of the law of jury charges begins with *Almanza v. State*,[129] the

119. *Id.* at 714-15 (citing Carter v. State, 390 S.W.2d 271 (Tex. Crim. App. 1965); Dubose v. State, 10 Tex. App. 230 (1881).

120. *Id.* at 715-16 (citing Ramirez v. State, 543 S.W.2d 631 (Tex. Crim. App. 1976); Stone v. State, 98 Tex. Crim. 364, 265 S.W. 900 (1924)). An analysis of the admissibility of third party declarations against penal interest begins with Dubose v. State, 10 Tex. App. 230 (1881), which stated that if evidence showed that a third party had an opportunity to commit an offense, threats by the third party had strong probative force. In the nine year period between 1902 and 1911 the court decided four cases concerning declarations against penal interest by third persons as evidence of the accused's innocence, including Blocker v. State, 55 Tex. Crim. 30, 114 S.W. 814, 815 (1908), which held such evidence was admissible, especially in circumstantial evidence cases. Subsequently, in Walsh v. State, 85 Tex. Crim. 208, 211 S.W. 241 (1919), the court, citing *Blocker*, held that such testimony was admissible only in circumstantial cases. *Id.* at 216-17, 211 S.W.2d at 245; *see* C. MCCORMICK AND R. RAY, TEXAS LAW OF EVIDENCE § 1006, at 8-9 (2d ed. 1956).

121. South Dakota v. Neville, 459 U.S. 553, 564 (1983).

122. TEX. CONST. art. I, § 10.

123. 723 S.W.2d 696 (Tex. Crim. App. 1986).

124. *Id.* at 703-04.

125. Gaskin v. State, 172 Tex. Crim. 7, 353 S.W.2d 467 (1961).

126. 719 S.W.2d 195, 197 (Tex. Crim. App. 1986).

127. *Id.* at 198.

128. *Id.*

129. 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

1985 court of criminal appeals opinion overruling more than a hundred years of case law. The *Almanza* decision presents two separate standards for appellate review. If the trial court overrules a proper objection or properly requested instruction, then the appellate court must determine whether the defendant suffered any harm.[130] If the defendant failed to make a proper objection, then only fundamental error can be reviewed, and the defendant must show that the harm is egregious.[131]

As a general rule, presumptions should not be included in a jury charge unless the presumption is established by section 2.05 of the Penal Code.[132] In *Browning v. State*[133] the court of criminal appeals noted that some trial courts had been giving jury instructions on the law of presumptions arising from sources other than the Penal Code. One such presumption, that the act of breaking and entering at nighttime raises a presumption of an intent to commit a theft, provided the subject matter in *Browning*.[134] In an opinion by Judge Clinton, the court of criminal appeals first held that old legal axioms or rules for appellate consideration do not constitute legal presumptions.[135] The court further held that a jury instruction stating the legal axiom or evidentiary presumption as a statutory presumption amounted to

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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. 645 S.W.2d at 171. If no objection or requested instruction was filed, the error must be fundamental, and only error so egregious and harmful as to deprive the accused of a fair trial will result in a reversal. 645 S.W.2d at 171-72; *see* Keck & Johnson, *supra* note 13, at 634-36, and Goranson, *supra* note 13, at 565-66.

130. Arline v. State, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). In Hayes v. State, 728 S.W.2d 804, 808 (Tex. Crim. App. 1987) the court of criminal appeals stated: "If the error was properly preserved at trial, *any* harm, regardless of degree, is sufficient to require reversal of the conviction. 'Cases involving preserved charging error will be affirmed only if no harm has occurred.' "

131. Almanza v. State, 686 S.W.2d at 172.

132. TEX. PENAL CODE ANN. § 2.05 (Vernon Supp. 1988). Section 2.05 of the Penal Code provides:

> When this code or another penal law establishes a presumption with respect to any fact, it has the following consequences:
>
> (1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and
>
> (2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows: (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt; (B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find; (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and (D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

Id.

133. 720 S.W.2d 504, 506-07 (Tex. Crim. App. 1986).

134. *Id.* at 505.

