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by

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I. CAPITAL MURDER

Jurek v. Texas[1] ended the death penalty prosecution hiatus in Texas, an interruption that stemmed from the United States Supreme Court's decision in *Furman v. Georgia*.[2] Vigorous action by district attorneys across the state resulted in 117 persons residing on "death row" by December 1979.[3] Texas accounted for almost one-fifth of the persons sentenced to death in the United States at that time.[4]

A. *Indictment*

Because of the severity of the crime alleged and the punishment inflicted, indictments for capital murder are closely scrutinized by bar and bench. Under section 19.03(a)(2) of the Texas Penal Code, intentional murder committed during the course of a robbery allows the state to indict for capital murder rather than murder,[5] and the court of criminal appeals does not require that the indictment allege the elements of the underlying robbery offense.[6] If the murder is committed during a conspiracy to commit robbery, however, the requisites of the capital murder statutes are not met. Conspiracy to rob, as contrasted with actual or attempted robbery, does not give rise to capital murder. In *English v. State*[7] the jury charge included a charge both on robbery and conspiracy to commit robbery. The defendant contended that the instruction wrongfully allowed a capital murder conviction based on the conspiracy. The court of criminal appeals disagreed and upheld the jury charge, concluding that the "conspiracy" language referred to the parties statute, section 7.02(b),[8] and not to the substantive offense of conspiracy.[9] Thus, because the jury had relied on the robbery charge, rather than the conspiracy charge, to elevate the offense, the court held that the capital murder conviction was proper.[10]

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1. 428 U.S. 262 (1976).
2. 408 U.S. 238 (1972).
3. *See* Dix, *Constitutional Validity of the Texas Capital Murder Scheme: A Continuing Question*, 43 TEX. B.J. 627, 627 (1980).
4. *Id.*
5. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1974).
6. *See* Demouchette v. State, 591 S.W.2d 488, 490 (Tex. Crim. App. 1979).
7. 592 S.W.2d 949 (Tex. Crim. App. 1980).
8. TEX. PENAL CODE ANN. § 7.02(b) (Vernon 1974).
9. 592 S.W.2d at 954-55.
10. *Id.* at 956.

In *Quinones v. State*[11] the court considered the propriety of a capital murder indictment that charged two underlying offenses. The defendant was accused of committing and attempting to commit kidnapping and robbery while intentionally causing the death of another. Such a charge is not "duplicitous," according to the *Quinones* court.[12] Apparently, if one transaction is involved in the intentional murder, more than one underlying felony may be charged so long as each is an assault-type offense such as rape, robbery, or kidnapping. In any event, the indictment must recite the name of the victim. If it does not, the overruling of a timely motion to quash a capital murder indictment constitutes reversible error.[13]

B. *Juries and Instructions*

Qualifying an impartial jury is one part of the procedure in death penalty cases. Prosecutors have invoked section 12.31(b) of the Penal Code[14] to disqualify members of the panel who would refuse to impose a death sentence. Defense attorneys, however, have noticed the fact that section 12.31(b) excludes veniremen for reasons beyond those set forth by the United States Supreme Court in *Witherspoon v. Illinois*,[15] and have based appeals upon that apparent conflict.[16] In *Adams v. Texas*[17] the United States Supreme Court ruled that the two rules may coexist, emphasizing, however, that courts may not use section 12.31(b) to exclude jurors on broader grounds than *Witherspoon* allows.[18] The two are not independent bases for disqualification; thus, section 12.31(b) may be used as part of the Texas death penalty procedure, albeit cautiously. Following the *Adams* decision, the court of criminal appeals has begun to reverse cases for *Adams* error.[19]

Once a Texas jury has rendered a guilty verdict in a capital murder case, it enters into a separate punishment proceeding. During this second phase of the trial, jurors consider three questions about the defendant, the first

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11. 592 S.W.2d 933 (Tex. Crim. App. 1980).

12. *Id.* at 944.

13. Evans v. State, 601 S.W.2d 943, 946-47 (Tex. Crim. App. 1980); *accord*, Brasfield v. State, 600 S.W.2d 288, 294 (Tex. Crim. App. 1980) (kidnap victim not named); King v. State, 594 S.W.2d 425, 426-27 (Tex. Crim. App. 1980) (rape victim not named).

14. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974) provides:

> 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 . . . unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

15. 391 U.S. 510 (1968). 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. *Id.* at 522 n.21.

16. *See generally* Butts, *Criminal Law, Annual Survey of Texas Law*, 34 SW. L.J. 493, 504-05 (1980).

17. 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

18. *Id.* at 2528, 65 L. Ed. 2d at 592.

19. *See, e.g.*, Hartfield v. State, No. 59,343 (Tex. Crim. App. Sept. 17, 1980); Evans v. State, No. 60,016 (Tex. Crim. App. Sept. 10, 1980).

being whether he deliberately killed the victim.[20] An affirmative answer to all inquiries gives rise to the death penalty. The term "deliberately" often proves to be perplexing when defendants ask the court to define it for the jury. The strongly worded dissent in *Esquivel v. State*,[21] a capital conviction that was affirmed by the court of criminal appeals, noted that the court has not specifically determined whether the charge properly may allow the jury to consider mitigating circumstances in its consideration of the first special issue of article 37.071.[22] The dissent contended that such an instruction would be proper so that jurors might understand that the term "deliberately" means more than intentionally or knowingly, the culpable mental states defined in the charge at the guilty phase.[23]

The second question asked during the punishment phase is whether a probability exists that the defendant will commit other criminal acts of violence.[24] In *Barefoot v. State*,[25] however, the court held that the trial court did not err by refusing to define "probability" in its punishment phase jury charge.[26] Moreover, in *Milton v. State*[27] the court ruled that the trial court has discretion to limit the defense's voir dire of potential jurors' understanding of the meaning of the words of article 37.071, among them "deliberately," "probability," and "criminal acts of violence."[28]

The third question asked during the punishment phase is inquired into only if it is raised by the evidence. It asks whether the defendant's conduct was an unreasonable response to the provocation, if any, by the deceased.[29] Although a defendant accused of robbery has no right of self-defense against a manager of the property who fires a gun at the defendant, he does have an imperfect self-defense claim that entitles him to submission of the provocation issue of article 37.071. Failure to submit this third issue to the jury resulted in reversible error in *Evans v. State*.[30]

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20. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1980-1981) provides that upon finding the defendant guilty of a capital offense, the court must conduct a separate sentencing proceeding. After the presentation of 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. art. 37.071(b).

21. 595 S.W.2d 516, 529 (Tex. Crim. App. 1980) (Clinton, J., dissenting).

22. *Id.* at 530; *cf.* Starvaggi v. State, 593 S.W.2d 323 (Tex. Crim. App. 1979) (instruction on temporary insanity based on intoxication adequately protected accused's rights; refusal to instruct jury to consider exculpatory excerpts from confession was proper).

23. 595 S.W.2d at 530.

24. *See* note 20 *supra*.

25. 596 S.W.2d 875 (Tex. Crim. App. 1980).

26. *Id.* at 887.

27. 599 S.W.2d 824 (Tex. Crim. App. 1980).

28. *Id.* at 826; *see* note 20 *supra*.

29. *See* note 20 *supra*.

30. 601 S.W.2d 943, 946-47 (Tex. Crim. App. 1980).

C. *Evidence*

Article 37.071 gives great discretion to the trial judge in admitting evidence during the punishment phase of a capital murder trial.[31] Following its earlier decisions, the court of criminal appeals has extended to the trial judge much leeway in his determination of relevancy.[32] Evidence of an extraneous offense is admissible at the capital punishment phase, even before a final conviction on that offense has been secured.[33]

The rule of evidence that excludes hearsay during the guilt stage of a capital trial also is applicable in the punishment phase. In *Rumbaugh v. State*[34] the state introduced tape recordings over the objection of the defendant. The reviewing court determined that a violation of the hearsay rule had occurred and reversed the case.[35]

Once a jury convicts a defendant of capital murder, the punishment hearing can have one of three possible outcomes: (1) a death sentence; (2) a life sentence; or (3) a hung jury. When a life sentence is imposed, any error in admitting or excluding evidence at the punishment phase is deemed harmless. The court so concluded in *Phelps v. State*,[36] and went on to rule that *Witherspoon* is inapplicable when the jury assesses life imprisonment and no evidence is shown that the selection process produced a panel that was necessarily "prosecution prone."[37]

Insufficiency of evidence in the punishment phase will prevent the state from seeking the death penalty again in the same case. The court of criminal appeals reached this conclusion in *Brasfield v. State*.[38] In examining the record, the court found that the circumstantial evidence introduced at trial was insufficient to support an affirmative answer to the second issue of article 37.071.[39] Thus, in future cases, the safe procedure for the state will be to seek a new indictment for murder, not capital murder, once such a finding is made by the appellate court. In *Brasfield*, however, the court remarked that "under the present indictment the offense is still capital murder . . . . [W]e are permitted the assumption that the case will be retried on an amended indictment."[40] This statement indicates that the court saw no resultant problem in a trial based upon a valid indictment for capital murder, although the state is precluded from seeking the death penalty.

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31. TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon Supp. 1980-1981).

32. *See, e.g.*, Milton v. State, 599 S.W.2d 824 (Tex. Crim. App. 1980); Davis v. State, 597 S.W.2d 358 (Tex. Crim. App. 1980); Barefoot v. State, 596 S.W.2d 875 (Tex. Crim. App. 1980); McManus v. State, 591 S.W.2d 505 (Tex. Crim. App. 1979); Demouchette v. State, 591 S.W.2d 488 (Tex. Crim. App. 1979); O'Bryan v. State, 591 S.W.2d 464 (Tex. Crim. App. 1979).

33. *See* Brooks v. State, 599 S.W.2d 312, 322 (Tex. Crim. App. 1979).

34. 589 S.W.2d 414 (Tex. Crim. App. 1979).

35. *Id.* at 417.

36. 594 S.W.2d 434, 437 (Tex. Crim. App. 1980).

37. *Id.*

38. 600 S.W.2d 288, 298 (Tex. Crim. App. 1980).

39. *Id.* at 294; *see* note 20 *supra*.

40. 600 S.W.2d at 295.

Apart from insufficiency of the evidence at the punishment phase as to one of the article 37.071 issues, another situation that may bar the state from seeking the death penalty in a retrial may be predicted: when the first jury answers one of the three article 37.071 questions "No." Differing from the insufficiency problem, this situation may be characterized as collateral estoppel in that a jury already has decided an ultimate issue. The court's answer to this precise question will have far-reaching effects on some of Texas's many death penalty cases.

II. OTHER HOMICIDES

A. *Murder*

Although the defendant is charged in a one-count indictment with capital murder, the trial court properly may accept a plea of guilty to the lesser included offense of murder without impaneling a jury. The en banc decision in *Ex parte McClelland*[41] settled the question whether reindictment is necessary after the state and the defense have negotiated a plea. Petitioner McClelland relied upon the "category of cases" theory espoused in *Ex parte Dowden*[42] and *Batten v. State*.[43] In those cases the criminal appeals court held that all of the requirements of the capital murder statutes must be followed, including a jury trial and a specified number of peremptory jury strikes.[44] Further, the court held that the state could not waive the death penalty.[45] In *McClelland* the court emphasized that these strictures are not binding when the defendant enters a plea to murder, a lesser included offense.[46] Reindictment is not required.

