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## Criminal Procedure: Trial and Appeal

Jeffrey B. Keck

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# CRIMINAL PROCEDURE: TRIAL AND APPEAL

by  
Jeffrey B. Keck\*

## I. SIXTH AMENDMENT RIGHT TO COUNSEL

### A. Right to Assistance of Counsel

**D**URING the survey period the most important decision concerning the absolute right to counsel was *Polk v. State*,<sup>1</sup> a court of criminal appeals opinion concerning an indigent defendant's right to representation when petitioning for discretionary review. The court of criminal appeals affirmed the defendant's conviction and the defendant filed a pro se petition for discretionary review, advising the court of criminal appeals that he was both indigent and not represented by counsel.<sup>2</sup> The court granted discretionary review, abated the appeal, and remanded the case to the trial court ordering that an attorney be appointed to represent the appellant in filing a brief in the court of criminal appeals.<sup>3</sup> The majority distinguished its prior decision in *Ayala v. State*,<sup>4</sup> in which it had denied an indigent provision of counsel for the purpose of petitioning for discretionary review, stating that *Ayala* stood only for the position that an indigent defendant is not entitled to the assistance of counsel to aid him in *filing* a petition for discretionary review, a decision not disturbed by *Polk*.<sup>5</sup> The decision to remand to the

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\* B.A., University of Washington; J.D., University of Texas School of Law. Assistant District Attorney, Dallas County, Texas.

1. 676 S.W.2d 408 (Tex. Crim. App. 1984).

2. *Id.* at 409. The majority treated this statement as a request for counsel although Judge Teague, in his dissent, argued that the appellant had never made a request to the court to appoint him counsel to assist him in the preparation or the filing of a brief in support of his position. *Id.* at 415.

3. *Id.* at 409.

4. 633 S.W.2d 526 (Tex. Crim. App. 1982).

5. In *Ayala* the court chose to confront the question of whether an indigent defendant had been deprived of effective assistance of counsel on appeal when his appointed counsel failed to file an adequate petition for discretionary review. Appointed counsel had filed a petition for discretionary review that failed to set forth any of the grounds for such a petition required by TEX. R. CRIM. APP. P. 302(c) & 304(d)(4). Although the court found that the petition lacked even colorable grounds for review, the court wrote to clarify the duty of appellate counsel. *Ayala*, 633 S.W.2d at 527. The court found that, because an appeal to the court of criminal appeals is discretionary in non-death penalty cases, *see* TEX. CONST. art.V, § 5, indigent appellants were not deprived of effective assistance of counsel when petitioning for discretionary review, since neither the federal Constitution nor state law required indigent defendants to be provided with counsel for that purpose. *Ayala*, 633 S.W.2d at 528; *see* *Wainwright v. Torna*, 455 U.S. 586, 590 (1982) (neither due process nor equal protection requires assistance of appointed counsel beyond the intermediate appellate court); *Ross v. Moffit*, 417

trial court in *Polk* was based on the particular facts of the case, in which a pro se petition for discretionary review had already been filed and the court had agreed to review one of the grounds asserted in that petition.<sup>6</sup>

In reaching its decision that the appointment of counsel was necessary, the *Polk* court found unnecessary any discussion of the constitutional ramifications of the problem.<sup>7</sup> The court focused instead upon statutory language that the court held manifested a legislative choice that indigents should be provided with counsel once the court had granted a petition for discretionary review.<sup>8</sup> The legislative choice in question was not a result of any specifically enacted legislation that mandated appointment of counsel at a particular stage of appellate proceedings.<sup>9</sup> Rather, it was a result of the court's interpretation of the provisions of article 26.05 of the Code of Criminal Procedure.<sup>10</sup> The rationale of the court was that, by providing compensation to appointed counsel for the prosecution of a bona fide appeal to a court of appeals or to the court of criminal appeals, in article 26.05, section 1(e), the legislature intended that an indigent defendant be provided with counsel to prepare a brief on petition for discretionary review once the defendant's petition was granted.<sup>11</sup> Thus, only successful petitions for discretionary review are bona fide petitions as that term is used in the statute.<sup>12</sup>

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U.S. 600, 617 (1974) (same); see also TEX. CODE CRIM. PROC. ANN. arts. 26.04 (Vernon 1966), 26.05 (Vernon Pam. Supp. 1966-1985). Chief Judge Onion and Judge Clinton concurred on the ground that since appointed counsel had prepared Ayala's petition the court should not reach beyond the merits of the petition. *Ayala*, 633 S.W.2d at 529-30. Judge Teague would have found a statutory right to such representation was created by TEX. CODE CRIM. PROC. ANN. art. 26.05 (Vernon Pam. Supp. 1966-1985). *Ayala*, 633 S.W.2d at 534. The language in *Ayala* that intimated that no constitutional or state law guarantee to counsel on discretionary review existed became the textual basis of trial court refusals to appoint counsel for indigent defendants seeking discretionary review. At least in Dallas County, some trial courts have approved payment for indigents' appellate counsel only when the court of criminal appeals granted the petition prepared by counsel.

6. 676 S.W.2d at 409.

7. *Id.*

8. *Id.* In *Ross v. Moffit*, 417 U.S. 600 (1974), the majority opinion stated: "We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review." *Id.* at 618.

9. 676 S.W.2d at 410.

10. TEX. CODE CRIM. PROC. ANN. art. 26.05 (Vernon Pam. Supp. 1966-1985) provides:

Section 1. A counsel appointed to defend a person accused of a felony or a misdemeanor punishable by imprisonment, or to represent an indigent in a habeas corpus hearing, shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held, according to the following schedule:

(e) For the prosecution to a final conclusion of a bona fide appeal to a court of appeals or the Court of Criminal Appeals, a reasonable fee to be set by the court but in no event to be less than \$350;

(f) For the prosecution to a final conclusion of a bona fide appeal to the Court of Criminal Appeals in a case where the death penalty has been assessed, a reasonable fee to be set by the court but in no event to be less than \$500.

11. 676 S.W.2d at 410.

12. *Id.* at 411. In reaching this conclusion the court also cited TEX. CODE CRIM. PROC. ANN. art. 44.45 (Vernon Supp. 1985) and TEX. R. CRIM. APP. P. 306, which require that both parties file briefs after the court of criminal appeals grants review in a non-death penalty case.

Apart from the somewhat strained reasoning the court used to reach the conclusion that article 26.05 requires the appointment of counsel only for petitions seeking discretionary review,<sup>13</sup> the most troubling question the court's decision in *Polk* poses is whether an indigent accused who prevails in the court of criminal appeals is entitled to appointed counsel to assist him in opposing the state's petition for discretionary review.<sup>14</sup> The decision in *Polk* presumably can be extrapolated to mean that the indigent defendant would not be entitled to assistance of counsel to file a response to the state's application for discretionary review, but would be entitled to such assistance to prepare a brief if the state's petition was granted. The majority opinion relied solely upon the language of article 26.05, section 1(e), which provides for compensation for the prosecution of a bona fide appeal, rather than the language of article 26.04(a), which provides for appointment of counsel to defend an indigent accused. Therefore, the court, when presented with such an issue in the future, might conclude that the indigent accused is not entitled to have counsel prepare a brief when the court undertakes discretionary review on the state's petition.

### B. Ineffective Assistance of Counsel

#### 1. The United States Supreme Court

The United States Supreme Court issued two major opinions during the survey period dealing with ineffective assistance of counsel, a component of the right to counsel guaranteed by the sixth amendment.<sup>15</sup> In *Strickland v. Washington*,<sup>16</sup> a death penalty case, the Court addressed for the first time a claim of actual ineffectiveness of counsel's assistance<sup>17</sup> in a case that had

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676 S.W.2d at 411. It is difficult to see how the rules of criminal appellate procedure, which the court itself promulgated in accordance with TEX. CODE CRIM. PROC. ANN. arts. 40.10, 44.33, 44.45 (Vernon Supp. 1985), can themselves be the source of any direct legislative choice.

13. Judge Clinton, in his concurring opinion stated that article 26.05, standing alone "seems to be a slender reed," 676 S.W.2d at 412, and would have also relied upon the history of modifications to the former Code of Criminal Procedure and the fact that TEX. CODE CRIM. PROC. ANN. art. 26.04 (Vernon 1966), which was unchanged by the 1981 amendments to the present Code of Criminal Procedure, provides for appointment of counsel to defend an accused, without limitation. 676 S.W.2d at 412-15 (Clinton, J., concurring).

14. See Judge Clinton's concurring opinion in *Ayala*, 633 S.W.2d at 528, quoted with approval by Judge Teague in his dissent in *Polk*, 676 S.W.2d at 416: "Even now one feels pity for the indigent appellant whose appointed counsel achieved a reversal in the court of appeals and proudly retired from the appellate affray with his victory, leaving his erstwhile client to fend for himself when the State seeks discretionary review from this Court."

15. U.S. CONST. amend. VI.

16. 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

17. The Court had dealt with the issue of ineffective assistance of counsel in prior opinions. These opinions, however, dealt with cases in which the circumstances surrounding the trial made it unlikely that the defendant could have received the effective assistance of counsel. Thus, for example, when counsel is denied the right of effective cross-examination, *Davis v. Alaska*, 415 U.S. 308, 315 (1974), or counsel is given insufficient time to prepare for trial, *Powell v. Alabama*, 287 U.S. 45, 71 (1932), external constraints on the performance of trial counsel that justify a presumption of prejudice to the accused arise because the "[p]rejudice in these circumstances is so likely that case by case inquiry into the prejudice is not worth the cost . . . . [S]uch circumstances involve impairments of the Sixth Amendment right that are

gone to trial. The Court, in a 7-2 decision<sup>18</sup> by Justice O'Connor, held that, conflict of interest claims aside, to make a successful claim of actual ineffectiveness of counsel based upon the attorney's performance the defendant bears the burden of demonstrating that his attorney's performance fell below an objective standard of reasonable professional judgment.<sup>19</sup> Furthermore, the claimant must demonstrate that a reasonable probability<sup>20</sup> existed that but for such errors the result of the proceeding would have been different.<sup>21</sup> Applying this two-part test to the facts of the case, the Court concluded that the district court had properly refused the state's petition for federal writ of habeas corpus.

Justice O'Connor's opinion noted that a court reviewing an ineffectiveness claim must consider the totality of the evidence before the judge or jury since "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."<sup>22</sup> The majority also stated that a court was not required to address the two component parts of an ineffectiveness claim, the performance component and the prejudice component, in the same order as the *Strickland* Court did when making its decision.<sup>23</sup> Justice O'Connor also observed that the principles stated in her opinion did not establish mechanical rules.<sup>24</sup> Moreover, when lower courts have applied different standards to ineffectiveness claims in the past, the standards articulated did not require reconsideration of ineffectiveness claims rejected under different standards except in rare instances.<sup>25</sup>

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easy to identify and . . . easy for the government to prevent." *Strickland*, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697.

In *Strickland* the Court distinguished ineffective assistance of counsel claims based on actual conflict of interest on the part of counsel, such as those raised in *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). While *Cuyler*-type claims comprise one category of actual ineffectiveness, such claims warrant a presumption of prejudice similar to the presumption arising in the external constraint situations referred to above. The presumption of prejudice arises only after the defendant demonstrates that his counsel represented conflicting interests, and that the actual conflict of interest adversely affected that counsel's performance. 104 S. Ct. at 2067, 80 L. Ed. 2d at 696-97.

18. Justice Brennan joined in the majority opinion's standards regarding ineffectiveness of counsel but dissented from the judgment because of his views on capital punishment. 104 S. Ct. at 2071-74, 80 L. Ed. 2d at 702-06 (Brennan, J., dissenting).

19. *Id.* at 2068, 80 L. Ed. 2d at 698.

20. "Reasonable probability" was defined as a "probability sufficient to undermine confidence in the outcome." *Id.*

21. *Id.* at 2069, 80 L. Ed. 2d at 698. The majority held that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When the defendant challenges a death sentence such as the one at issue . . . , the question is whether there is reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent that it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.*

22. *Id.*, 80 L. Ed. 2d at 699.

23. *Id.*

24. *Id.*

25. *Id.* As for Texas cases, little or no practical change in the standard for judging ineffectiveness of actual representation will probably result since the court of criminal appeals had, prior to *Strickland*, adopted the same standard of reasonably effective assistance of counsel that the court of appeals applied in *Strickland*. 104 S. Ct. at 2060-61, 80 L. Ed. 2d at 688-89;

Since the failure of counsel to investigate independently the facts of the case before trial continues to result in some reversals,<sup>26</sup> the Court's discussion of this component of counsel's duty to his client is of particular importance. The Court noted that the defendant's own statements or actions may determine or substantially influence the reasonableness of a trial court's action. Strategic choices of defense counsel are properly based on information the defendant supplied and when a defendant has given his counsel cause to believe that pursuing certain courses of investigation would be frivolous or harmful, counsel's failure to pursue those courses may not later be challenged as unreasonable. Counsel's conversations with the defendant may be vital to a proper assessment of counsel's decisions regarding investigation and other litigation decisions.<sup>27</sup> This discussion should serve as an additional reminder to defense counsel of the importance of maintaining careful records concerning information the accused provided him prior to and during trial.

