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CRIMINAL LAW

by

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I. FUNDAMENTAL ERROR

"During recent years, we have reversed no small number of cases for fundamental error in the court's charge."[1] The meaning of fundamental error in courts' charges to juries becomes clearer now with *Cumbie v. State*.[2] Recognizing that the *en banc* decision of *Gooden v. State*[3] settled the rule requiring reversal when the charge contains fundamental error, the Texas Court of Criminal Appeals in *Cumbie* discussed four possible types of fundamental error.[4] Error occurs when: (1) the court's charge omits an allegation in the indictment that is required to be proved, such as a culpable mental state;[5] (2) the charge to the jury substitutes a theory of the offense completely different from the theory alleged in the indictment;[6] (3) the charge to the jury authorizes conviction on the theory alleged in the indictment and on one or more other theories not alleged in the indictment;[7] and (4) the charge authorizes conviction for conduct that could not

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1. Cumbie v. State, 578 S.W.2d 732, 733 (Tex. Crim. App. 1979).
2. *Id.*
3. 576 S.W.2d 382 (Tex. Crim. App. 1979).
4. 578 S.W.2d at 733-35.
5. West v. State, 567 S.W.2d 515 (Tex. Crim. App. 1978).
6. Shaw v. State, 557 S.W.2d 305 (Tex. Crim. App. 1977).
7. "Such a charge would permit conviction on proof different from (and sometimes less than), that required to prove the allegations in the indictment." Cumbie v. State, 578 S.W.2d 732, 734 (Tex. Crim. App. 1979). Several recent aggravated robbery cases illustrate this kind of error. Aldaco v. State, 576 S.W.2d 641 (Tex. Crim. App. 1979); Clements v. State, 576 S.W.2d 390 (Tex. Crim. App. 1979); Gooden v. State, 576 S.W.2d 382 (Tex. Crim. App. 1979); Armstead v. State, 573 S.W.2d 231 (Tex. Crim. App. 1978); Brewer v. State, 572 S.W.2d 940 (Tex. Crim. App. 1978); Smith v. State, 570 S.W.2d 958 (Tex. Crim. App. 1978). Many robbery cases have been submitted to the juries on every theory of robbery and aggravated robbery found in TEX. PENAL CODE ANN. §§ 29.02-.03 (Vernon 1974), regardless of the allegations in the indictment. Williams v. State, 577 S.W.2d 241 (Tex. Crim. App. 1979); Hill v. State, 576 S.W.2d 642 (Tex. Crim. App. 1979); Todd v. State, 576 S.W.2d 636 (Tex. Crim. App. 1979); McGee v. State, 575 S.W.2d 563 (Tex. Crim. App. 1979); Bridges v. State, 574 S.W.2d 143 (Tex. Crim. App. 1978). *See also* Lee v. State, 577 S.W.2d 736 (Tex. Crim. App. 1979). Other than robbery cases illustrating this enlargement on the indictment, there have been the following types of cases: voluntary manslaughter, Garcia v. State, 574 S.W.2d 133 (Tex. Crim. App. 1978); Fella v. State, 573 S.W.2d 548 (Tex. Crim. App. 1978); injury to a child, Morter v. State, 551 S.W.2d 715 (Tex. Crim. App. 1977); prostitution, Thompson v. State, 577 S.W.2d 497 (Tex. Crim. App. 1979); unlawful possession of a firearm by a felon, Smith v. State, 574 S.W.2d 551 (Tex. Crim. App. 1978); aggravated rape, Lowry v. State, 579 S.W.2d 477 (Tex. Crim. App. 1979); burglary, Albert v. State, 579 S.W.2d 925 (Tex. Crim. App. 1979); and indecency with a child, Sandig v. State, 580 S.W.2d 584 (Tex. Crim. App. 1979).

constitute the offense charged.[8] This charge not only enlarges upon the indictment but also defines noncriminal conduct as an offense.

Any one of the four kinds of fundamental errors in the court's charge to the jury will result in reversal on appeal even though the error is not called to the trial court's attention.[9] The Texas Court of Criminal Appeals en banc has determined, however, that these fundamental errors in the court's charge to the jury must be raised on appeal since refusal of habeas corpus relief is not a denial of due process.[10] Thus, the error in the charge that is fundamental at trial or on appeal is not always fundamental error that requires habeas corpus relief.[11]

Ex parte Coleman posed this question: "Will an error in the instruction to find Coleman guilty, if he caused bodily injury to the complainant or threatened serious bodily injury violate due process because robbery by committing bodily injury was not alleged in the indictment?"[12] The indictment charged only that the defendant had placed the complainant in fear of imminent bodily injury or death by using and exhibiting a deadly weapon.[13] The dimensions of the due process clause have been delineated by the Supreme Court: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[14] The jury charge in *Coleman* enlarged upon the allegations of the indictment and permitted the accused to be convicted under a statutory offense other than that alleged in the indictment. This would constitute fundamental error on appeal but is not subject to a collateral attack by way of a habeas corpus.[15] Rarely will error in an instruction to the jury be based on constitutional grounds.[16] *Ex parte Clark*[17] closely followed *Coleman* and divided the court. The court granted habeas corpus relief because the trial court's charge failed to apply the law to the facts, thus infringing upon both the Texas Constitution and the United States Constitution. Such an infringement is fundamental to the case and denies the fair and impartial trial to which an accused is entitled under the due process provisions of the fourteenth amendment to the United States Constitution[18] and the due course of law provision in article 1, section 19 of the Texas Constitution.[19] The *Coleman* trial judge apparently applied the law to the facts; his error, not of constitutional dimension for purposes of habeas corpus, was to apply all the statutory definitions of robbery and aggravated robbery and not

8. Jackson v. State, 576 S.W.2d 88, 90 (Tex. Crim. App. 1979); Dowden v. State, 537 S.W.2d 5, 6 (Tex. Crim. App. 1976).
9. Cumbie v. State, 578 S.W.2d 732, 733 (Tex. Crim. App. 1979).
10. *Ex parte* Coleman, 574 S.W.2d 164 (Tex. Crim. App. 1978).
11. *Id.* at 165.
12. *Id.*
13. *See* TEX. PENAL CODE ANN. §§ 29.02-.03 (Vernon 1974).
14. *In re* Winship, 397 U.S. 358, 364 (1970).
15. 574 S.W.2d at 165.
16. *Id.*
17. No. 62,655 (Tex. Crim. App. Nov. 28, 1979).
18. U.S. CONST. amend. XIV.
19. TEX. CONST. art. I, § 19.

just the one for which the defendant had been indicted. The *Clark* trial judge instructed by abstract definitions and did not apply any of the law to the facts. Such an error did rise to constitutional dimension for purposes of habeas corpus.

The court has granted habeas corpus relief in a variety of cases when an essential element of the offense was omitted from the charging instrument. Relief was granted in credit card abuse cases in which the indictment failed to allege that the defendant "intended to obtain the property fraudulently and that he acted with knowledge that the card was not issued to him."[20] Relief was granted when a charging instrument failed to allege a necessary element of "escape."[21] Post-conviction application for habeas corpus relief resulted in dismissal of theft cases wherein enhancement was effected by proof of two prior misdemeanor convictions.[22] When the court found that one of the prior convictions was based upon a fatally defective information, omitting a necessary element of the offense, the court permitted the petitioner to attack the enhancement provisions of that indictment by a post-conviction writ.[23] Other instances in which relief was granted because of fatally defective charging instruments include convictions for criminal mischief,[24] unauthorized use of a motor vehicle,[25] and burglary.[26]

Under the authority of article 40.09, section 13 of the Texas Code of Criminal Procedure,[27] the court of criminal appeals will review a fundamentally defective indictment or information[28] as unassigned error, "in the interest of justice." Probably the most significant effect of a fatally defective charging instrument concerns probation revocation. When a defendant's sentence of probation is a result of a conviction based upon a fatally defective indictment or information, the original conviction based on that charging instrument will be set aside in an appeal from a probation revocation proceeding.[29] The jurisdiction of the court is not invoked by a fundmentally defective indictment, and such defect may therefore be noticed or raised at any time, including on appeal from an order revoking probation.[30] It follows that habeas corpus relief after revocation of probation will be granted for the same reason.

20. *Ex parte* Sharpe, 581 S.W.2d 183 (Tex. Crim. App. 1979); *Ex parte* Mathis, 580 S.W.2d 371 (Tex. Crim. App. 1979): *Ex parte* Dawson, 578 S.W.2d 749 (Tex. Crim. App. 1979); *Ex parte* Mathis, 571 S.W.2d 186 (Tex. Crim. App. 1978). *See also Ex parte* Seaton, 580 S.W.2d 593 (Tex. Crim. App. 1979).
21. *Ex parte* Abbey, 574 S.W.2d 104 (Tex. Crim. App. 1978); *Ex parte* McCurdy, 571 S.W.2d 31 (Tex. Crim. App. 1978).
22. *Ex parte* Lucky, 571 S.W.2d 913 (Tex. Crim. App. 1978).
23. *Id.*
24. *Ex parte* Dobbins, 571 S.W.2d 30 (Tex. Crim. App. 1978).
25. *Ex parte* Ellis, 579 S.W.2d 13 (Tex. Crim. App. 1979).
26. *Ex parte* Cranford, 579 S.W.2d 934 (Tex. Crim. App. 1979).
27. TEX. CODE CRIM. PROC. ANN. art. 40.09, § 13 (Vernon 1979).
28. Arden v. State, 572 S.W.2d 546 (Tex. Crim. App. 1978).
29. Morgan v. State, 571 S.W.2d 333 (Tex. Crim. App. 1978).
30. Daniels v. State, 573 S.W.2d 21 (Tex. Crim. App. 1978).

II. JURY CHARGES

When the error does not injure the rights of the defendant or deny him a fair and impartial trial, error in the court's charge does not require reversal. When the trial court charged both on murder[31] and on the separate offense of injury to a child,[32] which latter count had been abandoned by the state, the defendant's rights were not injured since he was convicted of murder.[33] This ruling follows Texas law that finds no harm of which a defendant may complain when the jury charge might have benefited him.[34]

In cases involving burglary of a habitation[35] a question has arisen as to how the requirement of specific intent to commit theft or a felony may be presented in an instruction to the jury, when the facts show only that the person is discovered inside the house, and nothing has been disturbed. The question of intent is, of course, a fact question for the jury. The defendant in *Stearn v. State*[36] requested a charge on circumstantial evidence, but the request was denied by the trial court. Affirming the conviction, the court held that when intent is the only element of the offense to be determined by circumstances, a charge on circumstantial evidence is not required.[37]

Although a circumstantial evidence charge under proper circumstances is required in Texas cases,[38] in many other jurisdictions it is not.[39] Texas seems to be moving away from the past rigid construction of this rule. At the present time, when confronted with a proper request for an instruction on circumstantial evidence, a trial judge should ask two questions: "(1) Is there any direct evidence on the main fact essential to guilt? (2) If no such direct evidence exists, are the proven facts so closely related to the main fact to be proved as to be the equivalent of direct evidence? An instruction on circumstantial evidence is not required when either question can clearly be resolved in the affirmative."[40] A charge on circumstantial evidence is not required when the facts are in such a close relationship to the main fact to be proven as to be equivalent to direct testimony.[41]

Hill v. State[42] reiterates the traditional Texas law that any defensive theory raised by the evidence must be submitted in an affirmative manner by instruction to the jury. Over defendant's objection the court charged, in