Fundamental error occurs when the jury charge enlarges upon the theory alleged in the indictment. The indictment in *Scott v. State*[47] was based upon section 19.02(a)(1) of the murder statutes.[48] It stated in part that the defendant "did then and there unlawfully knowingly and intentionally cause the death of an individual . . . by shooting him with a gun."[49] The jury charge, however, provided that in addition to a conviction under that section, the jury might convict the defendant under section 19.02(a)(2).[50] The court cited *Cumbie v. State*,[51] concerning fundamental errors in jury

41. 588 S.W.2d 957 (Tex. Crim. App. 1979).
42. 580 S.W.2d 364, 366 (Tex. Crim. App. 1979).
43. 533 S.W.2d 788, 793 (Tex. Crim. App. 1976).
44. 580 S.W.2d at 366; 533 S.W.2d at 793.
45. 580 S.W.2d at 366; 533 S.W.2d at 793.
46. 588 S.W.2d at 959.
47. 593 S.W.2d 724 (Tex. Crim. App. 1980).
48. TEX. PENAL CODE ANN. § 19.02(a)(1) (Vernon 1974) provides that a person commits an offense if he "intentionally or knowingly causes the death of an individual."
49. 593 S.W.2d at 724.
50. TEX. PENAL CODE ANN. § 19.02(a)(2) (Vernon 1974) provides that a person commits an offense if he "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual."
51. 578 S.W.2d 732 (Tex. Crim. App. 1979); *accord*, Young v. State, 594 S.W.2d 428 (Tex. Crim. App. 1980); Bentacur v. State, 593 S.W.2d 686 (Tex. Crim. App. 1980); Moring v. State, 591 S.W.2d 538 (Tex. Crim. App. 1979); Stewart v. State, 591 S.W.2d 537 (Tex. Crim. App. 1979); *cf.* Trostle v. State, 588 S.W.2d 925, 931 (Tex. Crim. App. 1979) (omission

charges, and reversed the conviction.[52]

Reversible error at the penalty phase of a murder trial results in a retrial of the entire case when a jury assesses the punishment.[53] The court is without authority to direct a new hearing before a different jury on the issue of punishment alone.[54] Texas lawyers predict that an imminent amendment to article 37.07 will change this procedure.

Insufficiency of the evidence in the first trial that resulted in a conviction for murder can cause a reversal of the second conviction and the defendant's release on a writ of habeas corpus.[55] The court of criminal appeals will grant retroactive relief when the original conviction is reversed on insufficiency of the evidence.[56] In two cases the court of criminal appeals relied upon *Burks v. United States*[57] and *Greene v. Massey*[58] in holding that when the evidence upon review is found to be legally insufficient to sustain a guilty verdict, the double jeopardy clause prohibits retrial.[59]

In *Nixon v. State*[60] the court construed section 19.06, an evidentiary rule in criminal cases.[61] The trial judge had refused to allow the defense to question the accused regarding conversations with the deceased just before he killed her. A hearsay objection by the state was sustained. Holding that the statute permitted testimony as to all relevant facts and circumstances surrounding the killing, the court reversed the conviction.[62]

A defendant is criminally responsible for the acts of her companion and may be convicted for murder when the evidence shows that she bound the hands of the murder victims, had a gun ready to use, was present at the home of the victims at the time of the murders, and later was arrested with her co-defendant.[63] In *LeDuc v. State*[64] the defendant requested a charge on parties that included one on the "independent impulse" of her co-de-

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from jury charge of means of causing death held not to be a denial of due process and not to be fundamental error).

52. 593 S.W.2d at 725.

53. Daniel v. State, 585 S.W.2d 688, 693 (Tex. Crim. App. 1979); *see* Bullard v. State, 548 S.W.2d 13, 18 (Tex. Crim. App. 1977).

54. Daniel v. State, 585 S.W.2d 688, 693 (Tex. Crim. App. 1979).

55. *See Ex parte* Colunga, 587 S.W.2d 426, 427 (Tex. Crim. App. 1979).

56. *See Ex parte* Reynolds, 588 S.W.2d 900, 904 (Tex. Crim. App. 1979).

57. 437 U.S. 1 (1978).

58. 437 U.S. 19 (1978).

59. *See Ex parte* Reynolds, 588 S.W.2d 900, 902-04 (Tex. Crim. App. 1979); *Ex parte* Colunga, 587 S.W.2d 426, 427 (Tex. Crim. App. 1979).

60. 587 S.W.2d 709 (Tex. Crim. App. 1979).

61. TEX. PENAL CODE ANN. § 19.06 (Vernon 1974) provides:

> In all prosecutions for murder or voluntary manslaughter, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

62. 587 S.W.2d at 711.

63. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974) 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."

64. 593 S.W.2d 678 (Tex. Crim. App. 1979).

fendant, who actually committed the offenses.[65] The defendant was in another part of the house at that time. The trial court's refusal to grant the requested charge was upheld by the court of criminal appeals.[66] The court reasoned that such a denial was proper when the charge on parties that was given fully protected the defendant.[67]

The mother of a child who died as the result of lack of medical care entered a plea of guilty to the offense of murder, while the co-indictee, her companion, was tried and convicted of the offense of injury to a child. In *Lang v. State*[68] the companion successfully argued fundamental error in the indictment because the indictment for murder made no allegation that the companion was a parent nor that the deceased was a child.[69] By writ the mother then questioned the same indictment as applied to her in *Ex parte Moss*.[70] When the omission is the conduct that is the basis of the indictment, there must be allegations that the death was caused by failure of the defendant to provide medical care, that the defendant was a parent, and that the deceased was a child. Thus, the requested relief was denied to Moss because the indictment met these requirements as to her.[71] The disposition of *Lang* raises the question of the application of the law of parties, for it is settled law that if the evidence supports a charge on the law of parties, the court may charge on the law of parties even though the indictment contains no such allegation.[72]

B. *Felony Murder*

Few felony murder indictments[73] are returned in Texas. Having been convicted of felony murder, the petitioner by habeas corpus in *Ex parte Bailey*[74] convinced four members of the court of criminal appeals, who dissented to the majority opinion denying relief, that his indictment was

65. The requested jury charge and the one submitted are quoted *id.* at 683-84. A dissent was based on the trial court's failure to charge on circumstantial evidence, citing the dissent in Coleman v. State, 530 S.W.2d 823, 826-27 (Tex. Crim. App. 1976) (Roberts, J., dissenting). 593 S.W.2d at 685 (Roberts, J., dissenting).

66. 593 S.W.2d at 684-85.

67. *Id.*

68. 586 S.W.2d 532 (Tex. Crim. App. 1979).

69. TEX. FAM. CODE ANN. § 11.01(1) (Vernon 1975) provides: " 'Child' . . . means a person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed . . . ." *Id.* § 11.01(3) defines "parent" as "the mother, a man as to whom the child is legitimate, or an adoptive mother or father."

70. 598 S.W.2d 877 (Tex. Crim. App. 1980).

71. *Id.* at 878.

72. *See* LeDuc v. State, 593 S.W.2d 678, 685 (Tex. Crim. App. 1979).

73. TEX. PENAL CODE ANN. § 19.02(a) (Vernon 1974) provides:

> A person commits an offense if he:
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> . . . .
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> (3) 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.

74. 600 S.W.2d 331 (Tex. Crim. App. 1980).

defective for failure to allege a culpable mental state.[75] Only those indictments that fail to set forth an offense are fundamentally defective, however, according to the majority, and these may be challenged for the first time in a post-conviction writ of habeas corpus.[76] The court held that the use of the word "attempt" in the indictment sufficed to supply the culpable mental state because it included "intent."[77] The dissent pointed to the differences in "attempt" cases and felony murder ones.[78] In the former the aim or desire of the defendant is an offense higher than the one committed; in the latter, the aim or desire is an offense that is less than causing death, but is one that, through the defendant's dangerous acts, escalates to murder. The dissent urged that "to permit a failed desire to be the *mens rea* of an offense that ordinarily is coupled with great malevolence is not [understandable]."[79] In the view of the dissent, a felony murder indictment should allege the appropriate culpable mental state in relation to commission of acts that cause death.[80]

C. *Voluntary Manslaughter*

The trial court refused the requested jury charge on voluntary manslaughter after charging on self-defense in the murder case of *Medlock v. State*.[81] The evidence clearly raised the theory of voluntary manslaughter, and the court of criminal appeals reversed, holding that the fact that the evidence raised the issue of self-defense did not deprive the accused of the right to an instruction on voluntary manslaughter.[82]

A trial court may properly refuse to submit a charge to the jury on involuntary manslaughter,[83] but only when the evidence does not raise the issue of the defendant's having acted in a reckless manner in causing the death of an individual. In *Stewart v. State*[84] the court held that the testimony of the defendant himself showed that he was acting in a manner that did not show recklessness, the requisite culpable mental state of involuntary man-

75. *Id.* at 334 (Clinton, J., dissenting).

76. 600 S.W.2d at 332. The court also held that no claim of deprivation of adequate notice can be raised in a habeas corpus proceeding. *Id.*

77. *Id.*; *see, e.g.*, Dovalina v. State, 564 S.W.2d 378, 379-81 (Tex. Crim. App. 1978).

78. 600 S.W.2d at 332-34. TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1980-1981) provides: "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."

79. 600 S.W.2d at 333.

80. *Id.* at 334.

81. 591 S.W.2d 485, 486 (Tex. Crim. App. 1979). *See also* Roberts v. State, 590 S.W.2d 498 (Tex. Crim. App. 1979) (trial court erred in not submitting requested charge on voluntary manslaughter when evidence fairly raised issue).

82. 591 S.W.2d at 487. TEX. PENAL CODE ANN. § 19.04(a) (Vernon 1974) provides: "A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 . . . except that he caused the death under the immediate influence of sudden passion arising from an adequate cause."

83. TEX. PENAL CODE ANN. § 19.05(a)(1) (Vernon 1974) states that a person commits an offense if "he recklessly causes the death of an individual."