In *United States v. Cronic*,<sup>28</sup> another sixth amendment case decided the same day as *Strickland*, the Court reversed the holding of the Tenth Circuit Court of Appeals.<sup>29</sup> The court of appeals, using five separate criteria, had inferred that the defendant in a mail fraud case involving a "check kiting" scheme<sup>30</sup> had been denied effective assistance of counsel.<sup>31</sup> The defendant's appointed attorney was a young lawyer with no real criminal law practice experience and who was given only twenty-five days to prepare for trial, while the government had taken four years to prepare the case against his client. The court of appeals had reversed the conviction without finding that

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see *Ex parte Raborn*, 658 S.W.2d 602, 605 (Tex. Crim. App. 1983), and cases cited therein. Indeed, in its opinion on rehearing in *Flanagan v. State*, 675 S.W.2d 734, 736 (Tex. Crim. App. 1984), the court, speaking through Judge Miller, mentioned *Strickland* only in passing.

While *Strickland* put the focus of the inquiry on specific lapses of performance that harmed the defendant, rather than on the totality of the representation, the court of criminal appeals and the majority opinion in *Strickland* suggest that most ineffective assistance of counsel claims, if successful, will be based upon multiple errors of trial counsel, not on a single failure to render reasonably effective assistance. As a practical matter, most appellate records do contain more than one example of errors in trial counsel's performance. Moreover, under the totality of the representation standard, Texas state courts have found that a single strategic error can constitute ineffective assistance of counsel. *Jackson v. State*, 662 S.W.2d 74, 76 (Tex. App.—San Antonio 1983, no pet.), in which ineffective assistance of counsel was found based upon counsel's advice concerning the defendant's election to seek punishment from the jury upon a re-trial of a prior conviction, illustrates this fact. In the prior trial the defendant had received a 15-year sentence, the minimum possible punishment under the relevant habitual offender's statute. On re-trial counsel advised the defendant to go to the jury for punishment, despite the fact that under *North Carolina v. Pearce*, 395 U.S. 711, 714 (1969), the minimum sentence that the new jury could have imposed was the maximum that the trial court could have ordered. 662 S.W.2d at 76. This single piece of bad legal advice was sufficient for the court of appeals to find that the defendant had received ineffective assistance of counsel requiring the reversal of his conviction. *Id.* at 76.

26. See *Ex parte Raborn*, 658 S.W.2d at 605.

27. 104 S. Ct. at 2066-67, 80 L. Ed. 2d at 693-94.

28. 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

29. *United States v. Cronic*, 675 F.2d 1126 (10th Cir. 1982), *rev'd*, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

30. See *Williams v. United States*, 458 U.S. 279, 280-82 & n.1 (1982).

31. 675 F.2d at 1129.

Cronic's trial counsel had made any specific errors, that his performance had prejudiced the defense, or that he had not used "the skill, judgment, and diligence of a reasonably competent defense attorney."<sup>32</sup> Instead the conclusion rested on the premise that no such showing was necessary when circumstances deter a given lawyer's preparation of the defendant's case.<sup>33</sup>

The Supreme Court reversed the court of appeals because the five criteria that the Tenth Circuit had used<sup>34</sup> did not provide, either independently or in combination, a basis for inferring that the defendant was denied the effective assistance of counsel.<sup>35</sup> Justice Stevens stated that the case was not one in which the surrounding circumstances made likely the situation that the defendant was denied the effective assistance of counsel, and indicated that the criteria the court of appeals used did not demonstrate that counsel failed to provide an adequate defense.<sup>36</sup> The case was remanded to the court of appeals for consideration of a claim of ineffective assistance of counsel based on specific errors made by defense counsel. The court was to evaluate those errors by the standards enunciated in *Strickland v. Washington*.<sup>37</sup>

## 2. State Courts

In *Ex parte Raborn*<sup>38</sup> a finding of ineffective assistance of counsel was based primarily upon counsel's failure to investigate the facts of the case. The court of criminal appeals reversed the applicants' convictions on this ground.<sup>39</sup> The majority opinion's refusal to consider whether the fact that disciplinary action had been taken against the attorney for the applicants should have any bearing on the court's decision in the habeas corpus action is of particular interest. A State Bar District Grievance Committee had suspended the applicants' trial counsel from the practice of law as a result of his violations of disciplinary rules during his representation of the applicants. The case had been filed in order to consider what bearing, if any, a grievance committee finding of professional misconduct should have in a subsequent post-conviction habeas corpus proceeding.<sup>40</sup> The majority of the court, however, upon finding that the suspension was based in part on violations other than the question of effective assistance of counsel at trial, held that such a finding should have no bearing in a subsequent habeas corpus case

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32. 104 S. Ct. at 2042, 80 L. Ed. 2d at 662 (quoting the 10th Circuit's opinion, 675 F.2d at 1128).

33. 104 S. Ct. at 2042, 80 L. Ed. 2d at 662.

34. The five factors relied upon by the court of appeals in making its inference of ineffective assistance of counsel were: (1) the time afforded for investigation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of the possible defenses; and (5) the accessibility of counsel. 104 S. Ct. at 2043, 80 L. Ed. 2d at 663-64 (citing *United States v. Cronic*, 675 F.2d at 1129, which in turn had quoted *United States v. Golub*, 638 F.2d 185, 189 (10th Cir. 1980)).

35. 104 S. Ct. at 2049, 80 L. Ed. 2d at 670.

36. *Id.* at 2051, 80 L. Ed. 2d at 672-73.

37. *Id.* at 2051 n.41; 80 L. Ed. 2d at 673 n.41.

38. 658 S.W.2d 602 (Tex. Crim. App. 1983).

39. *Id.* at 605.

40. *Id.* at 605 (Clinton, J., concurring).

alleging solely the ineffective assistance of counsel at trial.<sup>41</sup> The majority opinion declined to discuss the matter as an "abstract subject."<sup>42</sup>

When an accused pleads guilty as a result of reliance on advice of counsel that falls below the minimum standards for effective assistance of counsel, the resulting plea may not be a voluntary or knowing and intelligent act of the accused and the resulting conviction may be reversed.<sup>43</sup> In *Ex parte Stansbery*<sup>44</sup> defendant's counsel attacked an allegedly involuntary confession but then waived preservation of this point for appellate purposes by having the defendant plead guilty and sign a judicial confession, after first advising his client that the merits of his pre-trial suppression motion would be addressed on appeal. Since the trial court did not correct this misinformation but rather tacitly approved it, the court of criminal appeals found that the plea of guilty was involuntary.<sup>45</sup>

In *Ex parte Kelly*,<sup>46</sup> a case in which the facts closely paralleled those found in *Stansbery*, the court reversed a guilty plea on the ground that it was rendered involuntarily as a result of ineffective assistance of counsel.<sup>47</sup> The accused was charged with three counts of aggravated sexual abuse.<sup>48</sup> At the habeas corpus hearing the accused established that he had pleaded guilty because his counsel had advised him that he might receive probation from the trial court, and that he would not have pleaded guilty had he known that probation was statutorily unavailable to him.<sup>49</sup>

The court of appeals cases decided in the survey period make it clear that in prosecuting a *Stansbery*-type claim, care must be taken to ensure that the record on appeal reflects both that the defendant received misinformation from his trial counsel and that the defendant relied upon that misinformation when entering his plea of guilty. In *Shepherd v. State*<sup>50</sup> the defendant

41. *Id.* at 604.

42. *Id.* In his concurring opinion, Judge Clinton stated that such disciplinary actions should never have a bearing in habeas corpus proceedings, citing the different focus of inquiry in a disciplinary proceeding and the fact that because disciplinary committee records are confidential, TEX. REV. CIV. STAT. ANN. art. 320a-1, § 13(b) (Vernon Supp. 1985), the court would only be able to learn what was contained in the abstract of the judgment of the committee and the testimony of counsel concerning its contents. 658 S.W.2d at 605-07.

43. See *McMann v. Richardson*, 397 U.S. 759, 763 (1970); *Ex parte Young*, 644 S.W.2d 3, 5 (Tex. Crim. App. 1983) (defendant "grossly misinformed" about parole eligibility by attorney). The distinction between a voluntary waiver of a constitutional right and a waiver that is knowing and intelligent and made with adequate familiarity of the pertinent circumstances or probable consequences of the waiver is significant. See *Brady v. United States*, 397 U.S. 742, 747-48 (1970). Because the Texas statute, TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon Pam. Supp. 1966-1985), concerning guilty pleas conditions the trial court's acceptance of a guilty plea on a finding that the defendant is mentally competent and the plea is of his own volition, the state courts have held that a plea of guilty that is the product of bad legal advice is *involuntary* rather than unknowing. See *Ex parte Stansbery*, No. 69,274 (Tex. Crim. App. July 11, 1984) (not yet reported); *Ex parte Kelly*, 676 S.W.2d 132, 134 (Tex. Crim. App. 1984).

44. No. 69,274 (Tex. Crim. App. July 11, 1984) (not yet reported).

45. *Id.*, slip op. at 2.

46. 676 S.W.2d 132 (Tex. Crim. App. 1984).

47. *Id.* at 134.

48. TEX. PENAL CODE ANN. § 21.05 (Vernon 1974).

49. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3f(a)(1)(D) (Vernon 1979).

50. 673 S.W.2d 263 (Tex. App.—Houston [1st. Dist.] 1984, no pet.).



claimed that his pleas of guilty to aggravated robbery indictments were involuntarily entered because the trial court and his counsel led him to believe that he could receive probation for aggravated robbery. The record before the court of appeals contained only the statement of facts made at the guilt/innocence hearing and at the punishment hearing. At the punishment hearing defense counsel presented six witnesses whose testimony was used primarily to influence the court to grant a probated sentence. Counsel also argued for probation. The trial court correctly stated the proper range of punishment when it admonished the accused but did not inform him that aggravated robbery was not a probatable offense. The court of appeals declined to determine from these facts that the trial counsel gave the accused improper advice regarding the possibility of probation or that, if such advice had been given, the accused had relied on such advice.<sup>51</sup> The court found "conceivable that trial counsel pursued the hope at the punishment hearing that the court would withdraw its finding of guilt of aggravated robbery and replace it with a finding on a lesser, probatable offense."<sup>52</sup> In *Sterling v. State*<sup>53</sup> the court of appeals applied the two-step analysis enunciated in *Strickland v. Washington*<sup>54</sup> and found that the appellate record demonstrated the defendant's trial counsel's understanding of basic premises of criminal law was deficient but that the accused had made no showing that counsel's deficient performance significantly influenced him to plead guilty.<sup>55</sup>

With regard to claims of ineffective assistance of counsel on appeal, in *Ex parte Miller*<sup>56</sup> the court of criminal appeals faced a record that established that the defendant had hired counsel to file a petition for discretionary review, that counsel represented to the defendant that such a petition had been filed, and that the defendant relied upon this representation. Counsel had, in fact, filed no petition and appellant's conviction, therefore, became final. The court declined to follow the approach of *Wainwright v. Torna*,<sup>57</sup> holding that while federal rulings did not require that an accused be afforded counsel for purposes of perfecting a discretionary appeal, the state constitution<sup>58</sup> as well as statutory law<sup>59</sup> give an accused the right to petition for discretionary review.<sup>60</sup> This right was lost when counsel failed to file the petition as promised. The court granted appellant's request for an out-of-time filing of a petition for discretionary review.<sup>61</sup>

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51. *Id.* at 268.

52. *Id.* at 267.

53. 681 S.W.2d 680 (Tex. App.—Houston [14th. Dist.] 1984, no. pet.).

54. 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see supra* text accompanying notes 16-27.

55. *Sterling*, 681 S.W.2d at 682.

56. No. 69,164 (Tex. Crim. App. Oct. 5, 1983) (not yet reported).

57. 455 U.S. 586, 590 (1982).

58. TEX. CONST. art. I, §§ 10, 19 (granting accused the right to counsel).

59. TEX. CODE CRIM. PROC. ANN. art. 44.45(b)(1) (Vernon Supp. 1985).

60. *Miller*, No. 69,164, slip op. at 2. The court distinguished *Ayala v. State*, 633 S.W.2d 526 (1982), on the ground that while *Ayala* held that the accused had no right to counsel for purposes of filing a petition for discretionary review, it also recognized that the accused had a right to petition the court for such review. No. 69,194, slip op. at 4.

