HOT ISSUES
IN THE
TEXAS COURT OF CRIMINAL APPEALS

WHAT'S HOT, WHAT'S NOT, AND WHY

PETITIONS FOR DISCRETIONARY REVIEW
PENDING IN THE
TEXAS COURT OF CRIMINAL APPEALS
AS OF APRIL 7, 1998

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ACCOMPLICE WITNESSES

a. Can a juvenile, too young to be certified as an adult, be an "accomplice?"

Lane v. State,
942 S.W. 2d 208
(Tex. App.--Fort Worth 1997, pet. granted)
PDR No. 97-0609
Appellant's Petition

Appellant requested the trial court to give the jury an instruction on accomplice as a matter of fact concerning state's witness Patricia R., who was 13 years old at the time of the offense. The trial court refused because the witness could not have been prosecuted as an adult, since she was under 15.

Appellant argued on appeal that the law which said that a 13 year old cannot be an accomplice is no longer applicable because the legislature has now provided that a child of this age convicted of robbery can receive up to forty years imprisonment as a determinate sentence. The court of appeals disagreed. The fact that the juvenile cannot possibly be prosecuted under the penal code is the controlling factor in the application of the accomplice witness rule. That she could be deprived of her liberty is not a factor. "We are therefore constrained to hold that the amendments to the family code increasing the penalty of incarceration to up to forty years' confinement in the Institutional Division of the Texas Department of Criminal Justice do not affect the case holdings that exclude from the accomplice-witness rule juveniles who cannot be prosecuted under the penal code. The trial court was therefore not in error in refusing to give the requested charge."

Ground for Review: Do amendments to the Family Code increasing the maximum penalty for the incarceration of juveniles to forty years confinement in the Texas Department of Criminal Justice end the exclusion of juveniles from the accomplice-witness rule?

Blake v. State,
946 S.W. 2d 118
(Tex. App.--Texarkana 1997, pet. granted)
PDR No. 97-0736
Appellant's Petition

The trial court refused to instruct the jury that the testimony of a 12 year old needed to be corroborated, and the court of appeals affirmed. "A minor who cannot be prosecuted for an offense is not an accomplice witness." In light of precedent from the court of criminal appeals, the court of appeals found "unavailing" appellant's arguments that that interpretation of the accomplice witness rule did not make sense. Justice Grant concurred, noting that "[t]he time is

past for treating juvenile proceedings as if they were civil matters." It is unrealistic to argue that the accomplice witness rule is inapplicable since juveniles are not actually punished. "Ask a juvenile ordered to confinement if he is being punished or is merely undergoing rehabilitation, and he is likely to explain to you that he is being punished."

Ground for Review: Should the testimony of an underage accomplice -- one who is a blameworthy participant in the crime and not the victim of the crime -- be subject to the accomplice witness statute?

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(Tex. App.--Houston [14th Dist.] 1996, pet. granted)
PDR No. 97-0175
Appellant's Petition

Appellant was accused of commercial bribery for accepting a kickback from a man named Kassing concerning the purchase of heavy equipment. Kassing testified against appellant and claimed, among other things, that he gave appellant a check for $2,000.00.

The court of appeals found that Kassing was an accomplice as a matter of law. The non-accomplice testimony proved that appellant was in exclusive possession of a check from Kassing's company for $2,000.00. That is, the non-accomplice testimony showed that appellant was in possession of the "fruits of the crime." This, coupled with a purchase requisition prepared by appellant, tended to connect appellant to the crime. "We hold that the non-accomplice evidence was legally sufficient to corroborate the testimony of the accomplice Kassing."

Ground for Review: Whether the court of appeals properly applied the test to determine the sufficiency of non-accomplice testimony?

APPEALS

a. Should the "Helms rule" be reconsidered?

Young v. State,
940 S.W. 2d 680
(Tex. App.--Beaumont 1996, pet. granted)
PDR No. 1579-96
Appellant's Petition

The trial court heard, and overruled, appellant's pretrial motion to suppress, after which appellant pleaded guilty without the benefit of a negotiated punishment recommendation.