135. *Id.* at 506-07.

an improper comment on the weight of the evidence.[136]

Judge Clinton also wrote the opinion in *Johnson v. State*[137] in which the court of criminal appeals reviewed the law of parties.[138] Upon request of either side, the trial court is required to apply the law to the specific facts of the case.[139] When the law of parties is involved, the *Almanza* rule provides that if the evidence clearly supports the defendant's guilt as a primary actor, the failure to apply the law of parties to the facts, even on request, is harmless error. In contrast if a party makes a proper request and if (1) the prosecution's theory of guilt is based on the law of parties, (2) there is conflicting evidence that the defendant is guilty as a primary actor, or (3) there is a basis to reject the state's evidence that the defendant is guilty as a primary actor, then under the *Almanza* rule the failure to apply the law of parties to the facts is reversible error.[140]

The court reviewed the law concerning giving the jury a charge on accomplice witnesses in *Gamez v. State*.[141] If a prosecution witness could be prosecuted for the crime in the indictment against the defendant, the prosecution witness is an accomplice witness as a matter of law.[142] If the evidence clearly shows that the witness is an accomplice, then the jury should be in-

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136. *Id.* at 508. The case was remanded for an *Almanza* determination to see if there was any harm since the issue was raised by a proper objection to the charge. *Id.*; *see also* LaPoint v. State, No. 227-86 (Tex. Crim. App., Nov. 26, 1986) (not yet reported) (affirming appellate court reversal because some harm shown); Turner v. State, 720 S.W.2d 533 (Tex. Crim. App. 1986) (remanded for *Almanza* egregious harm test since no trial objection raised).

137. 739 S.W.2d 299 (Tex. Crim. App., 1987).

138. Sections 7.01 and 7.02 of the Penal Code provide in part:

> § 7.01. Parties To Offenses
>
> (a) 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.
>
> § 7.02. Criminal Responsibility For Conduct Of Another
>
> (a) A person is criminally responsible for an offense committed by the conduct of another if: (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense; (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.
>
> (b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

TEX. PENAL CODE ANN. §§ 7.01-.02 (Vernon 1974).

139. *Johnson*, 739 S.W.2d at 305.

140. *Id.* at 304-05.

141. 737 S.W.2d 315 (Tex. Crim. App. 1987). Whether or not a witness is an accomplice affects the consideration of sufficiency of evidence. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979). The jury or the appellate court eliminates from consideration the testimony of the accomplice and then examines the evidence of the other witnesses to ascertain whether the incriminating character of the evidence tends to connect the defendant with the commission of the offense. *Id.* If it does, the corroboration is sufficient. *Id.*

142. *Gamez*, 737 S.W.2d at 322.

structed that the witness is an accomplice witness as a matter of law.[143] If there is a question from the evidence whether or not the witness is an accomplice witness, then the jury should be instructed to determine as a matter of fact whether or not he is an accomplice witness.[144] No charge is required if the evidence clearly shows that the witness is not an accomplice witness.[145]

The court of criminal appeals' decision in *Turner v. State*[146] involved the specificity of objections to the jury charge. In *Turner* the court of appeals reversed an aggravated sexual assault conviction finding error in an instruction that the defendant could be convicted if he committed the offense within a period of three years preceding the filing of the indictment.[147] The court of appeals concluded that the instruction permitted a conviction for an offense that may have occurred prior to the effective date of the Penal Code provisions making the conduct a criminal offense.[148] The court based its reversal on the appellant's trial objection that the charge failed to apply the law to the facts and allowed the jury to find the defendant guilty of an offense with which he had not been charged in the indictment.[149] The court of criminal appeals reversed the court of appeals and affirmed the conviction by holding that the trial objection was too general and ambiguous to properly preserve error for appeal.[150]

VI. PROSECUTORIAL ARGUMENT

Claims asserting that prosecutors exceeded the bounds of proper jury argument have consistently formed the basis of criminal appeals.[151] A review of the cases decided during this Survey period yields only one significant opinion. In *Good v. State*[152] the defendant's testimony included an alibi defense. During closing argument, over objection, the prosecutor said:

> You observed his [appellant's] demeanor in this courtroom and I submit to you it is a reasonable deduction that he would have reacted in some way, shown some concern. He has just sat there cold, unnerved, uncaring, just like he was like that morning. . . . *[T]hat has to do with the fact that he is guilty and he could care less this week that he is guilty and he could care less back on [that morning]* . . . 'Anybody would be able to sympathize, would be able to have some concern for what [victim] went through.' Why . . . didn't we see any of that in his [appellant's] demeanor . . .?[153]

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143. *Id.*
144. *Id.*
145. *Id.*
146. 726 S.W.2d 140 (Tex. Crim. App. 1987).
147. Turner v. State, 701 S.W.2d 932 (Tex. App.—Beaumont 1985).
148. *Id.* at 934. The child victim testified that she had been assaulted on numerous occasions, both before and after the date alleged in the indictment. The period included times prior to the enactment of Texas Penal Code article 22.011(a)(2)(A) (effective September 1, 1983). 701 S.W.2d at 934.
149. 726 S.W.2d at 141.
150. *Id.*
151. *See* Goranson, *supra* note 13, at 566-67; Keck & Johnson, *supra* note 13, at 641.
152. 723 S.W.2d 734 (Tex. Crim. App. 1986).
153. *Id.* at 735.

