CASES AND MOTIONS YOU CAN USE

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I. Scope of Paper

I have included in this paper Texas cases decided in the last year, that, in my very subjective opinion, might be useful to those who practice criminal defense law. Also included are a few motions I have recently filed. I hope you find this helpful.

II. Topics

APPEAL

1. The failure to object can be deadly.

***Swain v. State*, 181 S.W. 3d 359 (Tex. Crim. App. 2005)**

Appellant was convicted and sentenced to death and he appealed his case to the Texas Court of Criminal Appeals, raising 19 points of error. In the process of affirming his conviction and death sentence, the Court of Criminal Appeals rejected 13 of the 19 points of error as forfeited, waived, or not preserved.

2. Assertions by counsel can preserve error.

***Thieleman v. State*, 2005 WL 3408044 *2 (Tex. Crim. App. 2005)(emphasis in original)**

Defense counsel advised the court that a particular juror was sleeping during the trial and moved for a mistrial. The prosecutor said nothing, and the trial court overruled the motion. On appeal the question was whether counsel's assertion was sufficient to preserve error. The Court of Criminal Appeals found that it was.

"Such a statement, when made in open court without being contradicted or disputed by either opposing counsel or the trial court, provides *some* evidence of the fact of occurrence that is being asserted. At the very least, the assertion alerts the trial court that there may be a controversy over whether such an event occurred."

3. There is no right to appeal from the determination to adjudicate guilt.

***Lozano v. State*, 2006 WL 166364 *2 (Tex. App.–San Antonio 2006, pet. filed)(not designated for publication)**

Appellant pleaded no contest to indecency with a child and was given 10 years deferred adjudication. Nine years later, his probation officer discovered some 70 images of adult pornography on his computer. A hearing was held at which time appellant complained, among other things, that his computer was illegally searched and that statements were obtained from him illegally. The court of appeals does not have jurisdiction to review this complaint, since appellant was appealing concerning the trial court's determination to adjudicate. The statute that deprives a person who received deferred adjudication from appealing, but not a person who received regular probation, does not violate equal protection.

***Hogans v. State*, 176 S.W. 3d 829, 836 (Tex. Crim. App. 2005)(Johnson, J., concurring)**

The majority opinion restated the long-standing rule that the appellate courts have no jurisdiction over an appeal from the trial court's determination to adjudicate the defendant guilty. Judge Johnson wrote a concurring opinion suggesting that this approach might have constitutional problems:

> When rights guaranteed by the United States Constitution or the Texas Constitution are abrogated through state law, state law must give way.
>
> If, in a given case, the conduct of the adjudication hearing violated a defendant's right to counsel, due process, confrontation, equal protection, or any other constitutional right, the defendant must have some means of challenging the denial of those constitutional rights. To hold that Art. 42.12, § 5(b), bars all challenges, whatever their nature, to proceedings that result in adjudication elevates form over substance and produces a truly absurd result--that state procedural law overrules the United States Constitution.

***Olowosuko v. State*, 826 S.W. 2d 940, 942-43 (Tex. Crim. App. 1992)(Overstreet, J., concurring)**

Previously, Judge Overstreet has suggested that denying one on deferred adjudication the rights of appeal enjoyed by persons on ordinary probation might, in some

circumstances, deny equal protection.

4. Habeas might work, though.

***Ex parte Carmona*, 2006 WL 475455 (Tex. Crim. App. 2006)**

Applicant was placed on deferred adjudication. The state then filed a motion to enter adjudication of guilt based on an assault. A hearing was held, guilt was adjudicated and applicant was sentenced to 10 years imprisonment. He filed a writ of habeas corpus alleging that the testimony about the assault was based on perjured testimony, and the trial court agreed, recommending that relief be granted. The Court of Criminal Appeals agreed.

"Because habeas review is appropriate for denials of fundamental or constitutional rights, the applicant's claim that his community supervision was revoked solely on perjured evidence, and therefore without due process of law, is cognizable under the habeas jurisdiction of this court."

The Court rejected the state's argument that this violation was not cognizable because article 42.12, § 5(b) bars appeals from the determination to adjudicate guilt. An appeal is different than a writ of habeas corpus. "If the legislature meant to foreclose habeas relief from adjudication proceedings, it could have said so explicitly, but it did not. We conclude that the prohibition on direct appeals in Article 42.12, section 5(b) is not a bar to habeas relief in the applicant's case."

Relief was granted. Applicant's probation was revoked without due process of law because it was revoked solely based on perjured testimony.

5. The notice of appeal must be filed with the trial court.

***Dilworth v. State*, 2005 WL 1224741 *1 (Tex. App.–San Antonio 2006, no pet.)(not designated for publication)**

Appellant timely filed his notice of appeal with the Court of Appeals, but not with the trial court. Too bad for him. The notice should have been filed in the trial court. "A notice of appeal timely but mistakenly filed in the court of appeals is not deemed timely filed in the trial court."

6. PDR's should challenge the Court of Appeals, not the trial court.

***Gregory v. State*, 176 S.W. 3d 826, 827-28 (Tex. Crim. App. 2005)(Holcomb, J., concurring)**

A PDR should complain about what happened in the Court of Appeals, not in the trial court. The PDR that asserts, "The *trial court* committed reversible error in ruling admissible . . ." is unlikely to be granted. Do not just "cut and paste" from your direct appeal to the Court of Appeals.

7. The authority to review unassigned error.

***Sanchez v. State*, 182 S.W. 3d 34, 59 (Tex. App.–San Antonio 2005, pet. filed)**

The Court of Appeals has the authority to review unassigned error, even when the case is on remand from the Texas Court of Criminal Appeals.

ASSISTANCE OF COUNSEL

1. Notify your clients if they lose in the Court of Appeals.

***Ex parte Crow*, 180 S.W. 3d 135, 138 (Tex. Crim. App. 2005)**

Appellant's conviction was affirmed by the Court of Appeals and counsel did not inform appellant in time for him to file a PDR. He filed a writ seeking an out-of-time PDR, and relief was granted.

An applicant in this case must make a "limited" show of prejudice. Specifically, he must show that he was entitled to be in the appellate process, and that, absent counsel's conduct, he would have timely filed a PDR. Applicant met his burden here.

***Wilson v. State*, 956 S.W. 2d 25 (Tex. Crim. App. 1997)**

This case discusses the minimal amount of notice counsel must give their clients following affirmance in the Court of Appeals.

2. Retained counsel might be required to seek court-appointed experts.

***Ex parte Briggs*, 2005 WL 3440433 *5-6 (Tex. Crim. App. 2005)**

Applicant pleaded guilty to injury to a child, was sentenced to 17 years imprisonment, then filed a writ, alleging, among other things, that her trial counsel was ineffective for not adequately investigating the cause of her child's death. The Court of Criminal Appeals granted relief. Here, the lawyer's decision not to investigate was not a strategic one. Rather, it was economic. He did not consult with an expert because applicant could not come up with the money. A reasonably competent attorney would do one of the following: (1) subpoena all the doctors who had treated the baby, introduce through them the medical records, and elicit their opinions; (2) withdraw from the case, prove defendant's indigency, and seek appointment of counsel; or (3) prove her indigency and seek appointment of experts under *Ake v. Oklahoma*. Counsel's financial decision to do nothing to develop evidence concerning the child's medical history was not a reasonable professional judgment, and was prejudicial to applicant.

3. Finally, ineffectiveness on direct appeal.

***Walker v. State*, 2006 WL 397860 (Tex. App.–San Antonio 2006, no pet. h.)**

Trial counsel performed deficiently in the following ways:

- he failed to ask any questions in voir dire about potential bias;
- he failed to investigate or interview appellant in detail about his criminal history or his prior contacts with the complainant;
- he failed to seek discovery from the state pursuant to Rules 404 and 609 of the Texas Rules of Evidence;
- he failed to file and obtain rulings on a motion in limine to require the state to raise extraneous matters outside the presence of the jury;
- he failed to prepare appellant to testify;
- he failed to object to evidence of inadmissible extraneous matters during the guilt phase;
- he invited evidence of unadjudicated arrests during the punishment phase; and

- he failed to object to failure of the punishment-phase charge to include a reasonable doubt instruction.

And counsel's deficient performance was sufficiently serious to undermine the Court's confidence in the verdict. Appellant's conviction was reversed and remanded for a new trial.