31. TEX. PENAL CODE ANN. §§ 19.02(a)(1)-(2) (Vernon 1974).
32. *Id.* § 22.04 (Vernon 1977).
33. DeRusse v. State, 579 S.W.2d 224 (Tex. Crim. App. 1979).
34. TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1966).
35. TEX. PENAL CODE ANN. § 30.02(a)(1) (Vernon 1974).
36. 571 S.W.2d 177 (Tex. Crim. App. 1978).
37. *Id.* at 178.
38. Hielscher v. State, 511 S.W.2d 305, 308 (Tex. Crim. App. 1974); Denny v. State, 473 S.W.2d 503, 507 (Tex. Crim. App. 1971).
39. *See, e.g.*, Thurmond v. United States, 377 F.2d 448, 457 (5th Cir. 1967). *See generally* Holland v. United States, 348 U.S. 121, 129 (1954).
40. Frazier v. State, 576 S.W.2d 617, 619 (Tex. Crim. App. 1978).
41. Adams v. State, 588 S.W.2d 597 (Tex Crim. App. 1979); Ales v. State, 587 S.W.2d 686 (Tex. Crim. App. 1979).
42. 585 S.W.2d 713 (Tex. Crim. App. 1979).

part, "that the death of [*X*] was caused by the defendant, if it was, having choked or beaten her with his hands, if he did, or if you have a reasonable doubt thereof, you will resolve such doubt in favor of the defendant and find him not guilty."[43] The court of criminal appeals held that this charge does not constitute an affirmative submission of the defensive theory (here, death by natural cause) and is erroneous.[44]

Admonishing the bench and bar to avoid fundamental error in jury instructions, the Texas Court of Criminal Appeals has referred them to forms and source materials.[45] The court noted that the indictment controls the application of the law to the facts. By adhering to this rule, the trial courts cannot commit error by expanding on the allegations in the charge.[46]

The jury instructions in *Fortenberry v. State*,[47] a capital murder case involving the death of a peace officer,[48] were inadequate and required reversal. The objection by the defendant was that the accomplice witness instruction failed to direct the jury to the requirement that the accomplice's testimony be corroborated by the facts that make the case a death penalty case.[49] This would require an instruction on corroboration of the elements of that offense, including that the officer was acting in lawful discharge of an official duty and that the defendant knew the deceased was a peace officer. An accomplice's testimony must be corroborated as to those elements of the offense, such as knowledge, that must be proved.[50]

III. INSUFFICIENCY OF THE EVIDENCE

Holding that federal habeas corpus is a proper proceeding by which a state prisoner may challenge the sufficiency of the evidence that was the basis of his conviction, the Supreme Court of the United States outlined the standard for federal courts to apply.[51] The question presented was whether the constitutional rule of *In re Winship*[52] compels a new criterion by which the validity of a state court conviction must be tested in a federal habeas corpus proceeding. Answering affirmatively, the Supreme Court indicated that the record must reflect sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt.[53] The "no

43. *Id.* at 714.
44. *Id.*; *cf.* Wilson v. State, 581 S.W.2d 661, 665 (Tex. Crim. App. 1979) (misidentification of the defendant may be properly refused as the basis for an affirmative jury charge since the requirement that the jury must find beyond a reasonable doubt that the defendant committed the offense, and the instructions on presumption of innocence (in this case the additional instruction on the law of alibi) adequately protect the defendant and substantially incorporate the requested instructions).
45. Hawkins v. State, 579 S.W.2d 923, 925 (Tex. Crim. App. 1979).
46. *Id.* at 925.
47. 579 S.W.2d 482 (Tex. Crim. App. 1979).
48. *See* TEX. PENAL CODE ANN. § 19.03(a)(1) (Vernon 1974).
49. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979).
50. 579 S.W.2d at 486.
51. Jackson v. Virginia, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).
52. 397 U.S. 358 (1970).
53. 99 S. Ct. at 2792, 61 L. Ed. 2d at 576-77.

evidence" doctrine of *Thompson v. Louisville*,[54] which had been the guide for such a review, no longer applies. Rejecting the *Thompson* test, the Court held that the standard to be applied is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[55]

Many Texas convictions have fallen since the decisions in *Burks v. United States*[56] and *Greene v. Massey*.[57] Both misdemeanor and felony convictions have toppled as a result of determinations of insufficient evidence. Various offenses have been set aside, including burglary of a building,[58] burglary of a habitation,[59] credit card abuse,[60] evading arrest,[61] forgery,[62] making a false report to a police officer,[63] murder,[64] possession of marijuana,[65] and unauthorized use of a motor vehicle.[66] *Burks* and *Greene* have now progressed to the post-conviction stage, and a conviction based upon insufficient evidence may be successfully attacked by application for a writ of habeas corpus.[67] Retroactive relief may be granted when the original conviction was reversed on insufficiency of the evidence. When accomplice testimony has not been corroborated at trial in state court, thereby creating insufficiency of evidence in the case, *Burks* and *Greene* will be given retroactive effect.[68]

IV. PARTIES TO THE OFFENSE

In *Mendez v. State*[69] the Texas Court of Criminal Appeals was confronted with the novel question of whether the law of parties applies to the offense of involuntary manslaughter. Criminal responsibility for another's actions is established by statutes defining "parties."[70] In *Mendez* the appellant accompanied a companion who, in the midst of a shooting spree, shot randomly at several houses. The appellant did not shoot at the houses, and there was testimony that he and another tried to dissuade their

54. 362 U.S. 199 (1960).
55. 99 S. Ct. at 2789, 61 L. Ed. 2d at 573.
56. 437 U.S. 1 (1978).
57. 437 U.S. 19 (1978).
58. Owens v. State, 576 S.W.2d 859 (Tex. Crim. App. 1979).
59. Robinson v. State, 570 S.W.2d 906 (Tex. Crim. App. 1978).
60. Johnson v. State, 571 S.W.2d 4 (Tex. Crim. App. 1978).
61. Rodriguez v. State, 578 S.W.2d 419 (Tex. Crim. App. 1979).
62. Chase v. State, 573 S.W.2d 247 (Tex. Crim. App. 1978); Pfleging v. State, 572 S.W.2d 517 (Tex. Crim. App. 1978).
63. Wood v. State, 577 S.W.2d 477 (Tex. Crim. App. 1979).
64. Earnhart v. State, 575 S.W.2d 551 (Tex. Crim. App. 1979).
65. Reyes v. State, 575 S.W.2d 38 (Tex. Crim. App. 1979).
66. Schershel v. State, 575 S.W.2d 548 (Tex. Crim. App. 1979).
67. *Ex parte* Mixon, 583 S.W.2d 378 (Tex. Crim. App. 1979), *petition docketed*, No. 79-608, 48 U.S.L.W. 3340 (U.S. Nov. 20, 1979).
68. *Ex parte* Colunga, 587 S.W.2d 426 (Tex. Crim. App. 1979).
69. 575 S.W.2d 36 (Tex. Crim. App. 1979).
70. *See* TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974), which states that an individual is responsible for the acts of another if he acts "with intent to promote or assist the commission of the offense, [and in so doing] he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense."

companion from shooting. One person was struck by a random bullet and died. The appellant contended that he was not guilty of involuntary manslaughter under the parties theory because there can be no accomplice to that offense. Since the principal who commits an involuntary manslaughter does not act with a specific intent, he cannot be assisted by another. The court distinguished *Gonzales v. State*,[71] which held that attempted involuntary manslaughter was not an offense in Texas. It is true that one cannot attempt with specific intent a crime lacking any element of specific intent, such as involuntary manslaughter. The court stated, however, "[i]t is entirely possible to intentionally solicit or assist an individual in committing a reckless act. We hold that the law of parties does apply to the substantive offense of involuntary manslaughter."[72]

The earlier holding of *Romo v. State*[73] has been reaffirmed in *Bowers v. State*.[74] In *Romo* it was held that a charge on the law of parties is not necessary when there is no objection by the defendant to a failure to charge on party culpability.[75] The dissent reasoned that such an omission was fundamental error in that the charge failed to apply the law under which the accused was prosecuted, and failure to object does not constitute waiver if this error in the charge is a denial of due process.[76] The careful defense counsel, however, will present timely objections concerning party culpability, or these may be waived.

The defendant in *Ruiz v. State*[77] was convicted of capital murder.[78] The court stated that the essential elements of the offense were: "(1) the appellant conspired with others to commit an aggravated robbery and (2) one of the co-conspirators (3) intentionally or knowingly (4) caused the death of an individual (5) in the course of committing or attempting to commit the aggravated robbery (6) in furtherance of the unlawful purpose of the conspiracy and (7) which should have been anticipated as a result of carrying out the conspiracy."[79] The state prosecuted the defendant as a party to the offense of capital murder under the conspiracy theory expressed in section 7.02(b) of the Texas Penal Code. Reversing the case on another ground, the court of criminal appeals determined that this portion of the criminal responsibility statute "eliminates any necessity on the part of the State to prove . . . intent to kill . . . . The evidence . . . would permit any jury to infer that the aggravated robbery was committed as a result of a conspir-

71. 532 S.W.2d 343 (Tex. Crim. App. 1976).

72. 575 S.W.2d at 38. The court also noted there is a clear trend in other jurisdictions to hold the law of parties applicable to involuntary manslaughter. *Id.* at 37. *See, e.g.*, Wade v. State, 174 Tenn. 248, 124 S.W.2d 710 (1939); Black v. State, 103 Ohio St. 434, 133 N.E. 795 (1921).

73. 568 S.W.2d 298 (Tex. Crim. App. 1978).

74. 570 S.W.2d 929 (Tex. Crim. App. 1978).

75. 568 S.W.2d at 302. For an example of such error rising to constitutional dimension, see *Ex parte* Clark, No. 62,655 (Tex. Crim. App. Nov. 28, 1979); text accompanying note 17 *supra*.

76. *Id.* at 308 (Onion, J., dissenting).

77. 579 S.W.2d 206 (Tex. Crim. App. 1979).

78. TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1974).

79. 579 S.W.2d at 209.

acy and that a murder should have been anticipated in the carrying out of the conspiracy to commit aggravated robbery."[80]

V. COMPETENCY

In determining what is a meaningful retrospective competency hearing the Fifth Circuit Court of Appeals has defined the question as whether the "quantity and quality of available evidence [is] adequate to arrive at an assessment that could be labelled as more than mere speculation."[81] The trial court to which proceedings are remanded for such a hearing must make the initial determination of meaningfulness. If the issue of competency to stand trial is raised after conviction, the convicted defendant may be entitled to a competency hearing at that late time in the proceedings. He must first show, however, that the state or federal court failed to provide him with a fair competency hearing prior to or during his trial. After that predicate is laid, the trial court must determine the meaningfulness of such a procedure. The trial court must first determine whether it is possible to reconstruct the defendant's mental state at the time prior to his trial. If the trial court finds that a meaningful competency hearing cannot be conducted, the defendant may be entitled to a new trial. If the court determines that a meaningful competency hearing can be conducted, the hearing is conducted and a disposition of the case is made accordingly.[82]

In Zapata v. Estelle[83] the Fifth Circuit Court of Appeals held that when the trial court ignores a bona fide doubt as to the defendant's competence to stand trial, the Supreme Court decision in *Pate v. Robinson*[84] requires a nunc pro tunc competency hearing if a meaningful inquiry can still be had. If not, the defendant must be retried if found competent, or released.[85] If there was a bona fide doubt of the defendant's competence to stand trial, the defendant's due process right not to be tried while he is incompetent will be applied retroactively. In *Johnston v. State*[86] the Texas Court of Criminal Appeals addressed the question at the state level and ruled in accordance with the Fifth Circuit Court of Appeals.[87]

Corley v. State[88] concerned the application of the test in *Dusky v. United States*[89] for present competency to stand trial. The trial court, over defense objections and in spite of the proffered jury charge that tracked both *Dusky* and the similar provisions of the Texas Code of Criminal Proce-