61. No. 69,194, slip op. at 4.

C. *Right of Self-Representation*

In *McKaskle v. Wiggins*<sup>62</sup> the majority of the Supreme Court, speaking through Justice O'Connor, overruled a holding of the Fifth Circuit<sup>63</sup> that had determined that the proper role of standby counsel was to be seen and not heard and to be used or not used at the defendant's discretion.<sup>64</sup> The Supreme Court held that the goals of affirming the dignity and autonomy of the accused in allowing the accused to present his best defense<sup>65</sup> can be achieved without total non-participation by standby counsel.<sup>66</sup> The Court also recognized, however, that the right to proceed pro se must be protected from excessive and intrusive participation by standby counsel.<sup>67</sup> The Court concluded, therefore, that the right must create some limitations on standby counsel's intrusion in the trial so that the accused will be assured of a meaningful chance to present his case in his own fashion.<sup>68</sup>

The majority opinion detailed two such limitations. First, the pro se defendant must be allowed to preserve actual control over the case presented to the jury.<sup>69</sup> When standby counsel's participation results in counsel being able to make tactical decisions, control questioning of witnesses, or speak instead of the defendant on important matters, this right is eroded.<sup>70</sup> Second, standby counsel's participation "should not be allowed to destroy the jury's perception that the defendant is representing himself."<sup>71</sup>

The Court then noted that because intervention of standby counsel outside of the jury's presence involves only the first of these two limitations,<sup>72</sup> sixth amendment rights are adequately vindicated in proceedings outside of the jury's presence if the pro se defendant is allowed to address the trial court freely and disagreements between standby counsel and the pro se defendant are resolved in the defendant's favor.<sup>73</sup> After finding that most of the unsolicited interference by standby counsel assigned as error in *McKaskle* occurred outside of the jury's presence,<sup>74</sup> the majority examined the nature of the interference of standby counsel that occurred before the jury. Noting

62. 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

63. *Wiggins v. Estelle*, 681 F.2d 266 (5th Cir.), *reh'g denied*, 691 F.2d 213 (5th Cir. 1982).

64. 681 F.2d at 273. The United States Supreme Court recognized an accused's sixth amendment right to conduct his own defense provided that he knowingly and intentionally surrenders his right to assistance of counsel and that he abides by rules of procedure and protocol while engaged in such self-representation in *Faretta v. California*, 422 U.S. 806 (1975). The Court recognized that the state may appoint standby counsel over the objection of the accused, to aid the accused if the accused requests assistance and to be available to counsel the accused in the event that termination of the accused's self-representation becomes necessary. *Id.* at 834-35 n.46. However, the Court did not attempt to define the proper role of standby counsel.

65. See *Faretta v. California*, 422 U.S. 806, 819 (1975).

66. 104 S. Ct. at 950, 79 L. Ed. 2d at 132.

67. *Id.*

68. *Id.*

69. *Id.* at 951, 79 L. Ed. 2d at 134.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 952, 79 L. Ed. 2d at 135.

74. *Id.*

that a categorical bar on participation of standby counsel before the jury was not required, the majority opinion focused on the fact that the defendant had approved or acquiesced in many of the instances of counsel's participation that were assigned as error.<sup>75</sup> The Court, therefore, could not easily determine how much of counsel's participation was contrary to defendant's desires at the time.<sup>76</sup> After some analysis the Court concluded that the interruptions before the jury simply were not substantial enough to have seriously created the impression that defendant's appearance before the jury was not *pro se*.<sup>77</sup>

The accused may waive the right to self-representation, like other constitutional rights, if he does not timely assert that right. Two Texas Court of Criminal Appeals opinions discussed the timeliness of a request for self-representation. In *Blankenship v. State*<sup>78</sup> the court of criminal appeals reversed a conviction, holding that a request for self-representation made on the day of trial was not untimely and that honoring the request would not have resulted in a delay of the proceedings.<sup>79</sup> The court also reaffirmed the principle that the trial judge cannot deny a timely-made demand for self-representation because the court finds that the accused lacks the ability to represent himself and infers from this finding that the accused's lack of legal proficiency negates a knowing and intelligent waiver of his right to counsel.<sup>80</sup> In *Johnson v. State*<sup>81</sup> the defendant demanded self-representation after the jury was impaneled but prior to the time that evidence was presented. The trial court denied the demand as untimely. The court of criminal appeals held that the demand was not untimely made and the trial court should have honored it.<sup>82</sup>

Two other court of criminal appeals decisions discussed the right to self-representation in more unusual factual contexts. In *Neal v. State*<sup>83</sup> the de-

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75. *Id.*

76. *Id.* at 953, 79 L. Ed. 2d at 136.

77. *Id.* at 956, 79 L. Ed. 2d at 139. Justice White, writing for the dissent, criticized the factual findings of the majority opinion. More importantly, Justice White argued that the seen-but-not-heard rule used by the Fifth Circuit was more workable than the two-prong approach of the majority, which in his opinion, "provides little or no guidance for counsel and trial judges, imposes difficult, if not impossible, burdens on appellate courts, and undoubtedly will lead to the swift erosion of defendants' constitutional right to proceed *pro se*." *Id.* at 959, 79 L. Ed. 2d at 142-43 (White, J., dissenting).

78. 673 S.W.2d 578 (Tex. Crim. App. 1984).

79. *Id.* at 585. The court recognized that the accused may not wait until the day of trial to demand different counsel when such a demand would result in a delay of the proceedings, but found that the defendant here was not in fact demanding a delay in the trial so that he could prepare for trial by reading the "law books" he demanded. *Id.* at 584-85. The court of appeals had interpreted the demand for law books as a "conditional" request for self-representation. *Blankenship v. State*, 656 S.W.2d 184, 186 (Tex. App.—El Paso 1983). In a concurring opinion Judge Clinton stated that the issue of whether the defendant's request for law books was by inference a request for a delay of trial was a "much closer" issue than the majority of the court of criminal appeals believed it to be, 673 S.W.2d at 585, and stated that the record contained a "suggestion" that the demand was made to achieve a delay or tactical advantage. *Id.* at 590 (Clinton, J., concurring).

80. 673 S.W.2d at 584.

81. 676 S.W.2d 416 (Tex. Crim. App. 1984).

82. *Id.* at 419-20.

83. No. 63,819 (Tex. Crim. App. Oct. 24, 1984) (not yet reported).

fendant was a district attorney charged with official misconduct. The court held that, in light of the defendant's professional status, the trial court was not required to give precautionary warnings before allowing the defendant to proceed pro se.<sup>84</sup> In *Helton v. State*<sup>85</sup> defense counsel refused to assist his client in presenting perjured testimony from a defense witness. Instead, counsel advised the trial court that the witness was going to perjure himself. The defendant then testified outside the presence of the jury that he wished to question the witness himself. The trial court instructed the defendant to examine the witness with counsel standing by to provide advice. Questioning of the witness then proceeded as the trial court had ordered. After the witness was excused, defense counsel resumed conducting appellant's defense. The court of criminal appeals held that precautionary admonishments were not required in this situation, since, although the defendant questioned one witness, he was at all times represented and advised by counsel.<sup>86</sup>

## II. GUILTY PLEAS

In *Mabry v. Johnson*<sup>87</sup> Justice Stevens, speaking for a unanimous Court, addressed the issue of whether a defendant had a due process right to specific enforcement of a plea bargain offer the state prosecutor made to defense counsel, but later withdrew before the defendant had pleaded guilty. After accepting a second, less favorable plea bargain agreement<sup>88</sup> the defendant sought relief on federal habeas corpus grounds. The district court had dismissed the petition, holding that the defendant had understood the consequences of his guilty plea and that he had received the effective assistance of counsel. Moreover, because the defendant had not detrimentally relied upon the prosecutor's first proposed plea bargain, the defendant had no right to enforce it. The court of appeals reversed, concluding that fairness precluded the prosecution's withdrawal of a plea proposal once accepted by respondent.<sup>89</sup> The Supreme Court granted certiorari to resolve a conflict in the

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84. *Id.*, slip op. at 2.

85. 670 S.W.2d 644 (Tex. Crim. App. 1984).

86. *Id.* at 645 (citing *Maddox v. State*, 613 S.W.2d 275, 285 (Tex. Crim. App. 1981) (accused may knowingly waive right to counsel); *Phillips v. State*, 604 S.W.2d 904, 908 (Tex. Crim. App. 1979) (although accused partially represented himself he had assistance of counsel at all times)).

The court also held that defense counsel did not violate the attorney-client privilege, TEX. CODE CRIM. PROC. ANN. art. 38.10 (Vernon 1984), by advising the trial court of the fact that the defense witness was about to commit perjury. Rather, the defense attorney acted properly in trying to prevent the commission of a fraud on the court. 670 S.W.2d at 645-46.

87. 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984).

88. The original plea bargain the state offered would have permitted Johnson to dispose of his murder case upon a plea of guilty to the lesser charge of accessory after a felony murder. The prosecution offered to recommend a 21-year sentence for the accessory charge and to recommend that this sentence be served concurrently with preexisting sentences for two other felonies. Defense counsel called the prosecutor three days after the state had made offer and communicated his client's desire to accept the offer, but was informed that a mistake had been made and that the offer was now withdrawn. The prosecutor proposed that, instead of the 21-year *concurrent* sentence originally offered, he would recommend a 21-year *consecutive* sentence. Johnson ultimately accepted the new offer and he received the 21-year sentence to be served consecutively with the previous sentences.

89. *Mabry v. Johnson*, 707 F.2d 323, 327 (8th Cir. 1983).

Circuits.

Justice Stevens stated that a plea bargain agreement standing alone is a mere executory agreement, which, until it is embodied in the judgment of a court, does not restrain freedom or deprive an accused of other rights.<sup>90</sup> Stevens then noted that an intelligent and voluntary plea of guilty, when executed by a person who is adequately advised of his rights, cannot be attacked collaterally.<sup>91</sup> Nor does the fact that the defendant making such a plea may do so to obtain sentencing benefits or other advantages render his plea "less voluntary than any other bargained for exchange."<sup>92</sup> Questions regarding the voluntariness of the plea arise only when the defendant is not fairly apprised of its consequences.<sup>93</sup>

Justice Stevens then contrasted the instant case with the facts of *Santobello v. New York*.<sup>94</sup> Unlike Santobello, who pleaded guilty thinking he had bargained for a specific prosecutorial sentencing recommendation that was not ultimately made, the defendant in *Johnson* was fully aware of the terms and consequences of the second plea bargain offer: that the "prosecutor would recommend and that the judge could impose the sentence now under attack."<sup>95</sup> Johnson's inability to enforce the prosecutor's earlier and more favorable offer, therefore, did not alter the voluntariness of his guilty plea.<sup>96</sup> The Court held that the question of whether the first offer was the product of prosecutorial negligence was irrelevant since the due process clause is not a code of ethics for prosecutors; its primary concern is with the manner in which persons are deprived of their liberty.<sup>97</sup> Since the defendant was fully aware of the possible consequences of his plea of guilty, "it is not unfair to expect him to live with those consequences now."<sup>98</sup>

Several state court cases involved the voluntariness of the defendant's guilty plea. In these cases, the defendants did not receive the benefits that they had been led to believe they would obtain in exchange for their pleas of guilty. In *Ex parte Griffin*<sup>99</sup> the court of criminal appeals granted relief to a defendant whose defense counsel had told him that in exchange for a plea of guilty in one Harris County case, a second case in that county would be dismissed. The defendant was also promised that, while his ten-year probated sentence from Walker County would be revoked, that sentence would

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90. 104 S. Ct. at 2546, 81 L. Ed. 2d at 442.

91. *Id.* at 2547, 81 L. Ed. 2d at 443.

92. *Id.*

93. *Id.*, 81 L. Ed. 2d at 444. In *Santobello v. New York*, 404 U.S. 257 (1971), the defendant's plea of guilty was induced by a plea agreement as to punishment. Because the prosecution failed to make the agreed upon recommendation as to punishment, the Court held that the resulting conviction could not stand. *Santobello*, Justice Stevens observed in a footnote, did not suggest that specific performance of the agreement was the only remedy in such a situation; permitting Santobello to replead was also an appropriate remedy. 104 S. Ct. at 2548 n.11, 81 L. Ed. 2d at 444 n.11 (citing *Santobello*, 404 U.S. at 262-63).

94. 404 U.S. 257 (1971).

95. 104 S. Ct. at 2548, 81 L. Ed. 2d at 444.

96. *Id.*

97. *Id.*

98. *Id.*, 81 L. Ed. 2d at 445.

99. 679 S.W.2d 15 (Tex. Crim. App. 1984).

be reduced to five years and would run concurrently with the Harris County five-year sentence. The evidence elicited at the habeas corpus hearing established that the disposition of the Walker County case was not part of the plea bargain, and that the Walker County probation had not been revoked. The defendant was sent to the penitentiary to serve the Harris County sentence and a hold from Walker County was placed on him. The court of criminal appeals granted relief but stressed that this was not a broken plea bargain case like *Santobello*.<sup>100</sup> Rather, since the defendant had relied upon his attorney's misstated account of the terms of the plea bargain and his reliance had induced the plea of guilty, the plea could not have been a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.<sup>101</sup>

In *Huffman v. State*<sup>102</sup> the court of appeals reversed a guilty plea, holding that the plea was not knowingly made.<sup>103</sup> In *Huffman* the defendant had testified against his co-defendant in a kidnapping case after the prosecutor had discussed the case with defense counsel. Both attorneys had promised the defendant that, in exchange for his testimony, the prosecutor would recommend a "lenient" thirty-year sentence and that the trial court would follow this recommendation. Because the co-defendant's case had not gone to trial at the time the trial court accepted the defendant's guilty plea, however, the prosecutor, for tactical reasons relating to the case against the co-defendant,<sup>104</sup> had not wished to enter formally into a plea bargain. At the guilty plea hearing the trial court was informed that the parties had not entered into a plea agreement, but that the prosecutor would recommend that the sentence not exceed thirty years. The defendant told the trial judge he understood that the prosecutor's recommendations would not bind the court since no formal plea bargain had been made.<sup>105</sup> The case was then passed for a pre-sentence report. At the punishment hearing the trial judge rejected the thirty-year recommendation the prosecutor made and assessed a ninety-year sentence.<sup>106</sup>

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100. *Id.* at 17.