84. 587 S.W.2d 148 (Tex. Crim. App. 1979).

slaughter, and the trial court did not err by refusing to so charge the jury.[85] In *Simpkins v. State*,[86] however, the court reiterated the basic proposition that when the facts raise the issue of criminally negligent homicide, a charge must be given.[87] Further, in another case,[88] the court ruled that when the evidence raises the issue, the trial court upon a proper request must submit an instruction on criminal negligence as a lesser included offense of involuntary manslaughter.[89]

Texas requires a jury charge on retreat if it is reasonable in the defendant's situation, as well as on reasonable apprehension of danger, whether real or apparent, as viewed from the defendant's standpoint.[90] When the trial court limits the jury charge on self-defense by a qualifying charge on provoking the difficulty, the jury also must be charged that the accused's right of self-defense would not necessarily be abridged by the fact that he carried arms to the scene of the difficulty. The additional instruction is necessary to ameliorate the limitation imposed upon his right of self-defense by the charge on provoking the difficulty.[91]

III. BURGLARY

A. *Indictment*

Omitting an essential element of a burglary indictment creates fundamental error. The penal statute[92] requires an allegation that the defendant's intent is to commit a felony or theft.[93] On the other hand, an indictment for attempted burglary need not allege the constituent elements of the underlying offense, that is whether a felony or a theft was attempted.[94]

When the entry is completed and a felony is then attempted, the state must properly allege the culpable mental state accompanying the entry. In *Watts v. State*[95] the indictment for burglary of a habitation and attempt to

85. *Id.* at 151.
86. 590 S.W.2d 129 (Tex. Crim. App. 1979).
87. *Id.* at 133. TEX. PENAL CODE ANN. § 19.07(a) (Vernon 1974) provides: "A person commits an offense if he causes the death of an individual by criminal negligence."
88. Ormsby v. State, 600 S.W.2d 782 (Tex. Crim. App. 1980).
89. *Id.* at 784-85.
90. *See* Valentine v. State, 587 S.W.2d 399, 401-02 (Tex. Crim. App. 1979); TEX. PENAL CODE ANN. § 9.31(a) (Vernon 1974), which provides that except in certain prescribed situations, "a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force." *See also* TEX. PENAL CODE ANN. § 9.32 (Vernon 1974) (deadly force is justified if the actor would be so justified under § 9.31, and if he reasonably believes the force is necessary to protect himself or to prevent the commission of certain crimes).
91. *See* Gassett v. State, 587 S.W.2d 695, 697 (Tex. Crim. App. 1979).
92. TEX. PENAL CODE ANN. § 30.02(a)(1) (Vernon 1974) provides that a person commits an offense if, without the effective consent of the owner, he "enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft."
93. *See, e.g., Ex parte* Nixon, 571 S.W.2d 32 (Tex. Crim. App. 1978).
94. *See* Prodon v. State, 555 S.W.2d 451, 453 (Tex. Crim. App. 1977).
95. 587 S.W.2d 159 (Tex. Crim. App. 1979).

commit rape[96] was found to be defective, and the court of criminal appeals reaffirmed its 1978 *Holcomb v. State*[97] decision. The court stated: "The bald conclusory allegation that he entered the habitation and did 'attempt to commit the felony of rape' is insufficient, as a matter of law, to charge a crime."[98] The court stated that an indictment for this offense must include an allegation of a culpable mental state.[99] As none was included in this indictment, it was found to be fundamentally defective.[100]

Noting that an indictment that is fatally defective is subject to collateral attack, the court agreed with the defendant in *Thomas v. State*[101] and reversed the case.[102] The defendant was convicted of burglary, and punishment was enhanced by two prior convictions.[103] One of the prior convictions was based upon a defective theft indictment, mandating reversal of the punishment error.[104] Because a jury had assessed punishment, the entire bifurcated trial, including the guilt-innocence phase, had to be retried.[105] When the court assesses the punishment, however, the case may be reviewed as to the punishment alone.[106]

B. *Evidence*

Applying the reasonable doubt standard in an attempted burglary case, *Solis v. State*,[107] the court held the evidence insufficient to support the conviction. After removing the screen from a window, the defendant apparently abandoned the effort. Reasonable doubt existed as to his specific criminal intent to commit burglary, an essential element of the attempt statute.[108] Ironically, this same evidence satisfied the preponderance of the evidence standard, thus permitting the trial judge to revoke the defendant's probation. The court of criminal appeals reversed the conviction for attempted burglary and affirmed the revocation order.[109]

Intent to commit theft may be presumed if the entry occurs at night-

96. TEX. PENAL CODE ANN. § 30.02(a)(3) (Vernon 1974) provides that a person commits an offense if, without the effective consent of the owner, he "enters a building or habitation and commits or attempts to commit a felony or theft."

97. 573 S.W.2d 814 (Tex. Crim. App. 1978).

98. 587 S.W.2d at 160. *But see* Dovalina v. State, 564 S.W.2d 378 (Tex. Crim. App. 1978) (word "attempt" includes word "intent").

99. 587 S.W.2d at 161.

100. *Id.*

101. 589 S.W.2d 129 (Tex. Crim. App. 1979).

102. *Id.* at 130.

103. TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974) provides:

> If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

104. 589 S.W.2d at 130.

105. *Id.*

106. *See* Girnus v. State, 595 S.W.2d 118, 119 (Tex. Crim. App. 1980).

107. 589 S.W.2d 444 (Tex. Crim. App. 1979).

108. *See* note 78 *supra* for the text of TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1980-1981).

109. 589 S.W.2d at 447.

time.[110] Relating to burglary, "night" means any time from thirty minutes after sunset to thirty minutes before sunrise.[111] Rejecting the defendant's argument in *Alvarado v. State*[112] that there is a conflict between the presumption of innocence and the presumption of intent to commit theft if the entry occurs at nighttime, the court stated that presumptions are not to be given the weight of evidence; rather, stated the court, they are procedural devices to determine which party must first produce evidence.[113]

The burglary of vehicles statute[114] provides that any part of the body or any physical object connected with the body will suffice for "entry." In *Simmons v. State*[115] the defendant's "leaning into" the vehicle was sufficient.[116] Further, the court held that specific intent to commit theft may be inferred from the circumstances in such a case.[117]

Two cases during the survey period were reversed, although both reached the appellate court without transcription of the court reporters' notes, bills of exceptions, or even briefs.[118] In examining the record the court found fundamental error in these companion cases and in the interest of justice reversed and remanded.[119] The jury charge in the joint trial was silent on the law of parties.[120] It authorized the jurors to convict each defendant for burglary if they found that his co-defendant was the guilty party, without necessarily finding that such defendant must be guilty as a party to the offense, or that he personally committed the offense. The lower court, thus, had authorized conviction on a set of facts that would not constitute an offense for which the accused was criminally responsible. The convictions, therefore, were held fundamentally defective.[121]

IV. ROBBERY

A. *Indictment*

For those lawyers who believed the old robbery laws of Texas were immutable, the decisive break with tradition fostered by the robbery laws of

110. *Id.* at 446; Jones v. State, 587 S.W.2d 115, 119 (Tex. Crim. App. 1979).
111. 589 S.W.2d at 446.
112. 596 S.W.2d 904, 905-06 (Tex. Crim. App. 1980).
113. *Id.* at 906.
114. TEX. PENAL CODE ANN. § 30.04(a) (Vernon 1974) provides: "A person commits an offense if, without the effective consent of the owner, he breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft." " '[E]nter' means to intrude: (1) any part of the body . . . or (2) any physical object connected with the body." *Id.* § 30.04(b). Thus, the gist of the offense now is the entry, and it is not necessary to prove breaking.
115. 590 S.W.2d 137 (Tex. Crim. App. 1979).
116. *Id.* at 138.
117. *Id.*
118. Zuckerman v. State, 591 S.W.2d 497 (Tex. Crim. App. 1979); Zuckerman v. State, 591 S.W.2d 495 (Tex. Crim. App. 1979).
119. By authority of TEX. CODE CRIM. PROC. ANN. art. 40.09, § 13 (Vernon 1979), the court of criminal appeals reviews such records.
120. *See* note 63 *supra* for the text of TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974), the statute on party responsibility.
121. Zuckerman v. State, 591 S.W.2d 497, 498 (Tex. Crim. App. 1979); Zuckerman v. State, 591 S.W.2d 495, 496 (Tex. Crim. App. 1979).

the new Penal Code proved them wrong.[122] Because of the definition of robbery, Texas has yet to see attempted robbery cases filed or final convictions entered on that offense.[123] It is clear that under the statutes, an ordinary shoplifting case wherein the defendant struggles with a security guard and causes any injury beyond the theft advances the offense to robbery. In the event the guard is seriously injured, the charge elevates to aggravated robbery.[124] If, however, a motion is made to quash the indictment for failure to allege by what means bodily injury was caused, it should be granted if the indictment does so fail. In *Cruise v. State*[125] the indictment averred that the defendant knowingly and intentionally caused *bodily injury* to the complainant. Although the allegation of the manner and means of causing bodily injury under section 29.02(a)(1) is not a fundamental requisite of charging for the purpose of invoking jurisdiction, the court ruled that the appellant's motion to quash entitled him to facts sufficient to bar a subsequent prosecution for the same offense and precise notice of the offense with which he was charged.[126]

In *Honea v. State*[127] the victim of the robbery died from suffocation caused by inhalation of dust leading to aspiration of vomitus into his lungs. He had been left bound and gagged on the floor of a barn. Appellant contended that there was a fatal variance between the indictment and the proof at trial: the indictment alleged the defendant caused "serious bodily injury," whereas the victim had actually died. The court, however, was not persuaded, observing that the physical conditions of the death qualified as bodily injuries and were concurrent causes of the death.[128] Serious bodily injury is defined, in part, as "bodily injury that . . . causes death."[129]

B. *Jury Instructions*

Three uncommon defenses were raised in *Montgomery v. State*:[130] duress;[131] entrapment;[132] and mistake of fact.[133] The defense showed that

122. *See* Butts, *supra* note 16, at 510-11.

123. 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."

124. *Id.* § 29.03(a) provides: "A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he: (1) causes serious bodily injury to another; or (2) uses or exhibits a deadly weapon."

125. 587 S.W.2d 403 (Tex. Crim. App. 1979).

126. *Id.* at 405.

127. 585 S.W.2d 681 (Tex. Crim. App. 1979).

128. *Id.* at 684.

129. TEX. PENAL CODE ANN. § 1.07(a)(34) (Vernon 1974).

130. 588 S.W.2d 950, 953 (Tex. Crim. App. 1979).

131. TEX. PENAL CODE ANN. § 8.05 (Vernon 1974) provides:

> (a) It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another.
>
> (b) In a prosecution for an offense that does not constitute a felony, it is an

during the robbery the defendant was acting under conditions that reasonably raised these issues. Although the trial court submitted the issues of duress and entrapment in its charge to the jury, it did not instruct on the defense of mistake of fact. This omission won a reversal for Montgomery. The court stated that the evidence did raise the issue whether appellant, through mistake, formed a reasonable belief that he was acting on instructions from a law enforcement officer, thus negating the culpability required for aggravated robbery.[134] As a result, the court stated that the jury should have been charged on the issue, as the trial court is required to charge on every defensive issue raised by the evidence.[135]

The jury instructions in *Robinson v. State*[136] omitted a word from one of the elements of aggravated robbery.[137] The omitted word was "imminent." The en banc decision analyzed the charge as a whole, using the factors from *Cumbie v. State*.[138] The court remarked that a jury charge is fundamentally erroneous if it authorizes some diminution of the state's burden of proof, or authorizes conviction for conduct that does not constitute a criminal offense, or authorizes conviction for an offense of which the accused has no notice.[139] Finding that none of the *Cumbie* evils resulted from the omission of "imminent" from the jury charge, the court affirmed the conviction.[140]

When the jury charge, however, clearly authorizes the jury to convict the defendant under a theory that is not alleged in the indictment, as in *Brown v. State*,[141] fundamental error exists. This error occurs when the instructions include that portion of the robbery statutes that is the basis for the indictment allegations as well as another portion of the robbery statutes not alleged in the indictment. Simliar consequences arise when the jury charge adds a culpable mental state, such as recklessness, that is not alleged as a culpable mental state in the indictment.[142] The court will re-

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affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force.

132. *Id.* § 8.06(a) provides:

It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

See Langford v. State, 571 S.W.2d 326 (Tex. Crim. App. 1978) (Texas statute provides for "objective" test).

133. TEX. PENAL CODE ANN. § 8.02(a) (Vernon 1974) provides: "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense."

134. 588 S.W.2d at 953.

135. *Id.*

136. 596 S.W.2d 130, 131-32 (Tex. Crim. App. 1980).

137. *See* note 124 *supra* for the text of TEX. PENAL CODE ANN. § 29.03(a) (Vernon 1974).