80. *Id.*
81. Martin v. Estelle, 583 F.2d 1373, 1374 (5th Cir. 1978) (quoting Bruce v. Estelle, 536 F.2d 1051, 1057 (5th Cir. 1976)).
82. *See id.*; Zapata v. Estelle, 588 F.2d 1017, 1020 (5th Cir. 1979).
83. 588 F.2d 1017 (5th Cir. 1979).
84. 383 U.S. 375 (1966).
85. 588 F.2d at 1020.
86. 587 S.W.2d 163 (Tex. Crim. App. 1979); *see* Caballero v. State, 587 S.W.2d 741 (Tex. Crim. App. 1979).
87. 587 S.W.2d at 165. The court did not, however, cite to *Zapata*.
88. 582 S.W.2d 815 (Tex. Crim. App. 1979).
89. 362 U.S. 402 (1960).

dure,[90] overruled the objections and submitted its own charge to the jury. The issue was whether the charge denied the defendant due process at the competency trial. The Texas Court of Criminal Appeals held that although *Pate* raised the competency procedure to a constitutional position by guaranteeing the defendant's right to such a hearing, the Supreme Court decision in *Dusky* does not mean that there is only one way to determine a person's competency. As long as the charge is broad enough to comply with *Dusky* and provides adequate procedural safeguards to ensure that an incompetent individual will not be convicted, the defendant is not denied due process.[91]

Sections 1 and 2(b) of article 46.02 of the Texas Code of Criminal Procedure allow the trial judge properly to withdraw a competency matter from an already empaneled jury and find as a matter of law that the defendant is presently sane.[92] The contention of the defendant in *Rivera v. State*[93] was that the trial court, sua sponte, may not take the question of competency away from the jury once the jury has been empaneled. The Texas Court of Criminal Appeals held that the issue of present insanity should not be submitted to the jury that has been empaneled for that purpose unless there is competent evidence supporting that issue.[94] The court thereby interpreted the statutes as mandating a removal of the incompetency issue from the jury, even after the competency hearing has begun, when the issue is not supported by competent testimony.[95]

The absolute right to introduce extraneous offenses to rebut a defense of insanity[96] has been overruled.[97] Extraneous offenses may, however, be probative of the presence or absence of insanity and are admissible in such instances. But the fact that another offense was committed does not, by itself, tend to rebut a claim of insanity.[98]

VI. CAPITAL MURDER

In *Wilder v. State*[99] the Texas Court of Criminal Appeals held that a defendant can be found guilty of capital murder and may also be assessed the death penalty even when the victim was killed by a co-defendant rather than by the defendant himself. The decision in *Wilder* is in accord

90. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1(a) (Vernon 1979) provides: "A person is incompetent to stand trial if he does not have: (1) sufficient present ability to consult with his lawyer with a resonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against him."

91. 582 S.W.2d at 818-19.

92. TEX. CODE CRIM. PROC. ANN. art. 46.02, §§ 1-2(b) (Vernon 1979).

93. 581 S.W.2d 161 (Tex. Crim. App. 1979).

94. *Id.* at 163.

95. *Id.*

96. Sanders v. State, 450 S.W.2d 871 (Tex. Crim. App. 1970); Sanders v. State, 449 S.W.2d 262 (Tex. Crim. App. 1970).

97. Holley v. State, 582 S.W.2d 115 (Tex. Crim. App. 1979).

98. *Id.* at 119.

99. 583 S.W.2d 349 (Tex. Crim. App. 1979).

with an earlier decision[100] of the court that reached the same result and held that sections 7.01 and 7.02 of the Texas Penal Code[101] apply to section 19.03 of the Texas Penal Code,[102] the capital murder statute, and to article 37.071 of the Texas Code of Criminal Procedure,[103] the capital sentencing procedures.

Also in *Wilder*[104] the relevancy of evidence presented at the punishment phase was questioned. The court noted that article 37.071(a)[105] has been interpreted as allowing the trial judge wide discretion in the evidence that may be introduced. The court held that the capital sentencing statutes do not require a final conviction of an extraneous offense in order for such evidence to be admissible at the punishment phase.[106]

The jury may consider the evidence presented at the guilt phase in order to resolve the three special issues submitted at the punishment phase.[107] If there is no previous extraneous offense or final conviction of the defend-

100. Livingston v. State, 542 S.W.2d 655 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977).

101. TEX. PENAL CODE ANN. § 7.01 (Vernon 1974), concerning parties to offenses, provides in part: "(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. (b) Each party to an offense may be charged with commission of the offense." TEX. PENAL CODE ANN. § 7.02 (Vernon 1974), concerning criminal responsibility for the conduct of another, states:

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
>
> . . . .
>
> (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 . . . .
>
> . . . .
>
> (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.

See, e.g., Ruiz v. State, 579 S.W.2d 206 (Tex. Crim. App. 1979).

102. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).

103. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1973) provides, *inter alia*, that upon a finding of the guilt of the defendant for a capital offense, the court must conduct a separate sentencing procedure. After the presentation of the evidence, the court must submit these issues to the jury:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id.

104. 583 S.W.2d at 361; *see* Garcia v. State, 581 S.W.2d 168 (Tex. Crim. App. 1979).

105. TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon 1973) provides, *inter alia*, that evidence may be presented in the proceeding as to any matter that the court deems relevant to the sentence.

106. 583 S.W.2d at 361.

107. McMahon v. State, 582 S.W.2d 786, 792 (Tex. Crim. App. 1979); *see* note 103 *supra*.

ant, other evidence of actions both prior to and after the primary offense may be considered by the jury at the punishment phase. Prior conduct of the defendant at the jail pending trial, which showed the defendant's attitude and treatment of other inmates in the jail, has been held admissible in the punishment trial.[108] It is apparent that the court construes the term "prior conduct" broadly when determining the relevancy of evidence at the punishment phase. When the extraneous offense is introduced into evidence at the guilt or innocence phase of a capital murder case, however, the traditional and more rigid standard is employed.[109]

The "category of cases" view was acknowledged in Texas criminal law in *Batten v. State*[110] and was reaffirmed in *Ex parte Dowden*.[111] This doctrine requires that all of the mandatory procedures[112] in death penalty cases be followed in any of the offenses categorized as capital crimes, regardless of whether the death penalty is sought. Even on a plea of guilty to capital murder in which punishment is assessed by the court at life imprisonment, the defendant and the state may not waive a jury trial.[113] Such a waiver would be an attempt to use part of the capital statutes, but not all. The category of cases view also prohibits the denial by the trial judge of fifteen peremptory strikes to the defendant, when the state, in a capital case, "waives" the death penalty.[114] The category of cases standard also precludes the waiver of the death penalty by the state in a capital case.[115]

The court of criminal appeals strained to reconcile the holding in *Dowden* with that in *Allen v. State*.[116] Allen, who committed capital murder while a juvenile, was indicted and tried for capital murder. The *Allen* majority discussed the category of cases view, affirming the trial court's conviction for capital murder and its assessment of life imprisonment.[117] The dissenting judge, referring to the same view, pointed out that since death cannot be a possible punishment for a juvenile offender, the offense is not a capital one, and the defendant should not have been so indicted.[118] Further, because a jury could not deliberate on punishment in this case, as

108. *See* Earvin v. State, 582 S.W.2d 794, 799 (Tex. Crim. App. 1979).

109. Ruiz v. State, 579 S.W.2d 206, 209 (Tex. Crim. App. 1979). When aggravated robbery is the underlying offense and the state has the burden of proving the essential elements of the offense, proof of an extraneous offense may not be introduced properly when a necessary element can be inferred from the act itself.

110. 533 S.W.2d 788 (Tex. Crim. App. 1976).

111. 580 S.W.2d 364 (Tex. Crim. App. 1979).

112. *E.g.*, in a capital felony case (1) the defendant may not waive the right of trial by jury, TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon 1975); (2) a prospective juror must state under oath that the mandatory penalty of death or life imprisonment will not affect his deliberations on any issue of fact, TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974); (3) the defendant has a right to fifteen peremptory challenges, TEX. CODE CRIM. PROC. ANN. art. 35.15(a) (Vernon 1975); and (4) upon a finding of guilt, the court must submit certain special issues to the jury, *id.* art. 37.071. *See* note 103 *supra*.

113. 580 S.W.2d at 366.

114. 533 S.W.2d at 793.

115. 580 S.W.2d at 366.

116. 552 S.W.2d 843 (Tex. Crim. App. 1977).

117. *Id.* at 847.

118. *Id.* at 847-48 (Roberts, J., dissenting).

required by article 37.071, this would be a partial use of the capital procedures, which is prohibited by the category of cases view.

The Texas Court of Criminal Appeals has declined to overturn its earlier cases construing *Witherspoon v. Illinois*.[119] In those early cases the court stated that the inability of the prospective juror to take the oath required by section 12.31(b) of the Texas Penal Code[120] automatically disqualified him and that the trial judge did not err in sustaining the state's challenge for cause although the venireman was not questioned under the *Witherspoon* rule. The resolution of the conflict in Texas between *Witherspoon* and section 12.31(b), if indeed there is one, appears imminent. In *Burns v. State*[121] the court repeated its stand that it is unnecessary to consider the *Witherspoon* question when the prospective juror has been disqualified under section 12.31(b). *Garcia v. State*[122] and *Adams v. State*[123] held likewise.

The Fifth Circuit Court of Appeals, by a three-judge panel, granted a writ of habeas corpus in *Burns v. Estelle*,[124] holding that the use of section 12.31(b) might, in some circumstances, be impermissibly broad. The Fifth Circuit pointed out that certain challenged venireman in *Burns* should have been pressed further as to how the presence of a possible death sentence might "affect" their deliberations. A mere conclusory question framed in the words of the statute is insufficient to permit disqualification when that disqualification is based only upon an ambiguous response. The court stated, "It well may be that, measured by some universal law or standard, the Texas statute is just and fair. But we must measure by *Witherspoon*, and by it Burns' death sentence cannot stand."[125]

Until granting certiorari in *Adams v. State*,[126] the Supreme Court of the United States has declined to examine the conflict between *Witherspoon*

119. 391 U.S. 510 (1968); *see, e.g.*, Moore v. State, 542 S.W.2d 664 (Tex. Crim. App. 1976). *See also* Comment, *Death Prone Jurors: The Disintegration of the Witherspoon Rule in Texas*, 9 ST. MARY'S L.J. 288 (1977).

120. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974) provides that prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. "A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberation on any issue of fact." The *Witherspoon* rule is that a venireman can be struck for cause only when he is irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. 391 U.S. 510, 522 n.21 (1968).

121. 556 S.W.2d 270 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977); *see* Villarreal v. State, 576 S.W.2d 51 (Tex. Crim. App. 1979), *cert. denied*, 100 S. Ct. 176, 62 L. Ed. 2d 114 (1979).

122. 581 S.W.2d 168 (Tex. Crim. App. 1979).

123. 577 S.W.2d 717 (Tex. Crim. App.), *cert. granted*, 48 U.S.L.W. 3387 (U.S. Dec. 11, 1979). The appellant contended that by permitting the application of § 12.31(b) to the three punishment issues specified by TEX. PENAL CODE ANN. art. 37.071 (Vernon 1973), the trial court allowed the prosecution a broader basis of exclusion than would be allowed under the *Witherspoon* rule.

124. 592 F.2d 1297 (5th Cir.), *rehearing granted*, 598 F.2d 1016 (5th Cir. 1979).

125. 592 F.2d at 1302.