101. *Id.* at 18. Here the court applied the standard of *Brady v. United States*, 397 U.S. 742, 755 (1970) (plea of guilty entered by one fully aware of the consequences must stand). The court also relied on *McAleney v. United States*, 539 F.2d 282, 286 (1st Cir. 1976) (issue was not what the government said but, rather, what the attorney told the client) and *Ex parte Bratchett*, 513 S.W.2d 852, 853-54 (Tex. Crim. App. 1974) (same).

102. 676 S.W.2d 677 (Tex. App.—Houston [1st Dist.] 1984, no pet.).

103. *Id.* at 680.

104. If the defendant had entered into a formal plea bargain agreement at the trial of the co-defendant, this fact would have been a proper subject for cross-examination by the co-defendant. See *Parker v. State*, 657 S.W.2d 137, 140 (Tex. Crim. App. 1983); *Spain v. State*, 585 S.W.2d 705, 710 (Tex. Crim. App. 1979); *Simmons v. State*, 548 S.W.2d 386, 388 (Tex. Crim. App. 1977). Accordingly, the prosecutor testified at the hearing on defendant's new trial motion that he did not wish to enter into a formal plea bargain agreement with the defendant because he did not want the jury in the co-defendant's trial to be aware of the 30-year sentence offered to the defendant in exchange for his testimony. The prosecutor testified that he feared that if the jury became aware of that fact they would be improperly influenced and assess the co-defendant's punishment at thirty years also. 676 S.W.2d at 680-81.

105. *Id.* at 679.

106. Since the parties had not entered into a formal plea agreement the trial judge was not

The court of appeals reversed the conviction on two grounds. First, the court held that the plea was not made with sufficient information as to the possible and likely consequences of the plea.<sup>107</sup> Second, the defendant was denied the effective assistance of counsel because his attorney advised him to answer the trial court's inquiries in such a way that kept his reliance upon the prosecutor's promise of leniency from the trial judge.<sup>108</sup> Such deceptiveness, said the court, was injurious to both bench and bar.<sup>109</sup>

Improper admonishments from the trial court may also invalidate a plea of guilty. In *Harrison v. State*<sup>110</sup> the court reversed the defendant's conviction because the trial judge, in taking the defendant's guilty plea, admonished him that probation was a matter for the trial court's discretion, when, in fact, a conviction for the offense charged precluded the possibility of probation from the court.<sup>111</sup> The court of appeals held that this misinformation rendered the plea involuntary.<sup>112</sup> However, in *Edwards v. State*<sup>113</sup> the court refused to hold that an accused was entitled to be specifically warned of his right to avoid self-incrimination<sup>114</sup> insofar as that right related to the presentence investigation report,<sup>115</sup> when the defendant failed to show affirmatively that he was misled or harmed by the general admonishment the court had given with regard to self-incrimination.<sup>116</sup>

The court of criminal appeals repeatedly has refused to permit trial court judges to become involved in plea bargaining negotiations.<sup>117</sup> In *State ex rel. Bryan v. McDonald*<sup>118</sup> the court held that the due process provisions of the federal and Texas constitutions<sup>119</sup> were violated when a trial judge inspected pre-sentence reports prior to a determination of a plea of guilty, and then issued a proposed assessment of punishment conditional on the entry of a

required to permit the defendant to withdraw his plea after rejecting the prosecutor's recommendation. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (Vernon Pam. Supp. 1966-1985).

107. 676 S.W.2d at 682.

108. *Id.* at 682-83.

109. *Id.* at 683.

110. 663 S.W.2d 120 (Tex. App.—Houston [1st Dist.] 1983, pet. granted).

111. *Id.* at 121. The accused was charged with aggravated robbery. The trial court lacked the power to probate the sentence for this offense. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3f(a)(1)(E) (Vernon 1979).

112. 663 S.W.2d at 121. The court relied upon the statutory right of the accused to be advised of the full consequences of his plea, TEX. CODE CRIM. PROC. ANN. art. 26.13(a), (c) (Vernon Pam. Supp. 1966-1985).

*Author's Note:* After this Article went to print, the court of criminal appeals reversed the court of appeals, holding that the appellant failed to show that he was misled to his detriment as required by art. 26.13(c) of the Code of Criminal Procedure. *Harrison v. State*, No. 0110-84 (Tex. Crim. App. Feb. 20, 1985) (not yet reported).

113. 663 S.W.2d 142 (Tex. App.—Houston [1st Dist.] 1983, no pet.).

114. *Id.* at 144. The defendant, on appeal, relied upon *Estelle v. Smith*, 451 U.S. 454, 473 (1981), which held that a psychiatrist conducting an evaluation of the accused must advise the accused of his fifth amendment rights prior to conducting the interview.

115. TEX. CODE CRIM. PROC. ANN. art. 37.07(d) (Vernon Supp. 1985) (allowing judge to order pre-sentencing investigative report).

116. 633 S.W.2d at 144.

117. See, e.g., *Ex parte Shuffin*, 528 S.W.2d 610, 616-17 (Tex. Crim. App. 1975); *Kincade v. State*, 500 S.W.2d 487, 490 (Tex. Crim. App. 1973).

118. 662 S.W.2d 5 (Tex. Crim. App. 1983).

119. U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19.

plea of guilty.<sup>120</sup> The court found that the trial court's power over the defendant gave it an unfair advantage in the negotiations and made clear to the defendant the possibly harsh consequences of rejecting the court's offer.<sup>121</sup>

### III. PROCEDURAL ASPECTS OF THE RIGHT TO A JURY TRIAL

#### A. Waiver of a Jury Trial

Lack of compliance with the requirements of article 1.13 of the Code of Criminal Procedure<sup>122</sup> continues to create problems. In *Lopez v. State*<sup>123</sup> the defendant was convicted in a trial before the court. On appeal the record contained a judgment that included a conclusory statement that the defendant had waived his rights to a jury trial. The record, however, did not contain the written waiver required by article 1.13. The majority of the court of criminal appeals reversed the conviction, although the absence of the waiver form was raised as error for the first time on discretionary review.<sup>124</sup> The court reaffirmed this holding in a later case, *Breazeale v. State*.<sup>125</sup> In *Vega v. State*,<sup>126</sup> however, the court made it clear that reversals will not be required when evidence contained in the record clearly establishes that the defendant had executed a written waiver but it had been lost or misfiled.<sup>127</sup>

When the defendant wishes to collaterally attack the validity of a prior conviction on the ground that no jury waiver was executed, he bears the burden of proof of this fact.<sup>128</sup> In *Boyd v. State*<sup>129</sup> the court held that this

120. Although TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(c)(1) (Vernon Supp. 1985) in its present form authorizes a trial judge to inspect the pre-sentence report if authorized in writing by the defendant, the court of criminal appeals declined to discuss the issue of whether this statutory revision would have cured the due process problems that formed the basis for extraordinary relief in *Bryan*. 662 S.W.2d at 8.

121. 662 S.W.2d at 8.

122. TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon 1977) provides:

The defendant in a criminal prosecution for any offense classified as a felony less than capital shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that such waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the State. The consent and approval by the court shall be entered of record on the minutes of the court, and the consent and approval of the attorney representing the State shall be in writing, signed by him, and filed in the papers of the cause before the defendant enters his plea. Before a defendant who has no attorney can agree to waive the jury, the court must appoint an attorney to represent him.

123. No. 509-83 (Tex. Crim. App. March 28, 1984) (not yet reported).

124. *Id.*, slip op. at 1. In his dissenting opinion upon motion for rehearing, No. 509-83, slip op. at 1 (Tex. Crim. App. July 18, 1984) (McCormick, J., dissenting), Judge McCormick noted that jury waiver forms are not automatically included in an appellate record by the trial court clerk. See TEX. CODE CRIM. PROC. ANN. art. 40.09, § 1 (Vernon Supp. 1985) (listing instruments clerk must include in appellate record, not including jury waiver). He would have held that such forms need not be in the appellate record when the judgment recited that a waiver was executed. No. 509-83, slip op. at 1 (McCormick, J., dissenting).

125. Nos. 387-83 & 604-83 (Tex. Crim. App. July 11, 1984) (not yet reported).

126. No. 1154-83 (Tex. Crim. App. April 11, 1984) (not yet reported).

127. *Id.*, slip op. at 2.

128. See *Ex parte Collier*, 614 S.W.2d 429 (Tex. Crim. App. 1981).

129. 633 S.W.2d 661 (Tex. App.—Eastland), *aff'd on state's petition*, 660 S.W.2d 820 (Tex. Crim. App. 1983).



burden was met when the record on appeal included the jury waiver form executed for six prior pleas of guilty, but the form did not contain the cause number of the case used for purposes of enhancement.<sup>130</sup> The court found that the waiver of a defendant's right to a jury trial must be in person, in writing, and in open court to be valid.<sup>131</sup>

Article 1.13 also requires that the attorney representing the state and the trial judge execute a written consent to the waiver of a jury trial.<sup>132</sup> In *State ex rel. Turner v. McDonald*<sup>133</sup> the trial judge admitted the defendant's written waiver of a jury and agreed with the defense counsel that, because the state has no right to due process of law, the requirements of article 1.13 as to written approval of the waiver of jury trial violated constitutional due process. The trial judge then called the case and heard evidence on the defendant's plea of guilty. The trial court, however, took the case under advisement while the state sought writs of mandamus and prohibition.

Justice Clinton, writing for a unanimous court of criminal appeals, ordered the case in issue to be set for a jury trial and prohibited the respondent trial judge from entering a judgment in the case except upon a jury verdict or the state's consent to the waiver of jury trial.<sup>134</sup> The court agreed with the respondent that the state technically had no constitutional right to trial by jury or to due process.<sup>135</sup> The prosecutor, however, as a representative of the collective citizenry, has a statutory duty to see that justice is done.<sup>136</sup> Therefore, article 1.13 represents the legislature's provision for ensuring that an accused is afforded a trial by a fair and impartial jury, if the prosecutor believes that a jury trial is essential in a particular case.<sup>137</sup> A criminal defendant has no Texas or federal constitutional right to have a felony accusation tried by the court without a jury.<sup>138</sup> This right is statutory and is subject to the procedural limitations imposed by article 1.13.<sup>139</sup> Accordingly, when the state refuses to consent to a defendant's waiver of jury trial, the trial court has a ministerial duty to conduct a jury trial.<sup>140</sup>

### B. *The Right to a Shuffle of the Jury Panel*

The procedural requirements of the right to a jury shuffle<sup>141</sup> continues to

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130. 660 S.W.2d at 821 (citing *Ex parte Felton*, 590 S.W.2d 471 (Tex. Crim. App. 1979)).

131. 660 S.W.2d at 822.

132. TEX. CODE CRIM. PROC. ANN. 1.13 (Vernon 1977).

133. 676 S.W.2d 371 (Tex. Crim. App. 1984).

134. *Id.* at 373.

135. *Id.* at 372.

136. TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon Supp. 1985) provides that "[i]t shall be the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done."

137. 676 S.W.2d at 372.

138. *Id.* at 374 (quoting *Singer v. United States*, 380 U.S. 24, 36 (1965)).

139. *Id.* at 372.

140. *Id.* at 374.

141. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon 1966) provides:

The trial judge, upon the demand of the defendant or his attorney, or of the State's counsel, shall cause the names of all the members of the general panel drawn or assigned as jurors in such case to be placed in a receptacle and well-

be the subject of litigation. Two cases, *Hall v. State*<sup>142</sup> and *Eldridge v. State*,<sup>143</sup> made clear that in a non-death penalty case either party is entitled to request a shuffle of the jury panel assigned to that case.<sup>144</sup> Prior to deciding whether to ask for a shuffle, the parties have the right to view the panel members seated in the courtroom in the order in which they will be seated if no shuffle is requested.<sup>145</sup> Despite the fact that the required procedure will be time consuming, the failure to grant the defendant's timely request for a shuffle constitutes automatic reversible error.<sup>146</sup>

In *Hall v. State*<sup>147</sup> the court held that, in a capital murder case when the special venire provisions of article 34.01 of the Code of Criminal Procedure<sup>148</sup> have not been invoked,<sup>149</sup> a party has a right to demand a shuffle of each mini-jury panel sent to the courtroom.<sup>150</sup> The court left open the question whether a right to shuffle exists when a special venire is requested.<sup>151</sup>

#### IV. SELF-INCRIMINATION

Two cases the court of criminal appeals decided dealt with the exercise of the fifth amendment privilege against self-incrimination by witnesses testifying at a trial. In *Keller v. State*<sup>152</sup> the court held that the trial court properly excluded from the jury's consideration a defense witness's direct testimony following the assertion of the privilege against self-incrimination by this witness during cross-examination by the state.<sup>153</sup> The majority of the court disagreed with the court of appeals' factual conclusion that the questions the state posed that elicited the witness's assertion of the fifth amendment privilege related to collateral matters.<sup>154</sup> The court of criminal appeals apparently endorsed the court of appeals' legal analysis in applying the rule of *United States v. Cardillo*<sup>155</sup> to the problem, however, despite the court's rec-

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shaken, and the Clerk shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such case, and such names shall be written, in the order drawn, on the jury list from which the jury is to be selected to try such case, and write the names as drawn upon two slips of paper and deliver one slip to the State's counsel and the other to the defendant or his attorney.