138. 578 S.W.2d 732 (Tex. Crim. App. 1979).

139. 596 S.W.2d at 132.

140. *Id.* at 134.

141. 595 S.W.2d 550, 551-52 (Tex. Crim. App. 1980).

142. Hutchins v. State, 590 S.W.2d 710, 711 (Tex. Crim. App. 1979); *accord*, McNiel v. State, 599 S.W.2d 328 (Tex. Crim. App. 1980).

spond with a reversal to a complaint that the jury charge in an aggravated robbery case contained an alternative theory by which the defendant might be found guilty. The charge in *Stone v. State*[143] authorized conviction if the jury found either that the defendant caused bodily injury, or threatened or placed the victim in fear of imminent bodily injury or death. Only the latter allegation, threatening and placing in fear, was set out in the indictment.[144]

The Texas Court of Criminal Appeals has again illuminated its reasoning when this kind of error surfaces by way of habeas corpus rather than by appeal. *Ex parte Coleman*[145] raised a fundamental error question in a case in which the jury charge set out the alternative theory of causing bodily injury while the indictment alleged only threatening serious bodily injury, as in *Stone*. Noting that error in instructions rarely rises to a constitutional level,[146] the court followed the test set out in *Cupp v. Naughten*:[147] "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."[148]

V. THEFT AND FORGERY

Two receiving and concealing cases fell when the Texas Court of Criminal Appeals determined that fundamental error existed in the indictments.[149] The governing theft statute[150] mandates that the indictment allege that the subject property had been stolen and, further, that it had been stolen by another. These allegations were omitted in these cases, causing reversal and dismissal of the indictments.[151] Furthermore, if the indictment contains a property description so vague as to constitute fundamental error, such as merely alleging "property" or "merchandise" of a certain value, the defendant may raise this issue for the first time on appeal.[152]

Managerial authority over a department of a corporation confers "ownership" status for purposes of the theft statutes.[153] The court in *Cross v.*

143. 599 S.W.2d 830, 831 (Tex. Crim. App. 1980). For an analysis of jury charge cases in which the charge differs from the allegations of the indictment, see Sattiewhite v. State, 600 S.W.2d 277, 279-85 (Tex. Crim. App. 1980).

144. 599 S.W.2d at 831.

145. 599 S.W.2d 305 (Tex. Crim. App. 1978); *see* Butts, *supra* note 16, at 495.

146. 599 S.W.2d at 306.

147. 414 U.S. 141 (1973).

148. *Id.* at 147. *See also In re* Winship, 397 U.S. 358, 364 (1970) (setting forth the "beyond a reasonable doubt" standard of persuasion).

149. Beasley v. State, 599 S.W.2d 620 (Tex. Crim. App. 1980); Shaddox v. State, 594 S.W.2d 69 (Tex. Crim. App. 1980).

150. TEX. PENAL CODE ANN. § 31.03(a) (Vernon Supp. 1980-1981) provides: "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." *Id.* § 31.03(b) states: "Appropriation of property is unlawful if: . . . (2) the property is stolen and the actor appropriates the property knowing it was stolen by another."

151. Beasley v. State, 599 S.W.2d 620, 622 (Tex. Crim. App. 1980); Shaddox v. State, 594 S.W.2d 69, 70 (Tex. Crim. App. 1980).

152. Harris v. State, 587 S.W.2d 429, 430 (Tex. Crim. App. 1979).

153. TEX. PENAL CODE ANN. § 1.07(a)(24) (Vernon 1974) states: " 'Owner' means a per-

State[154] said that a better practice is to allege ownership on behalf of a corporation in a person acting for the corporation. An employee who has responsibility over property or is in a managerial capacity is such an "owner."[155]

Coplin v. State[156] was a conviction for misapplication of fiduciary property having a value of $10,000 or more.[157] The defendant was shown to have received money from investors with which to obtain television rights to a Mohammed Ali fight. He never obtained the rights, but he apparently did use some of the cash. The court held that the language of section 32.45(a)(1)(B), "any other person acting in a fiduciary capacity," embraces any fiduciary, including a joint adventurer or partner.[158]

The defendant in *Littlefield v. State*,[159] while on probation, was leasing an automobile in the name of Littlefield Enterprises Incorporated. No payments were made on the lease before the auto was recovered as stolen. The defendant's probation was revoked based on the theft of service statute.[160] The Texas Court of Criminal Appeals affirmed, stating that the defendant had retained possession of the car for four months after being placed on probation.[161] The court found that his failure to make lease payments during that time constituted a theft of service, although the evidence showed that the lease was made before he was placed on probation.[162] Further, the court ruled that he properly could be held responsible as a party to the offense.[163]

In *Ex parte Kimberlin*[164] the state's motion for rehearing was granted, and the court en banc reversed its earlier position in a case wherein the court had questioned the requirement of a culpable mental state as an essential element of credit card abuse.[165] The indictment alleged that the defendant fraudulently rented a car "with the knowledge that the card had not been issued to him . . . and that said card was not used with the effective consent of the cardholder."[166] The court held that the culpable mental

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son who 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."

154. 590 S.W.2d 510 (Tex. Crim. App. 1979).

155. *Id.* at 511.

156. 585 S.W.2d 734 (Tex. Crim. App. 1979).

157. TEX. PENAL CODE ANN. § 32.45(a)(1)(B) (Vernon 1974) provides that "fiduciary" includes any person acting in a fiduciary capacity.

158. 585 S.W.2d at 735.

159. 586 S.W.2d 534 (Tex. Crim. App. 1979).

160. TEX. PENAL CODE ANN. § 31.04(a)(1) (Vernon Supp. 1980-1981) provides: "A person commits theft of service if, with intent to avoid payment for service that he knows is provided only for compensation: (1) he intentionally or knowingly secures performance of the service by deception, threat, or false token . . . ."

161. 586 S.W.2d at 535.

162. *Id.*

163. *Id.* at 535-36.

164. 594 S.W.2d 438 (Tex. Crim. App. 1980).

165. *See* TEX. PENAL CODE ANN. § 32.31(b)(1)(A) (Vernon 1974), which provides: "A person commits an offense if . . . with intent to obtain property or service fraudulently, he presents or uses a credit card with knowledge that . . . the card . . . has not been issued to him and is not used with the effective consent of the cardholder . . . ."

166. 594 S.W.2d at 439.

state of knowledge related to the allegation of lack of consent by the cardholder.[167] In *Baker v. State*,[168] however, an indictment was not upheld because the culpable mental state of knowledge was inserted at the end of the allegations and did not relate to lack of effective consent.[169]

Problems in the drafting of indictments for forgery[170] lead to later reversals because of fundamentally defective charging instruments. When the forged writing purports to be the act of another, an essential element of the offense will be that the other person did not authorize the act. Omission of this element is fatal.[171]

VI. SEX OFFENSES

A. *Indictment*

Having established previously that a culpable mental state must be alleged and proved to support a conviction for attempted aggravated rape,[172] the Texas Court of Criminal Appeals scrutinized another attempted aggravated rape indictment for fundamental error in *Ex parte Prophet*.[173] The indictment alleged that the defendant "did then and there unlawfully with intent to commit rape, attempt, by force and by threatening the imminent infliction of serious bodily injury and death, to have sexual intercourse with N S M, a female not his wife and without her consent."[174] The petitioner failed in contending that the "intent to commit rape" as alleged did not suffice to allege a culpable mental state. Although the court did concede that it is better practice to allege the culpable mental state of the attempted offense, it found that failure to allege the constituent elements of the offense attempted is not a fundamental defect.[175] The court stated, however, that pleading the requisite specific intent is sufficient to allege a culpable mental state where the gravamen of an offense is an act coupled

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167. *Id.*

168. 593 S.W.2d 719 (Tex. Crim. App. 1980).

169. *Id.* at 720; *accord, Ex parte* Sharpe, 581 S.W.2d 183, 184 (Tex. Crim. App. 1979); *see Ex parte* Clark, 588 S.W.2d 898, 900 (Tex. Crim. App. 1979).

170. TEX. PENAL CODE ANN. § 32.21(a)(1)(A)(i) (Vernon 1974) provides: " '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 . . . ."

171. *See* Lee v. State, 589 S.W.2d 710, 710 (Tex. Crim. App. 1979); Morren v. State, 587 S.W.2d 427, 428 (Tex. Crim. App. 1979); Kulhanek v. State, 587 S.W.2d 424, 425-26 (Tex. Crim. App. 1979).

172. *See* Zachery v. State, 552 S.W.2d 136, 137 (Tex. Crim. App. 1977).

173. 601 S.W.2d 372 (Tex. Crim. App. 1980).

174. *Id.* at 373. TEX. PENAL CODE ANN. § 21.02(a) (Vernon 1974) provides: "A person commits an offense if he has sexual intercourse with a female not his wife without the female's consent." *Id.* § 21.03(a) (Vernon 1974) provides:

> A person commits an offense if he commits rape as defined in Section 21.02 of this code . . . 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; or
>
> (2) compels submission to the rape by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone.

175. 601 S.W.2d at 374.

with a specific intent.[176]

B. *Jury Instructions*

The jury charge in aggravated rape cases often causes reversible error. If the jury charge authorizes conviction on a theory not alleged in the indictment, the court will reverse the conviction, as was done in *Scott v. State*.[177] The indictment alleged that aggravated rape was committed by compelling the prosecutrix to submit to sexual intercourse by a threat of death to be imminently inflicted on her. In contrast, the jury was charged to convict if the defendant compelled submission to the rape either by threat of death or by threat of serious bodily injury to be imminently inflicted on her. The en banc holding was that this disparity constituted reversible fundamental error as it enlarged upon the allegations in the indictment and permitted a conviction on facts not there alleged.[178] The dissent admonished that "[i]t is past time for this Court to turn away from the automatic application of 'fundamental charge error' without the requirement, in lieu of a proper objection, of a showing of harm to the appellant . . . ."[179]

An essential element of the offense of aggravated rape is the culpable mental state of intent, knowledge, or recklessness. In a case in which the indictment alleged that the defendant compelled submission by an imminent threat of death, serious bodily injury, or kidnapping, a jury charge that fails to charge the essential element of a culpable mental state is fundamentally erroneous.[180] Although the statutory language of section 21.03[181] does not prescribe a culpable mental state, a culpable mental state is required, and a jury charge that omits such an essential element is erroneous.[182]

The defendant in *Martinez v. State*[183] was indicted for sexual abuse of a child.[184] The jury, however, was charged not only in the words of the indictment but also under another theory for conviction. By enlarging the

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176. *Id.*

177. 599 S.W.2d 618 (Tex. Crim. App. 1980).

178. *Id.* at 618.

179. *Id.* at 619-20; *cf.* Jackson v. State, 591 S.W.2d 820 (Tex. Crim. App. 1980) (defendant's conviction upheld because jury charge, although leaving much to be desired, was not fundamentally defective). The five-to-four decision in *Jackson* affirming conviction brought a strong dissent emphasizing that lay juries cannot assemble an instruction by choosing to follow only the legally correct portions piecemeal and to ignore the incorrect. *Id.* at 825-26.

180. North v. State, 598 S.W.2d 634, 636 (Tex. Crim. App. 1980).

181. For the partial text of TEX. PENAL CODE ANN. § 21.03 (Vernon 1974), see note 174 *supra*.

182. North v. State, 598 S.W.2d 634, 636 (Tex. Crim. App. 1980); *accord*, Stidham v. State, 590 S.W.2d 502, 503 (Tex. Crim. App. 1979); Banks v. State, 586 S.W.2d 518, 520 (Tex. Crim. App. 1979).