126. 577 S.W.2d 717 (Tex. Crim. App.), *cert. granted*, 48 U.S.L.W. 3387 (U.S. Dec. 11, 1979).

and section 12.31(b) when that question was presented to it on appeal.[127] After the Fifth Circuit announcement in *Burns v. Estelle*,[128] the Texas Court of Criminal Appeals reaffirmed its previous stance in *Garcia* by a denial of rehearing.[129] Finally, the Fifth Circuit Court of Appeals has ordered oral arguments and briefs in the *Burns* case for an en banc determination.[130] In *Jurek v. Estelle*,[131] however, the Fifth Circuit held that failure to object to a *Witherspoon* violation did not waive the error, as that was the apparent law in Texas at that time.[132] Since *Jurek* involved a clear *Witherspoon* violation and apparently no forfeiture at that time of the habeas corpus claim in the federal system, the result in *Jurek* is not as startling as the *Burns* decision. It is possible that section 12.31(b) will meet the independent and adequate state grounds test enforced within the federal system,[133] and, accordingly, the Texas Court of Criminal Appeals' interpretation of the state statute in state cases will prevail. On the other hand, section 12.31(b) may be struck down as impermissibly broad. A positive result of the conflict is that counsel for both the state and the defense in death penalty cases presently question jurors intensely within the scope of the statute, as they continue to explore the meaning of *Witherspoon*.

VII. OTHER HOMICIDES

Since 1974 few felony-murder cases[134] are found "on the books." *Garrett v. State*[135] is such a case. The question in *Garrett* was whether aggravated assault is a valid underlying felony for a felony-murder conviction. The underlying felony in a felony-murder prosecution supplies the requisite culpable mental state and dispenses with proof of intent to cause death. The prosecution's theory in *Garrett* was that the intent to commit aggravated assault was transferred to the act that caused the homicide, thus supplying the requisite means rea. The Texas Court of Criminal Appeals reversed the conviction, stating that the act of aggravated assault that

127. *Burns v. State* 556 S.W.2d 270 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977).
128. 592 F.2d 1297 (5th Cir.), *rehearing granted*, 598 F.2d 1016 (5th Cir. 1979).
129. Garcia v. State, 581 S.W.2d 168 (Tex. Crim. App. 1979).
130. Burns v. Estelle, 598 F.2d 1016 (5th Cir. 1979).
131. 593 F.2d 672 (5th Cir. 1979).
132. *Id.* at 681-82.
133. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117 (1945).
> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights . . . . If the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 125-26.
134. TEX. PENAL CODE ANN. § 19.02(a)(3) (Vernon 1974) provides:
> (a) A person commits an offense if he . . . commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

135. 573 S.W.2d 543 (Tex. Crim. App. 1978).

caused the homicide cannot be used to boost the homicide into the murder category.[136] "The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein . . . ."[137] The transaction is indivisible. Further, aggravated assault may be a lesser included offense of voluntary manslaughter, which is precluded by statute from being the basis of a felony-murder prosecution in Texas.[138] The *Garrett* decision is the most recent statement of the court of criminal appeals on the merger doctrine. With the codification of the felony-murder rule in Texas, it can be expected that the merger doctrine will become a part of the jurisprudence.

Conspiracy to commit capital murder for remuneration[139] was the charge in *Brown v. State*.[140] Granting the appellant's motion for rehearing and setting aside the conviction for insufficient evidence, the Texas Court of Criminal Appeals, en banc, differentiated between the corpus delicti of murder and conspiracy to murder when there is a confession. While the corpus delicti of murder, a death caused by criminal means, supports and corroborates a confession to the murder, and the corpus delicti need not be entirely independent of the confession, the same rules do not apply in a conspiracy to murder case. In such a case the corpus delicti must show an agreement to commit the crime.[141] In *Brown* the proof failed to show, beyond the confession itself, that there had been an agreement to commit murder. "Absent any evidence of the corpus delicti of conspiracy, outside the extrajudicial confession itself, the conspiracy conviction founded on that confession cannot stand."[142]

Doty v. State[143] presents a mix-up similar to *Hobbs v. State*[144] concerning the allegations of an indictment for attempted capital murder. In *Hobbs* the court determined that attempted capital murder was not alleged properly but that solicitation of capital murder was sufficiently alleged.[145] The majority in *Doty* found that the indictment did allege attempted capital murder.[146] In *Hobbs* the indictment alleged a further promise to pay, while in *Doty* the consideration alleged under the "murder for hire" statute[147] was framed in both past and future tenses: "paid and promised to

136. *Id.* at 545.
137. *Id.* (quoting People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927)).
138. TEX. PENAL CODE ANN. § 19.02(a)(3) (Vernon 1974).
139. *Id.* § 19.03(a)(3) provides that a person commits capital murder if he commits murder under § 19.02(a)(1) and also "commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration." Section 15.02(a) of the Code provides: "A person commits criminal conspiracy if, with intent that a felony be committed: (1) he agrees with one or more persons that they . . . engage in conduct that would constitute the offense; and (2) he or one or more of them performs an overt act in pursuance of the agreement."
140. 576 S.W.2d 36 (Tex. Crim. App. 1979).
141. *Id.* at 43.
142. *Id.*
143. 585 S.W.2d 726 (Tex. Crim. App. 1979).
144. Hobbs v. State, 548 S.W.2d 884 (Tex. Crim. App. 1977).
145. *Id.* at 887.
146. 585 S.W.2d at 728.
147. TEX. PENAL CODE ANN. § 19.03(a)(3) (Vernon 1974).

be paid."[148] The majority held that this language, while not a "model indictment," was a proper allegation of attempt.

The dissent disagreed, however, because the indictment failed to allege an act that the appellant performed to effect the intended offense of murder.[149] Thus, the indictment was insufficient because the offense of attempted capital murder was not alleged. Some further act done in the attempt to kill the intended victim must be alleged. Further, the dissenting judge argued, without the act done to effect the intended murder, the employer would be guilty of solicitation to commit capital murder.[150] If either the employer or employee obtained a gun, that would be an overt act sufficient to allege conspiracy to commit capital murder against both.[151] But if the employee shot at the intended victim, both the employer and employee may properly be charged with attempted capital murder.[152] According to the majority in *Doty*, alleging attempted capital murder would seem to require nothing more than the employer's paying and promising to pay the employee, denoting acceptance by the employee. It may be questioned, however, whether such an act alone is "more than mere preparation that tends but fails to effect the commission of the offense intended."[153] Neither is it clear whether evidence that conforms to these allegations will show proof of an attempt. In other attempted capital murder cases, acts by the defendant constituting the attempt have been alleged in the indictment.[154] It is the "murder for hire" allegation for attempted capital murder that creates pitfalls for the persons who draft those indictments.

In *Paige v. State*[155] the Texas Court of Criminal Appeals addressed the question whether voluntary manslaughter[156] can be a lesser included offense of murder. The appellant argued that because voluntary manslaughter has an additional element requiring that the act be committed "under the immediate influence of sudden passion arising from an adequate cause,"[157] voluntary manslaughter cannot be a lesser included offense of murder. Since that argument had been rejected in a prior case,[158] the court held that the requirement of "sudden passion" is not an element of voluntary manslaughter; rather it is in the nature of a defense to murder that reduces that offense to the lesser included offense of voluntary manslaugh-

148. 585 S.W.2d at 728.
149. *Id.* at 731 (Dally, J., dissenting).
150. *Id.* at 733.
151. *Id.*
152. *Id.*
153. TEX. PENAL CODE ANN. § 15.01(a) (Vernon 1975) 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."
154. *See, e.g.*, Dovalina v. State, 564 S.W.2d 378, 379, 384-85 (Tex. Crim. App. 1978).
155. 573 S.W.2d 16 (Tex. Crim. App. 1978).
156. TEX. PENAL CODE ANN. § 19.04 (Vernon 1974).
157. *Id.*
158. Braudrick v. State, 572 S.W.2d 709 (Tex. Crim. App. 1978), *cert. denied*, 99 S. Ct. 1252, 59 L. Ed. 2d 477 (1979).

ter.[159] The state, therefore, need not prove such influence beyond a reasonable doubt.[160]

The Texas Court of Criminal Appeals has confirmed an earlier ruling[161] that if the act relied on to constitute recklessness in an involuntary manslaughter prosecution is alleged with sufficiently reasonable certainty to inform the accused of the nature of the reckless act, the state is not required to plead such acts in terms of the statutory language.[162] In *Parr v. State*[163] the court held that the involuntary manslaughter statute grounded on driving while intoxicated[164] is constitutional.

In both *Moore v. State*[165] and *Branham v. State*[166] the Texas Court of Criminal Appeals reversed the trial court for failure to charge on the defensive theory of criminally negligent homicide.[167] In both cases, which resulted in convictions of involuntary manslaughter, evidence was introduced raising the issue of criminal negligence. Pointing out that criminally negligent homicide is a lesser included offense of involuntary manslaughter, the court stated that when the evidence raises both issues, upon a proper request the issues must be submitted to the jury.[168]

VIII. CRIMINAL CONSPIRACY

An evidentiary rule in Fifth Circuit conspiracy cases has been that once an individual is shown to be clearly connected to the conspiracy group, only "slight evidence" is required to support the inference that his participation was knowing.[169] The "slight evidence" rule has been replaced by the "substantial evidence" rule. No longer is slight evidence of the defendant's knowledge of the scheme, once the conspiracy has been established, sufficient to sustain a jury's finding that he was a member of the conspiracy.[170] *United States v. Malatesta*,[171] an en banc decision, now mandates that "when the sufficiency of the evidence to support any criminal conviction, including conspiracies, is challenged on appeal the correct standard of review is *substantial evidence*."[172] This rule comports with the reason-

159. 573 S.W.2d at 18.
160. *Id.*
161. Townsley v. State, 538 S.W.2d 411 (Tex. Crim. App. 1976).
162. Arrendondo v. State, 582 S.W.2d 457 (Tex. Crim. App. 1979).
163. 575 S.W.2d 522 (Tex. Crim. App. 1979).
164. TEX. PENAL CODE ANN. § 19.05(a) (Vernon 1974) provides: "A person commits an offense if he . . . (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual."
165. 574 S.W.2d 122 (Tex. Crim. App. 1978).
166. 583 S.W.2d 782 (Tex. Crim. App. 1979).
167. TEX. PENAL CODE ANN. § 19.07 (Vernon 1974).
168. 583 S.W.2d at 784-85; 574 S.W.2d at 124.
169. *See* United States v. Teal, 582 F.2d 343, 345 (5th Cir. 1978); United States v. Evans, 572 F.2d 455, 469 (5th Cir. 1978).
170. *See* United States v. Harbin, 601 F.2d 773 (5th Cir. 1979). "For an accused to be convicted of an unlawful conspiracy, there must be proof beyond a reasonable doubt that a conspiracy existed, that he knew of it, and that, with this knowledge, he voluntarily became a part of it." *Id.* at 781.
171. 590 F.2d 1379 (5th Cir.), *cert. denied*, 99 S. Ct. 1508, 59 L. Ed. 2d 779 (1979).
172. 590 F.2d at 1382 (emphasis by the court).

able doubt burden of proof imposed upon the prosecution in all criminal cases.

United States v. James[173] overruled another long-standing rule of Fifth Circuit conspiracy cases. The former rule, announced in *United States v. Apollo*,[174] required only that the trial judge give a proper cautionary jury instruction regarding the role of hearsay evidence in conspiracy cases. This situation arose when co-conspirators' statements were introduced into evidence. It was necessary for the trial judge to instruct the jurors that the hearsay statements of co-conspirators could not be considered by the jury unless proof of the conspiracy was provided by independent, nonhearsay testimony.[175] The en banc decision in *James* requires the trial judge to make a determination outside the presence of the jury regarding the admissibility of the co-conspirators' statements.[176] The government's substantial independent evidence must establish a sufficient foundation for admission of the hearsay statements.