142. 661 S.W.2d 113 (Tex. Crim. App. 1983).

143. 666 S.W.2d 357 (Tex. App.—Dallas, 1984, pet. ref'd).

144. *Id.* at 359.

145. *Id.*

146. *Id.* at 358-59.

147. 661 S.W.2d 113 (Tex. Crim. App. 1983).

148. TEX. CODE CRIM. PROC. ANN. art. 34.01 (Vernon 1966) (writ issued in a capital case ordering sheriff to summon not less than 50 people for jury duty).

149. See *Esquivel v. State*, 595 S.W.2d 516, 519-22 (Tex. Crim. App. 1980), *cert denied*, 449 U.S. 986 (1980).

150. 661 S.W.2d at 116.

151. *Id.* n.3.

152. 662 S.W.2d 362 (Tex. Crim. App. 1984).

153. *Id.* at 365.

154. *Id.*

155. 316 F.2d 606, 610 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963); *United States v. Ginn*, 455 F.2d 980, 980 (5th Cir. 1972) (*per curiam*); *Fountain v. United States*, 384 F.2d 624, 625 (5th Cir. 1967). The *Keller* court held that "when a defendant is prevented from cross-examining a prosecution witness due to the assertion of a Fifth Amendment privilege, the court need

ognition that *Cardillo* involved sixth amendment considerations.<sup>156</sup> Therefore, the rule in such situations appears to be that the trial court may properly strike the direct testimony of a witness, upon request for this sanction from the opposing party, when the witness, on fifth amendment grounds, refuses to answer questions on non-collateral matters posed on cross-examination by the opposing party, when such questions are pertinent to the subject matter of the investigation or relate to the witness's direct testimony.<sup>157</sup> Decisions of the trial court upon such requests are subject to review only for an abuse of discretion. The dissent in *Keller* would have permitted the trial court to strike the testimony of a defense witness on direct examination only when the witness's exercise of his fifth amendment privilege deprived the state of its ability to test the truth of the witness's direct testimony.<sup>158</sup>

In *Ellis v. State*<sup>159</sup> the court reaffirmed its prior holding that an accused does not have the right to compel a witness to take the stand just so the jury can observe the witness invoke the fifth amendment.<sup>160</sup> The majority used procedural grounds<sup>161</sup> to avoid answering the more disturbing question of whether the prosecutor had infringed upon the defendant's sixth amendment right to compulsory process by entering into a plea bargain with a co-defendant in which one of the terms of the agreement was that the co-defendant would not testify for either party in the defendant's cause.<sup>162</sup>

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

In many cases dealing with errors or alleged errors in the trial court's instructions to the jury, the holdings are limited to specific situations. Errors in the trial court's charge account for a large number of reversals of criminal convictions. Thus, no annual survey of criminal procedure would be complete without at least a brief discussion of those cases that have dealt with unusual problems in various jury instructions.

The court of criminal appeals has repeatedly held that upon timely request<sup>163</sup> an accused is entitled to the submission of a charge on a defensive

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not strike the witness' direct testimony if the questions asked on cross-examination relate to 'collateral' matters." 662 S.W.2d at 364 (citing *Cardillo*, *Ginn*, and *Fountain*).

156. When an exercise of the witness's fifth amendment privilege prevents a defendant from cross-examining a state's witness, the situation presented by *Cardillo*, the defendant's sixth amendment right to confrontation through cross-examination is implicated. When, as in *Keller*, the testimony of a defense witness is stricken, the defendant's sixth amendment right to offer witnesses in his own defense is implicated. 662 S.W.2d at 364.

157. *Id.* at 365.

158. *Id.* at 366 n.1, 368 (Clinton, J., dissenting).

159. 683 S.W.2d 379 (Tex. Crim. App. 1984).

160. See *Mendoza v. State*, 552 S.W.2d 444, 451 (Tex. Crim. App. 1977); *Victoria v. State*, 424 S.W.2d 919, 922 (Tex. Crim. App. 1975); *Rodriguez v. State*, 513 S.W.2d 594, 595 (Tex. Crim. App. 1974). The rationale behind these decisions is that, because a witness's assertion of his privilege against self-incrimination is the exercise of a constitutional right personal to the witness, the refusal to testify should not be made the basis of any inference by the jury favorable to either party.

161. 683 S.W.2d at 382.

162. *Id.* at 384 (Teague, J., dissenting).

163. Pursuant to TEX. CODE CRIM. PROC. ANN. art. 36.14, 36.15 (Vernon Supp. 1985),

issue or a lesser included offense<sup>164</sup> when evidence from any source raises a defensive issue or raises an issue that a lesser included offense may have been committed.<sup>165</sup> In *Booth v. State*<sup>166</sup> the court confronted the issue of whether a trial court must instruct the jury on inconsistent defensive theories raised by the evidence. The court held that inconsistent theories must be submitted upon request, even though they directly contradict each other.<sup>167</sup> Booth was charged with murdering both his natural mother and adoptive father by stabbing. At trial the state produced evidence that Booth first told authorities that two strangers, who had entered his parents' trailer home, killed his parents. A short time later Booth signed a written statement indicating that he first stabbed his father in self-defense, and then stabbed his mother in self-defense. Booth later testified at trial that he did not stab his mother in self-defense, but rather came to her defense while his father was stabbing his mother, and then killed him in self-defense and in defense of his mother. The trial court instructed the jury that it could acquit Booth of killing his father if it believed he had acted in self-defense or in defense of his mother. The court refused, however, to instruct the jury that Booth was also warranted in killing his mother if he did so in self-defense. Because of this refusal the court of criminal appeals reversed Booth's conviction for the murder of his mother.<sup>168</sup> The court held that prior case law has expressly granted the accused the right to have the jury decide inconsistent defensive theories, even when they contradict one another.<sup>169</sup>

The court reached a similar result in another prosecution for murder in *Lugo v. State*.<sup>170</sup> The court of criminal appeals held that the trial court erred in refusing to instruct the jury on the law of involuntary manslaughter as a lesser included offense of murder.<sup>171</sup> The court held that, in determining

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the accused may preserve error by either objecting to errors contained in, or omissions from, the trial court's proposed charge or by providing the court with requested special instructions. In *Cuddy v. State*, No. 989-83 (Tex. Crim. App. June 13, 1984) (not yet reported), however, the court held that the defendant's request for a self-defense charge did not preserve his objection to the trial court's failure to include an instruction on the issue of self-defense in its proposed charge. The court concluded that this objection was not sufficiently specific because the appellant had had a choice of at least fourteen different jury instructions on the issue and appellant had failed to specify any particular instruction. *Id.*, slip op. at 4; see P. MCCLUNG, JURY CHARGES FOR TEXAS CRIMINAL PRACTICE 319-30 (rev. ed. 1983).

164. Pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.08 (Vernon 1981) the jury may find the accused guilty of any lesser offense included within the offense charged. The requisites of a lesser included offense are set forth in TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1981).

165. See *Moore v. State*, 574 S.W.2d 122, 124 (Tex. Crim. App. 1978); *Thompson v. State*, 521 S.W.2d 621, 624 (Tex. Crim. App. 1974).

166. 679 S.W.2d 498 (Tex. Crim. App. 1984).

167. *Id.* at 501. The court rejected the state's theory that the defendant's trial testimony binds him to a particular defensive theory, because the jury can accept or reject, in whole or in part, testimony of any witness including the accused. *Id.*

168. *Id.* at 502.

169. *Id.* at 500. The court relied primarily upon its prior holdings in *Warren v. State*, 565 S.W.2d 931, 934 (Tex. Crim. App. 1978) (jurors entitled to benefit of defense theory before them), and *Thompson v. State*, 521 S.W.2d 621, 630 (Tex. Crim. App. 1974) (jury may accept or reject all or a part of a witness's testimony).

170. 667 S.W.2d 144 (Tex. Crim. App. 1984).

171. *Id.* at 146.

whether the evidence raised the issue of a lesser included offense or a defense, the trial court should have considered not only the defendant's testimony but also the evidence presented at trial.<sup>172</sup> The court disapproved earlier opinions that implied that a defendant's testimony could negate other evidence that raised the issue of the existence of the commission of a lesser offense,<sup>173</sup> or that only the defendant's testimony should be considered.<sup>174</sup>

Another potential problem with the trial court's instruction is the expansive charge: a set of instructions that expands upon the offense charged in the indictment by authorizing in its application paragraph a conviction without first requiring that the jury find all of the elements alleged in the indictment.<sup>175</sup> This type of defective charge, because it is fundamentally erroneous, need not be objected to at trial in order to preserve the error thereby engendered for appellate review. The court of criminal appeals confronted a number of purportedly expansive charges during the survey period.

In *Garrett v. State*<sup>176</sup> the court confronted an appeal from a death sentence imposed after the defendant had been convicted of murdering an elderly nun while in the course of committing aggravated rape. The indictment had charged that the defendant had caused the victim's death by choking and strangling in a manner and means unknown to the grand jurors. The state's proof at trial supported the allegation that the grand jurors had been unable to determine the manner in which the victim had been strangled. The trial court's charge, however, failed to require that the jury, before convicting the defendant, find that the manner and means of causing the death were unknown to the grand jurors. The court of criminal appeals held that while such lack of knowledge on the part of the grand jurors must be pleaded in an indictment and proven at trial, an unknown manner cannot be

172. *Id.*

173. See *Simpkins v. State*, 590 S.W.2d 129, 136-37 (Tex. Crim. App. 1979).

174. 667 S.W.2d at 147; see *Brooks v. State*, 548 S.W.2d 680, 684-85 (Tex. Crim. App. 1977) (only defendant's testimony to be considered).

175. In *Cumbie v. State*, 578 S.W.2d 732, 733-35 (Tex. Crim. App. 1979), the court of criminal appeals gave examples of the four types of fundamentally defective expansive charges that the court previously had identified:

1) an omission from the court's charge of an allegation in the indictment which is required to be proved has long been held to be fundamental error. [Here the court cited as one example the failure to require the jury to find that stolen property was received from "some party to the grand jurors unknown." *Moore v. State*, 84 Tex. Crim. 256, 256, 206 S.W. 683, 683 (1918)];

2) [a] charge to the jury [that] substitutes a theory of the offense completely different from the theory alleged in the indictment;

3) [a] charge to the jury [that] authorizes conviction on the theory alleged in the indictment and on one or more theories not alleged in the indictment; [and]

4) [a] charge [that] authorizes conviction for conduct which is not an offense as well for conduct which is an offense.

*Author's Note:* After this Article went to print, the court of criminal appeals decided *Almanza v. State*, No. 242-83 (Tex. Crim. App. Feb. 27, 1985) (not yet reported). In light of this opinion, the continued validity of *Cumbie* is questionable.

176. No. 69,088 (Tex. Crim. App. Sept. 19, 1984) (not yet reported).

considered to be a necessary element of the offense of capital murder.<sup>177</sup> Therefore, absent an objection, the trial court's failure to instruct the jury that the manner and means were not known to the grand jurors did not require reversal.<sup>178</sup>

In *Huddleston v. State*<sup>179</sup> the court of criminal appeals held that the application portion of a charge on kidnapping, which authorized conviction when the jury found that the defendant had unlawfully, with knowledge or intent, abducted another person, did not authorize a conviction if the jury found that the defendant acted unlawfully or knowingly or intentionally.<sup>180</sup> The charge, as a whole, therefore, was not fundamentally defective.<sup>181</sup> The court looked to the abstract definition of kidnapping and found that this portion of the charge defined the offense of kidnapping without the use of the word unlawfully.<sup>182</sup>

In *Gordon v. State*<sup>183</sup> the court severely split on the issue of which paragraph of the charge constituted the application portion of the charge as opposed to the abstract portion. In addition, the three dissenting judges, in an opinion Presiding Judge Onion authored, would have overruled the court's prior opinion in *Doyle v. State*,<sup>184</sup> which held that a court should review the charge as a whole only to explain the application paragraph but should not look to the abstract portion of the charge when the application portion fails to include an entire element of the offense charged.<sup>185</sup> The dissenters in *Gordon* found nothing in the law that required that the trial court's application of the law to the facts be done in one and only one paragraph and would further have found error in the appeals court judge's failure to analyze the charge as a whole.<sup>186</sup> Apparently the dissent would have also required a showing of harm pursuant to article 36.19<sup>187</sup> before reversing a conviction because of an error in the application portion of the charge not objected to at trial.<sup>188</sup>

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177. *Id.*, slip op. at 10-11.