4. Again!

***Robertson v. State*, 2006 WL 709305 (Tex. Crim. App. 2006)**

Charged with aggravated assault, appellant testified in his own behalf and asserted self-defense. On direct examination during the guilt phase of the trial his own lawyer elicited testimony from appellant that he was then incarcerated on two convictions that were pending on appeal. The convictions would not have been admissible on cross-examination under Rule 609 because they were on appeal. The questioning opened the door to damaging cross-examination, and both parties referred to the convictions during their summations.

The question in this PDR was: "Is the impeachment of a defendant by defense counsel with an inadmissible conviction 'deficient' behavior under a *Strickland v. Washington* analysis?"

Noting that appellant's self-defense claim rested almost entirely on his credibility, the Court found that counsel was deficient in allowing the jury to hear prejudicial and clearly inadmissible evidence that had no strategic value.

5. The trial court erred in not granting a hearing on appellant's motion for new trial alleging ineffective counsel.

***Stogiera v. State*, 2005 WL 3115551 (Tex. App.–San Antonio 2005, no pet.)**

Counsel filed a motion for new trial, complaining that trial counsel had been ineffective, because, among other things, he did not pursue a psychological analysis to mitigate punishment. "Because we cannot determine from the record whether the failure to pursue the psychological evidence was part of counsel's trial strategy, the trial court was required to hold a hearing on Stogiera's motion for new trial in which the factual basis for his ineffective assistance of counsel claim could have been fully developed."

***Norman v. State*, 2005 WL 1552318 *2 (Tex. App.–San Antonio 2005, no pet.)(not designated for publication)**

To be sufficient to entitle a movant to a hearing, the motion for new trial need not establish a *prima facie* case. Rather, the affidavit "must merely reflect that reasonable grounds exist for holding that such relief could be granted." In this case, the trial court abused its discretion in denying the hearing. "Here, Norman raises an ineffective assistance of counsel issue on appeal, arguing that his counsel was ineffective for opening the door to the extraneous unadjudicated offenses. Without a fully developed record from a motion for new trial proceeding, Norman is unable to show that his counsel's ineffectiveness is firmly founded in the record."

BAIL

1. Bail must be granted if the state is not ready for trial within 90 days of arrest.

***Ex parte Tellez*, 2005 WL 1277660 *1 (Tex. App.–San Antonio 2005, no pet.)(not designated for publication)**

On the 91st day after his arrest for murder, applicant filed a motion for personal bond or bond reduction pursuant to article 17.151 of the Texas Code of Criminal Procedure, and this motion was denied. The Court of Appeals reversed. The statute is mandatory. Because applicant was not indicted within 90 days after his arrest and detention, the state could not have been ready for trial, so he was entitled to reduction of his bond.

CAPITAL MURDER

***Boyce v. State*, 2005 WL 1629807 *1 (Tex. App.–San Antonio 2005, pet. ref'd)(Stone, J., concurring)(not designated for publication)**

Appellant argued, pursuant to *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that an indictment for capital murder must plead the aggravating factors that make him eligible for the death penalty. The Court disagreed and affirmed his conviction.

Justice Stone concurred. Although she agreed that the Court of Criminal Appeals has ruled against appellant on this issue, she noted that "the issue remains one of uncertainty," in light of language in *Blakely* that requires a charging instrument to plead "every fact which is legally essential to the punishment."

CHARGING INSTRUMENTS

1. An indictment will be quashed if it does not allege facts constituting an offense.

***State v. Ford*, 179 S.W. 3d 117, 124 (Tex. App.–San Antonio 2005, no pet. h.)**

Appellees were indicted for soliciting information from grand jurors, in violation of § 39.06 of the Texas Penal Code. The trial court quashed the indictments because, among other things, they did not allege an offense, and the state appealed. The Court of Appeals affirmed, finding that the indictments did not allege facts that, if true, would constitute a violation of § 39.06.

2. The *Sanchez* Saga: *Sanchez* V.

***Sanchez v. State*, 182 S.W. 3d 34 (Tex. App.–San Antonio 2005, pet. filed)**

The trial court overruled appellant's motion to set aside his indictment for sexual harassment because it failed to specify what rights, privileges, and immunities the state would seek to prove. The Court of Appeals" held that this was error, and that it was harmful under the case of *Adams v. State*. "Appellant was left to speculate what rights, immunities, etc. the State would seek to prove, hampering any investigation and preparation for trial." In the process, the Court urged the Court of Criminal Appeals to reconsider *Adams*.

CONFESSIONS

1. When one statement is made as a result of, and as a continuation of, a prior inadmissible confession.

***Xu v. State*, 2005 WL 3295668 *5 (Tex. App.–San Antonio 2005, no pet.)**

Following his conviction for murder, appellant complained that the trial court had erred when it admitted his written statement, because it was the product of custodial interrogation, and made without *Miranda* warnings, or compliance with article 38.22 of the Texas Code of Criminal Procedure. The Court of Appeals reversed and remanded the case for a new trial.

At the second trial, the state did not attempt to introduce the written statement that had caused the first reversal, but it did offer, and the trial court did admit, an oral

statement made by appellant shortly after he made the illegally-obtained written statement. Specifically, as appellant was leaving the interview room, he "'"threw himself to the floor, began screaming and crying and hitting his head on the floor and saying that he wanted [the detectives] to kill him, that he did not deserve to live, he wanted [the detectives] to beat him and shoot him.'" This oral statement was admitted, appellant was convicted, again, and again he appealed.

And again the Court of Appeals reversed. "From Xu's perspective, the same circumstances and influences which produced the inadmissible written statement also produced the oral statement, even though he was not being directly questioned at the time of the oral statement. Additionally, the officers should have known their interrogation would result in Xu's oral statement." The oral confession was made as a result of, and in continuation of, the inadmissible written confession, and it is therefore also inadmissible.

CROSS-EXAMINATION

1. *Crawford v. Washington*.

***Crawford v. Washington*, 541 U.S. 36 (2004)**

At Crawford's assault trial the state offered a tape recorded statement his wife had made to the police the night of the alleged crime in which she told them that she had not seen anything in the complainant's hand when he was stabbed. This statement, which tended to refute Crawford's claim of self-defense, was offered as a statement against penal interest, an exception to the hearsay rule. The wife did not testify at trial. Crawford objected that this statement, though admissible under state law, would violate his Sixth Amendment right to confrontation. The evidence was admitted, Crawford was convicted, and eventually his appeal found itself in the United States Supreme Court.

Concluding that the admission of the tape recorded statement violated the Sixth Amendment, the Supreme Court acknowledged two essential propositions.

First, the Confrontation Clause applies to those who "bear testimony." Although various types of out-of-court statements might or might not qualify as "testimonial," certain types meet even the narrowest definition, including *ex parte* testimony at a preliminary hearing, and "[s]tatements taken by police officers in the course of interrogation." It is not dispositive that the statements in question were not made under oath. The primary object of the Sixth Amendment is "testimonial hearsay . . . and interrogations by law enforcement officers fall squarely within that class."

Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

The Court stated this rule: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."

2. Excited utterances may be "testimonial evidence."

***Wall v. State*, 2006 WL 119575 (Tex. Crim. App. 2006)**

The police interviewed Norman, an alleged assault victim at the hospital, and the trial court admitted the interviewing officer's testimony at trial as an "excited utterance." The Court of Criminal Appeals held that a case-by-case approach is necessary to determine whether an excited utterance is testimonial evidence as contemplated by *Crawford*.

"An inquiring court first should determine whether a particular hearsay statement qualifies as an excited utterance. If not, the inquiry ends. If, however, the statement so qualifies, the court then must look to the attendant circumstances and assess the likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance."

"Under these circumstances we conclude that a reasonable person in Mr. Norman's shoes would have either retained or regained the capacity to make a testimonial statement at the time of the utterance, and that a reasonable person would have appreciated the fact that the officers were conducting a criminal investigation and collecting evidence for a prospective prosecution. The fact that Mr. Norman's statement also qualifies as an excited utterance exception under the Texas hearsay rule does not alter its testimonial nature. Because Mr. Norman was not available to testify at trial, and appellant had no prior opportunity for cross-examination, the court of appeals properly held that admission of Mr. Norman's statement violated appellant's right to confrontation under the Sixth Amendment of the United States Constitution."

The Court concluded that this error was harmless at the guilt innocence phase of the trial, and remanded to the Court of Appeals to conduct a harm analysis for the punishment phase.