The court of criminal appeals reversed the conviction, holding that, although the prosecutor may comment on the defendant's demeanor exhibited while testifying, the prosecutor must avoid commentary on all other neutral or passive and orderly courtroom demeanor of the defendant during trial.[154] The comments injected facts not contained in the record, since neutral courtroom demeanor is not evidence.[155] Furthermore, the comments constituted an unreasonable inference of guilt since the defendant is supposed to sit orderly in the courtroom.[156]

VII. PUNISHMENT AND SENTENCING

Although without direct application to Texas state law at the present time, the Supreme Court's decision in *Miller v. Florida*[157] may have some application to federal cases since Congress revised the whole federal sentencing structure on November 1, 1987.[158] The *Miller* case concerned the effect of the *ex post facto* clause[159] of the United States Constitution on changes in sentencing law. In *Miller* the State of Florida employed a new sentencing scheme that confined the trial judge's sentencing discretion significantly more than the sentencing scheme in effect at the time of the offense. The unanimous opinion, authored by Justice O'Connor, emphasized that changes in sentencing laws adopted after the defendant commits a crime may not be used if the revised guidelines are more onerous than the guidelines in effect when the defendant committed the offense.[160] Justice O'Connor stated that the basic test asked whether the law applied to events occurring before its enactment and whether the law disadvantaged the offender by affecting substantial personal rights.[161] The Court specifically noted that a defendant need not prove that he would have obtained a lesser sentence under the old law in order to show that the new law disadvantaged him.[162]

In *Kelly v. Robinson*[163] the Supreme Court held that restitution orders imposed as part of a criminal sentence are not dischargeable in bankruptcy. Unlike traditional criminal fines, restitution payments are generally forwarded to the victim. Writing for the 7-2 majority, Justice Powell reasoned

154. *Id.* at 736, 738.
155. *Id.* at 736.
156. *Id.* at 738.
157. 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).
158. Congress extensively revised chapters 229, 231, 232, and 311 of Title 18 of the United States Code effective November 1, 1987. *See* Pub. L. 98-473, Title II, ch. II, October 12, 1984, 98 Stat. 2027, as amended by Pub. L. 99-217, December 26, 1985, 99 Stat. 1728. The change basically removes the indefinite sentencing procedures and parole law and adopts a specific sentence, grid system. *See generally*, United States Sentencing Commission Guidelines and Policy Statements for the Federal Courts, 41 CRIM. L. 3087; United States Sentencing Commission Guidelines - Supplementary Materials, 41 CRIM. L. 3145.
159. Article I, section 9 of the United States Constitution provides: "No . . . ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. Article I, section 10 provides: "No state shall . . . pass any . . . ex post facto Law, . . ." U.S. CONST. art. I, § 10, cl. 1.
160. 107 S. Ct. at 2451, 96 L. Ed. 2d at 360.
161. *Id.*
162. *Id.* at 2452, 96 L. Ed. 2d at 361.
163. 107 S. Ct. 353, 362, 93 L. Ed. 2d 216, 230 (1986).

that the decision to impose restitution usually turns on the state's penal goals and the defendant's situation, rather than on the victim's injury.[164] Since restitution formed a part of a plan furthering the penal and rehabilitative interests of the state, the Court decided that restitution should be treated the same as traditional fines.[165]

The trial court in *Ellis v. State*[166] submitted a jury instruction to which the parties failed to object that told the jury the judge could impose nine conditions of probation, although article 42.12, section 6 of the Code of Criminal Procedure[167] actually contains nineteen conditions of probation. The jury instruction also stated that the trial court could not add other conditions of probation, even though article 42.12, section 3 of the Code[168] permits the trial court to impose additional conditions. Employing an *Almanza* analysis,[169] the court of criminal appeals held that the trial court's error showed egregious harm since in this case the defendant entered a guilty plea and the sole issue was probation.[170] The erroneous instructions had precluded the jury from considering that the judge could add special conditions of probation, such as drug testing. Furthermore, the prosecutor told the jury in argument that some of the conditions were unenforceable. The court of criminal appeals also found that, although the defendant received a ten year prison sentence, he appeared an excellent candidate for probation.[171]