178. *Id.*, slip op. at 10-12. Here the court relied upon its earlier opinion in *Sattiewhite v. State*, 600 S.W.2d 277 (Tex. Crim. App. 1980), which limited *Cumby*-type error to those cases in which the trial court's charge omitted an essential element of the offense alleged.

179. 661 S.W.2d 111 (Tex. Crim. App. 1983).

180. *Id.* at 113.

181. *Id.*

182. *Id.*

183. No. 213-83 (Tex. Crim. App. Sept. 19, 1984) (not yet reported).

184. 661 S.W.2d 726 (Tex. Crim. App. 1983).

185. *Gordon*, No. 213-83, slip op. at 7, 8; *Doyle*, 661 S.W.2d at 730.

186. No. 213-83, slip op. at 7, 8 (Onion, J., dissenting).

187. TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981) explains that judgments shall not be reversed because the court did not grant a special jury charge or make requested charges in his charge to the jury, under articles 36.14-.18, "unless the error appearing from the record was calculated to injure the rights of [the] defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial." In *Ex parte Clark*, 597 S.W.2d 760, 761 (Tex. Crim. App. 1980), the court had held that a total failure of a charge to apply the law to the facts was actually calculated to injure the rights of a defendant within the meaning of article 36.19, and also amounted to a violation of state and federal due process.

188. *Gordon*, No. 213-83, slip op. at 8 (Onion, J., dissenting).

## VI. PUNISHMENT AND SENTENCING

In its 1969 decision in *North Carolina v. Pearce*<sup>189</sup> the Supreme Court placed due process limitations on the sentencing discretion of trial court judges regarding the sentence they could impose when a defendant successfully appealed a conviction but was convicted again upon retrial.<sup>190</sup> Such limitations were imposed in order to prevent vindictiveness in the re-sentencing process. In *Pearce* the Court created a prophylactic rule<sup>191</sup> that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for the increased punishment must manifest themselves in the record.<sup>192</sup> This rule had been read to create a presumption of vindictiveness that is only rebuttable by objective statements in the record explicating the increased sentence.<sup>193</sup>

In *Wasman v. United States*<sup>194</sup> the Supreme Court rejected a defendant's claim, which had been previously accepted in some circuits,<sup>195</sup> by which an enhanced sentence could be imposed on retrial only if the sentencing judge became aware of conduct by the defendant that had occurred between the two sentencing proceedings.<sup>196</sup> Instead, the Court held that after a retrial following the defendant's successful appeal, a sentencing judge may justify an enhanced sentence by affirmatively showing "relevant conduct or events that occurred subsequent to the original sentencing proceedings."<sup>197</sup> In *Wasman* the subsequent event was the defendant's conviction for the offense of possession of counterfeit certificates of deposit. At the first sentencing hearing the counterfeiting charge was still pending and the trial court did not consider it in assessing punishment. At the second sentencing the trial judge imposed a longer sentence because of Wasman's intervening conviction. This explanation rebutted any presumption of vindictiveness on the part of the trial court.<sup>198</sup>

Two court of criminal appeals opinions also concerned the due process protections established by *North Carolina v. Pearce*.<sup>199</sup> In *Castleberry v. State*<sup>200</sup> the court held that neither judicial nor prosecutorial vindictiveness<sup>201</sup> was evidenced when the defendant received a harsher sentence after

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189. 395 U.S. 711 (1969).

190. *Id.* at 725.

191. *See Colten v. Kentucky*, 407 U.S. 104, 116 (1972) (whenever a judge imposes a more severe sentence on a defendant after a new trial he must affirmatively state his reasons for doing so).

192. 395 U.S. at 726.

193. *See United States v. Goodwin*, 457 U.S. 368, 374 (1982).

194. 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984).

195. *United States v. Williams*, 651 F. 2d 644 (9th Cir. 1981); *United States v. Markus*, 603 F.2d 409 (2d Cir. 1979).

196. 104 S. Ct. at 3225, 82 L. Ed. 2d at 429.

197. *Id.* at 3221, 82 L. Ed. 2d at 435-36.

198. *Id.*

199. 395 U.S. 711 (1969).

200. No. 166-83 (Tex. Crim. App. July 18, 1984) (not yet reported).

201. *North Carolina v. Pearce* was concerned only with judicial vindictiveness. In *Blackledge v. Perry*, 417 U.S. 21, 27 (1974), a rebuttable presumption of vindictiveness was established with regard to prosecutorial acts that result in higher sentences on retrial.

the trial court granted the defendant's motion for a new trial. The defendant had been indicted for a first degree felony, enhanced with an allegation of one prior felony conviction. Pursuant to a plea bargain, the defendant had received a twelve-year sentence, after which the state abandoned the enhancement count and recommended the sentence imposed by the trial judge. After the plea the defendant became convinced that he had received a bad deal and expressed this opinion in a letter to the court. The trial judge then had the defendant brought before him. The defendant persisted in demanding a jury trial, even after the judge warned him that, if the enhancement count was proven, the minimum punishment available from the jury would be fifteen years. The trial court granted the defendant's motion for a new trial. The jury found him guilty and he went to the court for punishment, having pleaded true to the enhancement allegation. The trial court assessed punishment at twenty years. The court of criminal appeals held that *Pearce* did not apply because the defendant never exercised his right to review by a higher court.<sup>202</sup> Moreover, the court emphasized that *Castleberry* was not a case of prosecutorial vindictiveness, after taking pains to distinguish the difference between prosecutorial and judicial vindictiveness.<sup>203</sup>

In *McCullough v. State*<sup>204</sup> the defendant received a twenty-year sentence from a jury. The trial court granted defendant's motion for new trial and again found the defendant guilty. The defendant still elected to go before the trial judge for punishment. The judge, who had presided at the first trial as well, assessed punishment at fifty years. The court of appeals found that the increased punishment violated the principles of *Pearce*, but instead of remanding the case to the trial court, granted the defendant's request for reformation of the sentence to reflect a punishment of twenty years. The court of criminal appeals did not question the lower court's application of *Pearce* to the problem, but held that the court of appeals lacked the authority to reform a judgment when the error involved a sentence not authorized by law.<sup>205</sup> Accordingly, the court of criminal appeals remanded the case to the trial court. The retrial in *McCullough* resulted from the trial court's granting the defendant's motion for new trial. The result in *McCullough* is, therefore, difficult to harmonize with the rationale of *Castleberry*, in which no *Pearce* problems were found, because the case never went to a higher court.

The court of criminal appeals also dealt with a number of more technical procedural problems relating to punishment hearings and sentencing. In

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202. No. 166-83, slip op. at 4. The court also noted that the higher sentence could not "chill" the exercise of a right to appeal by others since the defendant received exactly what he asked for: a new trial before a jury without the constraints of plea bargains. *Id.*

203. *Id.*, slip op. at 6-7. In *Bordenkircher v. Hayes*, 434 U.S. 357, 363-64 (1978), the Supreme Court recognized that no element of prosecutorial vindictiveness arises in the give-and-take of plea bargaining, so long as the accused can freely accept or reject the prosecution's offer. Plea bargaining offers advantages to defendants as well as prosecutors; and even though confronting the defendant with the spectre of more severe punishment if the plea bargain is rejected could have a discouraging effect on the exercise of trial rights, this effect is both inevitable and permissible in a system that encourages the negotiation of pleas.

204. No. 351-83 (Tex. Crim. App. Dec. 7, 1983) (not yet reported).

205. *Id.*, slip op. at 2.



*Williams v. State*<sup>206</sup> the court held that a cumulation order<sup>207</sup> contained in a sentence was valid even though it used the term "stacked" instead of the statutory language.<sup>208</sup> The court also held that the order was sufficiently specific despite the fact that it failed to include all of the recommended elements of a cumulation order.<sup>209</sup>

In *Elder v. State*<sup>210</sup> the court overruled its prior holding in *Baehr v. State*<sup>211</sup> and held that, at the punishment phase of a criminal trial, the state can properly introduce the order revoking the defendant's probation in a prior case.<sup>212</sup> In *Baehr* the court had held that such an order was not a criminal record<sup>213</sup> for purposes of punishment.<sup>214</sup> In *Bogany v. State*<sup>215</sup> the court held that a person convicted of a first degree felony found to be a repeat offender could not be assessed a fine.<sup>216</sup> Because the jury's verdict in *Bogany* included a fine, the verdict was not authorized by law and neither the trial court nor the court of appeals could change the verdict or reform the judgment.<sup>217</sup>

With regard to deferred unadjudicated probation,<sup>218</sup> in *Green v. State*<sup>219</sup> the Houston court of appeals held that a defendant may not be impeached as a witness by virtue of the fact that he is on this type of probation.<sup>220</sup> Unadjudicated probation differs from other forms of probation because it does not include an adjudication of guilt.<sup>221</sup> In *Duhart v. State*<sup>222</sup> the court

206. 675 S.W.2d 754 (Tex. Crim. App. 1984).

207. See TEX. CODE CRIM. PROC. art. 42.08 (Vernon 1979) (judge has discretion to decide whether second sentence runs concurrently or if it begins when first sentence ends).

208. 675 S.W.2d at 761-63.

209. *Id.* at 763-65 (order failed to include the date of prior convictions and the nature of the prior convictions).

210. 677 S.W.2d 538 (Tex. Crim. App. 1984).

211. 615 S.W.2d 713 (Tex. Crim. App. 1981).

212. 677 S.W.2d at 538-39.

213. See TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon 1981 & Supp. 1985), which defines a prior criminal record as a final conviction in a court of record.

214. 615 S.W.2d at 717.

215. 661 S.W.2d 957 (Tex. Crim. App. 1983).

216. *Id.* at 958. TEX. PENAL CODE ANN. § 12.32(b) (Vernon Supp. 1985) allows a fine of up to \$10,000 to be imposed upon anyone convicted of a first degree felony. TEX. PENAL CODE ANN. § 12.42(c) (Vernon 1974) provides that if one convicted of a first degree felony had been once before convicted of any felony, the punishment is life or a term of years from 15 to 99. No mention is made of a fine in § 12.42(c). As Judge McCormick pointed out in his dissent in *Bogany*, the result of the decision is that a person convicted of a first degree felony with no prior offenses could receive a life sentence and a \$10,000 fine, but a defendant charged under § 12.42(c) could receive a maximum punishment of a life sentence but no fine. 661 S.W.2d at 960 (McCormick, J., dissenting).

217. 661 S.W.2d at 958-59; TEX. CODE CRIM. PROC. ANN. art. 44.24(b) (Vernon Supp. 1985); see Milezanowski v. State, 645 S.W.2d 445, 447 (Tex. Crim. App. 1983).

218. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3(d) (Vernon Supp. 1985) provides that upon a plea of guilty, the court may place the defendant on probation without an adjudication of guilt.

219. 663 S.W.2d 145 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd).

220. *Id.* at 146. Pursuant to TEX. CODE CRIM. PROC. ANN. art. 38.29 (Vernon 1965) the state may impeach a defendant or other witness by showing that he has been convicted of an offense or that he has received a suspended sentence that has not been set aside or that he is presently serving a probated sentence. The question before the court in *Green* was whether deferred unadjudicated probation was the equivalent of probation as used in article 38.29.

221. 663 S.W.2d at 146.

of criminal appeals held that in a hearing to proceed to an adjudication of guilt, a trial court need not conduct a separate hearing on the issue of punishment as long as the accused is given an opportunity to present evidence in mitigation of punishment.<sup>223</sup>

## VII. THE MOTION FOR NEW TRIAL

### A. Procedural Aspects

Prior to 1981 a motion for new trial had to be filed before the imposition of sentence,<sup>224</sup> while the notice of appeal had to be filed after the sentence was imposed.<sup>225</sup> The sentence itself could not be imposed until the time for making a motion for new trial or arrest of judgment had expired.<sup>226</sup> Under the post-1981 Code of Criminal Procedure, the sentence and judgment constitute a single document<sup>227</sup> and time limits for motions for new trial and notices of appeal begin running on the date judgment and sentence are entered.<sup>228</sup>

In *Ex parte Drewery*<sup>229</sup> the court faced the question whether, under the present Code, a filing of a notice of appeal terminated the power of the trial court to rule on a timely motion for new trial filed after the notice of appeal was given. The court held that the filing of a notice of appeal did not terminate the right to file a motion for a new trial, noting that article 44.11 provides that the filing of the appellate record in the appellate court suspends all further proceedings in the trial court.<sup>230</sup> The opinion in *Drewery* specifically left open the question whether, under the post-1981 Code, a notice of appeal filed prior to the overruling of a motion for new trial is premature and, therefore, ineffective.<sup>231</sup> The concurring opinion cited with approval two prior

222. 668 S.W.2d 384 (Tex. Crim. App. 1984).

223. *Id.* at 386-87.

224. TEX. CODE CRIM. PROC. ANN. art. 40.05 (Vernon 1979).

225. *Id.* art. 44.08.

226. *See id.*, arts. 40.05, 42.03, 44.08; *see also* Dally & Brockway, *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment*, 13 ST. MARY'S L.J. 211, 220-23 (1981) (discussing new procedural requirement establishing thirty-day time limit for filing a motion for a new trial).