3. Business records may be testimonial.

***Russeau v. State*, 171 S.W. 3d 871, 880-81 (Tex. Crim. App. 2005)**

In this capital murder case the trial court admitted incident reports from jail and prison as business records. They documented appellant's misconduct "in the most detailed and graphic of terms." These records violated *Crawford*. There was no showing that declarants were unavailable or that the appellant had the opportunity to cross-examine them. The statements were testimonial – that is, they were "solemn declarations[s] made for the purpose of establishing some fact." The admission of this evidence was not harmless, considering its highly damaging nature, and the fact that it was repeatedly emphasized during closing arguments.

4. Constitutional objections are required to preserve constitutional error.

Any time you think hearsay, make sure to add confrontation objections under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Texas Constitution. *E.g.,* ***Singleton v. State*, 2005 WL 3295756 *4 (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication)**(objections under the rules of evidence do not preserve constitutional issue on appeal).

5. *Crawford* is not applicable in certain proceedings.

***Diaz v. State*, 172 S.W. 3d 668, 670 (Tex. App.–San Antonio 2005, no pet.)**

Crawford v. Washington does not apply in probation revocation proceedings.

***In re D.L.*, 2006 WL 542776 *2 (Tex. App.–San Antonio 2006, no pet. h.)**

Crawford does not apply to a juvenile transfer hearing under § 54.11 of the Texas Family Code because this is not a stage of the criminal prosecution under the Sixth Amendment.

6. Is "forfeiture by wrongdoing" right?

***Gonzalez v. State*, 155 S.W. 3d 603, 610-11 (Tex. App.–San Antonio 2004, pet. granted)**

Appellant was tried and convicted of capital murder for killing Baldomero and Maria Herrera. Before she died, Ms. Herrera implicated appellant, and her statement doing so was admitted at trial as an excited utterance. The Court of Appeals rejected

appellant's complaint that admission of this evidence constituted a *Crawford* violation. Under the "doctrine of forfeiture by wrongdoing," appellant is precluded from excluding testimonial hearsay because it was his misconduct – murder – that rendered the witness unavailable for cross-examination.

The Court of Criminal Appeals granted appellant's PDR to consider this question: "Whether the Court of Appeals erred in holding that the petitioner forfeited his right to confrontation under the "Doctrine Of Forfeiture By Wrongdoing."

7. Witnesses may not testify in disguise.

***Romero v. State*, 173 S.W. 3d 502, 505-506 (Tex. Crim. App. 2005)**

A prosecution witness at first refused to testify, claiming fear of the appellant. He did testify after disguising himself in a baseball cap, sunglasses, and jacket. Allowing the witness to testify in disguise violated two of the four elements of confrontation: the witness's "physical presence," and the fact-finder's ability to observe the witness's demeanor. Only "compelling" interests can override the defendant's right to confrontation, and none of the interests put forth by the prosecution here were even important, much less compelling.

8. The prosecution may not examine on matter with no basis in fact.

***Eby v. State*, 165 S.W. 3d 723, 741 (Tex. App.–San Antonio 2005, pet. ref'd)**

Although cross-examination is wide open, a party may not use it to get before the jury matters with no basis in fact. In this murder case, the prosecutor asked appellant about his wife's affair with the man appellant was accused of murdering. This was improper, since there was no evidence that appellant knew about this affair. "Therefore, it was improper for the State to explore the marital affair subject when it had no basis in fact for the inquiry."

CONTINUANCE

1. Motion for new trial is not required.

***Harrison v. State*, 2005 WL 3408208 *3-5 (Tex. Crim. App. 2005)**

In this case the Court of Criminal Appeals overruled a long line of cases to hold that a motion for new trial is *not* required to preserve error concerning the denial of a

motion for continuance. Appellant's motion for continuance advised the trial court why it needed a continuance of 20 days – to locate a missing witness crucial to the case – and it explained briefly what counsel hoped to get from the witness. Counsel's affidavit swearing to the facts in the motion was attached, as was an affidavit from the defense's investigator stating the efforts that had been made to find the witness. This motion sufficiently advised the court of counsel's request and the grounds for the request, and it therefore complied with Rule 33.1(a)(1)(A) of the Texas Rules of Appellate Procedure for preservation of error.

The Court went on to hold, however, that the trial court did not abuse its discretion in denying the motion for continuance because the motion contained only "general averments as to the topics of the witness's expected testimony."

2. But, the motion must be sworn to.

***Salazar v. State*, 2005 WL 1397142 *1 (Tex. App.–San Antonio 2005, no pet.)(not designated for publication)**

Defendant's complaint that the trial court erred in not granting his motion for continuance will not be considered on appeal because his written motion for continuance was not sworn.

DESTRUCTION OF EVIDENCE

1. The Waco Court finds more protection in the state constitution.

***Pena v. State*, 166 S.W. 3d 274, (Tex. App.–Waco 2005, pet. granted)**

Appellant moved for independent testing of the marijuana he was charged with possessing. Testing was impossible because the state destroyed the marijuana and lost all records concerning the testing, except the lab report. The trial court denied appellant's motion to suppress the lab report, and the court of appeals reversed.

The *federal* Due Process standard is found in *Arizona v. Youngblood*, 488 U.S. 51 (1988), which requires a defendant to show bad faith when the state fails to preserve "potentially useful" evidence. Since *Youngblood*, it has proven almost impossible to prove bad faith. The Court of Appeals observed that, because "science is becoming increasingly capable of answering life or death questions . . . it is imperative that we consider the loss or destruction of evidence carefully. Therefore, because of the increasing reliance of law enforcement upon the advances of science, and because of the

reasons articulated by the jurisdictions cited above, we join our sister states in rejecting *Youngblood* as persuasive when interpreting the due course clause of the Texas Constitution."

The Court went on to hold that Due Course of Law provision of the Texas Constitution imposes the duty on the state to preserve "apparent exculpatory evidence." This means both exculpatory evidence, and evidence that is potentially useful to the defense, provided the defense is unable to obtain comparable evidence by other reasonably available means. If the evidence is exculpatory, the case must be dismissed. If the evidence is merely "potentially useful," several factors must be considered.

"Keeping in mind the central objective of protecting the defendant's right to a fundamentally fair trial, a trial court should consider: (1) the degree of negligence involved; (2) the significance of the destroyed evidence considered in light of the probative value and reliability of secondary evidence that remains available; and (3) the sufficiency of the other evidence used at trial to support the conviction. If after considering these factors, the trial court concludes that a trial without the missing evidence would be fundamentally unfair, the court may then determine the appropriate measures needed to protect the defendants rights. For example, the trial court could instruct the jury that they may infer that the missing evidence would have been favorable to the defense, or dismiss the charges."

In this case, the Court held that Pena was denied due course of law. His conviction was reversed.

2. San Antonio disagrees with Waco.

The San Antonio Court of Appeals has declined to follow *Pena*. *See* ***Gutierrez v. State*, 2006 WL 542594 *2 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication); *Garcia v. State*, 2006 WL 47046 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication); *Salazar v. State*, 2005 WL 3115847 (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication).**

3. Object under the state constitution.

***Gutierrez v. State*, 2006 WL 542594 *1 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication)**

A specific objection at trial – invoking the Due Course of Law provision of the Texas Constitution – is necessary to preserve this issue.

4. The state's PDR has been granted in *Pena*.

The Court of Criminal Appeals granted the state's petition for discretionary review in *Pena v. State*, No. 05-0966 to consider the following two questions:

1. Did the Court of Appeals err by reversing the trial court's decision on a legal theory not presented either to the trial court or to the Court of Appeals by the complaining party?

2. Did the Court of Appeals err by failing to consider the factors outlined by this court in *Cobb v. State*, 85 S.W. 3d 258 (Tex. Crim. App. 2002), that should be considered when deciding whether to adopt a certain position as Texas constitutional law?

DNA

1. Do not delay.

***Thacker v. State*, 177 S. W. 3d 926, (Tex. Crim. App. 2005)**

Appellant waited four years after the DNA testing statute was created, until one month before his scheduled execution to ask for testing. The Court found that his request was an unreasonable effort to delay his execution, and denied it on this basis. The "two forum rule" does not apply to DNA testing. That is, you do not have to wait until federal habeas corpus is exhausted to ask for DNA testing.