183. 599 S.W.2d 622 (Tex. Crim. App. 1980).

184. TEX. PENAL CODE ANN. § 21.04 (Vernon 1974) provides:

> (a) A person commits an offense if, without the other person's consent and with intent to arouse or gratify the sexual desire of any person, the actor:
>
> (1) engages in deviate sexual intercourse with the other person, not his spouse, whether the other person is of the same or opposite sex . . . .

facts on which the jury might base its conviction, the appellate court ruled that the trial court committed fundamental error.[185]

C. *Retrial and Double Jeopardy*

In *Martinez* the jury originally found the defendant guilty of the lesser included offense of indecency with a child. The questions then arise whether the defendant may be tried for sexual abuse of a child upon the reversal and remand and whether the *Burks-Greene*[186] reasoning precludes retrial. Because this case is not an "insufficiency of the evidence" decision, the *Burks-Greene* analysis would seem not applicable here. Nonetheless, one could argue that the jury, in effect, acquitted the defendant of sexual abuse of a child by finding him guilty of indecency with a child. Yet, the court held that, under the facts of the instant case, indecency with a child cannot be a lesser included offense of sexual abuse of a child.[187] Thus, the defendant could properly be retried for the offense alleged in the indictment. A different factual situation, however, might make indecency with a child a lesser included offense of sexual abuse. In such a circumstance, the question becomes whether a defendant, after conviction of the lesser included offense, could be retried for sexual abuse of a child. The court of criminal appeals may justify retrial in a jury charge case by distinguishing this kind of error as one instigated by the trial court and thus not one that denies a defendant due process of law and a fair trial as required by the Texas and United States Constitutions. Some lawyers believe the court may find acquittal of the higher offense.

Rucker v. State[188] illustrates the situation in which a retrial must be for the lesser offense of rape because on review insufficient evidence was found to support the conviction of the defendant for aggravated rape. The jury's verdict on the element of aggravation can be upheld only if an implied threat of death or serious bodily injury was communicated by the defendant's acts and conduct.[189] The court of criminal appeals divided in an en banc decision, and in dissent, Judge Clinton reviewed the history and legislative purpose of Texas rape laws. The dissent noted that the court "should consider the violence we do to the Penal Code's specified intent and purpose that we construe it in such a way 'to prescribe penalties that are proportionate to the seriousness of the offenses.' "[190] The dissent suggested that the jury must consider all of the happenings in the criminal episode and not base its verdict on an isolated act or verbal threat to determine whether an aggravating factor occurred.[191] The plurality opinion

185. 599 S.W.2d at 624.

186. When the evidence is found to be insufficient to sustain the conviction, the appellate court will reverse the case and order an acquittal of the offense. Although the evidence fails as to the highest offense, here sexual abuse of a child, a lesser included offense may sometimes be proved sufficiently. *See* notes 57-59 *supra* and accompanying text.

187. 599 S.W.2d at 624.

188. 599 S.W.2d 581 (Tex. Crim. App. 1980).

189. *Id.* at 582.

190. *Id.* at 587.

191. *Id.* at 595.

cited *Rogers v. State*,[192] which held that, absent an express verbal threat, evidence was sufficient to prove the aggravating element only when a gun, knife, or a deadly weapon was used or serious bodily injury was in fact inflicted.[193] The *Rucker* opinion reaffirms the holding in *Rogers*.[194]

When the same assaulting acts are directed against one victim, no conviction for both aggravated rape and aggravated robbery can stand. The court struck down the aggravated robbery conviction and affirmed the aggravated rape conviction in *Orosco v. State*.[195] Judge Douglas's dissent, which traced the history of the Texas "carving doctrine,"[196] noted that carving is a court-made rule.[197] The dissent advocated a change in this Texas approach to double jeopardy and suggested that the court, in determining whether prosecution should be barred for multiple offenses arising out of the same transaction, should look to the definition of the offenses and whether the results stemmed from single or multiple acts.[198] The dissent listed as factors that should be considered the defendant's act or acts, the intent for each act, and the different injuries incurred by the victim.[199]

VII. ASSAULT OFFENSES

The Sixty-fifth Legislature enlarged criminal offenses by enacting significant additions to the assault statutes. Both the assault statute[200] and the aggravated assault statute[201] now contain the words "including his spouse" to clarify who the recipient of the assault might be. When the assault victim is an educator engaged in the performance of educational duties, pun-

192. 575 S.W.2d 555 (Tex. Crim. App. 1979) (a threat of future as opposed to imminent harm will not suffice).

193. *Id.* at 559.

194. 599 S.W.2d at 586.

195. 590 S.W.2d 121, 124 (Tex. Crim. App. 1979); *accord*, Phillips v. State, 597 S.W.2d 929, 937 (Tex. Crim. App. 1980).

196. Carving is a court-made rule separate from TEX. CONST. art. I, § 14, which states that "[n]o person, for the same offense, shall be twice put in jeopardy of life or liberty . . . ." The state is allowed to "carve" out of a criminal transaction as large an offense as is desired, but the state can carve only once. 590 S.W.2d at 125 (Douglas, J., dissenting). The state is then bound by its election. *Id.* (citing Herera v. State, 35 Tex. Crim. 607, 34 S.W. 943 (1896)).

197. 590 S.W.2d at 125.

198. *Id.* at 129.

199. *Id.*

200. TEX. PENAL CODE ANN. § 22.01(a) (Vernon Supp. 1980-1981) provides: "A person commits an offense if he: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including his spouse; or (2) intentionally or knowingly threatens another with imminent bodily injury, including his spouse . . . ."

201. *Id.* § 22.02(a) provides:

> A person commits an offense if he commits assault as defined in Section 22.01 of this code and he:
>
> (1) causes serious bodily injury to another, including his spouse;
>
> (2) causes bodily injury to a peace officer when he knows or has been informed the person assaulted is a peace officer . . . .
>
> (3) causes bodily injury to a participant in a court proceeding when he knows or has been informed the person assaulted is a participant in a court proceeding . . . .

ishment is that for a class B misdemeanor.[202]

If the defendant has knowledge that the victim is a peace officer, his retaliatory action relating to an official duty performed by the officer forms the basis for an aggravated assault charge. Any retaliatory or threatening action performed against court personnel or court participants engaged in prescribed court duty becomes an aggravated assault. These are third degree felonies.[203] In addition, deadly assault[204] on either a peace officer or a court participant constitutes a first degree felony. The statute concerning injury to a child[205] adds bodily injury as a felony of the third degree, unless the proscribed conduct was engaged in with the accompanying culpable mental state of recklessness or negligence, in which case it becomes a class A misdemeanor.[206] When there is a terroristic threat[207] that involves violence to any person or to any property with intent to cause impairment or interruption of public communications, public transportation, public water, gas, or power supply, or other public service, this offense is a felony of the third degree.

In *Craig v. State*[208] the intoxicated defendant fought with police officers

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202. *See id.* § 22.01(c)(2).

203. *Id.* § 22.02(a) provides:

> A person commits an offense if he commits assault as defined in Section 22.01 of this code and he:
>
> . . . .
>
> (2) causes bodily injury to a peace officer when he knows or has been informed the person assaulted is a peace officer:
>
> (A) while the peace officer is lawfully discharging an official duty; or
>
> (B) in retaliation for or on account of the peace officer's exercise of official power or performance of official duty as a peace officer; or
>
> (3) causes bodily injury to a participant in a court proceeding when he knows or has been informed the person assaulted is a participant in a court proceeding:
>
> (A) while the injured person is lawfully discharging an official duty; or
>
> (B) in retaliation for or on account of the injured person's having exercised an official power or performed an official duty as a participant in a court proceeding . . . .

204. *Id.* § 22.03(a) provides:

> A person commits an offense if, with a firearm or a prohibited weapon, he intentionally or knowingly causes serious bodily injury:
>
> (1) to a peace officer where he knows or has been informed the person assaulted is a peace officer . . . .
>
> (2) to a participant in a court proceeding when he knows or has been informed that the person assaulted is a participant in a court proceeding . . . .

205. *Id.* § 22.04 provides:

> A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that causes to a child who is 14 years of age or younger:
>
> (1) serious bodily injury;
>
> (2) serious physical or mental deficiency or impairment;
>
> (3) disfigurement or deformity; or
>
> (4) bodily injury.

206. *Id.* § 22.04(c).

207. *Id.* § 22.07(a) provides: "A person commits an offense if he threatens to commit any offense involving violence to any person or property . . . ."

208. 594 S.W.2d 91 (Tex. Crim. App. 1980).

and was later convicted of aggravated assault. He argued that the arrest was illegal, thereby giving him the right to resist it. The court rejected this argument, reasoning that the illegality of the arrest does not establish that the officer was not in the lawful discharge of his duty.[209] Defendant further contended that, while intoxicated, he was struck on the head and sprayed with mace before striking the officer. He argued that this prevented him from forming the culpable mental state of intent necessary to sustain a conviction. The court dismissed this argument as well, ruling that the defendant had waived the issue because he had not raised it at trial.[210] Further, the court noted that "neither intoxication nor temporary insanity of mind produced by the recent voluntary use of alcohol constitutes a defense to the commission of a crime."[211]

Texas law requires that the defendant have knowledge that the person he assaults is a peace officer.[212] The court in *Payne v. State*[213] held that a jury charge that permitted conviction if the jury found that the defendant either knew or had been informed that the victim was a peace officer was not fundamentally defective, although it authorized conviction on a theory not alleged in the indictment.[214] Only the knowledge of the defendant had been alleged in the indictment. In effect the court said that both personal knowledge and informed knowledge connote knowledge under the assault statute.[215] A prudent trial judge should delete one or the other from the jury charge, however, and follow the allegations of the indictment. Failure to grant a motion to quash the indictment, although not urged herein, could result in a reversal under similar facts.

In *Guevara v. State*[216] the court established the elements of the offense of resisting arrest.[217] It held that knowledge is an element, along with preventing the person known to be a peace officer from effecting an arrest.[218] The information in *Guevara* omitted an allegation that the defendant prevented and obstructed a peace officer from making the arrest, but it did allege that a peace officer was subjected to force from the defendant. The court also concluded that force may be applied to someone other than the officer effecting the arrest.[219]

The meaning of the words "a child who is 14 years of age or younger" in the injury to a child statute[220] presents an issue that continually divides

209. *Id.* at 94; *see* TEX. PENAL CODE ANN. §§ 9.31(b)(2), (c) (Vernon 1974).
210. 594 S.W.2d at 96.
211. *Id.*; *see, e.g.*, Blott v. State, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979).
212. TEX. PENAL CODE ANN. § 22.02(a)(2) (Vernon Supp. 1980-1981).
213. 596 S.W.2d 911 (Tex. Crim. App. 1980).
214. *Id.* at 913.
215. *See id.*
216. 585 S.W.2d 744 (Tex. Crim. App. 1979).
217. *Id.* at 745; *see* TEX. PENAL CODE ANN. § 38.03 (Vernon 1974).
218. 585 S.W.2d at 745.
219. *Id.* TEX. PENAL CODE ANN. § 38.03 (Vernon 1974) specifies that the force may be used against "the peace officer or another."
220. TEX. PENAL CODE ANN. § 22.04 (Vernon Supp. 1980-1981).

courts. In *Philips v. State*[221] the majority opinion held that the words mean "all children who have not attained their fifteenth birthday."[222] Observing that the legislature could have used those words and did not, the dissent believed that the statute applied only to a child who has not yet passed his fourteenth birthday.[223] The injured boy in the instant case was over the age of fourteen but not yet fifteen.