Although a defendant may be found guilty of different substantive and conspiracy counts in one indictment, he may not be convicted of a conspiracy that is a lesser included offense of the substantive offense. The Fifth Circuit Court of Appeals held that conspiracy to import marijuana is a lesser included offense of conducting a continuing criminal enterprise.[177] However, when one conviction is for the substantive offense of delivery of counterfeit bills and another is for conspiracy, both convictions may stand.[178]

So long as conviction for one offense requires proof of a fact not required for the conviction of the other, there is no double jeopardy.[179] In *United States v. Cowart*[180] the Fifth Circuit adhered to the "separate offense" test of *Blockburger v. United States*.[181] *Blockburger* focused on the elements of the offense charged, not the evidence.[182] The "same evidence" test does not apply. The offense of conspiracy requires proof of a conspiratorial agreement, an element that need not be proved for the crime of aiding and abetting.[183]

IX. ROBBERY

The use of force, violence, or intimidation in taking the property distin-

173. 590 F.2d 575 (5th Cir. 1979).
174. 476 F.2d 156, 163 (5th Cir. 1973).
175. *See* United States v. Escamilla, 590 F.2d 187, 189 (5th Cir. 1979).
176. 590 F.2d at 580-82; *cf.* United States v. Zule, 581 F.2d 1218, 1220 (5th Cir. 1978) (before a co-conspirator's statement may go to the jury, the government must first establish by independent evidence both the existence of a conspiracy and the accused's participtation in that conspiracy).
177. *See* United States v. Michel, 588 F.2d 986, 1000-01 (5th Cir. 1979).
178. *See* Wilkerson v. United States, 591 F.2d 1046, 1047 (5th Cir. 1979).
179. *See* United States v. Bankston, 603 F.2d 528, 533 (5th Cir. 1979).
180. 595 F.2d 1023, 1029-30 (5th Cir. 1979).
181. 284 U.S. 299 (1932).
182. *Id.* at 304.
183. *See* 595 F.2d at 1034.

guishes robbery from theft. Traditionally force, violence, or intimidation elevated a theft offense to robbery only if occurring before or during the act of taking the property. Further, the property must have been taken by the defendant with intent to obtain or maintain control. These rules have changed in Texas with the advent of the present robbery statutes.[184] Earlier cases held that the use of threats or violence must be antecedent to or during the taking of the property,[185] a rule overruled by the current robbery statutes.

Lightner v. State[186] set the guidelines for determining whether robbery has been committed when force is used during the immediate flight after the attempt or commission of theft. The court of criminal appeals determined that force or a threat of force used subsequent to the taking supplies that essential element to the attempted or committed theft to elevate it to robbery, even though the force is applied to a third person.[187] It is not clear whether the essential force element of robbery is supplied in cases in which the force or threat of force is applied merely as a means to escape.

When there is no completed theft, the robbery defendant is not entitled to a jury charge on attempted robbery, at least not under the set of facts presented in *Wells v. State*.[188] In that case the court held that the case was properly prosecuted under the robbery statute.[189] The question remains whether there can ever be attempted robbery in Texas.

Before there can be a valid aggravated robbery indictment, the robbery statutes require first that robbery must be alleged, and secondly that the aggravating factors must be alleged.[190] Failure to allege a robbery, a necessary precondition to a conviction for aggravated robbery, caused reversal in *Ex parte County*.[191] The robbery statutes also alter the common law rules that required the indictment to describe the property and to allege ownership of the property. In robbery cases prosecuted under an earlier Texas statute[192] reversible error was committed when the property taken was not described.[193] Since under the common law robbery was but an

184. TEX. PENAL CODE ANN. §§ 29.02, 29.03 (Vernon 1974).

185. *See* Crawford v. State, 509 S.W.2d 582, 584 (Tex. Crim. App. 1974); Spead v. State, 500 S.W.2d 112, 113 (Tex. Crim. App. 1973); Jones v. State, 467 S.W.2d 453, 454 (Tex. Crim. App. 1971); Johnson v. State, 35 Tex. Crim. 140, 141-42, 32 S.W. 537, 538 (1895).

186. 535 S.W.2d 176 (Tex. Crim. App. 1976).

187. *Id.* at 177-78.

188. 576 S.W.2d 857 (Tex. Crim. App. 1979).

189. *Id.* at 859.

190. TEX. PENAL CODE ANN. § 29.02(a) (Vernon 1974) provides:

> A person commits an offense if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

TEX. PENAL CODE ANN. § 29.03(a) (Vernon 1974) provides: "A person commits an offense if he commits robbery as defined in Section 21.02 . . . , and he: (1) causes serious bodily injury to another; or (2) uses or exhibits a deadly weapon." *See, e.g.*, Ulloa v. State, 570 S.W.2d 954 (Tex. Crim. App. 1978).

191. 577 S.W.2d 260, 261 (Tex. Crim. App. 1979).

192. 1895 Tex. Gen Laws, ch. 62, § 1, at 89.

193. *See Ex parte* Cannady, 571 S.W.2d 16, 16-17 (Tex. Crim. App. 1978).

aggravated form of theft, the court reasoned that when charging robbery it was necessary to describe the property.[194] Similarly, in cases prosecuted under the former robbery statute it was necessary to allege ownership of the property. Failure to do so rendered the indictment fundamentally defective.[195] Presently, however, the court has said that the common law analysis of the nature of a robbery offense no longer applies. At common law a completed theft was an element of the offense; under section 29.03, however, a completed theft is not required. Accordingly, the court has held that an indictment under section 29.03 does not require a description of the property or an allegation as to ownership.[196]

Although theft may not always be a lesser included offense of robbery, the court ruled in *Campbell v. State*[197] that in some instances it may be. When the issue is raised by the evidence, the jury must be charged on the lesser included offense of theft.[198] Shortly thereafter, the court interpreted and applied the *Campbell* ruling in *Eldred v. State*.[199] *Eldred* first requires the state to establish theft in its proof of either robbery or aggravated robbery.[200] Secondly, the entire record, not just the state's evidence, must be examined to determine whether the jury should have been charged on the lesser included offense of theft.[201] A court must search for evidence that shows that if appellant is guilty, he is guilty of theft only.[202] The court in *Eldred* also pointed out that when the defensive testimony, if believed, would prove the defendant was not guilty of any offense, a charge on the lesser included offense of theft would not be required.[203]

Conspiracy to commit aggravated robbery is rarely prosecuted in Texas. Such a conviction was obtained and affirmed, however, in *Arney v. State*.[204] In *Arney* the appellant argued that the indictment was insufficient. Although the majority opinion overruled this contention, the dissent addressed the "bootstrap" or merger theory. Stating that the gist of conspiracy[205] is the agreement to engage in felonious conduct, the dissenting judge observed that there is further required an overt act to give the conspirators an opportunity to abandon their undertaking.[206] The overt act must be one that does more than define the terms and objective of the

194. *Id.*
195. *See* Lucero v. State, 502 S.W.2d 128, 128 (Tex. Crim. App. 1973); Snow v. State, 156 Tex. Crim. 49, 238 S.W.2d 966 (1951) (citing Tex. Pen. Code art. 1408 (1925)).
196. *See Ex Parte* Lucas, 574 S.W.2d 162, 164 (Tex. Crim. App. 1978).
197. 571 S.W.2d 161, 162 (Tex. Crim. App. 1978). "The issue is not whether the primary offense is capable of proof on some theory that would not show theft. The issue is whether the State's case as presented to prove the offense charged included proof of the theft." *Id.*
198. *Id.*
199. 578 S.W.2d 721, 722-24 (Tex. Crim. App. 1979); *accord*, Williams v. State, 575 S.W.2d 30, 33 (Tex. Crim. App. 1979).
200. 578 S.W.2d at 722.
201. *Id.* at 722-23.
202. *Id.*
203. *Id.* at 724.
204. 580 S.W.2d 836 (Tex. Crim. App. 1979).
205. *See* TEX. PENAL CODE ANN. § 15.02 (Vernon 1974).
206. 580 S.W.2d at 841 (Clinton, J., dissenting).

agreement.[207] In *Arney* the overt act alleged to be in pursuance of the agreement was that the appellant had shot the victim with a gun while attempting to rob him.[208] The dissenting judge stated:

> Convinced, therefore, that the indictment in this cause clearly alleges an intent and agreement to commit the offense of robbery in describing the criminal conspiracy, I dissent to application of the notion that an allegation of an overt act involving using or exhibiting a deadly weapon may be utilized to "bootstrap" the offense to the higher grade of aggravated robbery.[209]

X. BURGLARY

A panel of the court of criminal appeals found the indictment for burglary of a habitation[210] in *Holcomb v. State*[211] to be fundamentally defective for failure to allege a culpable mental state. The indictment alleged that the defendant "did then and there unlawfully enter a habitation without the effective consent of [the victim] and therein attempted to commit rape."[212] The state unsuccessfully argued that *Teniente v. State*[213] applied.[214] In *Teniente* the allegation that the entry was "with the intent to commit theft" was held to be sufficient to allege the necessary culpable mental state.[215] The specific intent alleged stood in lieu of any other required allegation, and the indictment was not therefore defective. The application of *Dovalina v. State*[216] likewise proved ineffectual in rescuing this indictment.[217] In *Dovalina* the indictment for attempted capital murder had been deemed sufficient. The allegation that the defendant "did then and there unlawfully, knowingly and intentionally attempt to cause the death" of the victim sufficed even though there was no allegation of specific intent to commit the offense of murder.[218] An allegation of attempt may be substituted for intent.[219] The words, "attempt to cause the death" of an individual necessarily include the intent to cause the death of an individual.[220]

Under *Greene v. Massey*[221] and *Burks v. United States*[222] an indictment will not be ordered dismissed when the case is reversed because the evi-

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207. *Id.*
208. *Id.* at 839.
209. *Id.* at 841.
210. *See* TEX. PENAL CODE ANN. § 30.02 (Vernon 1974).
211. 573 S.W.2d 814 (Tex. Crim. App. 1978).
212. *Id.* at 815.
213. 533 S.W.2d 805 (Tex. Crim. App. 1976).
214. 573 S.W.2d at 815.
215. 533 S.W.2d at 805-06.
216. 564 S.W.2d 378 (Tex. Crim. App. 1978).
217. 573 S.W.2d at 815-16.
218. 564 S.W.2d at 379-81.
219. *Id.* at 380.
220. *Id.* at 381. This construction of the words "attempt" and "intent" raises such questions as whether an allegation of attempted rape includes within its meaning "with the intent to commit rape."
221. 437 U.S. 19 (1978).
222. 437 U.S. 1 (1978); *see* text accompanying notes 56-68 *supra*.

dence in a burglary of habitation case is insufficient. Rather, the defendant may be retried for the lesser included offense of burglary of a building.[223]

When alleging that a person previously convicted of a felony involving an act of violence possessed a firearm, the state may track and state a conclusory allegation. In *Bates v. State*[224] the court reaffirmed that burglary is an act of violence to property that may be alleged in the indictment and that it is not necessary to allege specific evidentiary facts to show that the burglary involved acts of violence to the property.[225]

In further definition of "habitation,"[226] the court of criminal appeals has excluded from the meaning of habitation an entry upon an unenclosed and unsecured stairway attached to a residence.[227] The trial court's charge should state that mere entry upon the stairway alone would not be burglary of a habitation.[228]