2. Second, successive petitions are available; ineffective counsel claims are not.

***Ex parte Baker*, 2006 WL 289122 *3 (Tex. Crim. App. 2006)**

The post-conviction writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure is not available to raise claims that counsel was ineffective during DNA testing proceedings brought under Chapter 64. In some cases, though a person whose counsel is ineffective may receive relief on direct appeal under Chapter 64. Also, Chapter 64 does not prohibit second, successive petitions for DNA testing. *Accord* ***Ex parte Suhre*, 2006 WL 289115 *1 (Tex. Crim. App. 2006)**.

DOUBLE JEOPARDY

1. Convictions for burglary during the commission of aggravated assault and aggravated assault were prohibited.

***Rangel v. State*, 179 S.W. 3d 64 (Tex. App.–San Antonio 2005, pet. ref'd)**

Appellant was convicted in a single trial of both burglary while attempting to commit and committing aggravated assault, and aggravated assault. "Because under the facts presented here the State would have to prove the offense of aggravated assault in proving burglary under section 30.02(3), we hold that when Rangel was convicted and sentenced on both charges, his right against double jeopardy was violated."

The Court granted double jeopardy relief even though no objection was made at trial, because, (1) the undisputed facts showed that the double jeopardy claim was apparent from the record, and (2) enforcement of the usual procedural default rules would serve no legitimate state purpose.

2. Can *Bauder* survive another term of the Court?

***Ex parte Lewis*, 165 S.W. 3d 376, (Tex. App.–Fort Worth 2005, pet. granted)**

Twice the prosecutor attempted to ask questions that violated appellant's right to post-arrest silence, and the trial court finally declared a mistrial. Appellant filed a pre-trial writ of habeas corpus arguing that retrial was barred under the Double Jeopardy Clause of the Texas Constitution because of the reckless prosecutorial misconduct. The Court of Appeals agreed.

The state's PDR was granted to answer the following questions:

A. Should this Court reconsider its decision in *Bauder v. State*, 921 S.W. 2d 696 (Tex. Cr. App. 1996)?

B. Is the mere showing that a prosecutor recklessly engaged in conduct that required the declaration of a mistrial, without showing that the prosecutor intended to induce such mistrial, sufficient to order a double jeopardy bar to reprosecution for that offense?

C. Did the Court of Appeals correctly apply the *Bauder*

standard?

DRUGS

1. Twelve factors to determine the affirmative link.

***Arevalo v. State*, 2006 WL 332627 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication)**

"Factors to be considered in establishing an affirmative link include the following: (1) the defendant's presence when the search was executed; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) the presence of odor of the contraband; (10) the presence of other contraband or drug paraphernalia; (11) the defendant's ownership or right to possession of the place where the controlled substance was found; and (12) whether the place the drugs were found was enclosed.

In this case the conviction for possession of cocaine was affirmed where five out of the twelve listed factors were present.

2. Fourteen factors; no affirmative link.

***Evans v. State*, 2005 WL 2860000 *4-5 (Tex. App.–San Antonio 2005, pet. filed)**

In this case, the Court of Appeals cited a case from the Houston Court of Appeals that listed 14 items on the non-exclusive list of factors to consider when determining an affirmative link:

(1) the defendant's presence when a search is conducted;

(2) whether the contraband was in plain view;

(3) the defendant's proximity to and the accessibility of the narcotic;

(4) whether the defendant was under the influence of narcotics when arrested;

(5) whether the defendant possessed other contraband or narcotics when arrested;

(6) whether the defendant made incriminating statements when arrested;

(7) whether the defendant attempted to flee;

(8) whether the defendant made furtive gestures;

(9) whether there was an odor of contraband;

(10) whether other contraband or drug paraphernalia were present;

(11) whether the defendant owned or had the right to possess the place where the drugs were found;

(12) whether the place where the drugs were found was enclosed;

(13) whether the defendant was found with a large amount of cash; and

(14) whether the conduct of the defendant indicated a consciousness of guilt.

"In short, viewing the evidence in the light most favorable to the prosecution, the only factors that support a finding that Evans exercised care, custody, control, or management of the cocaine are his presence and the cocaine was in plain view on the coffee table approximately one foot in front of him when the search was conducted. Under these circumstances, we conclude the evidence is legally insufficient to affirmatively link Evans to the cocaine."

3. Factually insufficient evidence.

***Stewart v. State*, 2006 WL 428965 *6 (Tex. App.–El Paso 2006, no pet. h.)**

In this case, the Court of Appeals found the evidence *legally*, but not *factually* sufficient to support the conviction.

DWI

1. Probable cause to arrest.

***Torres v. State*, 182 S.W. 3d 899, 903 (Tex. Crim. App. 2005)**

Probable cause must be based on facts, not opinion. Here, a DPS trooper arrested

appellant for DWI based on the opinions of two other deputies that he was intoxicated. The other two did not testify, though, and their unexplained opinions did not give the trooper probable cause to arrest.

2. There is still hope, even after *Mechler* and *Stewart.*

***Gigliobianco v. State*, 179 S.W. 3d 176 (Tex. App.–San Antonio 2005, pet. granted)**

The trial court admitted Mr. Gigliobianco's unextrapolated breath test results barely over the legal limit – 0.90 and 0.92 – taken almost an hour and a half after he drove. The Court of Appeals relied on *Mechler v. State*, 153 S.W. 3d 435 (Tex. Crim. App. 2005), and rejected the defense's challenge to this evidence under Rule 403. Specifically, the Court found that the results were probative because they showed the consumption of alcohol; that they were not unfairly prejudicial because they related directly to the charged offense; and that, because of this direct relationship, the time spent was inconsequential and could not have distracted the jury. This is precisely the analysis the majority used in *Mechler*.

Chief Justice Lopez wrote this in dissent:

> Most importantly, I believe this case presents a cogent argument for the Texas Court of Criminal Appeals to reconsider the analysis set forth in Judge Cochran's concurring opinion in *Mechler* and to provide further guidance to the trial and appellate courts regarding the application of the Rule 403 balancing test in this context.

Apparently, some members of the Court of Criminal Appeals agreed with Chief Justice Lopez. On March 1, 2006, the Court granted Mr. Gigliobianco's petition to decide this question: "After *Mechler*, are breath test results always admissible under Rule 403 of the Texas Rules of Evidence?"

3. Where retrograde extrapolation testimony is unreliable.

***Franco v. State*, 180 S.W. 3d 219 (Tex. App.–San Antonio 2005, no pet. h.)**

The trial court suppressed Dr. Kunsman's retrograde extrapolation testimony concerning the defendant's blood test results, and the state appealed. The Court of Appeals affirmed the suppression order.

In light of Kunsman's admission that he would need more specific information about the defendant to reliably extrapolate, the trial court did not abuse its discretion in suppressing this testimony.

Four factors must be examined to determine admission under Rule 403: the probativeness of the evidence; its potential to irrationally prejudice the jury; the time it takes to develop this testimony; and, the state's need for the evidence. Here, the first factor, probativeness, weighs in Franco's favor, considering the two and four hour delays in obtaining the samples, and the fact that the results are *below* the legal limit. The fourth factor also favors Franco. "Because the sum of the Rule 403 factors slightly favors exclusion of the blood test results, we hold the trial court's decision to exclude the evidence was within the zone of reasonable disagreement. We therefore hold the trial court did not abuse its discretion in granting Franco's motion to suppress and affirm its orders."

4. When the supervisor is competent, retrograde extrapolation testimony can be reliable and admissible.

***Beckendorf v. State*, 2005 WL 1025341 *2 (Tex. App.–San Antonio 2005, no pet.)(not designated for publication)**

Retrograde extrapolation testimony was admissible where the technical supervisor "was provided with a significant number of Beckendorf's personal characteristics and behaviors in order to make his calculation."

5. When the reference sample temperature is unknown.

***Garza v. State*, 2005 WL 2138082 (Tex. App.–San Antonio 2005, no pet.)(not designated for publication)**

The Texas Breath Alcohol Testing Regulations require that the reference sample must contain a known amount of alcohol "at a known temperature." Here, the arresting officer did not record the temperature of the reference sample. To prove the temperature, the state relied on McDougall, who, with no personal knowledge of the actual temperature, inferred that it must have been 34 degrees centigrade because he measured this temperature approximately a week before Mr. Garza was tested, and several weeks later. Given this testimony, the Court of Appeals could not "hold that the trial court abused its discretion in finding that there was no credible testimony that the temperature was 'known,' or that the intoxilyzer test was properly applied to Garza, on the occasion in question."