The term "serious physical deficiency" employed in the statute wherein the offense of injury to a child is defined[224] is not unconstitutionally vague according to the court in *Ahearn v. State*.[225] The court held that the parents, indicted for recklessly and negligently engaging in conduct that caused serious physical deficiency to their deceased child by failing to provide the minimum requirements of food and medical care that they were legally obligated to do, may be correctly charged under this statute for injury to a child.[226]

VIII. WEAPONS

The initial question raised in case law concerning weapons is that of what constitutes a deadly weapon. This gray area of law provides the defense with unlimited arguments in challenging whether a weapon is or is not deadly. It has been established that a knife is not a deadly weapon per se.[227] In *Denham v. State*[228] the court recognized that expert testimony is not necessary for the prosecution to establish the deadly character of a weapon. In *Davidson v. State*,[229] however, the defendant faced an aggravated robbery conviction for using a knife to threaten the complainant, who was about five feet away from the defendant. The knife was not introduced into evidence. The court ruled that even with proof of the size of the knife, the evidence was not sufficient to prove that the defendant used or intended to use the knife so as to inflict serious bodily injury.[230] Such intent is required by the aggravated robbery law.[231] Nevertheless, the

221. 588 S.W.2d 378, 380-82 (Tex. Crim. App. 1979); *accord*, Canada v. State, 589 S.W.2d 452, 454 (Tex. Crim. App. 1979).

222. 588 S.W.2d at 380.

223. *Id.* at 382.

224. TEX. PENAL CODE ANN. §§ 22.04(a)(1)-(4) (Vernon Supp. 1980-1981).

225. 588 S.W.2d 327, 338 (Tex. Crim. App. 1979).

226. *Id.* at 336. For an indictment to withstand scrutiny there must be allegations that the death was caused by the defendant's failure to provide medical care, that the defendant was a parent, and that the deceased was a child. *See* text accompanying notes 57-61 *supra*. *Compare Ex parte* Moss, 598 S.W.2d 877, 878 (Tex. Crim. App. 1980) ("for purposes of the Family Code, to say that *A* is a parent of *B is* to say that *B* is a child") *with* Lang v. State, 586 S.W.2d 532, 534 (Tex. Crim. App. 1979) ("To say that *A* is a parent of *B* is not to say that *B* is still a child.").

227. *See generally* TEX. PENAL CODE ANN. § 1.07(a)(11) (Vernon 1974), which states: " 'Deadly weapon' means: (A) . . . 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 of causing death or serious bodily injury."

228. 574 S.W.2d 129, 131 (Tex. Crim. App. 1978).

229. 602 S.W.2d 272 (Tex. Crim. App. 1980).

230. *Id.* at 274.

231. TEX. PENAL CODE ANN. § 29.03 (Vernon 1974).

court further held that although the evidence would not support a conviction for aggravated robbery, it was sufficient for the lesser included offense of robbery.[232] The court affirmed an aggravated robbery conviction in *Dominique v. State*,[233] a case in which the prosecution had shown that scissors held to the complainant's neck caused scratches, and that other superficial cuts were inflicted on the complainant's hand and bicep. The defendant was shown to have made slashing motions with the scissors, accompanied by a threat to kill. These actions were held to meet the deadly weapon requirement of the aggravated robbery statute.[234]

An earlier case raised the deadly weapon question and acted as a catalyst in resolving the law.[235] Convicted again after his plea of guilty in the same case, the defendant finds his second conviction similar to many others in the *Burks-Greene* graveyard. The court of criminal appeals applied the rule of those cases retroactively, and the relief sought was granted.[236]

A firearm is per se a deadly weapon.[237] The defendant challenged the sufficiency of the evidence in *Wright v. State*,[238] pointing out that the weapon was referred to as a "gun" or "revolver" or "pistol," but never as a "firearm." The court held that testimony using any of the terms is sufficient to authorize the jury to find that a deadly weapon was used.[239] When an assault is made with an antique firearm, as in an aggravated robbery, the antique exception for possessory purposes is of no importance. The antique firearm serves as a deadly weapon to elevate the offense to aggravated robbery.[240]

Failure of the trial court to give a requested charge may reverse the conviction for carrying an illegal knife.[241] In *Inzer v. State*[242] the defendant, carrying a machete on the auto seat, was stopped for a traffic violation. He testified that he was returning the machete to his home after his father had borrowed it. The trial court had refused to instruct the jury to acquit the defendant if it found that the defendant was carrying the machete directly home after lending it to a third person. The appellate court pointed

232. 602 S.W.2d at 274; *see* TEX. PENAL CODE ANN. § 29.02 (Vernon 1974).

233. 598 S.W.2d 285, 286 (Tex. Crim. App. 1980).

234. *Id.*; *see* TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 1974).

235. Alvarez v. State, 566 S.W.2d 612 (Tex. Crim. App. 1978). The court ruled that the evidence was insufficient to sustain a conviction for aggravated assault based on the police officer's testimony that the defendant swung a linoleum knife at him from a distance of three or four feet. *Id.* at 612-13. The court held that the evidence regarding the manner of its use or intended use failed to show that the knife was capable of causing death or serious bodily injury. *Id.* at 614. This opinion spotlighted the need for consistent decisions on what constitutes a deadly weapon, and later cases settled the question.

236. *Ex parte* Alvarez, 601 S.W.2d 359 (Tex. Crim. App. 1980).

237. TEX. PENAL CODE ANN. § 1.07(a)(11)(A) (Vernon 1974).

238. 591 S.W.2d 458, 459 (Tex. Crim. App. 1980); *cf.* Bugbee v. State, 593 S.W.2d 696, 697 (Tex. Crim. App. 1980) (state failed to prove the length of a short-barrel firearm, resulting in reversal with court-ordered judgment of acquittal for insufficiency of evidence).

239. 591 S.W.2d at 459.

240. *See* Vaughn v. State, 600 S.W.2d 314, 315 (Tex. Crim. App. 1980).

241. *See* TEX. PENAL CODE ANN. § 46.02 (Vernon 1974).

242. 601 S.W.2d 367 (Tex. Crim. App. 1980).

out that there are certain statutory defenses[243] to the offense of carrying a weapon, as well as a number of judicially recognized ones.[244] Because the present Penal Code defense provisions reflect the law of Texas as it has existed since the nineteenth century, the court of criminal appeals continues to recognize case law defenses that have had a continuing vitality since that early time. Reasoning that the carrying of his machete under legitimate circumstances was not an offense, the court held that the defendant was entitled to the submission of this defense.[245]

The defendant in *United States v. Elorduy*[246] contended that his conviction for unlawfully carrying a firearm during the commission of a felony must be reversed because the government failed to prove the essential element of "unlawfully carrying."[247] The Fifth Circuit held that the government was required to prove only that while the felony was in progress, appellant was carrying a gun in violation of any firearms law.[248] Texas law provides that carrying a gun is unlawful,[249] unless the person shows that he came within one of the other statutory exceptions to the offense.[250] As the defendant did not show an exception, the court ruled that the government met its burden of proof. The Fifth Circuit will thus look to the laws of the state where the offense occurred should the government fail to prove a federal violation in carrying a firearm. Proof may show a violation of federal, state, or local "carrying laws" of the area.[251] The facts in *Elorduy* are silent as to whether the jury was apprised of the violation of Texas law. An affirmative showing of the law should be required to support an "unlawful" finding, as this element of the offense cannot be assumed by the factfinder.

IX. CONTROLLED SUBSTANCES

Vicarious entrapment was the imaginative defense in *Norman v. State*,[252] a case involving the delivery of heroin.[253] The defendant never was contacted directly by the government agent; rather, the contact was made through a friend of a friend of her husband. This distance precluded

243. TEX. PENAL CODE ANN. § 46.03 (Vernon Supp. 1980-1981) provides for exceptions to prosecution such as traveling. These are not exclusive exceptions.

244. 601 S.W.2d at 368-69.

245. *Id.* at 369.

246. 612 F.2d 986 (5th Cir. 1980).

247. 18 U.S.C. § 924(c)(2) (1976) provides, in part, that "[w]hoever . . . carries a firearm unlawfully during the commission of any felony . . . shall . . . be sentenced to a term of imprisonment for not less than one year nor more than ten years."

248. 612 F.2d at 990.

249. TEX. PENAL CODE ANN. § 46.02(a) (Vernon 1974) ("A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun . . . .").

250. *See id.* § 46.03 (Vernon Supp. 1980-1981).

251. 612 F.2d at 990.

252. 588 S.W.2d 340 (Tex. Crim. App. 1979).

253. TEX. REV. CIV. STAT. ANN. art. 4476—15, § 4.03(a) (Vernon 1976) states: "Except as authorized by this Act, a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1, 2, 3, or 4." (Heroin is listed in Penalty Group 1.).

her defense of entrapment.[254] The court focused on the conduct of the government agents, rather than on whether the defendant was predisposed to commit the offense or was otherwise innocent.[255]

The officer in *Olguin v. State*[256] without question had probable cause to stop an auto that pulled away from a stop sign without its lights on and proceeded the wrong way on a one-way street. Upon approaching the car, he smelled marihuana and thus had probable cause to search the car and its occupants. A small quantity of marihuana was found in a plastic bag under the passenger seat. The defendant, the driver of the car, was charged with possession.[257] The defendant was not the owner of the auto, nor did he have any contraband on him. Further, the officer testified that he did not see the defendant throw any marihuana under the seat. The court found the evidence insufficient and remanded with instructions for a judgment of acquittal. The court held that when the accused is not in exclusive control of the place where the contraband is found, knowledge of the contraband and control of it cannot be imputed to him unless additional independent facts and circumstances affirmatively link the accused to the contraband.[258]

The court in *Scott v. State*[259] stated that an ultimate user[260] of a controlled substance is not authorized to deliver this substance to anyone other than members of his own household.[261] When the ultimate user delivers that controlled substance to a friend, however, the friend can properly be charged with possession, as in *Scott*, because the friend's conduct is an offense against the laws of this state.[262]

Doctors and pharmacists appear more often now as defendants in delivery of controlled substances cases, as established in two notable cases decided during the survey period, *Santoscoy v. State*[263] and *Merriman v. State*.[264] The court en banc affirmed the conviction in *Merriman* and held that the defendant's prescriptionless sale after hours in the defendant's

254. 588 S.W.2d at 346.

255. *Id.*; *see* United States v. Russell, 411 U.S. 423 (1973), in which the majority sets forth a subjective test that focuses on the predisposition of the defendant to commit the offense rather than on the intolerable conduct of the police. *See also* Langford v. State, 571 S.W.2d 326, 331 (Tex. Crim. App. 1978) (construes the Texas entrapment statute; panel decision that has not been overturned).

256. 601 S.W.2d 941 (Tex. Crim. App. 1980).

257. TEX. REV. CIV. STAT. ANN. art. 4476—15, § 4.05(a) (Vernon 1976) provides that "a person commits an offense if he knowingly or intentionally possesses a usable quantity of marihuana." *Id.* § 4.05(d) provides for an offense if the person "knowingly or intentionally delivers marihuana."