Appellant appealed, contending among other things, that the trial court erred in overruling her motion to suppress.

The court of appeals affirmed, invoking the "Helms rule" which "simply states that where a guilty plea is voluntarily and understandingly entered without benefit of a plea bargain, all nonjurisdictional defects occurring prior to the entry of the plea are waived." The court found that appellant was precluded from appealing the denial of the motion to suppress. Appellant argued that the "Helms rule" violates the open courts provision of the Texas Constitution. The court of appeals disagreed, declining appellant's "rather brazen request" to overrule *Helms*. The court of criminal appeals granted discretionary review on its own motion.

Ground for Review: Whether this Court should reconsider its decision in *Helms v. State*, 484 S.W. 2d 925 (1975).

b. Should the judgment be remanded or rendered when the appellate court reverses for insufficient evidence following a nolo plea?

Floyd v. State,
914 S.W. 2d 658
(Tex. App.--Texarkana 1996, pet. granted)
PDR Nos. 96-0397 & 96-0398
State's Petition

Appellant pleaded nolo to an indictment alleging securities fraud. On appeal, he contended that the evidence offered by the state showed that the prosecution was barred by limitations. The state argued that appellant waived the limitations defense by not objecting to the indictment on this basis.

The court of appeals reversed and rendered a judgment of acquittal. "The failure to timely object to the indictment waives a claim of a limitations defect in the indictment; it does not waive a claim that the evidence is insufficient to support the conviction because it shows that limitations has run." Since the undisputed evidence in this case shows that limitations had run, the court must reverse and order an acquittal.

Grounds for Review:

1. **The Court of Appeals erred in ordering acquittals because, when the evidence is insufficient to support a nolo contendere/guilty plea, remand is required.**

2. **The Court of Appeals erred in holding that *Lemell v. State*, 915 S.W. 2d 486, applies to nolo contendere and guilty pleas.**

c. Is guilt/innocence error waived under DeGarmo and McGlothlin if the defendant testifies and admits guilt in order to obtain a jury instruction under article 38.23?

LeDay v. State,
1997 WL 354770
(Tex. App.--Beaumont 1997, pet. granted)
PDR No. 97-1125
Appellant's Petition

Appellant admitted at both phases of his trial that he had been in intentional and knowing possession of the contraband in question. He was convicted and he complained on appeal that the trial court had erroneously denied his motion to suppress evidence.

Under *DeGarmo v. State*, 691 S.W. 2d 657 (Tex. Crim. App. 1985) and *McGlothlin v. State*, 896 S.W. 2d 183 (Tex. Crim. App. 1995), any error occurring in the guilt/innocence phase is waived if the defendant admits his guilt to the charged offense during the punishment phase. The court of appeals held that appellant waived any error concerning the motion to suppress when he admitted his guilt at both phases of the trial.

Ground for Review: Whether a defendant waives an appellate complaint of illegally obtained evidence under *DeGarmo v. State*, 691 S.W. 2d 657 (Tex. Crim. App. 1985) when he testifies at guilt/innocence and admits guilt, but testifies in order to obtain a jury charge on the legality of his arrest.

d. Does former rule 40(b)(1) apply to appeals from orders revoking probation?

Feagin v. State,
1996 WL 730579
(Tex. App.--Dallas 1996, pet. granted)
PDR No. 97-0101
State's Petition

Appellant pleaded guilty pursuant to a plea bargain agreement and received five years probation. Later the state filed a motion to revoke her probation, and, after a hearing, the trial court granted the motion. Appellant appealed to the court of appeals.

Appellant contended on appeal that the trial court had erred because the state failed to use due diligence to apprehend her after the motion to revoke was filed and the capias issued. The state argued that the court of appeals lacked jurisdiction to hear the appeal because appellant filed only a general notice of appeal, insufficient under former article 40(b)(1).