227. TEX. CODE CRIM. PROC. ANN. arts. 42.01, .02 (Vernon Supp. 1985).

228. *Id.* arts. 40.05, 44.08(b). Pursuant to article 40.05, a motion for new trial must be filed within 30 days of the imposition of the sentence. Article 44.08(b) prescribes the time limit for filing notice of appeal: within 15 days after the overruling of the motion or amended motion for new trial and, if there be no motion for new trial, then within 15 days after sentencing.

229. 677 S.W.2d 533 (Tex. Crim. App. 1984).

230. TEX. CODE CRIM. PROC. ANN. art. 44.11 (Vernon Supp. 1985), unchanged except for the addition of a reference to the criminal jurisdiction of the courts of appeal and the deletion of the reference to procedures authorized by article 40.09, provides that: "Upon the appellate record being filed in [the appellate court] . . . all further proceedings in the trial court, except as to bond . . . shall be suspended and arrested until the mandate of the appellate court is received by the trial court." *Id.*

231. 677 S.W.2d at 536 n.6. Prior opinions of the court of criminal appeals, decided under the pre-1981 version of the Code of Criminal Procedure, held that premature filing of the notice of appeal was not effective, and failed to invoke the jurisdiction of the appellate court. *See Gordon v. State*, 627 S.W.2d 708, 709-10 (Tex. Crim. App. 1982).

court of appeals opinions<sup>232</sup> that had held that, under the Texas Rules of Civil Procedure, now applicable to criminal appeals when not in conflict with the Code of Criminal Procedure, a premature filing of a notice of appeal did not render the notice ineffective.<sup>233</sup>

In *Gipson v. State*<sup>234</sup> the defendant filed a notice of appeal on the day the trial court imposed his sentence. The appellate record was subsequently approved by the trial court and filed in the court of appeals. After the record was transmitted to the court of appeals, but before the thirty-day time limit for filing a motion for new trial had expired, the defendant's counsel attempted to file a motion for new trial with the clerk of the trial court. The clerk refused to acknowledge receipt of this motion, on grounds that the record in the case had been sent to the court of appeals, and the trial court no longer had jurisdiction over the case. The court of appeals held that the clerk had properly refused to accept the motion, but held that "the precipitous filing of the record" should not operate to limit the thirty-day period provided by article 40.05<sup>235</sup> for the filing of a motion for new trial.<sup>236</sup> The court of appeals, therefore, abated the appeal with instructions to the trial court to accept the filing of the defendant's motion for new trial and to dispose of the motion in any way the trial court deemed proper.<sup>237</sup>

*Lamb v. State*<sup>238</sup> presented a different type of procedural question. *Lamb* was a capital murder case in which operation of law overruled the defendant's motion for new trial without the trial court's hearing. On appeal the majority of the court of criminal appeals considered the merits of the motion for new trial, referring to the affidavits filed in support of the motion for new trial to provide a factual basis for holding that the motion was without merit.<sup>239</sup> In a dissenting opinion, Presiding Judge Onion stated that the affidavits were not part of the record before the trial court and cautioned against deviations from established procedure.<sup>240</sup>

### B. Motions for New Trial Based on Discussion of the Parole Law by Jurors

Perhaps no other ground for a new trial has generated as much confusion as a discussion of the law of pardon and parole by the jurors during their deliberations. A permanent majority of the court of criminal appeals can

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232. *Johnson v. State*, 649 S.W.2d 153, 154 (Tex. App.—Austin 1983, no pet.); *Mayfield v. State*, 627 S.W.2d 474, 475 (Tex. App.—Corpus Christi 1981, no pet.).

233. 677 S.W.2d at 537-38 (Miller, J., concurring). Under TEX. R. CRIM. APP. P. 211, when not inconsistent with the Code of Criminal Procedure, the Rules of Civil Procedure govern proceedings in the court of appeals in criminal cases. TEX. R. CIV. P. 306(c) provides that certain prematurely filed documents, including notice of appeal are "deemed to have been filed on the date of but subsequent to . . . the date of the overruling of motion for new trial if such a motion is filed."

234. 669 S.W.2d 351 (Tex. App.—Fort Worth 1984, no pet.).

235. See TEX. CODE CRIM. PROC. ANN. arts. 40.05, 44.08 (Vernon Supp. 1985).

236. 669 S.W.2d at 353.

237. *Id.*

238. 680 S.W.2d 11 (Tex. Crim. App. 1984).

239. *Id.* at 13.

240. *Id.* at 17 (Onion, J., dissenting).

not agree as to whether a claim that the jurors' deliberations included a discussion of the parole laws is properly considered jury misconduct pursuant to subsection 8 of article 40.03 of the Code of Criminal Procedure, or, as receipt of other evidence under subsection 7 of that article, or falls under both subsections 7 and 8.<sup>241</sup> That fact illustrates the seriousness of the analytical problems this issue raises.

Present purposes require only a glimpse into one corner of this judicially crafted Pandora's box. In *Munroe v. State*,<sup>242</sup> a 1982 opinion, a divided court of criminal appeals appeared to adopt a two-part test for determining whether the jury's misconduct in discussing the parole laws constituted grounds for granting a motion for new trial. This test required the defendant to show (1) that *any* discussion of the parole laws took place during the jury's deliberations (thereby showing misconduct); and (2) that the discussion denied the defendant a fair and impartial trial.<sup>243</sup> This requirement could be met by showing that a single juror voted for increased punishment as a result of the discussion.<sup>244</sup> The author of the plurality opinion, Judge Roberts, declared that the application of this two-part test was, in his opinion, "the only clear and workable solution to the problem."<sup>245</sup>

In *Sneed v. State*,<sup>246</sup> however, a majority of the court of criminal appeals concluded that the *Munroe* test should be jettisoned, in favor of the five-prong test considered in the court's 1975 opinion, *Heredia v. State*.<sup>247</sup> Under that test, as restated in *Sneed*, reversible error occurs only when it can be shown that a jury's discussion of the parole law included: "(1) . . . a misstatement of law (2) asserted as a fact . . . (3) by one professing to know the law (4) which was relied on by other jurors, (5) who for that reason change their vote to a harsher punishment."<sup>248</sup> Applying the test to the facts before the court, the majority found that the first three prongs of this test were not satisfied and held that the court of appeals should not have reversed the conviction on the parole discussion ground.<sup>249</sup> Undoubtedly, the majority felt that the five-prong test announced in *Sneed* is also "clear and worka-

241. TEX. CODE CRIM. PROC. ANN. art. 40.03 (Vernon 1979) provides:  
New trials in cases of felony, shall be granted the defendant for the following causes, and for no other:

. . .  
(7) Where the jury, after having retired to deliberate upon a case, has received other evidence; . . .

(8) Where, from the misconduct of the jury, the court is of the opinion that the defendant has not received a fair and impartial trial.

242. 637 S.W.2d 475 (Tex. Crim. App. 1982).

243. *Id.* at 478.

244. *Id.*

245. *Id.* at 480. Judge Roberts was mistaken if he thought the test was workable, in the sense of producing uniform, predictable results. Courts of appeals, generally in unpublished opinions, immediately began to find ways to circumvent the two-part test of *Munroe*. The most favored means of attack was to quibble over what constituted a discussion of the parole laws, a discussion obviously being more than a mere mention of or reference to the parole laws.

246. 670 S.W.2d 262 (Tex. Crim. App. 1984).

247. 528 S.W.2d 847, 852 (Tex. Crim. App. 1975).

248. 670 S.W.2d at 214.

249. *Id.* at 266-67.

ble.”<sup>250</sup> If recent history is any guide, however, *Sneed* will not be the last battle waged in the court over this troublesome issue.

## VIII. DIRECT APPEAL

### A. Standards of Review

In 1983 four cases<sup>251</sup> were consolidated on rehearing, to allow the court of criminal appeals to consider whether the standard for appellate review for the sufficiency of evidence was the same in circumstantial evidence cases as in direct evidence cases.<sup>252</sup> The majority of the court held that the standard of review was the same in both types of cases: “whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>253</sup> The majority, however, did not set forth any reason for jettisoning the utilitarian “exclusion of outstanding reasonable hypotheses” analysis for applying this standard of review in circumstantial evidence cases.<sup>254</sup> The concurring opinion by Judge McCormick, in which three other judges joined, agreed that the standard for review should be the same in direct and circumstantial evidence cases.<sup>255</sup> Judge McCormick nevertheless took pains to point out that, while the reasonable hypotheses analysis was one criterion that may be applied in determining the sufficiency of a circumstantial evidence case, it should not be considered a component of that final standard.<sup>256</sup> The concurring opinion, citing the court’s earlier opinion in *Hankins v. State*,<sup>257</sup> which had held that direct and circumstantial evidence were to be treated alike, condemned as illogical any attempt to incorporate into the standard of appellate review any exception, variance, or special treatment for one type of evidence or the other.<sup>258</sup>

With regard to the application of the “reasonable hypotheses” analysis, in two cases decided in 1984, *Houston v. State*<sup>259</sup> and *Jackson v. State*,<sup>260</sup> the court reiterated what it had stated in a footnote in the *Carlsen* line of cases: circumstantial evidence cases are not to be reviewed under the presumption

250. Judge Odom, dissenting, called the majority’s goal the subversion of the constitution and termed the majority’s opinion the court’s rubber stamp on lawlessness in the jury room. 670 S.W.2d at 267 (Odom, J., dissenting). The majority’s radical position, said Judge Odom, was a revolt against the law. *Id.* at 269-70. Judges Teague and Miller joined in both dissents.

251. *Wilson v. State*, 654 S.W.2d 465 (Tex. Crim. App. 1983); *Denby v. State*, 654 S.W.2d 457 (Tex. Crim. App. 1983); *Freeman v. State*, 654 S.W.2d 451 (Tex. Crim. App. 1983); *Carlsen v. State*, 654 S.W.2d 444 (Tex. Crim. App. 1983). Separate but identical opinions on rehearing were delivered for each of the above cases. All future references cite only to the *Carlsen* opinion.

252. 654 S.W.2d at 448.

253. *Id.* (emphasis in original). This is the standard of sufficiency of evidence for review of state convictions in federal courts, mandated by fourteenth amendment due process, and binding upon the states. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

254. 654 S.W.2d at 449 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

255. *Id.* at 450 (McCormick, J., concurring).

256. *Id.*

257. 646 S.W.2d 191 (Tex. Crim. App. 1983).

258. 654 S.W.2d at 450 (McCormick, J., concurring).

259. 663 S.W.2d 455 (Tex. Crim. App. 1984).

260. 672 S.W.2d 801 (Tex. Crim. App. 1984).

that the accused is innocent.<sup>261</sup> In *Jackson* the court also held that the court of appeals had erred in considering "whether *the Court* was convinced to a moral certainty that all other reasonable hypotheses had been excluded,"<sup>262</sup> and by requiring the state to refute directly any reasonable hypothesis raised by defensive evidence.<sup>263</sup> Although such narrow distinctions may seem hypertechnical, these cases illustrate just how closely the court of criminal appeals is examining the method of analysis the courts of appeals use to review the sufficiency of evidence in circumstantial evidence cases.

In two other cases decided during the survey period, *Benson v. State*<sup>264</sup> and *Boozer v. State*,<sup>265</sup> the court ruled that, in assessing the sufficiency of the evidence on appeal, the reviewing court must consider the language of the trial court's charge as well as the indictment.<sup>266</sup> In *Benson* the defendant was charged with burglary with the intent to commit the felony offense of retaliation, after he broke into a residence of a third party and attempted to coerce his ex-wife into dropping assault charges she had filed against him. The indictment did not allege the various elements of retaliation, but the trial court's charge to the jury informed them that this offense was committed if the actor harmed or threatened to harm another in retaliation for his services as a witness. The majority of the court concluded that, under the facts of the case, the ex-wife, who had not yet testified in the assault case, could not have been a witness, and, therefore, the evidence was insufficient to support the conviction.<sup>267</sup> The state argued that the evidence was sufficient to support the allegations contained in the indictment and, hence, the erroneous charge, which was drafted on a theory not supported by the evidence, amounted to mere "trial error" by the trial court, which did not necessitate the entry of a judgment of acquittal under *Burks v. United States*.<sup>268</sup> In its opinion on the state's second motion for rehearing, the court held that, because the state failed to object to the charge the trial court submitted, it could not claim on appeal that the ex-wife was not a witness but an informer.<sup>269</sup>

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261. *Carlsen*, 654 S.W.2d at 449-50 note.

262. 672 S.W.2d at 803 (emphasis in original).

263. *Id.* at 804.

264. 661 S.W.2d 708 (Tex. Crim. App. 1982). Although it does not appear in the advance sheet's description of the case, the court returned its opinion on the state's second motion for rehearing on December 12, 1983.

265. No. 402-82 (Tex. Crim. App. Sept. 19, 1984) (not yet reported).

266. *Id.*, slip op. at 5; 661 S.W.2d at 712.

267. The former retaliation statute, TEX. PENAL CODE ANN. § 36.06 (Vernon 1974), provided that the offense was committed if the actor ". . . intentionally or knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the service of another as a public servant, witness or informant." The statute has now been amended to protect a prospective witness from retaliation. TEX. PENAL CODE ANN. § 36.06 (Vernon Supp. 1985). In *Benson* the majority held that, while the ex-wife might have been a prospective witness or an informer, she was not a "witness" within the word's statutory meaning. 661 S.W.2d at 710-11.