258. 601 S.W.2d at 943; *accord*, Galvan v. State, 598 S.W.2d 624, 626 (Tex. Crim. App. 1980); Alexander v. State, 587 S.W.2d 729, 731 (Tex. Crim. App. 1979) (evidence determined insufficient to prove delivery to third person).

259. 600 S.W.2d 801 (Tex. Crim. App. 1980).

260. TEX. REV. CIV. STAT. ANN. art. 4476—15, § 1.02(26) (Vernon 1976) defines "ultimate user" as "a person who has lawfully obtained and possesses a controlled substance for his own use or for the use of a member of his household."

261. 600 S.W.2d at 802-03.

262. *Id.* at 803.

263. 596 S.W.2d 896 (Tex. Crim. App. 1980).

264. 594 S.W.2d 410 (Tex. Crim. App. 1980).

pharmacy of fifty dilaudid tablets containing a controlled substance constituted a delivery under the Controlled Substances Act and that the defendant's status as a licensed pharmacist "practitioner" bestowed no immunity upon him.[265] At the time of the offense in *Santoscoy*, a medical practitioner who was registered with the Department of Public Safety as required could not be convicted for delivery of a controlled substance merely because he did not act in the course of professional practice.[266] Accordingly, the court held that the trial court's submission of a charge to that effect required reversal of the defendant's conviction for delivery of controlled substances.[267] The legislature recently enacted a penal law to make an offense the prescribing, dispensing, or administering of a controlled substance except for a valid medical purpose.[268]

The court of criminal appeals stated a new rule in *Ex parte Wilson*[269] as to charging instruments in both controlled substances and dangerous drug cases.[270] When the controlled substance or dangerous drug is not specifically named in a penalty group but is otherwise described in that group, for example, an isomer of methamphetamine or a legend drug, such description is an essential element of the offense and must be alleged in the charging instrument in order to state an offense.[271]

Possession of a controlled substance may be a lesser included offense of delivery. When possession can be proved by the same facts necessary to establish delivery of cocaine, a conviction for possession of cocaine will be held valid.[272] Attempted violations of the Controlled Substance Act and Dangerous Drug Act, however, are not offenses against the laws of Texas.[273]

The Fifth Circuit stated in *United States v. Solis*[274] that because knowledge, actual participation, and criminal intent are the necessary elements of the crime of conspiracy, the government must prove each of these elements beyond a reasonable doubt.[275] Recalling that the court had banished the slight evidence rule in *United States v. Malatesta*,[276] the opinion reemphasized that the verdict of a jury must be sustained if, after evaluat-

265. *Id.* at 415.
266. 596 S.W.2d at 902 (citing Haney v. State, 544 S.W.2d 384 (Tex. Crim. App. 1976)).
267. 596 S.W.2d at 902.
268. TEX. REV. CIV. STAT. ANN. art. 4476—15, § 3.08(f) (Vernon Supp. 1980-1981).
269. 588 S.W.2d 905, 908 (Tex. Crim. App. 1979).
270. *See* TEX. REV. CIV. STAT. ANN. arts. 4476—14, —15 (Vernon 1976 & Supp. 1980-1981).
271. 588 S.W.2d at 908-09.
272. *See* Jones v. State, 580 S.W.2d 542 (Tex. Crim. App. 1976).
273. TEX. PENAL CODE ANN. § 1.03(b) (Vernon 1974) provides that titles 1, 2, and 3 of the Code apply to offenses defined elsewhere by other laws. The criminal attempt statute is located in title 4; hence, the attempt statute does not apply to those other laws. *But see* TEX. REV. CIV. STAT. ANN. art. 4476—15, § 4.09(a)(3) (Vernon Supp. 1980-1981) ("It is unlawful for any person knowingly or intentionally . . . to acquire, obtain, or attempt to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge . . . .").
274. 612 F.2d 930 (5th Cir. 1980).
275. *Id.* at 934.
276. 590 F.2d 1379 (5th Cir. 1979).

ing the government's case in a favorable light, there is substantial evidence to support it.[277] In the present case the evidence was insufficient and an acquittal was ordered.[278]

X. ARSON

In *Adrian v. State*[279] the only evidence presented by the state was the defendant's confession that he had deliberately set the fire in question.[280] The cause of the fire was never shown by other evidence. The court stated that to establish the corpus delicti of arson the state must show that the house was designedly set on fire by someone; even if the defendant confesses, the extrajudicial confession alone is insufficient to sustain a conviction.[281] The court emphasized that the confession must be corroborated by evidence that a crime has been committed, such as proof of the corpus delicti.[282] Since the evidence was insufficient, the court ordered a reversal and a judgment of acquittal.[283]

The arson statute requires only that the defendant act with intent to damage or destroy a building, and the act is complete when the defendant starts a fire with the requisite culpable mental state.[284] The co-defendants in *Romo v. State*[285] and *Beltran v. State*[286] were convicted of arson, although the Travis County jail contained noncombustible material, and efforts to keep a fire going in their cellblock failed. In both cases the court stated that whether damage of any kind actually occurs is irrelevant.[287]

When bodily injury less than death is suffered by any person by reason of the commission of arson, it becomes a first degree felony. Otherwise, arson is a second degree felony.[288] The defendant in *Rinehart v. State*[289] prevailed in overturning his first degree arson conviction by contending that the conviction was void because the person named in the indictment died by reason of the fire. The court noted that if death results from the arson, a different offense is committed.[290] A legislative amendment is expected to correct this incongruity.

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277. 612 F.2d at 934.

278. *Id.*

279. 587 S.W.2d 733 (Tex. Crim. App. 1979).

280. TEX. PENAL CODE ANN. §§ 28.02(a), (c) (Vernon Supp. 1980-1981) provide: "A person commits an offense if he starts a fire or causes an explosion . . . . [This] is a felony of the second degree, unless *any bodily injury less than death* is suffered . . . in which event it is a felony of the first degree." (Emphasis added.)

281. 587 S.W.2d at 735.

282. *Id.* at 734; *see, e.g.*, Self v. State, 513 S.W.2d 832 (Tex. Crim. App. 1974).

283. 587 S.W.2d at 735.

284. TEX. PENAL CODE ANN. § 28.02(a) (Vernon Supp. 1980-1981).

285. 593 S.W.2d 690 (Tex. Crim. App. 1980).

286. 593 S.W.2d 688 (Tex. Crim. App. 1980).

287. 593 S.W.2d at 693; 593 S.W.2d at 690.

288. TEX. PENAL CODE ANN. § 28.02(c) (Vernon Supp. 1980-1981).

289. 589 S.W.2d 442 (Tex. Crim. App. 1979).

290. *Id.* at 443-44. The court lists three possible offenses: second degree felony arson; murder; or capital murder. *Id.* at 444.

XI. INTOXICATION

Intoxication results not only from the consumption of liquor but also from the ingestion of drugs or any other substance that disturbs mental or physical capacities of the body.[291] The driving while intoxicated statute[292] encompasses all situations where the driver is intoxicated, whether from alcohol, narcotics, or other drugs. Although the Texas Penal Code closely follows most of the Model Penal Code, there is a sharp departure concerning intoxication.[293] The Model Penal Code allows intoxication as a defense to a criminal charge if it is such as to negate a particular element essential to conviction.[294] Texas retains its former law on intoxication, and the Penal Code provides that voluntary intoxication is no defense to the commission of a crime[295] even if the accused was so incapacitated by his intoxicated state at the time of the offense that he was unable to form an intent. Thus, if the evidence shows proof of voluntary intoxication, the jury will be instructed at the guilt-innocence phase of the trial that voluntary intoxication is no defense.

Another problem arises concerning the accused who claims to be involuntarily intoxicated. Texas law has been silent in reference to this question. In *Torres v. State*[296] the accused presented evidence that her friend had drugged her drink without her knowledge. The defense asserted that because of this involuntary intoxication she could not form an intent required to commit the crime of robbery. The court questioned whether the defense of involuntary intoxication existed in Texas.[297] In its answer, the court created a new affirmative defense.[298] The court held:

[I]nvoluntary intoxication is a defense to criminal culpability when it

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291. TEX. PENAL CODE ANN. § 8.04 (Vernon 1974) provides:

(a) Voluntary intoxication does not constitute a defense to the commission of crime.

(b) Evidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried.

(c) When temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of this section.

(d) For purposes of this section "intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

292. TEX. REV. CIV. STAT. ANN. art. 6701*l*—1 (Vernon Supp. 1980-1981). The driving while intoxicated statute was amended by the 66th Legislature to include "beach." *Id.*

293. *Compare* MODEL PENAL CODE § 2.08 *with* TEX. PENAL CODE ANN. § 8.04 (Vernon 1974).

294. MODEL PENAL CODE § 2.08(1).

295. TEX. PENAL CODE ANN. § 8.04(a) (Vernon 1974).

296. 585 S.W.2d 746 (Tex. Crim. App. 1979).

297. *Id.* at 748.

298. TEX. PENAL CODE ANN. § 2.04 (Vernon 1974) provides:

(a) An affirmative defense . . . is so labeled by the phrase: "It is an affirmative defense to prosecution . . . ."

. . . .

(c) The issue of the existence of an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of an affirmative defense is submitted to

> is shown that: (1) the accused has exercised no independent judgment or volition in taking the intoxicant; and (2) as a result of his intoxication the accused did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated.[299]

The court reversed the case with the admonition that the jury should have been charged on this defense raised by the evidence.[300]

The court's approach to involuntary intoxication in *Torres* parallels that of temporary insanity produced by intoxication. As this latter affirmative defense, which places the burden of proof of a preponderance of the evidence on the defendant, is codified in section 8.01 of the Texas Penal Code, the legislature may be expected to amend the intoxication statutes to include the new involuntary intoxication defense. Raising an affirmative defense at the guilt-innocence phase weighs somewhat heavier on the due process scales than raising the issue at the punishment phase to effect mitigation of the penalty. The fundamental question is whether, in the face of the plain language of the affirmative defense statute,[301] the court, and not the legislature, can create an uncodified affirmative defense, as it has done in the instant case.

When one of the essential elements of an offense is voluntary intoxication, the legislature does not require proof of the culpable mental state of the accused.[302] Proof of a culpable mental state is not necessary when the offense is driving while intoxicated.[303] Nor does prosecution for involuntary manslaughter wherein voluntary intoxication is an essential element[304] require an allegation or proof of a culpable mental state.[305] By construing statutes to eliminate the culpable mental state requirement, the court precludes the argument that the acts of the accused at the time of the offense were not voluntary. This is significant in that Texas law is clear that in order for a crime to be committed there must be a voluntary act as

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> the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of the evidence.

299. 585 S.W.2d at 749; TEX. PENAL CODE ANN. § 8.01 (Vernon 1974) provides:

> (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of mental disease or defect, either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated.

300. 585 S.W.2d at 750.

301. TEX. PENAL CODE ANN. § 2.04 (Vernon 1974).

302. *See Ex parte* Ross, 522 S.W.2d 214, 218 (Tex. Crim. App. 1975).

303. TEX. REV. CIV. STAT. ANN. art. 6701*l*—1 (Vernon Supp. 1980-1981); *see, e.g.*, Owen v. State, 525 S.W.2d 164 (Tex. Crim. App. 1975); *Ex parte* Ross, 522 S.W.2d 214 (Tex. Crim. App. 1975).

304. TEX. PENAL CODE ANN. § 19.05 (Vernon 1974) states:

> (a) 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.
>
> (b) "[I]ntoxication" means that the actor does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.