The court of appeals agreed with appellant that the state had failed to use due diligence, and disagreed with the state that it lacked jurisdiction. Although there was a plea agreement as to

the original guilty plea, there was no agreement applicable to the separate probation revocation. "Therefore, we conclude rule 40(b)(1) is not applicable to this appeal."

Ground for Review: Whether the court of appeals erred in finding that the notice of appeal was sufficient to give the court of appeals jurisdiction.

e. May the state appeal the trial court's decision permitting the defendant to change his punishment election without the state's consent?

State v. Baize,
947 S.W. 2d 307
(Tex. App.--Amarillo 1997, pet. granted)
PDR No. 97-0926
State's Petition

Appellee elected to go to the jury for punishment prior to voir dire, but after he was convicted, the trial court granted his request to withdraw his earlier election, over the state's objection. The state appealed, asserting that the trial court had no authority to allow the defendant to change his punishment election in the face of the state's objection.

The court of appeals agreed that the trial court had erred, but also found that it had no jurisdiction over the appeal. Pursuant to article 44.01(b) of the code of criminal procedure, the state is entitled to appeal an illegal sentence. The court held, however, that this was not an illegal sentence, since it was not "one which the court had no jurisdiction to levy or one which violates a fundamental constitutional right." The court of appeals dismissed the appeal and the state filed a petition for discretionary review.

Ground for Review: Whether the court of appeals erred in holding that the state could not appeal the trial court's erroneous decision to allow appellee, over the state's explicit refusal to consent, to change his punishment election after he had been convicted.

f. Preservation of error

Moreno v. State,
944 S.W. 2d 685
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0710
State's Petition

Appellee was charged with DWI, and, when he testified in his own behalf, the state was allowed to impeach him with the fact that he was then on deferred adjudication for attempted murder. The theory was that this pending case gave him a bias or motive to testify, since, if he were convicted, his probation could be revoked. Also, a police officer testified that, in his opinion, appellant had a blood alcohol concentration greater than 0.10.

The court of appeals reversed. There was no proof of any circumstances supporting bias or interest other than that the pending adjudication *could* result in a conviction *if* the state filed a motion to adjudicate. "Accordingly, the state has failed to establish 'a specific connection between the witness' [appellant's] testimony and the cause, disclosing an *actual bias or motive*." Therefore, the evidence was not relevant and the trial court abused its discretion in admitting it.

The court of appeals also held that the trial court had erred in admitting the officer's opinion of appellant's alcohol concentration. Appellant did not take a breath test, and the officer was not qualified to express his opinion on what the result would have been based on his observations. The state argued that appellant waived error because he did not object to an unresponsive answer given by the witness. The court of appeals disagreed. This answer was unresponsive, and did not actually state an opinion about appellant himself. Nor did appellant waive the error by failing to reurge his objection later, because an objection at this time would have been futile, in light of the trial court's earlier ruling.

Grounds for Review

1. **Whether the court of appeals erred in holding the state is not allowed to cross-examine the defendant about a pending probation in order to establish bias or motive for testifying.**

2. **Did the court of appeals err in holding appellant preserved error as to admission of officer's objectionable testimony that he believed appellant's blood alcohol level exceeded .10 % based solely on his observations of appellant and his performance on field sobriety tests?**

g. The retroactive application of the new harmless error standard

Fowler v. State,
958 S.W. 2d 853
(Tex. App.--Waco 1997, pet. granted)
PDR No. 0075-98
Appellant's Petition

The court of appeals found that the trial court erroneously admitted expert testimony in violation of the *Kelly* test, and then conducted a harmless error review under new Rule 44.2 of the Texas Rules of Appellate Procedure. This rule requires the appellate courts to disregard any non-constitutional error that does not affect appellant's substantial rights. Applying this rule, the court of appeals held that the error was harmless and affirmed. The court acknowledged that, under the former Rule 81(b)(2), it would have had to reverse the conviction because it could not say beyond a reasonable doubt that the error was harmless.