Good time credit provided the subject for two cases decided during the Survey period. In *Ex parte Smiley*[172] the trial court revoked the accused's probation on one offense and entered a fifteen year sentence on a second offense. Due to a clerical error, the Department of Corrections was not notified of the fifteen year sentence. After being discharged on the probation revocation sentence, the defendant sought back time credit for the fifteen year sentence. The court of criminal appeals held that she was entitled to flat time credit for the time after sentencing, including the days after her release from custody.[173] She was also entitled to the same good time credit as she earned on the probation revocation sentence since the system erroneously released her through no fault of her own.[174] In the second case, *Ex parte Daniels*,[175] the court of criminal appeals allowed good time credit against a sentence for contempt awarded at the sheriff's discretion.[176]

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164. *Id.*
165. *Id.* at 363, 93 L. Ed. 2d at 231.
166. 723 S.W.2d 671 (Tex. Crim. App. 1986).
167. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6 (Vernon Supp. 1988).
168. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3 (Vernon Supp. 1988).
169. *See supra* note 129 and accompanying text.
170. *Ellis*, 723 S.W.2d at 673.
171. *Id.*
172. 730 S.W.2d 757 (Tex. Crim. App. 1987).
173. *Id.* at 759.
174. *Id.*
175. 722 S.W.2d 707 (Tex. Crim. App. 1987).
176. *Id.* at 712. *Compare Daniels with Ex parte* Cruthirds, 712 S.W.2d 749, 753-54 (Tex. Crim. App. 1986), which disallowed good time for time served as a condition of probation. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12(6)(b)(c).

As recent Surveys indicate,[177] the determination whether or not a deadly weapon is used in the commission of an offense critically affects the sentencing process. During this Survey period the court of criminal appeals decided two more cases concerning the issue. In *Ex Parte Brooks*[178] the defendant had been convicted of murder, but the trial court made no affirmative finding on the use of a deadly weapon. Nevertheless, prison authorities calculated Brook's parole eligibility date as if the trial court made an affirmative finding that a deadly weapon was used in the commission of the offense. The court of criminal appeals held that the trial court failed to enter a proper affirmative finding and ordered the prison authorities to allow good time.[179] In *Ex parte Shaw*[180] the trial court placed the defendant on probation for robbery. The trial court made no affirmative finding concerning use of a deadly weapon. Later, the trial court revoked the defendant's probation and made an affirmative finding that a deadly weapon had been used. The court of criminal appeals held that a finding of use of a deadly weapon can only be entered in the original judgment and not when probation is revoked.[181]

In 1987 the legislature amended the Code of Criminal Procedure to allow consecutive sentences when a court probates a sentence.[182] In felonies the cumulative total of suspended sentences cannot exceed ten years.[183] In misdemeanors the cumulative total cannot exceed the maximum period of imprisonment applicable to the misdemeanor offenses and in no event more than two years.[184] Further, if a defendant has been convicted in two or more cases and the court suspends the imposition of one sentence, the court cannot order a sentence of confinement to commence after completion of the suspended sentence.[185]

VIII. PROCEDURAL ASPECTS OF APPEAL

A. Retroactivity

In *Griffith v. Kentucky*[186] the United States Supreme Court announced a major change in rules concerning the retroactive application of new constitutional standards. Prior Supreme Court cases established that a decision announcing a new standard almost automatically applied non-retroactively if

177. *See* Goranson, *supra* note 13, at 568-69; Keck & Johnson, *supra* note 13, at 647-48; *see also* TEX. CODE CRIM. PROC. ANN. arts. 42.12, § 3g, 42.18, § 8 (Vernon Supp. 1988).

178. 722 S.W.2d 140 (Tex. Crim. App. 1986).

179. *Id.* at 141-42.

180. 724 S.W.2d 75 (Tex. Crim. App. 1987).

181. *Id.* at 77. In *Ex parte* Esquivel, No. 69,707 (Tex. Crim. App., June 17, 1987), the defendant was placed on a deferred adjudication pursuant to TEX. CODE CRIM. PROC. ANN. art. 42.12, § d (Vernon Supp. 1988). The court of criminal appeals held that in such situations it was proper to delay the affirmative finding until the probation is revoked and the defendant is found guilty.

182. TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (Vernon Supp. 1988). Prior case law had prohibited cumulation of probated sentences. *See* Green v. State, 706 S.W.2d 653, 658 (Tex. Crim. App. 1986).

183. TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (Vernon Supp. 1988).

184. *Id.*

185. *Id.* art. 42.08(c).

186. 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

the decision explicitly overruled past precedent.[187] In *Griffith* a 6-3 majority found the clear break analysis inappropriate because the exception was inconsistent with the nature of judicial review[188] and treated similarly situated defendants differently.[189] The Court held that any new rule for conducting criminal prosecutions should apply retroactively to all cases, both state and federal, whether pending review or not yet final, and that there should be no exception for new rules that clearly differ from past rules.[190]

B. Concurrent Sentence Doctrine

The concurrent sentence doctrine permits appellate courts to decline to review convictions on counts whose sentences run concurrently to other sentences that a court reviewed and found valid.[191] In *Ray v. United States*[192] the Supreme Court dealt a blow to the doctrine in federal cases. Under current federal law,[193] the court levies a mandatory fifty dollar special assessment against an individual on each count for which he is convicted.[194] The Supreme Court held in *Ray* that since the defendant's liability depends on the validity of each count in the judgment, the sentences are not concurrent.[195] The Court remanded the case to the court of appeals to consider the defendant's challenge to his second conviction.[196]

C. State's Right of Appeal

Article V, section 26 of the Texas Constitution[197] was amended in November 1987, to permit the state to appeal in a criminal case as authorized by the legislature.[198] Article 44.01 of the Code of Criminal Procedure[199] was amended to permit the state to appeal a court's order in a criminal case if the order: (1) dismisses an indictment, information or complaint; (2) ar-

187. In Stovall v. Denno, 388 U.S. 293, 297 (1967), the Court held that retroactivity depended on "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." In United States v. Johnson, 457 U.S. 537, 549 (1982) the Court modified the rule by stating that a new constitutional standard would apply to all cases on direct review, unless the new rule clearly broke with past precedent. Once the Court determined that the new rule was unanticipated, the second and third *Stovall* factors practically compelled a non-retroactivity finding. *Id.* at 549-50.

188. The announcing of new, prospective-only rules was deemed to be a legislative function, whereas the Court adjudicates cases and controversies. 107 S. Ct. at 713, 93 L. Ed. 2d at 658 (citing U.S. CONST. art. III, § 2).

189. *Id.* at 715-16, 93 L. Ed. 2d at 661.

190. *Id.* at 716, 93 L. Ed. 2d at 661.

191. Ray v. United States, 107 S. Ct. 2093, 2093, 95 L. Ed. 2d 693, 694 (1987) (per curiam).

192. *Id.*

193. 18 U.S.C. § 3013 (Supp. 1987).

194. United States v. Pagan, 785 F.2d 378, 380 (2nd Cir. 1986), *cert. denied*, 107 S. Ct. 667, 93 L. Ed. 2d 719 (1986).

195. 107 S. Ct. at 2093, 95 L. Ed. 2d at 694-95.

196. *Id.* at 2093-94, 95 L. Ed. 2d at 695.

197. TEX. CONST. art. V, § 26.

198. TEX. CONST. art. V, § 26 provides: "The State is entitled to appeal in criminal cases, as authorized by general law."

199. TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon Supp. 1988).

rests or modifies a judgment; (3) grants a new trial; (4) sustains a claim of former jeopardy; or (5) grants a motion to suppress evidence, a confession or an admission. The statute permits state appeals on orders granting motions to suppress only if jeopardy has not attached and the prosecuting attorney certifies that the appeal is not taken to delay and that the evidence, confession or admission is of substantial importance in the case.[200] The statute also permits the state to appeal a sentence upon a contention that the sentence is illegal.[201] Under the statute as amended, the state may appeal a ruling on a question of law if the defendant is convicted and appeals the judgment.[202] Except when a convicted defendant appeals, the state has fifteen days after the entry of order, ruling, or sentence to file notice of appeal.[203] The state is further entitled to a stay of the proceedings pending a disposition of an appeal of an order or an appeal of an illegal sentence.[204] If the state appeals and the defendant is released on bail, the defendant may remain free on the existing bail.[205] If the defendant is in custody and the state appeals, the defendant is entitled to reasonable bail unless the appeal is from an order terminating the prosecution, which entitles the defendant to release on a personal bond.[206] The state's right to appeal became effective on November 3, 1987, when a popular vote approved the constitutional amendment. The right to appeal applies to orders, rulings or sentences that occurred on or after the effective date of the amendment.[207]