268. 437 U.S. 1 (1978). In *Burks* the Supreme Court held that when an appellate court finds the evidence at trial insufficient, the double jeopardy clause entitles the appellant to have a judgment of acquittal entered. *Id.* at 17-18.

269. 661 S.W.2d at 716.

The dissent in *Benson* noted that in the past the court had tested for sufficiency by asking whether the evidence at trial supported the allegation in the indictment and had not looked to the abstract portion of trial court's charge to determine whether the charge contained error.<sup>270</sup> Moreover, the case upon which the majority relied for the restrictive definition of "witness," *Jones v. State*,<sup>271</sup> had not been decided at the time of the trial, and thus neither the trial court nor the parties had any reason to believe that the charge's definition of the offense of retaliation was so narrow as to cause a failure of the state's proof.<sup>272</sup>

A similar result obtained in *Boozer v. State*,<sup>273</sup> in which the trial court charged the jury that the state's main witness was an accomplice as a matter of law. The court of criminal appeals, relying upon *Benson*, held that, since the state did not corroborate the testimony of this witness, the only verdict authorized, in view of the charge, was not guilty, and ordered a judgment of acquittal.<sup>274</sup> As in *Benson*, the court held that the state's failure to object to the charge at trial "waives any question regarding 'trial error' on appeal."<sup>275</sup>

With regard to the sufficiency of the evidence as to the identity of the accused, the court of criminal appeals in *Miller v. State*<sup>276</sup> reversed a court of appeals' holding<sup>277</sup> that had caused some confusion with regard to a long-standing manner of questioning identification witnesses. In *Miller* the prosecutor asked witnesses if they saw the accused in the courtroom. When each of the witnesses pointed out the defendant, the prosecutor, without objection, asked that the record reflect the witness's identification of the defendant. An earlier opinion of the court of criminal appeals had suggested utilization of the "let the record reflect" language.<sup>278</sup> The court of appeals had held that, because the prosecutor's statement was in the nature of a request that the court announce that the record would reflect an identification and because no such response on the part of the court was forthcoming, on appeal the record left open to argument the question of whether the man identified was the appellant.<sup>279</sup> Accordingly, the court of appeals had held that evidence was insufficient to prove the identity of the appellant despite the fact that the defense did not object at trial to the procedure utilized and that the identity issue was not contested at trial.<sup>280</sup> In reversing the court of appeals, the court of criminal appeals cited its earlier opinion approving the practice and held that, in view of the totality of the circumstances, the identification evidence here was sufficient and not controverted.<sup>281</sup>

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270. *Id.* at 719 (McCormick, J., dissenting).

271. 628 S.W.2d 51 (Tex. Crim. App. 1982).

272. 661 S.W.2d at 720.

273. No. 402-82 (Tex. Crim. App. Sept. 19, 1984) (not yet reported).

274. *Id.*, slip op. at 7.

275. *Id.*, slip op. at 6.

276. 667 S.W.2d 773 (Tex. Crim. App. 1984).

277. 653 S.W.2d 510 (Tex. App.—Corpus Christi 1983).

278. *Rohlfing v. State*, 612 S.W.2d 598, 601-02 n.2 (Tex. Crim. App. 1981) (court urged that prosecutors use the talismanic words "Let the record reflect . . .").

279. 653 S.W.2d at 512.

280. *Id.*

281. 667 S.W.2d at 776.

With regard to death penalty cases, in *Pulley v. Harris*<sup>282</sup> the Supreme Court held that state appellate courts are not constitutionally required to provide automatic proportionality review of death sentences.<sup>283</sup> Such a requirement would involve a comparison between sentences imposed in similar cases in the particular state and the sentence in the case before the reviewing court. The court found that, in light of all the other procedural safeguards afforded a defendant, automatic proportionality review would be superfluous.<sup>284</sup>

### B. Procedural Aspects of Discretionary Review

During the survey period the court of criminal appeals continued to expand the body of case law controlling petitions for discretionary review to the court. Perhaps the most important, but least surprising, decision regarding this level of appellate review was *Todd v. State*.<sup>285</sup> The court, for the first time, expressly addressed the issue of whether the state could seek a petition for discretionary review without violating the Texas Constitution's prohibition of state appeals in criminal cases.<sup>286</sup> The majority held that, under the constitutional and statutory amendments<sup>287</sup> creating the discretionary review process, the court of criminal appeals, when it grants review, always does so on the court's own motion, regardless of which party's petition may have triggered the court's decision to hear the case.<sup>288</sup> Presiding Judge Onion, in a concurring opinion, pointed out that, in all non-death penalty cases, the defendant begins the appellate process by seeking review in a court of appeals.<sup>289</sup> Further review at the court of criminal appeals level, therefore, should be considered an extension of the appeal the defendant-appellant initiated and not as an appeal by the state.<sup>290</sup>

In *Lopez v. State*<sup>291</sup> the court held that an appellant could raise fundamental error for the first time on petition for discretionary review.<sup>292</sup> In *Noel v. State*,<sup>293</sup> however, four members of the court<sup>294</sup> refused to consider the state's claim that the legislature passed the Texas Speedy Trial Act<sup>295</sup> in an

282. 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

283. *Id.* at 880-81, 79 L. Ed. 2d at 42.

284. *Id.* at 879, 79 L. Ed. 2d at 40.

285. 661 S.W.2d 116 (Tex. Crim. App. 1983).

286. TEX. CONST. art. V, § 26 provides: "The State shall have no right of appeal in criminal cases."

287. TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. ANN. arts. 4.04, 44.01 & 44.45 (Vernon Supp. 1985).

288. 661 S.W.2d at 118.

289. *Id.* at 120 (Onion, J., concurring).

290. *Id.* at 121.

291. No. 509-83 (Tex. Crim. App. Mar. 28, 1984) (not yet reported).

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

293. No. 827-83 (Tex. Crim. App. Mar. 14, 1984) (not yet reported).

294. *Id.*, slip op. at 2. Judge Miller, in a concurring opinion, indicated that he would have rejected the state's constitutional argument on its merits. *Id.*, slip op. at 1 (Miller, J., concurring).

295. The Speedy Trail Act, ch. 787, 1981 Tex. Crim. Laws 1970, amended the Code of Criminal Procedure by adding chapter 32A and articles 17.151 and 28.061, and by amending articles 29.02 and 29.03.



unconstitutional manner,<sup>296</sup> since the state failed to raise the constitutional issue in the trial court or in the court of appeals.<sup>297</sup> The four dissenting judges pointed out that constitutional issues may be raised at any time.<sup>298</sup>

In *Measles v. State*<sup>299</sup> the state sought a petition for discretionary review after the court of appeals had ordered an appeal abated until a complete statement of facts could be obtained. The court of criminal appeals declined to entertain a petition from an interlocutory order of the court of appeals since that order does not finally dispose of the case in that court.<sup>300</sup>

#### IX. HABEAS CORPUS

In *Reed v. Ross*<sup>301</sup> Justice Brennan, writing for a bare majority of the Supreme Court, held that a defendant in a federal habeas corpus case has cause<sup>302</sup> for failing to raise a constitutional claim in accordance with a state's procedural rules when the claim was so novel at the time of the state court proceeding that the issue was reasonably unknown to defense counsel.<sup>303</sup> The question before the Court was whether, by failing to raise on appeal the propriety of a jury charge that placed the burden of proving an element of the offense on his client, defense counsel forfeited the petitioner's right to federal habeas relief. The Court agreed with the court of appeals that the issue was sufficiently novel at the time of the petitioner's state court appeal. At the time of the trial, the leading Supreme Court case on placing the burden of proof on the criminal defendant arguably required the defendant to prove affirmative defenses, even if it forced the defendant to disprove an element of the crime.<sup>304</sup> In addition, little lower court authority supported the petitioner's claim.<sup>305</sup> Therefore, petitioner's counsel had no reasonable basis

296. The state's claim was that the caption of the Speedy Trial Act failed to provide the type of notice required by TEX. CONST. art. III, § 35 (no bill shall contain more than one subject which shall be expressed in its title).

297. No. 827-83, slip op. at 6-7. The plurality opinion distinguished the case from *Carter v. State*, 656 S.W.2d 468, 469-70 (Tex. Crim. App. 1983), in which the court had reversed a conviction on unassigned, fundamental error. *Carter* was inapposite, said the plurality, because the state, unlike the accused, has no federal or state constitutional right to due process of law such as those the *Carter* opinion had relied upon in reaching the unassigned error. No. 827-83, slip op. at 5-6.

298. No. 827-83, slip op. at 1 (McCormick, J., dissenting).

299. No. 110-83 (Tex. Crim. App. Dec. 21, 1983) (not yet reported) (per curiam).

300. *Id.*, slip op. at 1.

301. 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984).

302. In *Engle v. Isaac*, 456 U.S. 107, 134-35 (1982), and *United States v. Frady*, 456 U.S. 152, 158-59 (1982), the Court had addressed the cause and prejudice standards for procedural bars under 28 U.S.C. § 2254 (1982). "When a procedural default bars litigation of a constitutional claim in state court, a state prisoner may not obtain federal habeas corpus relief absent a showing of 'cause and actual prejudice.'" 104 S. Ct. at 2908, 82 L. Ed. 2d at 12 (citing *Engle v. Isaac*, 456 U.S. 107 (1984); *Wainwright v. Sykes*, 433 U.S. 72 (1977)). The *Reed* Court further stated: "Because of the broad range of potential reasons for . . . failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur, [the Supreme] Court has not given the term 'cause' precise content." 104 S. Ct. at 2909, 82 L. Ed. 2d at 13.

303. 104 S. Ct. at 2912, 82 L. Ed. 2d at 17.

304. *Id.* at 2908-09, 82 L. Ed. 2d at 12-14 (referring to *Francis v. Henderson*, 425 U.S. 536, 538 (1978)).

305. 104 S. Ct. at 2911, 82 L. Ed. 2d at 13.

on which to raise the issue on state appeal.<sup>306</sup>

Justice Powell, in his concurring opinion, stated that he would "apply new constitutional rules retroactively on collateral review only in exceptional circumstances."<sup>307</sup> Justice Rehnquist, writing for the four dissenting justices, pointed out that equating novelty with cause was illogical since "[t]he more 'novel' a claimed constitutional right, the more unlikely a violation of that right undercut the fundamental fairness of the trial."<sup>308</sup> The dissent also argued that the majority incorrectly concluded that the claim was not novel at the time of the petitioner's state court appeal.<sup>309</sup>

The court of criminal appeals issued several opinions involving post-conviction writs of habeas corpus. In *Ex parte Cashman*<sup>310</sup> the court held that the applicant's failure to object at the time of his trial to the introduction of evidence of his prior Colorado robbery conviction precluded him from attacking, in a post-conviction proceeding, the use of the Colorado conviction in sentencing, even when the Colorado conviction was subsequently vacated.<sup>311</sup>

In *Ex parte Emmons*,<sup>312</sup> a per curiam opinion, the court confronted the problem of inmates who file pro se writs of habeas corpus that contain fabricated facts, which, if true, would entitle the applicant to relief, and the problem of "jail house lawyers" who help prepare such pro se writs. The court cited applicant Emmons for abusing the writ of habeas corpus and instructed the clerk of the court not to accept future writs filed by Emmons. The court also suggested that Emmons and the "writ writer" who assisted be prosecuted for perjury.<sup>313</sup>

In *Ex parte Ormsby*<sup>314</sup> the court held that "restraint" under the state habeas corpus statutes<sup>315</sup> extends to situations in which a defendant-applicant has been discharged from a probated sentence.<sup>316</sup> The applicant was still under restraint since, if he were convicted of another criminal offense, proof of his prior plea of guilty could have been introduced at the punishment hearing.<sup>317</sup>

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306. *Id.*

307. *Id.* at 2912, 82 L. Ed. 2d at 17 (Powell, J., concurring).

308. *Id.* at 2913-14, 82 L. Ed. 2d at 19 (Rehnquist, J., dissenting).

309. *Id.* at 2914-15, 82 L. Ed. 2d at 20.

310. 671 S.W.2d 510 (Tex. Crim. App. 1984) (on rehearing).

311. *Id.* at 512. The order vacating the Colorado judgment did not specify the basis for the action of the court. The court of criminal appeals distinguished this case from *Ex parte White*, 659 S.W.2d 434, 435 (Tex. Crim. App. 1983), a case in which the prior conviction had been obtained pursuant to a void charging instrument.

312. 660 S.W.2d 106 (Tex. Crim. App. 1983) (per curiam).

313. *Id.* at 110.

314. 676 S.W.2d 130 (Tex. Crim. App. 1984).

315. TEX. CODE CRIM. PROC. ANN. arts. 11.01, .22, .23, .64 (Vernon 1977).

316. 676 S.W.2d at 131-32.

317. *Id.* at 132; see TEX. CODE CRIM. PROC. ANN. art. 42.12, § 7 (Vernon Supp. 1985); *id.* art. 37.07, § 3(a).