In *Garcia v. State*[229] revocation of probation based upon a charge of burglary of a habitation was reversed because the proof failed. The state abandoned the burglary allegation and proceeded to the lesser included offense of theft in the "Motion to Revoke."[230] The court held that theft is not a lesser included offense of burglary of a habitation.[231]

XI. THEFT

In *Smith v. State*[232] the Texas Court of Criminal Appeals held that if a theft indictment alleges that the property taken has a value of over $200, but fails to allege it has a value of less than $10,000, the indictment is not fundamentally defective. Although such allegations set out a felony, there is no notice to the defendant of the possible felony punishment range. A defendant, therefore, would not know whether he is charged with a second or a third degree felony.[233] The court held that such failure to allege the maximum value of the property prohibits conviction for theft over $10,000 even if the proof establishes this amount. A third degree felony conviction, however, may be had without fundamental error.[234]

Two cases caution that when merchandise belonging to a store is obtained by the defendant in a theft case, someone other than the security officer in the case may be required to be named as the "owner" in the

223. *See* Moss v. State, 574 S.W.2d 542, 545 (Tex. Crim. App. 1978).
224. 571 S.W.2d 929 (Tex. Crim. App. 1978).
225. *Id.* at 930.
226. *See* TEX. PENAL CODE ANN. § 30.02 (Vernon 1974).
227. *See* Swain v. State, 583 S.W.2d 775, 777 (Tex. Crim. App. 1979).
228. *Id.*
229. 571 S.W.2d 896 (Tex. Crim. App. 1978).
230. *Id.* at 898.
231. *Id.* at 899.
232. 573 S.W.2d 546 (Tex. Crim. App. 1978).
233. *Id.* at 547; *see* TEX. PENAL CODE ANN. § 31.03(d)(4)-(5) (Vernon 1974) which provide, in part: "An offense under this section is a felony of the third degree if the value of the property stolen is $200 or more but less than $10,000 . . . [and] a felony of the second degree if the value of the property stolen is $10,000 or more . . . ."
234. 573 S.W.2d 547 (Tex. Crim. App. 1978).

indictment.[235] The security officer cannot be the owner unless it is shown he has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor.[236] The court does not state that a security guard may never be the "owner"; thus, under some circumstances, this allegation could be proper.

In *Mulchahey v. State*,[237] a "receiving and concealing" case, the court reiterated that under the 1974 Penal Code, theft and receiving and concealing now constitute one offense, theft.[238] The elements of the offenses of theft and of unauthorized use of a motor vehicle[239] are the same except that theft contains the additional element of an intent to deprive the owner of property.[240] Further, the term "appropriate" includes the operation of a motor vehicle.[241] Because the offense of unauthorized use of a motor vehicle can be proved by the same or less than all the facts necessary to prove theft, it is a lesser included offense of theft.[242]

In some instances issuance of a bad check may be a lesser included offense of theft, such as when the state fails to prove that the defendant obtained property or fails to prove the property's value.[243] Although the statute penalizing issuance of a bad check[244] is a specific statute, it is not a special statute that encompasses all theft by check offenses. Under the facts in *Christiansen v. State*,[245] in which the state proved theft, the trial court was not required to charge the jury on issuance of a bad check.

The state, in *Wages v. State*,[246] indicted the defendant for third degree felony theft. Three misdemeanor theft cases were aggregated and defendant was convicted for a third degree felony theft enhanced by one prior felony conviction for burglary.[247] On appeal the appellant contended that to allow aggregation of the three misdemeanor theft amounts, and to allow enhancement at the same time, effectively increased the punishment from a Class A misdemeanor to a second degree felony, which represented an increase from a possible maximum of one year in the county jail for each of the three offenses to fifteen years and one day in the penitentiary, his ultimate sentence.[248] Affirming the conviction, the court held that such procedure was proper and that enhancement did not constitute cruel and

235. Commons v. State, 575 S.W.2d 518 (Tex. Crim. App. 1979); McGee v. State, 572 S.W.2d 723 (Tex. Crim. App. 1978).
236. 572 S.W.2d at 724.
237. 574 S.W.2d 112 (Tex. Crim. App. 1978).
238. *Id.* at 113; *see* TEX. PENAL CODE ANN. § 31.02 (Vernon 1974).
239. TEX. PENAL CODE ANN. § 31.07 (Vernon 1974).
240. Neely v. State, 571 S.W.2d 926, 928 (Tex. Crim. App. 1978).
241. *Id.*
242. *Id.*
243. Christiansen v. State, 575 S.W.2d 42, 45 (Tex. Crim. App. 1979).
244. TEX. PENAL CODE ANN. § 32.41(a) (Vernon 1974) provides that a person commits an offense if he issues or passes a check for payment of money knowing that the issuer does not have sufficient funds in the bank for payment in full of the check and other checks outstanding at the time of issuance.
245. 575 S.W.2d 42, 45 (Tex. Crim. App. 1979).
246. 573 S.W.2d 804 (Tex. Crim. App. 1978).
247. *Id.* at 804-05.
248. *Id.* at 805.

unusual punishment.[249]

Construing the hybrid "labor-property" provisions of the theft statutes,[250] the court determined in *Chance v. State*[251] that the auto repair transaction in that case was not hybrid.[252] Thus, theft of services in excess of $200 was not proved because the services were not clearly distinguishable from the property.[253] As a solution to this kind of problem, the court suggested that the offenses be aggregated in one indictment.[254] The conduct could then be considered as one offense, the same transaction involving theft of services and property arising from repairs to one automobile, and set out as separate counts of one indictment.

In *Cortez v. State*[255] the court construed the term "deception" as used in the theft by a check statute.[256] Applying a strict construction of the term, the court stated that any deception that occurs after the other person has completed performance of the service allegedly stolen would not meet the requirement that the deception must be such as is likely to affect the judgment of another in the transaction.[257] A later deception is not capable of affecting retrospectively judgment as to what has already been completed.[258]

Despite a new penal code, courts still scrutinize forgery cases. Appealing successfully from a conviction for passing a forged check,[259] the appellant in *Armstrong v. State*[260] argued that there was a fatal variance between the check set out in the indictment and the check introduced into evidence by the prosecution. The fatal variance, held the court, was in the bank transit number and the date on the checks. In the indictment the check bore the number "88-135" and the date "2/19/74." The check in evidence showed the bank transit number to be "88-1135" and was dated "12/19/74." The court employed the terms "strictest proof" and "almost minute precision" to describe the conformity required between the indictment and the check introduced in evidence.[261]

In *Minix v. State*,[262] a prosecution for forgery by possession with intent

249. *Id.* at 806.
250. TEX. PENAL CODE ANN. § 31.01(7)(A) (Vernon 1974) states that labor and professional service are included in the term "service."
251. 579 S.W.2d 471 (Tex. Crim. App. 1979).
252. *Id.* at 474.
253. *Id.*
254. *Id.* at 475.
255. 582 S.W.2d 119, 120-21 (Tex. Crim. App. 1979).
256. TEX. PENAL CODE ANN. § 31.01(2) (Vernon 1974).
257. 582 S.W.2d at 121.
258. *Id.*
259. *See* TEX. PENAL CODE ANN. § 32.21(a)(1)(A)(i) (Vernon 1974), which provides that "forge" means to alter, make, complete, execute or authenticate any writing so that it purports to be the act of another who did not authorize that act. Subsection (b) states that a person commits an offense if he forges a writing with intent to defraud or harm another. *Id.* § 32.21(b).
260. 573 S.W.2d 813 (Tex. Crim. App. 1978).
261. *Id.* at 814.
262. 579 S.W.2d 466 (Tex. Crim. App. 1979).

to utter,[263] the court applied the *haec verba* rule: when the check is set out *haec verba* in the indictment, the requirement that the forged instrument "purports to be the act of another" is fulfilled, so long as the name of the maker is different from the name of the defendant.[264] The court further noted that the person "who did not authorize the act" must be included as an essential element.[265] As in *Minix*, therefore, simply stating that the check purported to be the act of another will not, of itself, imply that the act was without lawful authority. The specific allegation noted above must be included to avoid fundamental error.[266]

XII. CONTROLLED SUBSTANCES

Overcoming a strong dissent, in *United States v. Hernandez*[267] the Fifth Circuit, en banc, applied the rule of lenity announced in *Bell v. United States*[268] to the case and remanded for resentencing.[269] The dissent stated that lenity was inappropriate because severity, not lenity, of punishment in narcotics cases was the intent of Congress.[270] The defendant was convicted for possession with intent to distribute and for distribution of heroin, both violations of the same statute.[271] These offenses arose from a single transaction, a sale of heroin to undercover agents. Quoting from *Bell*, the court said: " 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . Doubt will be resolved against turning a single transaction into multiple offenses . . . .' "[272] Joining the other circuits confronted with the same question of a concurrent charge of possession with intent to distribute and of distribution,[273] the court affirmed the conviction, but vacated one of the sentences.[274] In a single transaction the Fifth Circuit now will refuse to permit double punishment for possession with intent to distribute and for distribution itself.[275]

Two elements must be proven to show "possession" of a controlled substance in a state prosecution: (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused *knew* that

263. *See* TEX. PENAL CODE ANN. § 32.21(a)(1)(C) (Vernon 1974).
264. 579 S.W.2d at 467.
265. *See* TEX. PENAL CODE ANN. § 32.21(a)(1)(A)(i) (Vernon 1974).
266. 579 S.W.2d at 467.
267. 591 F.2d 1019, 1022-28 (5th Cir. 1979).
268. 349 U.S. 81, 83-84 (1955).
269. 591 F.2d at 1022.
270. *Id.* at 1027-28 (Ainsworth, J., dissenting).
271. *Id.* at 1025; *see* 21 U.S.C. § 841(a)(1) (1976).
272. 591 F.2d at 1021 (quoting Bell v. United States, 349 U.S. 81, 83-84 (1955) (emphasis omitted)).
273. *See* 21 U.S.C. § 841(a)(1) (1976).
274. 591 F.2d at 1022.
275. The court observed that, under the facts in this case, the conduct merged into a single offense. The court confined its decision, however, to the specific facts before it, and indicated that consecutive sentences might be imposed for possession with intent to distribute and distribution if there were "separate evidence of possession with intent to distribute and evidence of distribution in one or more different transactions." *Id.*

the matter possessed was contraband.[276] Many convictions have fallen for failure to prove possession, and the possibility of revival in a new trial has been made impossible by the double jeopardy decisions of *Burks*[277] and *Greene*.[278] Failure to prove either of these elements of possession will result in insufficient evidence to support a conviction, thereby requiring dismissal.[279]

An indictment for delivery of marijuana[280] must allege the quantity of marijuana that was offered to be sold or whether the offer to sell was for renumeration; otherwise the indictment fails to allege a felony offense.[281] It does, however, allege a misdemeanor offense.