Grounds for Review:

1. **Whether a harm analysis conducted pursuant to Tex. R. App. Pro. 44.2, which became effective after appellant's brief was filed, instead of the former Rule 81(b)(2), resulted in an injustice to appellant.**

2. **Whether application of Tex. R. App. Pro. 44.2 under these circumstances constitutes a retroactive law in violation of the Texas Constitution.**

h. The standard to be used when the record on appeal is incomplete

Calvin Lee Jackson v. State,
No. 12-94-00365-CR
(Tex. App.--Tyler 1995, pet. granted)
PDR No. 95-1423
Appellant's Petition

State's exhibit four, a diagram of the crime scene, was properly admitted at trial. After its admission, it was used, marked upon and altered by witnesses to illustrate their testimony. It was not later offered or received into evidence in its altered form. After trial, the exhibit was lost. The court of appeals abated the appeal for a hearing concerning the lost exhibit. The trial court found that the exhibit could be duplicated in its original form, but not in its altered form.

The court of appeals affirmed. Since the exhibit could be duplicated in its original form, "the record is complete as to the exhibits received by the trial court. The additions to State's Exhibit No. 4 were merely cumulative to the witnesses testimonies before the jury and not dispositive to our analysis of the case."

Ground for Review: What is the correct appellate standard to be used when the record on appeal is incomplete?

i. Authority to address the state's cross-appeal when the conviction is affirmed

Sotelo v. State,
931 S.W. 2d 745
(Tex. App.--Fort Worth 1996, pet. granted)
PDR No. 96-1687
State's Petition

Appellant was convicted in the trial court and gave notice of appeal. The state cross-appealed, contending that the trial court had erred in ruling that enhancement paragraphs were unavailable for sentencing. After rejecting the appellant's claims, the court of appeals held that, because it had affirmed the conviction, it was precluded from addressing the merits of the state's appeal.

Ground for Review: Whether the court of appeals erred in refusing to order a new punishment hearing because the trial court had no authority to dismiss the enhancement paragraphs without the consent of the prosecutor?

j. Appeal of non-jurisdictional matters following deferred adjudication

Connolly v. State,
955 S.W. 2d 411
(Tex. App.--Austin 1997, pet. granted)
PDR No. 97-1637
State's Petition

Appellant was given deferred adjudication for a period of five years. Before the expiration of the five year period, the state filed a motion to revoke supervision and enter an adjudication of guilt. Later, a week before expiration, the state filed an amended motion and a capias. Four months after expiration, the sheriff's office executed the capias. Appellant filed a motion to dismiss, asserting that the state had failed to use due diligence in apprehending him. The trial court denied the motion and revoked supervision.

The court of appeals reversed. Once an appellant timely raises due diligence, the state has the burden of proving it by a preponderance of the evidence. The state did not meet that burden here. The court also overruled the state's contention that the question of due diligence is non-appealable under article 42.12 §5(b).

Ground for Review: May a defendant in a criminal case appeal the non-jurisdictional question of due diligence on the part of the state in rearresting a defendant pursuant to a capias which was issued before, but not executed until after, the expiration of the probationary period upon a motion to revoke deferred adjudication community supervision under art. 42.12, § 5(b), V.A.C.C.P?

ASSISTANCE OF COUNSEL

a. What is the future of Duffy?

Oliva v. State,
942 S.W. 2d 727

(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0651
State's Petition

The state argued at the punishment phase that appellant failed to show any remorse for his crime. Although it is well settled under the United States Constitution, the Texas Constitution, and article 38.08 of the Texas Code of Criminal Procedure that this argument is improper, trial counsel failed to object. Under *Ex parte Duffy*, 607 S.W. 2d 507 (Tex. Crim. App. 1980), an accused is entitled to counsel "reasonably likely to render and rendering reasonably effective assistance." The court of appeals found that trial counsel here, by failing to object, was ineffective under *Duffy*, and it reversed the case and remanded for a new punishment hearing.

Ground for Review: Whether *Duffy v. State*, 607 S.W. 2d 507 (Tex. Crim. App. 1980), should be abandoned as the standard for assessing claims of ineffective assistance of counsel based on errors occurring in the punishment phase of a non-capital trial?