6. The state cannot use the HGN to estimate blood alcohol level.

***Burkett v. State*, 179 S.W. 3d 18, 33 (Tex. App.–San Antonio 2005, no pet. h.)**

The trial court erred when it overruled appellant's objection to the officer's testimony that his performance on the HGN indicated "that he's intoxicated beyond the statutory limit." This was an attempt to estimate appellant's blood alcohol level and was impermissible under *Emerson*. The error, though, was harmless.

7. Proving enhancements.

***Blank v. State*, 172 S.W. 3d 673 (Tex. App.–San Antonio 2005, no pet. h.)**

The state charged appellant with DWI second, and used a computer-generated "case synopsis" from Illinois to prove the prior conviction. The trial court erred in admitting this document. "Nothing in the record supports the State's contention that the synopsis represents a judgment of conviction. The State introduced no other evidence of the 1993 conviction, and the defendant repeatedly denied such a conviction."

DWLS

1. Driving after license expired is not driving after license suspended.

***Arteaga v. State*, 2005 WL 2367593 (Tex. App.–San Antonio 2005, pet. ref'd)(not designated for publication)**

Appellant was convicted of driving while license invalid under § 521.457 of the Texas Transportation Code, because, according to the state, he was driving after his license had been suspended. In fact, he had been issued a driver's license in 1973, which expired in 1992. Since his license had expired, appellant was driving with no license at all, but he was not driving with a suspended license. The evidence was therefore legally insufficient.

***Arteaga v. State*, 2005 WL 2012336 *1 (Tex. App.–San Antonio 2005, pet. ref'd)(not designated for publication)**

"Arteaga argues the evidence is legally insufficient to support his conviction because there is no evidence that, at the time of the alleged offense, he had a license or privilege to drive and therefore no evidence that he was driving while his license or privilege was suspended. We agree."

EXPERTS

1. Beware the cell towers.

***Wilson v. State*, 2006 WL 228907 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication)**

"It is reasonable to conclude, given Danko's background, that her explanation of the reports and the information contained therein, specifically the incoming and outgoing calls, cell tower locations and general technology with regard to tracking cellular calls, would assist the trier of fact to better understand the evidence or to determine a fact in issue. See Tex.R. Evid. 702. The record further supports that officers and emergency vehicles relied on Danko to make similar interpretations on a daily basis. Under this record, the trial court did not abuse its discretion in admitting Danko's testimony."

2. If you want to *voir dire* the expert, ask to *voir dire* the expert.

***Govea v. State*, 2005 WL 2367551 (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication)**

On appeal, appellant complained that the trial court erred when it refused his request to voir dire a police officer under Rule 705(b) of the Texas Rules of Evidence.

The Court of Appeals held that appellant's request to "ask some questions . . . on his expertise," was a request to inquire into the expert's qualifications, not concerning the underlying facts and data as contemplated by Rule 705(b).

3. Does this sound familiar?

***Sanchez v. State*, 166 S.W. 3d 368, 371-72 (Tex. App.–Fort Worth 2005, pet. ref'd)**

The child-complainant testified that appellant penetrated her anus with his finger. The state called a pediatrician, Dr. Coffman, who testified that she examined the child months later, at which time there was no evidence of penetration. Coffman went on to testify, though, that, despite the lack of physical evidence, she diagnosed sexual abuse based solely on the history given by the child, and that the child had an exam consistent with that history. This testimony was a direct comment on the credibility of the complainant.

"Because there was no physical indication of digital penetration, Coffman's

testimony can only be seen as an attempt to directly bolster the credibility of the complainant and a direct comment on the complainant's truthfulness. Although Dr. Coffman could properly testify that the physical exam was normal, the trial court abused its discretion in admitting Dr. Coffman's testimony that she had diagnosed sexual abuse based on the child's medical history."

The error, though, was harmless, under Rule 44.2(b) of the Texas Rules of Appellate Procedure. The child's testimony was clear and unequivocal, her outcry was prompt, and the state did not emphasize the improper testimony in summation. "Under the limited facts of this case, we hold that the error in admitting Dr. Coffman's testimony concerning the complainant's credibility did not have a substantial and injurious effect or influence on the jury's verdict."

4. Using the non-testifying expert against the defense.

***Pope v. State*, 161 S.W. 3d 114, (Tex. App.–Fort Worth 2004, pet. granted)**

The trial court granted the defense's motion for independent examination of DNA evidence requesting that Dr. Robert Benjamin be allowed to review the DNA tests and reports already done in the case. Later the defense designated Dr. Benjamin as its expert. The defense cross-examined the state's experts, but did not call Dr. Benjamin, or any other DNA expert of its own. The state offered evidence of Dr. Benjamin's credentials, the materials it had provided to him, and whether he had requested additional testing. The trial court overruled the defense's objections that this questioning violated Pope's attorney-client and work product privileges.

The Court of Appeals affirmed. Once the defense designated Dr. Benjamin as its expert, his identity was no longer privileged. Testimony concerning his credentials and materials provided him do not constitute work product of the defense. On the other hand, testimony regarding Benjamin's failure to request additional testing "indirectly violated Pope's work-product privilege because the testimony could have had the effect of disclosing Dr. Benjamin's mental impressions regarding the absence of a need for further tests. Thus, the trial court abused its discretion in allowing this part of the testimony." This was non-constitutional error, though, and it was harmless under Rule 44.2(b) of the Texas Rules of Appellate Procedure.

The Texas Court of Criminal Appeals granted appellant's PDR on March 22, 2006 to answer the following questions:

A. Does admission of evidence of (1) the identity of a non-

testifying defense expert witness, (2) the qualifications of the non-testifying defense expert witness, and (3) the fact that the non-testifying defense expert witness reviewed materials provided by the state's expert permit the jury to improperly infer that the non-testifying defense expert reviewed the state's expert's work and concluded that it was correct, in violation of the Sixth Amendment right to counsel and the corollary work-product privilege?

B. Does improper admission of evidence indicating that a non-testifying defense expert reviewed the state's expert's work and did not request additional testing amount to a violation of the Sixth Amendment right to counsel, or is it merely a violation of a non-constitutional right?

EXTRANEOUS OFFENSES

1. Beware the plan exception.

***Daggett v. State,* 2005 WL 3409057 (Tex. Crim. App. 2005)**

The trial court permitted a second child to testify that appellant had had sex with her, and there were many commonalities between her accusations and those by the complainant-child. The trial court found that this testimony was admissible as an exception to Rule 404(b), the so-called "common plan or scheme" exception. The Court of Criminal Appeals disagreed.

The plan exception "allows admission of evidence to show steps taken by the defendant in preparation for the charged offense." Trial courts frequently admit evidence, not to show steps in preparation, but rather, to show repeated, similar actions. "Repetition of the same act or same crime does not equal a 'plan.'" The evidence in this case fell into the latter category.

Here, though, appellant opened the door to the other child's testimony, when he testified that he would never have sex with a 16 year old. Unfortunately for the state, the trial court's limiting instruction concerned the "plan" exception. A proper instruction would have advised the jury that it could only consider the extraneous misconduct for assessing the defendant's credibility. Here, though, the court's erroneous instruction, combined with the state's argument encouraging the jury to use this evidence for the wrong purpose, improperly permitted the jury to consider the evidence for its substantive

value.

HEARSAY

1. Statements against penal interest were improperly excluded.

***Eby v. State*, 165 S.W. 3d 723, 734-37 (Tex. App.–San Antonio 2005, pet. ref'd)**

The trial court erred in excluding statements made by a third person to others which implicated him in the murder appellant was convicted of. Two requirements must be met for a statement to be admissible as against penal interest under Rule 803(24). First, the statement must expose the declarant to criminal liability. Second, "there must be corroborating circumstances that clearly indicate the trustworthiness of the statement." Both parts of the test were met here. "Considering the relevant factors, it appears the corroborating evidence, even in light of evidence tending to undermine the trustworthiness of Alvin's statements, is sufficiently convincing to indicate trustworthiness. Alvin's statements to Officer Baker, Roland, and Hardin, if believed, could create a reasonable doubt as to Eby's guilt. Thus, the trial court acted outside the zone of reasonable disagreement when it excluded the statements in question."

JURY CHARGE

1. The charge must submit a fully constituted criminal offense.

***Sanchez v. State*, 182 S.W. 3d 34, 59 (Tex. App.–San Antonio 2005, pet. filed)**

The conduct alleged and submitted to the jury in the charge did not fully constitute a criminal offense under the sexual harassment statute, and constituted fundamental error under *Almanza*.