Attempted violations of the Controlled Substances Act[282] are not offenses against state law.[283] The Act does not contain a general attempt provision.[284] Further, the attempt provisions of the penal laws do not apply to the Controlled Substances Act.[285]

XIII. SEX OFFENSES

The question of what constitutes aggravated rape[286] has been posed often during this survey period. The rape statutes do not, on their face, answer some defensive questions. *Gross v. State*[287] tested whether the indictment for aggravated rape must allege to whom the threat of imminent infliction of death was directed. The appellant asserted that such an omission in the indictment constituted error. The court agreed, but affirmed the conviction because the defendant was convicted for the lesser included offense of rape.[288] The defendant was not harmed because the testimony admitted by the trial judge would have been admissible to show the plain

276. Heltcel v. State, 583 S.W.2d 791, 792 (Tex. Crim. App. 1979) (emphasis added).
277. Burks v. United States, 437 U.S. 1 (1978).
278. Greene v. Massey, 437 U.S. 19 (1978).
279. *See* 583 S.W.2d at 792; Dubry v. State, 582 S.W.2d 841, 844 (Tex. Crim. App. 1979); Sewell v. State, 578 S.W.2d 131, 137 (Tex. Crim. App. 1979); Pierce v. State, 577 S.W.2d 253, 256 (Tex. Crim. App. 1979); Reyes v. State, 575 S.W.2d 38, 40 (Tex. Crim. App. 1979); Shults v. State, 575 S.W.2d 29, 30 (Tex. Crim. App. 1979); Wilkes v. State, 572 S.W.2d 538, 540 (Tex. Crim. App. 1978).
280. *See* TEX. REV. CIV. STAT. ANN. art. 4476—15, §§ 1.02(8), .02(17), 2.03(d)(10), 4.05(d) (Vernon 1976).
281. *See Ex parte* Osbourn, 574 S.W.2d 568, 569 (Tex. Crim. App. 1978); Whitaker v. State, 572 S.W.2d 956, 957 (Tex. Crim. App. 1978).
282. TEX. REV. CIV. STAT. ANN. art. 4476—15 (Vernon 1976).
283. *See Ex parte* Brantley, 574 S.W.2d 567, 567-68 (Tex. Crim. App. 1978).
284. *Id.* at 567.
285. *See* TEX. PENAL CODE ANN. § 1.03(b) (Vernon 1974), which provides, in part, that the provisions of titles 1, 2, and 3 of the code apply to offenses defined by other laws. The criminal attempts statute is in title 4.
286. TEX. PENAL CODE ANN. § 21.03(a) (Vernon 1974) states:

> A person commits an offense if he commits rape as defined . . . or rape of a child as defined . . . and he: (1) causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode; and (2) compels submission . . . by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone.

287. 580 S.W.2d 587 (Tex. Crim. App. 1979).
288. *Id.* at 588.

offense of rape by "force and threats," in any event.[289]

Nor is it required that an indictment for aggravated rape set out or describe the specific actions or deeds of the defendant that communicated the threat of serious bodily injury to the prosecutrix.[290] Thus an indictment alleging that "the Defendant did intentionally and knowingly compel the Complainant to submit to the said act of sexual intercourse by threatening serious bodily injury to be imminently inflicted on the Complainant" was sufficient.[291]

The appellant in *Berry v. State*[292] contended that although the evidence may have shown rape, it was insufficient to sustain a conviction for aggravated rape. The evidence consisted of the complainant's testimony that the object placed at the back of her neck "felt like a knife," but that she never saw it.[293] After he had driven her around town in his car, stopping occasionally to speak to his acquaintances, during which time she testified she was in fear of her life, the defendant took the complainant to an apartment where he raped her. The woman never saw a weapon. The court held that the appellant indicated by action or words that he had a weapon and that he would use it if she resisted. These acts, coupled with his threats, are sufficient evidence of a threat of serious bodily injury.[294] The concurring opinion noted that the inquiry centered on whether there was a threat of serious bodily injury since there was no threat to kill. Although reluctant to agree, the concurring judge found that the testimony of the sharp object placed on the neck of complainant plus the later discovery of a putty knife in the defendant's car was sufficient to sustain the aggravated rape conviction.[295] "[T]hreats may be communicated by acts and deeds as well as words. . . ."[296]

The court emphasized in *Rogers v. State*,[297] however, that a threat of future harm will not support a finding of aggravating circumstances.[298] The court enumerated the circumstances that would support such a finding. They are: "[A] showing that a gun or knife was used, or a threat to kill the victim was made, or serious bodily injury was inflicted, or a combination of two or more of these factors."[299] In *Little v. State*[300] the defendant struck the complainant, breaking her jaw and causing her to lose consciousness. When she regained consciousness, and while the rape occurred, the defendant threatened to kill her.[301] These circumstances ele-

289. *Id.*
290. Brem v. State, 571 S.W.2d 314, 317 (Tex. Crim. App. 1978).
291. *Id.*
292. 579 S.W.2d 487 (Tex. Crim. App. 1979).
293. *Id.* at 489.
294. *Id.* at 489-90.
295. *Id.* at 492 (Onion, J., concurring).
296. *Id.* (citations omitted).
297. 575 S.W.2d 555 (Tex. Crim. App. 1979).
298. *Id.* at 559.
299. *Id.* (footnote omitted); *accord*, Johnson v. State, 583 S.W.2d 399, 403 (Tex. Crim. App. 1979).
300. 573 S.W.2d 775 (Tex. Crim. App. 1978).
301. *Id.* at 776.

vated the rape to aggravated rape. When no weapon is displayed, however, *Blount v. State*[302] held that the threat of death or serious bodily injury, made after the rape and to prevent the rape from being reported, will not suffice as an aggravating circumstance. In *Bright v. State*[303] the court, affirming an aggravated rape conviction, distinguished *Blount*. In *Bright* the death threats were made before the rape to compel submission.[304] In *Blount* they were made after the rape.[305] The threats in *Bright* were neither conditional nor indefinite as to time.[306]

Can a substitute victim volunteer herself in an about-to-happen aggravated rape? In *Brown v. State*[307] the victim offered to substitute herself to prevent the apparently imminent aggravated rape of her younger friend. The court affirmed the conviction, stating that the fact that the victim "volunteered" did not constitute consent to the intercourse, thereby removing an essential element of the offense.[308] The court analogized the victim's acts to those of a mother protecting her daughter.[309] The court further concluded that the defendant's display of a gun and his words and actions were sufficient to overcome resistance. This imminent threat of death or serious bodily injury was sufficient to aggravate the rape offense.[310]

In *Kirtley v. State*[311] the court said the dispositive issue was the meaning of "public place," as that term is used in the public lewdness statute.[312] In *Kirtley* the defendant apparently took his new secretary out to lunch and while in his automobile, his hand came in contact with her breast.[313] The court held that for the purpose of this case, the motor vehicle was not a "public place."[314] The court carefully noted, however, that this holding does not establish a per se rule that a motor vehicle traveling on a public road is not a public place.[315]

Jacquez v. State[316] was a prosecution for indecency with a child.[317] Because the indictment alleged that the victims were two male children, the defendant argued that the indictment was defective for failing to allege each was "not his spouse."[318] The court pointed out that marriage in any manner would be impossible. Although no *Texas* case has held that the words "not his spouse" are *not* an essential element of the offense, the court stated that the defendant was apprised of the charge against him and

302. 542 S.W.2d 164 (Tex. Crim. App. 1976).
303. 585 S.W.2d 739 (Tex. Crim. App. 1979).
304. *Id.* at 742.
305. 542 S.W.2d at 165-66.
306. 585 S.W.2d at 742.
307. 576 S.W.2d 820 (Tex. Crim. App. 1979).
308. *Id.* at 823.
309. *Id.* at 823-24.
310. *Id.* at 824.
311. 585 S.W.2d 724 (Tex. Crim. App. 1979).
312. *Id.* at 725; *see* TEX. PENAL CODE ANN. § 21.07 (Vernon 1974).
313. 585 S.W.2d at 725.
314. *Id.* at 726.
315. *Id.*
316. 579 S.W.2d 247 (Tex. Crim. App. 1979).
317. *See* TEX. PENAL CODE ANN. § 21.11 (Vernon 1974).
318. 579 S.W.2d at 248.

could prepare his defense. His substantial rights were not prejudiced by the omission of which he complained.[319]

The wife of the defendant in *Garcia v. State*[320] testified against him, over objection, and his conviction for indecency with a child was affirmed. The question was whether this case came within the exception stated within article 38.11 of the Texas Code of Criminal Procedure.[321] This article provides that the spouse may testify against the other when the case involves any grade of assault or violence committed by one against the other or against a child under sixteen years of age.[322] The court applied that statute in this indecency with a child case. The victim named in the indictment was the thirteen-year-old daughter of the defendant and his wife. The court stated that the criterion for determining whether this was an offense *involving* assault was an examination of the facts and circumstances of the case, not the allegations of the indictment.[323] Here the facts showed an assault.[324] The court concluded that the wife was a competent witness in the case.[325] It is apparent that the facts in this kind of offense will often come within the statutory exception permitting the spouse to testify against the other. The exception would not apply when there is no assault involved in the indecency with a child case.

In *Briceno v. State*,[326] another indecency case, the appellant contended that the court erred in failing to charge on the lesser included offense of indecent exposure.[327] The court held that indecent exposure is a lesser included offense of indecency with a child. The lesser included offense was established by proof of the same or less than all the facts required to establish the offense charged.[328] Appellant's testimony raised the issue whether he acted "recklessly" about the presence of another, a requirement of indecent exposure, or whether he "knew" of the child's presence, a requirement for indecency with a child.[329] Consequently, the trial court should have charged on the lesser included offense of indecent exposure.[330]

In *Floyd v. State*[331] the court of criminal appeals upheld the constitutionality of the prostitution[332] and aggravated promotion of prostitution statutes.[333] The holding stated that section 43.04 was not ambiguous and vague and that the appellant had sufficient notice of the conduct proscribed by the statute and was therefore not deprived of his right to proce-

319. *Id.* at 249.
320. 573 S.W.2d 12 (Tex. Crim. App. 1978).
321. *Id.* at 15.
322. *See* TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1974).
323. 573 S.W.2d at 15.
324. *Id.*
325. *Id.* at 16.
326. 580 S.W.2d 842 (Tex. Crim. App. 1979).
327. *Id.* at 843; *see* TEX. PENAL CODE ANN. § 21.08 (Vernon 1974).
328. 580 S.W.2d at 844.
329. *Id.*
330. *Id.*
331. 575 S.W.2d 21 (Tex. Crim. App. 1978).
332. TEX. PENAL CODE ANN. § 43.02(a)(1) (Vernon Supp. 1978).
333. *Id.* § 43.04 (Vernon 1974).

dural due process.[334]

XIV. WEAPONS

With the en banc decision of *Denham v. State*[335] the court of criminal appeals resolved former difficulties encountered in determining what is a "deadly weapon."[336] The source of the disagreements in *Harris v. State*[337] and *Danzig v. State*[338] was the definition of "deadly weapon" in the Texas Penal Code.[339] A knife is not a deadly weapon per se; thus the manner of its use or intended use showing its capability of causing death or serious bodily injury must be proven when the offense is based upon a statute requiring the aggravating factor. In both *Harris* and *Danzig* the courts held that expert testimony was required before the severity of the wounds could be determined.[340] *Denham v. State* expressly overruled those two cases to the extent that a lay witness may now competently testify to facts that will authorize the jury to find that a knife is a deadly weapon.[341] Interestingly, *Calvin v. State*,[342] although published the same date as *Denham*, consisted only of the dissent, which advocated the overruling of *Harris* and *Danzig* and chastised the majority for their inconsistencies in "deadly weapon" cases involving knives. Apparently, in light of *Denham*, inconsistencies in this kind of case will now occur rarely.[343]

When the weapon that is carried by the defendant is not one defined or listed as prohibited by the Penal Code,[344] the allegations in the pleading must assert that the instrument is one that is specifically designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with the instrument. In *Loya v. State*[345] these requirements were not met, and the court reversed because the instrument alleged in the information was a tire iron. Further, the complaint and information did not allege a violation of section 46.02, which prohibits the unlawful carrying of weapons.[346]