Hernandez v. State,
943 S.W. 2d 930
(Tex. App.--El Paso 1997, pet. granted)
PDR No. 97-0506
State's Petition

Trial counsel tried this aggravated sexual assault case "blind." Although counsel's performance was "mechanically adequate," "the totality of her representation was deficient and inadequate. Many good words were spoken, but to little purpose." The evidence of guilt, however, was "too overwhelming to find that the result of the guilt-innocence phase would have been different." Accordingly, the court found that appellant failed to meet his burden under *Strickland* of showing a reasonable probability that the result at the first phase would have been different but for the inadequate representation. The court went on to note, though, that the second prong of *Strickland* is not applicable to inadequacies at the punishment phase. "When the jury assessed the Appellant's punishment, they possessed information that the Appellant had raped a fourteen-year old girl, that he was on electronic monitoring, and that he had been indicted for raping two other girls." Under the totality of circumstances, appellant met his burden under *Duffy* of showing that his trial counsel was unreasonably deficient during the punishment phase. Accordingly, the cause was reversed and remanded for a new trial on punishment. The state filed a petition for discretionary review.

Ground for Review: Whether the court of appeals correctly applied the *Duffy* standard instead of the *Strickland* standard for determining ineffective assistance of counsel, to error that could have an indirect, ancillary impact on the punishment phase of trial?

b. Can a defendant collaterally attack on direct appeal a prior conviction used for

enhancement on the ground that he was deprived of effective counsel?

Van Eldon German v. State,
No. 10-94-192-CR
(Tex. App.--Waco July 5, 1995, pet. granted)
PDR No. 95-1036
State's Petition

The state charged appellant with aggravated assault and alleged a prior conviction for burglary of a vehicle for enhancement. Appellant pleaded guilty to the instant offense, but pleaded "not true" to the enhancement count, contending that he had received ineffective assistance of counsel at the prior proceeding. The trial court found the enhancement count "true," and appellant appealed.

The court of appeals reversed. A prior conviction alleged for enhancement can be collaterally attacked on direct appeal if the prior is void due to a constitutional defect. A complaint of ineffective assistance of counsel asserts a constitutional defect. The inquiry on appeal is whether the trial court's implied finding that appellant was not denied the effective assistance of counsel is so against the great weight and preponderance of the evidence as to be manifestly unjust. The court of appeals found that it was. But for counsel's failure to investigate and give accurate information, appellant would not have pleaded guilty. The court of appeals reversed and remanded for a new punishment hearing. The state's petition for discretionary review was granted.

Grounds for Review:

1. **Whether a direct appeal is a proper vehicle for claiming ineffective assistance of counsel in a prior conviction used for enhancement purposes.**

2. **Whether the *Meraz* "great weight and preponderance" standard for factual sufficiency applies to a review of a trial court's finding that an enhancement allegation was true when the appellant claims the prior conviction was void because of ineffective assistance of counsel.**

c. Application of the Strickland standard

Jackson v. State,
921 S.W. 2d 809
(Tex. App.--Houston [14th Dist.] 1996, pet. granted)

PDR No. 96-1035
State's Petition

Appellant was seized and the police found a crack pipe containing cocaine in his pocket pursuant to a pat down search. His lawyer did not file a motion to suppress, did not object to the admission of the crack pipe, did not ask for a jury instruction pursuant to article 38.23, and did not seek a new trial. Appellant was convicted and he appealed.

The court of appeals reversed, finding counsel ineffective for not seeking to suppress the evidence and not asking for a jury instruction, despite the fact that there were serious questions as to the validity of the search. In light of the undeveloped record, the court of appeals could not conclude that the search was valid or invalid. The state's petition for discretionary review was granted.