305. *See* Hardie v. State, 588 S.W.2d 936, 938 (Tex. Crim. App. 1979).

well as a culpable mental state.[306]

XII. JUVENILE DELINQUENCY

Upon the juvenile court's statutory transfer[307] of the juvenile defendant to the appropriate district court, that district court shall conduct an examining trial.[308] In *Menefee v. State*[309] the court announced that this procedural step is mandatory and that failure to comply is a jurisdictional defect that entitles the relator-juvenile to habeas corpus relief after conviction.[310] During the survey period two cases were decided granting juveniles post-conviction relief.[311]

The court of criminal appeals emphasized in *Criss v. State*[312] that waiver of the examining trial by the child and his attorney may be proper if there is strict compliance with the waiver statutes.[313] When the record fails to reflect such waiver and the state makes no affirmative showing of the examining trial, the court must remand the case to the district court for its findings, even in a case in which the same judge presides over the juvenile court and the district court.[314] In *Ex parte Morgan*[315] the Texas Court of Criminal Appeals was called upon to determine whether the former discretionary transfer provision[316] should be interpreted in the same manner that the court interpreted the present provision[317] in *Menefee*.[318] The court

306. TEX. PENAL CODE ANN. § 6.01(a) (Vernon Supp. 1980-1981) states: "A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." *Id.* § 1.07(a)(8) (Vernon 1974) provides: " 'Conduct' means an act or omission and its accompanying mental state." *Id.* § 1.07(a)(1) provides: " 'Act' means a bodily movement, whether voluntary or involuntary, and includes speech." *See* Powell v. Texas, 392 U.S. 514, 532-37 (1968) (conviction of defendant for public intoxication affirmed over defense of chronic, involuntary alcoholism).

307. TEX. FAM. CODE ANN. § 54.02 (Vernon 1975).

308. *Id.* § 54.02(h).

309. 561 S.W.2d 822 (Tex. Crim. App. 1978).

310. *Id.* at 829-30; *accord*, Simonton v. State, 586 S.W.2d 528 (Tex. Crim. App. 1979).

311. *Ex parte* Gilbert, 593 S.W.2d 685 (Tex. Crim. App. 1980); *Ex parte* Buchanan, 588 S.W.2d 596 (Tex. Crim. App. 1979); *cf.* Guzman v. State, 589 S.W.2d 461, 464 (Tex. Crim. App. 1979) (post-conviction relief denied because record affirmatively reflected that examining trial did occur). *See generally* Butts, *supra* note 16, at 522-24.

312. 563 S.W.2d 942, 945 (Tex. Crim. App. 1978).

313. TEX. FAM. CODE ANN. § 51.09(a) (Vernon Supp. 1980-1981) provides:

> Unless a contrary intent clearly appears elsewhere . . . 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 . . . if:
>
> (1) the waiver is made by the child and the attorney for the child;
>
> (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
>
> (3) the waiver is voluntary; and
>
> (4) the waiver is made in writing or in court proceedings that are recorded.

314. *See Ex parte* Lantroop, 604 S.W.2d 116, 117 (Tex. Crim. App. 1980); Hernandez v. State, 603 S.W.2d 848, 849 (Tex. Crim. App. 1980). *But see id.* at 849 (Dally, J., dissenting); White v. State, 576 S.W.2d 843, 850 (Tex. Crim. App. 1979) (Davis, J., dissenting); Menefee v. State, 561 S.W.2d at 830 (Douglas, J., dissenting).

315. 595 S.W.2d 128 (Tex. Crim. App. 1980).

316. 1967 Tex. Gen. Laws, ch. 475, § 6(j), at 1084.

317. TEX. FAM. CODE ANN. § 54.02(h) (Vernon 1975).

318. Menefee v. State, 561 S.W.2d at 829-30.

avoided reaching the merits of this question, ruling instead that petitioner was outside the jurisdiction of the juvenile court.[319] The defendant was seventeen years old at the time he was arrested, indicted, and tried, and under then article 2338—1, sections 3 and 5a,[320] the juvenile court had no jurisdiction because the male defendant was not a child. Thus, the court reasoned that he could not be denied any rights under that article, such as the right to an examining trial.[321]

In *Ex parte Trahan*[322] the court clarified the effect of the 1967 amendment to article 2338—1, the prior juvenile law, which provided for a statutory transfer and waiver of jurisdiction procedure as well as an examining trial. No proceedings of any kind were conducted by a juvenile court in *Trahan*. Instead, the juvenile was indicted when his age was sixteen and pleaded guilty when he was seventeen. This was customary procedure before the amendment. Under prior law, the age of the delinquent child was determined at the time of the trial, not at the time of the commission of the offense, as it is now. The court reasoned that had the legislature intended that procedure to continue, it would not have amended article 2338—1 as it did.[323] Thus, ruled the court, the indictment returned against Trahan in 1968 conflicted with the terms of the juvenile statute as amended in 1967.[324] Because of the jurisdictional defect, the court granted the writ of habeas corpus and dismissed the case.[325]

In another jurisdiction case, *Cordary v. State*,[326] the defendant entered a plea of guilty to a felony and was given probation. At a subsequent revocation hearing she proved her age to be sixteen at the time of her plea. The court of criminal appeals declared the indictment void and dismissed the case.[327] In its holding the court ruled that the provisions of the former juvenile law[328] and the present law[329] define the age jurisdiction of the

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319. 595 S.W.2d at 130.
320. 1967 Tex. Gen. Laws, ch. 475, §§ 3, 5(a), at 1082-83, *construed in Ex parte* Trahan, 591 S.W.2d 837 (Tex. Crim. App. 1979).
321. 595 S.W.2d at 130.
322. 591 S.W.2d 837 (Tex. Crim. App. 1979).
323. *Id.* at 842.
324. *Id.* at 841.
325. *Id.* at 842.
326. 596 S.W.2d 889 (Tex. Crim. App. 1980).
327. *Id.* at 891.
328. 1967 Tex. Gen. Laws, ch. 475, §§ 3, 5(a), at 1082-83.
329. TEX. FAM. CODE ANN. § 51.02 (Vernon 1975) states:

> (1) "Child" means a person who is:
>
> (A) ten years of age or older and under 17 years of age; or
>
> (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

TEX. PENAL CODE ANN. § 8.07 (Vernon Supp. 1980-1981) provides:

> (b) Unless the juvenile court waives jurisdiction and certifies the individual for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age . . . .
>
> . . . .
>
> (c) Unless the juvenile court waives jurisdiction and certifies the individ-

criminal court in substantially the same fashion.[330]

In efforts to curb the large number of applications for writs of habeas corpus by juvenile defendants who earlier have been transferred and convicted in criminal court, the court in *Ex parte Alexander*[331] limited the holding in *White v. State*[332] to direct appeals. The *White* holding, that the record must affirmatively reflect that an examining trial has in fact been held in the district court to which the juvenile is transferred will apply, therefore, only to direct appeals, not to collateral attacks under article 11.07 of the Code of Criminal Procedure.[333] Thus, the defendant's burden in a collateral attack is to prove the lack of an examining trial.[334]

The continuing *Burks-Greene* saga has emerged in the appellate civil courts that review juvenile cases. In *K.W.H. v. State*,[335] a case concerning circumstantial evidence, the state failed to prove the commission of criminal mischief, the offense charged. The court of civil appeals ruled that there was insufficient evidence concerning the matter and that the state was prohibited from trying the juvenile again on this charge.[336]

One young defendant's attempt to cloak himself in the protective mantle of the juvenile laws was refused by the court of criminal appeals. Shortly before his seventeenth birthday the petitioner was adjudicated a juvenile delinquent. After his seventeenth birthday he committed the offense of aggravated robbery. The petitioner claimed that the district court lacked jurisdiction to try him as an adult because he was still under the jurisdiction of the juvenile court and that there had been no waiver of jurisdiction under section 54.02.[337] The court held that his favored status as a "child" was not preserved by the adjudication; he could be prosecuted for a penal offense committed after reaching seventeen and before becoming eighteen.[338]

Conforming the juvenile code provisions on accomplice testimony to those in the Penal Code, a recent statutory amendment[339] was applied in

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ual for criminal prosecution, a person who has been alleged in a petition for an adjudication hearing to have engaged in delinquent conduct or conduct indicating a need for supervision may not be prosecuted for or convicted of any offense alleged in the juvenile court petition or any offense within the knowledge of the juvenile court judge as evidenced by anything in the record of the juvenile court proceedings.

330. 596 S.W.2d at 891.

331. 598 S.W.2d 308, 309 (Tex. Crim. App. 1980).

332. 576 S.W.2d 843 (Tex. Crim. App. 1979).

333. TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977 & Supp. 1980-1981).

334. *See Ex parte* Lantroop, 604 S.W.2d 116, 117 (Tex. Crim. App. 1980).

335. 596 S.W.2d 248 (Tex. Civ. App.—Texarkana 1980, no writ).

336. *Id.* at 251.

337. TEX. FAM. CODE ANN. § 54.02 (Vernon 1975).

338. *Ex parte* Mercado, 590 S.W.2d 464, 469 (Tex. Crim. App. 1979).

339. TEX. FAM. CODE ANN. § 54.03(e) (Vernon Supp. 1980-1981) provides in part: "An adjudication of delinquent conduct or conduct indicating a need for supervision cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the child with the alleged delinquent conduct . . . ."

two cases during the survey period.[340] In *In re A.D.L.C.*[341] the court stressed that the juvenile amendment is identical to the corresponding article of the Code of Criminal Procedure.[342] According to the court, the test to determine whether the accomplice testimony has been sufficiently corroborated is first to eliminate the accomplice testimony from consideration, then to examine the evidence of other witnesses, and if other incriminating evidence tending to connect the accused minor to the commission of the offense exists, that is sufficient corroboration.[343]

XIII. CONCLUSION

Noteworthy signs continued to manifest themselves in the criminal law field during the survey period. The Texas Court of Criminal Appeals scrutinizes indictments and informations, both on direct appeal and on collateral attack, for fundamental errors. It reverses, however, for fundamental error only on direct appeal, when the error is found in a charge to the jury. The exceptions to this approach are the rare instances when the jury charge violates constitutional due process and denies the defendant a fair trial. The court reviews for insufficiency of the evidence to sustain the conviction and reverses and orders a judgment of acquittal if that is the finding. Applications for writs of habeas corpus are granted to those convicted at a second prosecution following an earlier reversal for insufficiency of the evidence. From many years of decisions mandating a jury charge on circumstantial evidence when that charge is properly requested, the Texas court seems to be moving away from the rigid rule and toward the close juxtaposition rationale.[344] Further, the criminal appellate court is creating new law and construing much of the civil juvenile code.

340. *In re* M.L., 602 S.W.2d 550 (Tex. Civ. App.—Corpus Christi 1980, no writ); *In re* A.D.L.C., 598 S.W.2d 383 (Tex. Civ. App.—Amarillo 1980, no writ).

341. 598 S.W.2d 383, 385 (Tex. Civ. App.—Amarillo 1980, no writ).

342. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979), which states: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

343. 598 S.W.2d at 385.

344. *See* LeDuc v. State, 593 S.W.2d 678, 682 (Tex. Crim. App. 1980); Adams v. State, 588 S.W.2d 597, 598 (Tex. Crim. App. 1979); Ales v. State, 587 S.W.2d 686, 688 (Tex. Crim. App. 1979).