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334. 575 S.W.2d at 24.
335. 574 S.W.2d 129 (Tex. Crim. App. 1978).
336. *See, e.g.*, Butts, *Criminal Law, Annual Survey of Texas Law*, 33 Sw. L.J. 481, 482 (1979).
337. 562 S.W.2d 463 (Tex. Crim. App. 1978).
338. 546 S.W.2d 299 (Tex. Crim. App. 1977).
339. *See* TEX. PENAL CODE ANN. § 1.07(a)(11) (Vernon 1974), which states that "deadly weapon" means: "(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable to causing death or serious bodily injury."
340. *See* 562 S.W.2d at 466-67; 546 S.W.2d at 302.
341. 574 S.W.2d 129, 131 (Tex. Crim. App. 1978).
342. 577 S.W.2d 225 (Tex. Crim. App. 1978) (Douglas, J., concurring in part and dissenting in part).
343. *See* Hart v. State, 581 S.W.2d 675, 677 (Tex. Crim. App. 1979); Cruz v. State, 576 S.W.2d 841, 842-43 (Tex. Crim. App. 1979); *cf.* Hubbard v. State, 579 S.W.2d 930, 931 (Tex. Crim. App. 1979) (whether lay or expert testimony is required will depend on a case-by-case analysis of the evidence).
344. *See* TEX. PENAL CODE ANN. §§ 46.01, .06 (Vernon 1974 & Supp. 1980).
345. 571 S.W.2d 943, 944 (Tex. Crim. App. 1978).
346. *Id.*

In two cases[347] appellants argued unsuccessfully that the prosecution is required to prove that the firearm in the case was not an antique or curio.[348] The courts pointed out that the defendant is required to raise the matter as an affirmative defense and that the state is not required to prove that the weapon is not an antique or curio.[349] Without explaining its meaning, however, the court in an earlier case held that the "firearms" statute does not automatically exclude all firearms made before 1899; it excludes from the definition of firearm only those *antique* or *curio* firearms manufactured before that date.[350] The question becomes: when is a gun manufactured before 1899 not an antique? Another case further delimited the scope of deadly weapons, holding that an air pistol is a deadly weapon because it is "manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury."[351]

The court affirmed a conviction for unlawful possession of a firearm by a felon in *Shepperd v. State*[352] and held that the statute[353] is a legitimate exercise of the Texas Consitution's[354] directive that the bearing of arms be regulated.[355] The Texas Constitution does not protect the possession of firearms by a felon.[356]

XV. JUVENILE LAW

The sanctions of *Ex parte Menefee*,[357] concerning the juvenile who is transferred from juvenile court to be tried as an adult, have been solidified in *White v. State*.[358] In a five-to-four decision the majority reaffirmed the due process mandate of *Menefee*[359] that the accused juvenile is protected by the following three-step procedure.[360] First, the juvenile court must waive jurisdiction and transfer to the district court. Secondly, the district court to which the case is transferred must conduct an examining trial. That court may find "no probable cause" and remand the case to the juvenile court, which resumes jurisdiction. Thirdly, following the examining trial the grand jury must return an indictment. The grand jury may decline to return an indictment, in which event the district court so certifies

347. Wright v. State, 582 S.W.2d 845 (Tex. Crim. App. 1979); Jackson v. State, 575 S.W.2d 567 (Tex. Crim. App. 1979).

348. *See* TEX. PENAL CODE ANN. § 46.06(d) (Vernon 1974), which provides that it is an affirmative defense that the actor's conduct was incidental to dealing with a switchblade knife, springblade knife, or short-barrel firearm solely as an antique or curio.

349. *See* 582 S.W.2d at 846; 575 S.W.2d at 569.

350. Scott v. State, 571 S.W.2d 893, 895 (Tex. Crim. App. 1978).

351. Campbell v. State, 577 S.W.2d 493, 495 (Tex. Crim. App. 1979) (citation omitted).

352. 586 S.W.2d 500 (Tex. Crim. App. 1979).

353. TEX. PENAL CODE ANN. § 46.05(a) (Vernon 1974). "A person who has been convicted of a felony involving an act of violence or threatened violence to a person or property commits an offense if he possesses a firearm away from the premises where he lives." *Id.*

354. TEX. CONST. art. I, § 23.

355. 586 S.W.2d at 502.

356. *Id.* at 504.

357. 561 S.W.2d 822 (Tex. Crim. App. 1978).

358. 576 S.W.2d 843 (Tex. Crim. App. 1979).

359. *Id.* at 844-45.

360. 561 S.W.2d at 828.

and remands the case to the juvenile court jurisdiction.[361] The juvenile is thus afforded three separate opportunities to remain within the juvenile court's jurisdiction and not to be tried as an adult.

The examining trial is a valuable right, for it furnishes another opportunity to have the criminal proceeding against the juvenile terminated and the jurisdiction of the juvenile court resumed. It is the second vital step in determining whether a juvenile should be tried as an adult. Therefore, when an indictment is returned prior to an examining trial, that indictment is void, the district court has no jurisdiction to proceed, and any resulting conviction will be set aside.[362] The court, however, has held that the juvenile may properly waive the examining trial pursuant to section 51.09(a) of the Family Code.[363]

The dissenters in *White* sharply criticized the underlying premise of *Menefee*.[364] The minority equated the juvenile examining trial with the criminal defendant's examining trial. Since the defendant in a felony prosecution is not always afforded an examining trial as a matter of right, and since an indictment terminates the right to such a hearing, this reasoning, they believed, should apply to the juvenile.[365] Further the legislative provision for an appeal from the transfer order reflects the legislative intent at the juvenile court level.[366] On the other hand, in his concurring opinion, Presiding Judge Onion, author of both *Menefee* and *Criss v. State*,[367] elevated the examining trial of the juvenile above that of the adult and maintained that it is a requisite step before a valid indictment may be returned against one who, at the time of the offense, was not yet seventeen years of age.[368] Absent a showing in the record of an examining trial or a waiver

361. *See* TEX. FAM. CODE ANN. § 54.02(h) (Vernon 1975):

> If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and transfer the child to the appropriate court for criminal proceedings. On transfer of the child for criminal proceedings, he shall be dealt with as an adult and in accordance with the Texas Code of Criminal Procedure, 1965. The transfer of custody is an arrest. The examining trial shall be conducted by the court to which the case was transferred, which may remand the child to the jurisdiction of the juvenile court.

See also id. § 54.02(i):

> If the child's case is brought to the attention of the grand jury and the grand jury does not indict for the offense charged in the complaint forwarded by the juvenile court, the district court or criminal district court shall certify the grand jury's failure to indict to the juvenile court. On receipt of the certification, the juvenile court may resume jurisdiction of the case.

362. White v. State, 576 S.W.2d at 844; *accord*, Clark v. State, 579 S.W.2d 11, 12 (Tex. Crim. App. 1979); *Ex parte* Menefee, 561 S.W.2d 822, 829-30 (Tex. Crim. App. 1978).

363. *See* Criss v. State, 563 S.W.2d 942, 945 (Tex. Crim. App. 1978). TEX. FAM. CODE ANN. § 51.09(a) (Vernon Supp. 1980) provides, in part: "Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title . . . ."

364. 576 S.W.2d at 850-51 (Davis, J., dissenting).

365. *Id.* at 852.

366. *Id.* at 851.

367. 563 S.W.2d 942 (Tex. Crim. App. 1978).

368. 576 S.W.2d at 848-49.

thereof, the juvenile is denied due process. The *White* majority held that absent the waiver, there will be no presumption of regularity of the proceedings.[369]

Of further interest is the *White* court's consideration of this issue "in the interest of justice,"[370] under authority of the Code of Criminal Procedure.[371] The issue in all of the examining trial cases is whether the convicting district court ever acquired jurisdiction. Following *Menefee*, *Criss*, and *White*, the court has granted relief by post-conviction writ, holding that the indictments in such cases are void and must be dismissed.[372]

During the survey period the question arose as to the correct disposition of the case when the district court did provide the required examining trial, in which it found "no probable cause." The court then dismissed the charges but retained jurisdiction instead of remanding to the juvenile court. Following dismissal of the charges against the juvenile, who by then was seventeen years of age, the grand jury returned indictments against him.[373] The court of criminal appeals answered the question by holding that the last action of the grand jury was also void because the juvenile court must, in that event, resume jurisdiction.[374]

Since the denial of an examining trial to the juvenile assumes constitutional proportions, this denial may be attacked for the first time on an appeal of a probation revocation or by way of post-conviction writ.[375] The court has held that since the indictment for the original offense was void, the juvenile must be released from any further confinement resulting from his conviction under such indictment.[376]

The legislature settled the question of county court and statutory county court jurisdiction in juvenile matters[377] by enacting a law authorizing each district court, county court, and statutory county court exercising any of the constitutional jurisdiction of a county or district court to be designated as a juvenile court. If the juvenile judge is not a lawyer, a trial de novo may be had on appeal.[378]

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369. *Id.* at 845.

370. *Id.* at 844.

371. *See* TEX. CODE CRIM. PROC. ANN. art. 40.09, § 13 (Vernon 1979).

372. *Ex parte* Trehan, No. 62, 647 (Tex. Crim. App. Nov. 28, 1979); *Ex parte* Hunter, 581 S.W.2d 182, 183 (Tex. Crim. App. 1979); *Ex parte* Brooks, 579 S.W.2d 250, 251-52 (Tex. Crim. App. 1979); *Ex parte* Gloston, 579 S.W.2d 212, 213 (Tex. Crim. App. 1979); *Ex parte* Juarez, 579 S.W.2d 211, 211 (Tex. Crim. App. 1979); *Ex parte* Ytuarte, 579 S.W.2d 210, 211 (Tex. Crim. App. 1979); *Ex parte* LeBlanc, 577 S.W.2d 731, 733 (Tex. Crim. App. 1979).

373. *Ex parte* Spencer, 579 S.W.2d 242, 243 (Tex. Crim. App. 1979).

374. *Id.* at 244-45.

375. *See Ex parte* Ridgeway, 579 S.W.2d 935 (Tex. Crim. App. 1979).

376. *Id.* at 936.

377. *See In re* G.B.B., 572 S.W.2d 751 (Tex. Civ. App.—El Paso 1978, no writ) (county court had jurisdiction to consider juvenile matters); E.S. v. State, 536 S.W.2d 622 (Tex. Civ. App.—San Antonio 1976, no writ) (judge of county court at law has no authority to act for county judge in juvenile matters).

378. *See* 1979 Tex. Gen. Laws, ch. 178, § 1, at 387-88 (codified at TEX. REV. CIV. STAT. ANN. art. 2338—1.1 (Vernon Supp. 1980)).

XVI. CONCLUSION

The Texas state defendant may look to three areas of substantive criminal law for fundamental error: first, to the charging instrument, which must allege every essential element of the offense; secondly, to the evidence at trial, which must be "sufficient"; thirdly, to the court's charge to the jury, which must correctly apply all of the law, including essential elements of the offense, to the facts of the case. The area in which fundamental error occurs determines disposition of that case. The court may order outright dismissal of the fatally defective charging instrument, the result being that the defendant no longer is accused of the crime. The court may find an insufficiency of evidence, which bars retrial of the defendant for that offense. In both of these instances the defendant is not limited to direct attack by way of appeal; he may properly seek post-conviction relief. The jury charge, however, is a different matter. Like the other two "areas," any fundamental error in the jury instructions may be attacked on appeal without a trial objection having been made. Only, however, when the jury charge wholly fails to apply the law to the facts of the case, thereby raising the error to the required constitutional dimension, can this otherwise fundamental error be attacked by habeas corpus proceedings. Limiting collateral attacks based upon jury instructions may be viewed as a curtailment of the number of cases to be determined by the court of criminal appeals. When one considers the due process protections afforded the defendant throughout his trial and the magnitude of the appellate procedure in Texas, this procedure is understandable.