2. Appellant was egregiously harmed where court instructed the jury that he had a legal duty to prevent his wife's death.

***Guevara v. State*, 2005 WL 3295657 (Tex. App.–San Antonio 2005, pet. filed)**

Appellant was indicted for the murder of his wife. The abstract portion of the court's charge instructed the jury that appellant could be convicted either as a party, or, if the jury found that he did not make a reasonable effort to prevent his wife's death when he had a legal duty to do so. The charge did not define "legal duty," nor did it set forth the elements of any legal duty appellant may have owed his wife, nor did it instruct the jury on

when such a duty attaches.

The Court of Appeals found that the trial court's legal duty instruction was erroneous, since a spouse generally has no legal duty to prevent his spouse's death.

This was egregiously harmful to appellant and was therefore reversible error even though trial counsel did not object. In assessing harm, the Court conceded that the legal duty theory was submitted alternatively, and that the evidence that appellant was guilty as a party – the other theory submitted – was not legally insufficient. Here, though, because appellant had no legal duty to prevent his wife's death, his conviction could have been based on a legally insufficient ground, and in such a case, the Court will not presume that the jury based its verdict on the legally sufficient, parties theory. The Court also noted that the prosecutor emphasized the legal duty theory during voir dire and during its summation.

JURY POLL

1. To poll, or not to poll?

***Barnett v. State*, 2006 WL 547828 (Tex. Crim. App. 2006)**

The jury returned a verdict of not guilty on two counts of aggravated sexual assault, and guilty on two counts of indecency with a child. Appellant asked that the jury be polled. "During the polling procedure, it soon became apparent that the jury was not unanimous on the two 'not guilty' verdicts: 'the jurors were split eleven-to-one in favor of not guilty on count one and eleven-to-one in favor of guilty on count two.'" The judge sent the jury back to deliberate, and thirty minutes later – at 4:30 in the afternoon – the two hold-out jurors changed their votes, and returned verdicts of not guilty on count one, guilty on count two.

JUVENILE

1. The trial court abused its discretion in sending juvenile probationer to TYC.

***In re S.G.*, 2005 WL 763277 *4 (Tex. App.–San Antonio 2005, no pet.)(not designated for publication)**

Appellant asserted that the trial court abused its discretion in modifying her probation and sending her to TYC, and the Court of Appeals reversed. Everyone in the trial court agreed that placement in TYC was not appropriate, except the probation officer, who said that the department had exhausted its resources in dealing with appellant. There

is insufficient evidence to support the trial court's finding that the probation department had expended all resources in order to rehabilitate appellant.

LESSER INCLUDED OFFENSES

1. Deadly conduct is a lesser of aggravated assault.

***Blissit v. State*, 2005 WL 3050426 (Tex. App.–San Antonio 2005, no pet. h.)**

Appellant was charged with aggravated assault by using and exhibiting a deadly weapon. The trial court erred in refusing his request for the lesser included offense of deadly conduct.

MOTION FOR NEW TRIAL

1. If you want a hearing, ask for it.

***Rozell v. State*, 176 S.W. 3d 228, 231(Tex. Crim. App. 2005)**

The trial court did not err in not holding a hearing on appellant's motion for new trial where the motion did not contain a request for a hearing.

PLEA BARGAINING

1. What part of "no recommendation" do you not understand?

***Bitterman v. State*, 180 S.W. 3d 139, 140-144 (Tex. Crim. App. 2005)**

The prosecutor agreed to recommend 5 years and to remain silent on appellant's application for deferred adjudication, at the same time, allowing appellant to "make a pitch for" deferred. Appellant called several witnesses, and the state cross-examined them. Then the state called appellant's counselor who agreed that deferred adjudication would send the wrong message to appellant. And, in argument to the court, the prosecutor argued that appellant was not right for probation and should receive five years imprisonment. Appellant made no objection at the time, instead complaining in a motion for new trial that the state had breached its plea bargain. The Court of Appeals held that appellant waived error by waiting until his motion for new trial to make the complaint.

The Court of Criminal Appeals disagreed, calling this a "flagrant violation" of the plea agreement. "Based upon the underlying constitutional due process principles

involved when a defendant agrees to plead guilty in return for a promise by the State, as well as upon a long history of Texas cases supporting a defendant's right to withdraw a plea once the State has violated the plea bargain, we hold that Appellant properly preserved the issue of the plea bargain breach by bringing it to the trial court's attention as soon as the error could be cured, in a motion for a new trial."

PROSECUTORIAL MISCONDUCT

1. An impermissible comment on defendant's failure to testify.

***Archie v. State*, 181 S.W. 3d 428, 431-33 (Tex. App.–Waco 2005, pet. filed)**

The prosecutor argued that two people had testified that he assaulted them, and that they jury "heard no evidence to the contrary. . . . You hear no denial. That was just accepted." This was a direct comment on the defendant's failure to testify, since it referred to evidence that can come from only the defendant. The error was reversible, even though the trial court sustained the objection and instructed the jury to disregard, because the instruction was generic only. The court was unable to say beyond a reasonable doubt that this constitutional error did not contribute to appellant's punishment.

RELEVANCY

1. Life insurance policy is irrelevant absent appellant's knowledge.

***Eby v. State*, 165 S.W. 3d 723, 740 (Tex. App.–San Antonio 2005, pet. ref'd)**

Eby was tried for murdering Cervera, who was having an affair with Eby's wife. The state established at trial that Eby's wife was a beneficiary under Cervera's life insurance policy. Eby objected that this evidence was irrelevant because he knew nothing about the policy.

The Court of Appeals agreed. "In the underlying proceeding, the State wholly failed to present any evidence, direct or circumstantial, that Eby had any knowledge that his wife was a beneficiary under Cervera's life insurance policy. Without such evidence, the insurance motive evidence was irrelevant and should have been excluded from the consideration of the jury by the trial court."

SEARCH AND SEIZURE

1. Findings of fact.

***State v. Cullen*, 167 S.W. 3d 428, 429 (Tex. App.–San Antonio 2005, pet. granted)**

Trial court has no duty to make findings of fact after granting a defendant's motion to suppress.

2. Standing.

***Parker v. State*, 182 S.W. 3d 923, 927 (Tex. Crim. App. 2006)**

"We conclude that, given the evidence in this particular case, society would recognize as reasonable Appellee's expectation of privacy in the use of his girlfriend's rental car with her permission even though he was not listed as an authorized driver on the rental agreement."

3. The odor of marijuana alone does not justify a warrantless entry.

***State v. Sprigg*, 2005 WL 2654170 (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication)**

The police were dispatched for loud music, and, while at the door, they smelled marijuana. They knocked on the door, and when defendant opened it, smoke came out of the door. They entered the apartment, without a warrant and found marijuana. The trial court granted defendant's motion to suppress.

The Court of Appeals affirmed. When the police encountered the defendant, the only indication of criminal activity was the smell of marijuana. "Odor alone, however, does not constitute probable cause that an offense is being committed in an officer's presence."

Nor were there exigent circumstances that would justify the warrantless search. "The possibility that evidence is being destroyed is only one factor in determining whether exigent circumstances exist. Cox testified that he had, in the past, seen evidence destroyed. However, the record does not indicate any circumstances specific to this case that would show police were in any danger, the situation was urgent, the time needed to obtain a warrant was excessive, or that anyone inside the apartment was even aware of police presence. Quite simply, the circumstances in this case do not rise to the level . . . so as to establish the probable cause and exigent circumstances necessary to support a warrantless entry and search of a residence."

SELF DEFENSE

1. A factual sufficiency analysis of self defense evidence.

***Davis v. State*, 2005 S.W. 3d 1560534 (Tex. App.–San Antonio 2005, pet. ref'd)(not designated for publication)**

The jury rejected appellant's self defense claim and convicted him of murder, and he appealed, asserting that the evidence was factually insufficient. "When a defendant challenges the factual sufficiency of the jury's rejection of a defense, we review all the evidence in a neutral light and ask whether the evidence supporting the rejection of the defense, when considered by itself, is too weak to support the rejection beyond a reasonable doubt or whether contrary evidence, if present, is strong enough that the beyond-a-reasonable-doubt standard could not be met." Here, the Court found the evidence factually sufficient.

SENTENCING

1. Victim impact evidence not admissible.

***Haley v. State*, 173 S.W. 3d 510, 518 (Tex. Crim. App. 2005)**

Where appellant was charged with possession of cocaine, the trial court erred when it permitted the mother of a person killed by appellant's codefendant to give victim impact testimony. Since appellant's indictment did not identify a victim, this testimony was irrelevant under Rule 401.