D. Bail

The Texas Court of Criminal Appeals established the proper forums in which to appeal denials of bail in *Primrose v. State*.[208] If the court denies the defendant bail because he is charged with a capital offense and the proof is evident,[209] the defendant must appeal to the proper court of appeals.[210] If, however, bail is denied because the defendant has previous felony convictions or a pending felony action and the evidence substantially shows guilt,[211] the defendant must appeal to the court of criminal appeals.[212]

E. Appellate Argument

The state in *Tallant v. State*[213] conceded the invalidity of a search warrant before the court of appeals and based its argument on the harmless error

200. *Id.*
201. *Id.* art. 44.01(b).
202. *Id.* art. 44.01(c).
203. *Id.* art. 44.01(d).
204. *Id.* art. 44.01(e).
205. *Id.* art. 44.01(g).
206. *Id.*
207. Act of 1987, ch. 382, §§ 2, 3, 1987 Tex. Sess. Law Serv. 3751 (Vernon).
208. 725 S.W.2d 254 (Tex. Crim. App. 1987).
209. *See* TEX. CONST. art. I, § 11.
210. *Primrose*, 725 S.W.2d at 256.
211. *See* TEX. CONST. art. I, § 11a (expressly according a right of appeal to the court of criminal appeals).
212. *Primrose*, 725 S.W.2d at 255.
213. 742 S.W.2d 292 (Tex. Crim. App., 1987, pet. reh'g filed).

doctrine. On petition for discretionary review in the court of criminal appeals, however, the state argued that the defendant failed to properly preserve the error below. The court of criminal appeals held that the state could not concede error before the court of appeals and then argue the failure to preserve error before the court of criminal appeals.[214]

F. Test for Sufficiency on Appeal

During the last Survey period, the court of criminal appeals in *Van Guilder v. State*[215] recognized new law concerning the proper appellate standard for determining sufficiency of evidence issues raised by a jury's implicit rejection of the affirmative defense of insanity.[216] During this Survey period the court applied the new appellate standard of review to a jury's finding of competency in *Arnold v. State.*[217] The court of criminal appeals explained that since the standard of proof of incompetency is the same as the standard of proof for insanity, the standard of review for insanity established in *Van Guilder* could be used in a case involving competency.[218]

G. Effect of Reversal

Case law had firmly established that reversals for punishment error in cases in which a jury decided both guilt and punishment required a retrial on both issues.[219] In 1987 the legislature amended article 44.29 of the Code of Criminal Procedure to provide that in a case reversed for punishment error only, the case is remanded for retrial only on the issue of punishment.[220] The new rule became effective on August 31, 1987, and does not apply to capital murder cases.[221]

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214. *Id.* at 5. The court did recognize some inconsistency in prior rulings, but reminded all parties that a petition for discretionary review is "limited to those points of error decided by the courts of appeals. . . ." *Id.* at 4 (quoting Arline v. State, 721 S.W.2d 348, 353, n.9 (Tex. Crim. App. 1986)).

215. 709 S.W.2d 178, 181 (Tex. Crim. App. 1985) (en banc), *cert. denied*, 106 S. Ct. 2891, 90 L. Ed. 2d 978 (1986). For a discussion of *Van Guilder* see Goranson, *supra* note 13, at 573-74.

216. In Van Guilder v. State the court held that the appellate court must review the evidence on the insanity defense by looking at the evidence in the light most favorable to the implicit finding by the jury and then decide, by examining all the evidence, if any rational trier of fact could have found that the defendant failed to prove his defense by a preponderance of the evidence. *Van Guilder*, 709 S.W.2d at 181; *see* Schuessler v. State, 719 S.W.2d 320, 328 (Tex. Crim. App. 1986) (applying *Van Guilder* standard).

217. 719 S.W.2d 590, 592 (Tex. Crim. App. 1986).

218. *Id.*

219. "[I]f on appeal it is determined that reversible error occurred at the hearing on punishment before a jury, the Court of Criminal Appeals is without authority to direct a new trial or penalty hearing before a different jury on the issue of punishment alone." Bullard v. State, 548 S.W.2d 13, 18 (Tex. Crim. App. 1977) (reversed on other grounds in Cooper v. State, 631 S.W.2d 508 (Tex. Crim. App. 1982)). If reversible error occurs at the penalty hearing before the trial judge alone, the case on appeal may be remanded to the trial court for the proper assessment of punishment. *Bullard*, 548 S.W.2d at 18.

220. TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (Vernon Supp. 1988).

221. *Id.*, art. 44.29(c).