2. Trial court had no discretion to deny credit for time served.

***Jones v. State*, 2005 WL 2860016 (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication)**

The trial court abused its discretion when it refused to grant him credit for time served in the county jail while awaiting a motion to revoke his probation for a state jail felony.

3. Defendant is entitled to notice of deadly weapon allegation.

***Tellez v. State*, 170 S.W. 3d 158, 160 (Tex. App.–San Antonio 2005, no pet.)**

Tellez was arrested in possession of drugs and a loaded handgun, and she was indicted for possession of the drugs. The indictment said nothing about the handgun. She pleaded and received deferred adjudication. Later, the state filed a motion to adjudicate her guilty, and a notice of intent to seek an affirmative finding. Tellez was adjudicated, her probation was revoked, and the trial court made an affirmative finding. The sentence included an affirmative finding that she had used or exhibited a deadly weapon in connection with her initial drug offense. "We hold the State's failure to give Tellez notice of its intent to seek a deadly weapon finding before her plea was accepted precluded the trial court from entering a deadly weapon finding at Tellez's adjudication hearing. We therefore modify the judgment to delete the deadly weapon finding and, as so modified, affirm."

The Court granted relief even though Tellez did not object at her hearing. "[N]either Tellez by her conduct, nor her trial counsel by his failure to object, waived Tellez's right to complain on appeal that the trial court erred in entering a deadly weapon finding that was not charged or requested before she entered her original plea."

4. Time to amend a motion to revoke probation.

***Brown v. State*, 2005 WL 1276401 *1 (Tex. App.–San Antonio 2005, no pet.)**

Under article 42.12, § 21(b) of the Texas Code of Criminal Procedure, a motion to revoke probation cannot be amended by the state within seven days of the hearing absent good cause shown. Error is waived absent objection, though.

5. Proving probation eligibility by someone other than the defendant.

***Trevino v. State*, 577 S.W. 2d 242, 243 (Tex. Crim. App. 1979)**

Appellant's wife "testified, in effect, that she had known appellant since he was ten years old and that he had not been convicted of a felony during that time. This is sufficient to require the submission of a charge on probation." "The right to probation is valuable; when testimony reasonably supports a defendant's motion for probation, the issue should be submitted to the jury." ***Accord Resendez v. State*, 2005 WL 1025375 *1 n.1 (Tex. App.–San Antonio 2005, no pet.)(not designated for publication)**(rejecting state's claim that appellant could not have established his eligibility for probation because he absconded during trial; "this suggestion ignores that evidence that a defendant has not previously been convicted of a felony is available through sources other than the defendant.").

6. Can a probation officer testify about a defendant's suitability for probation?

***Ellison v. State*, 165 S.W. 3d 774, (Tex. App.–San Antonio 2005, pet. granted)**

The Court of Appeals held that the trial court did not abuse its discretion when it allowed a probation officer to testify about appellant's non-suitability for probation.

The Court of Criminal Appeals granted appellant's petition for discretionary review on this ground: "The Court of Appeals erred by holding that a probation officer may testify about a defendant's suitability for probation."

The Court of Criminal Appeals has not yet decided the merits of the petition.

7. Those on deferred adjudication probation may terminate early before the expiration of one-third of their term of probation.

***State v. Juvrud*, 2006 WL 709223 (Tex. Crim. App. 2006)**

Four months into a 10 year period of deferred adjudication probation the trial court granted defendant's motion to terminate. The state appealed, asserting that the defendant was not eligible for early termination until he had served at least one-third of this term.

The Court of Criminal Appeals affirmed.

"The question in this case is whether Section 20 of Article 42.12 of the Code of Criminal Procedure mandates that a defendant on deferred-adjudication community supervision must complete "one-third of the original community supervision period or two years of community supervision, whichever is less," or whether Section 5(c) of Article 42.12 permits a trial court to terminate a defendant's deferred-adjudication community supervision at any time."

"While the title of Section 20 may be misleading, a close reading of the article demonstrates that Section 20 and its procedures for terminating community supervision do not apply to a defendant placed on deferred-adjudication community supervision. Rather, Section 5(c) controls deferred-adjudication community supervision and requires no minimum period of supervision that must be served before early dismissal."

SEX OFFENSES

1. When must the state elect?

***O'Neal v. State*, 746 S.W. 2d 769, 771-72 (Tex. Crim. App. 1988)**

"The general rule is that where one act of intercourse is alleged in the indictment and more than one act of intercourse is shown by the evidence in a sexual assault trial, the State must elect the act upon which it would rely for conviction."

"The trial court in its discretion may order the State to make its election at any time prior to the resting of the State's case in chief. However, once the State rests its case in chief, in the face of a timely request by the defendant, the trial court *must* [emphasis added] order the State to make its election. Failure to do so constitutes error."

***Phillips v. State*, 130 S.W. 3d 343, (Tex. App.–Houston [14th Dist.] 2004, pet. granted)**

Appellant was charged with three counts of sexual assault of a child. The complainant testified that appellant had assaulted her numerous times over a period of several years. The Court of Appeals relied on *O'Neal* to hold that the trial court erred in not forcing the state to elect. The Court went on to hold that this was constitutional error, and that harm is determined under Rule 44.2(a) of the Texas Rules of Appellate Procedure.

The Texas Court of Criminal Appeals has granted the state's PDRs in *Phillips* to consider the following two issues:

> 1. The Court of Appeals erred by holding the state's failure to elect which specific transaction it intended to rely upon for conviction was constitutional error analyzed for harm under rule 44.2 (a) of the Texas Rules of Appellate Procedure.
>
> 2. The Court should reexamine its holding in *O'Neal v. State* to determine: (1) whether overruling an election request constitutes automatic error despite no erroneous evidentiary rulings or jury instructions; and (2) when the state is required to elect which transaction it will rely upon for conviction.

2. Are CPS workers agents of the state?

***Harm v. State*, 2006 WL 168374 (Tex. Crim. App. 2006)**

Whether CPS is acting as an agent for the state in terms of *Brady* must be determined on a case by case basis. "Here, the tardily produced reports were created in the course of an non-criminal investigation that was unrelated to appellant, but within the

duties of CPS to protect the welfare and safety of the children of Texas. In addition, the CPS reports significantly predate the allegations against appellant, thus CPS could not have been working with the prosecution or at its behest."

***Wilkerson v. State*, 173 S.W. 3d 521, 523-24 (Tex. Crim. App. 2005)**

"We hold that only when a CPS investigator (or other non-law enforcement state agent) is acting in tandem with police to investigate and gather evidence for a criminal prosecution are such warnings required. Here there was no evidence that the CPS worker was acting in tandem with police officers when she interviewed appellant."

3. What does "12 years of age or younger" mean?

***Marquez v. State*, 165 S.W. 3d 741, 746 (Tex. App.–San Antonio 2005, pet. ref'd)**

Article 38.072 permits testimony from the first adult to whom a child "12 years of age or younger" outcried. Here the child was 12 years and 3 months. "[W]e hold Article 38.072 applies to children who have not yet reached their thirteenth birthday."

4. Practice tip concerning the dates of commission.

The statute of limitations is very large in child-sex cases. *See* TEX. CODE CRIM. PROC. ANN. 12.01(5)("ten years from the 18th birthday of the victim of the offense").

And just about every time the legislature meets it creates a new sex crime. For example, the very first version of § 22.011 of the Texas Penal Code – entitled "Sexual Assault" – became effective on September 1, 1983, and its subsection (a)(2) enumerated only three ways to sexually assault a child, in sub-parts: A, B, and C. *See* Act of June 19, 1983, 68th Leg., R.S., ch. 977, § 3, 1983 Tex. Gen. Laws 5312-5313. Sub-part *D* was added in 1987, and established one more way to commit sexual assault of a child, namely, by intentionally or knowingly causing "the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor." *See* Act of June 19, 1987, 70th Leg., R.S., ch. 1029, § 1, 1987 Tex. Gen. Laws 3474. Effective September 1, 1997, there was another amendment to subsection (a)(2) that added sub-part *E*, for the first time making it a crime under the Texas Penal Code for a person to intentionally or knowingly cause "the mouth of a child to contact the anus or sexual organ of another person, including the actor." *See* Act of June 20, 1997, 75th Leg., R.S., ch. 1286, § 1, 1997 Tex. Gen. Laws 4911.

Because of this, it is not unheard of for a prosecutor in 2006 to be accusing a defendant of a sex crime that allegedly occurred in 1993, for example. In that case,

though, the penal code in effect in 1993, not the 2006 penal code, must govern. Many prosecutors, though, either don't know this, or they forget, and the result is that your client may be charged with a "crime" that wasn't a crime when it was allegedly committed. It is a good idea in such a case to go back and check the penal code that was actually in effect at the time of the crime alleged, to verify that it was in fact a crime at that time.

SPEEDY TRIAL

***Cathey v. State*, 2005 WL 3295748 (Tex. App.–2005, no pet. h.)(not designated for publication)**

Appellant was arrested for DWI, but not charged for almost two years. Trial was scheduled, then rescheduled several times. The 27-month delay between arrest and trial was presumptively prejudicial. The state failed to offer evidence as to the reason for the delay. Appellant promptly asserted his right to a speedy trial by moving to dismiss the charges soon after they were filed. Appellant made a prima facie showing of prejudice by testifying that one of his witnesses had died before trial. "Because Cathey made a prima facie case of prejudice, and the State failed to carry its burden to prove that he did not suffer prejudice beyond that inherent in the 'ordinary and inevitable delay,' we hold the prejudice factor weighs in favor of a finding that Cathey's right to a speedy trial was violated."

Finding that all four factors weighed in appellant's favor, the Court reversed and dismissed his prosecution.

SUFFICIENCY

1. Evidence in murder case is factually insufficient.

***Eby v. State*, 165 S.W. 3d 723, 733 (Tex. App.–San Antonio 2005, pet. ref'd)**

This was an entirely circumstantial evidence-murder case. "In light of the record before us, we must conclude that the evidence contrary to the verdict is strong enough such that the beyond-a-reasonable-doubt standard could not have been met in this case. Because we believe the jury's verdict is clearly wrong and manifestly unjust, we hold there is factually insufficient evidence to support Eby's conviction."

2. Sufficiency claim need not be preserved by trial objection.

***Oeffinger v. State*, 2006 WL 332725 *2 (Tex. App.–San Antonio 2006, no pet. h.)(not**

designated for publication)

Insufficiency of the evidence need not be preserved by objection at trial and is not waived by the failure to do so.

SUMMATION

1. Improper, but harmless, and what else is new?

***Ayers v. State*, 2005 WL 1025355 *3-4 (Tex. App.–San Antonio 2005, no pet.)(not designated for publication)**

The prosecutor argued: "I've got a lot of money, I'm going to pay an attorney, I'm going to go to court and I'm going to get off of this." Although this was "clearly outside the bounds of permissible prosecutorial closing argument," any harm was cured by the court's prompt instruction to disregard.

VERDICT

1. The non-unanimous jury verdict is illegal.

***Ngo v. State*, 175 S.W. 3d 738, 744 (Tex. Crim. App. 2005)**

Appellant was charged in a single indictment containing three paragraphs that charged that he (1) stole a credit card; (2) received a stolen credit card; and (3) fraudulently presented a credit card to pay for goods or services. The jury charge submitted the three offenses *disjunctively*, authorizing appellant's conviction if the jury found, *either* that he stole the card, *or* that he received it, *or* that he presented it. The jury was not instructed that it had to unanimously agree upon the commission of any one of these acts.

This submission was improper. "When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of any one of these criminal acts."

***Hisey v. State*, 161 S.W. 3d 502 (Tex. Crim. App. 2005)**

The indictment alleged that appellant committed capital murder by killing his mother and his father on different dates, but pursuant to the same scheme or course of

conduct. The jury was instructed that it should find appellant guilty of the lesser offense of murder if it found that he murdered both parents, but not during the same scheme or course of conduct, or if it found that he murdered only his mother, or only his father. The jury found him guilty of murder. In neither the jury instructions nor the verdict form was the jury instructed that it must unanimously agree upon one of the three different criminal acts – murder of the mother, or murder of the father, or murder of both, but not during the same scheme or course of conduct. This was error because it violated the code of criminal procedure's requirement for a unanimous jury verdict in felony cases.

***Sanchez v. State*, 182 S.W. 3d 34, 62 (Tex. App.–San Antonio 2005, pet. filed)**

"The trial court submitted to the jury ten separate and distinct offenses under section 39.03(a), (c); only a general jury verdict of guilt was received. Because of the possibility of a non-unanimous jury verdict by the submission of separate offense under these circumstances, there was error in the jury charge." The was fundamental error under *Almanza*, and therefore reversible even in the absence of an objection.

VIENNA CONVENTION

1. Does the Vienna Convention have teeth?

Under article 36 of the Vienna Convention on Consular Relations, a foreign national who has been taken into custody has a right to contact his consulate and the arresting authorities are required to inform the individual of this right "without delay."

***Sierra v. State*, 157 S.W. 3d 52, (Tex. App.–Fort Worth 2004, pet. granted)**

In this case the Court of Appeals held that the Texas Exclusionary Rule does not apply to treaties. Appellant's PDR was granted, and the parties were ordered to brief the following issues:

A. Does the Vienna Convention create a privately enforceable right in a criminal proceeding?

B. If so, does that right include the legal remedy of exclusion of a voluntary confession taken without notifying the arrestee of his right to contact his consulate?

C. Must a defendant show a causal connection between the violation of the Vienna Convention and the making of a confession?

D. What is the appropriate harmless error analysis that should be applied to Vienna Convention violations?

VOIR DIRE

1. Proper commitment questions.

***Burkett v. State*, 179 S.W. 3d 18, 33 (Tex. App.–San Antonio 2005, no pet. h.)**

This is a proper question under *Standefer* and the trial court should have permitted the defense to ask it:

> If a person is arrested for DWI, how likely or unlikely is it that that person is guilty of the charge of DWI? Would you say very likely, likely, somewhat likely, unlikely, or very unlikely? The mere fact that he is arrested for DWI, how many of you would say that if he is arrested for DWI, that it's very likely that he's guilty? Raise your hand.

The error was harmless, though, because other questions asked by the defense and the court were sufficient to permit the defense to intelligently exercise challenges for cause.

2. Another proper commitment question.

***Wingo v. State*, 2006 WL 336018 (Tex. Crim. App. 2006)**

The prosecutor was properly allowed to ask this question where appellant was a former police officer charged with falsifying an offense report: "'Do you believe there's anything wrong with putting false information in a police report?'"

3. Assessing harm when a proper question is denied.

***Sanchez v. State*, 165 S.W. 3d 707, 713 (Tex. Crim. App. 2005)**

The trial court overruled the defense's objections that certain questions asked by the state were improper commitment questions, and appellant appealed, asserting that this was error. Without determining whether the questions were proper, the Court of Appeals held that error, if any was harmless, since appellant had not shown that he had exhausted his peremptories, requested more unsuccessfully, and identified an objectionable juror.

The Court of Criminal Appeals disagreed with the lower Court's harm analysis and reversed. Harm in this situation is properly assessed according to Rule 44.2(b) of the Texas Rules of Appellate Procedure.

"Under Rule 44.2(b), reviewing courts should assess the potential harm of the State's improper commitment questioning by focusing upon whether a biased juror--one who had explicitly or implicitly promised to prejudge some aspect of the case because of the State's improper questioning--actually sat on the jury. The ultimate harm question is: was the defendant tried by an impartial jury, or, conversely, was the jury or any specific juror 'poisoned' by the State's improper commitment questions on a legal issue or fact that was important to the determination of the verdict or sentence?"

III. Sample Motions

Most of the motions listed below will be discussed in the lecture that accompanies this paper. I have not included the motions themselves with this paper because of their bulk. If you contact me at **mark@markstevenslaw.com**, I will e-mail you the whole package.

- **Appendix A: Ex Parte Motion To Appoint A Gun, Gun Handling, And Ballistics Expert To Assist In Evaluation, Preparation, And Presentation Of Defense**
- **Appendix B: Motion For Production Of Probation Office's File**
- **Appendix C: Motion To Suppress Statements Of Defendant**
- **Appendix D: Motion To Compel Election Before Trial Begins**
- **Appendix E: Motion For Production Of Field Sobriety Training Manuals Used By Arresting Officer**
- **Appendix F: Motion To Inspect And Copy A Designated Document**
- **Appendix G: Motion Requesting Trial Court To Make Findings Of Fact**
- **Appendix H: Letter To Opposing Counsel In Response To Article 39.14(b) Order**