Grounds for Review:

1. **Did the Court of Appeals err in relying upon speculation, rather than facts firmly founded in the record, to determine trial counsel was ineffective?**

2. **Did the Court of Appeals err in tacitly shifting the burden to the State to bring forth a sufficient record on appeal?**

3. **Did the Court of Appeals err in failing to address the second prong of the *Strickland* test?**

AUTHENTICATION

a. The proper authentication of a tape recording

Angleton v. State,
955 S.W. 2d 655
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-1536
State's Petition

Appellant was charged with capital murder and was remanded without bond. At the "proof evident" hearing, the state introduced, among other things, an audio tape which it claimed recorded a conversation between appellant and his brother in which the two plan the complainant's murder. Appellant's objection that this audio tape was not properly authenticated was overruled. Appellant's application for writ of habeas corpus was overruled, and appellant appealed.

The court of appeals agreed that the audio tape was not properly authenticated. The sponsoring witness admitted that the tape was not the original tape, nor was he able to provide any information as to how the offered tape differed from the original recording, other than to say that it had been "enhanced." On cross-examination, he admitted that he had no personal knowledge of where, how, when, or who made the tape recording. He could not swear that the tape was an accurate recording of the conversation it purported to represent, nor could he testify that the equipment which made the recording was accurate. A tape cannot be admitted unless it is properly authenticated. Its relevance here depended on whether it is a tape between appellant and his brother. "The State was required to furnish testimony of a witness who could verify the tape was what the State claimed it to be. In the absence of such evidence, we find the State failed to lay the proper predicate for the court to admit the tape into evidence."

Grounds for Review:

1. **Did the court of appeals err in holding that the state failed to lay the proper predicate for authenticating an audiotape seized from a defendant because the sponsoring witness did not have personal knowledge of where, how, when, or who made the tape recording? See *Kephart*, 875 S.W. 2d 319 (Tex. Crim. App. 1994) and Tex.R.Crim.Evid 901.**

2. **Did the court of appeals err in holding the "proof was not evident" under Art. I, §11 of the Tex.Const. in order to allow the trial court to deny appellant bail?**

BAIL

a. Conditions on bond pending appeal from misdemeanor

Dallas v. State,
945 S.W. 2d 328
(Tex. App.--Dallas 1997, pet. granted)
PDR No. 97-0899
State's Petition

Appellant was convicted of the misdemeanor offense of cruelty to animals, and appealed. The trial court imposed certain conditions on his bond pending appeal, and appellant complained, contending that there is no authority for imposing conditions on bond pending appeal from a misdemeanor.

The court of appeals agreed with appellant and reversed. Article 44.04 is clear and unambiguous, and provides for the imposition of conditions for bonds pending felony

convictions, but not for bonds pending appeal of misdemeanor convictions. "Because appellant was convicted of a misdemeanor, the trial court improperly imposed conditions of bail pending appellant's appeal."

Ground for Review: Did the court of appeals err in holding that the trial court did not have authority to place conditions on appellant's appeal bond? (See art. 44.04(a & c), V.A.C.C.P.).

b. "Proof evident"

Angleton v. State,
955 S.W. 2d 655
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-1536
State's Petition

Appellant was charged with capital murder and was remanded without bond. At the "proof evident" hearing, the state introduced, among other things, an audio tape which it claimed recorded a conversation between appellant and his brother in which the two plan the complainant's murder. Appellant's objection that this audio tape was not properly authenticated was overruled. Appellant's application for writ of habeas corpus was overruled, and appellant appealed.

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A tape cannot be admitted unless it is properly authenticated. Its relevance here depended on whether it is a tape between appellant and his brother. "The State was required to furnish testimony of a witness who could verify the tape was what the State claimed it to be. In the absence of such evidence, we find the State failed to lay the proper predicate for the court to admit the tape into evidence."

The court found that the state had failed to meet its burden of proving by clear and strong evidence that a jury would convict appellant of capital murder, or that it would answer the special issues in such a way as to cause the assessment of the death penalty. The case was remanded to the trial court for determination of the appropriate amount of the bond.

Grounds for Review:

1. **Did the court of appeals err in holding that the state failed to lay the proper predicate for authenticating an audiotape seized from a defendant because the sponsoring witness did not have personal knowledge of where, how, when, or who made the tape recording? See *Kephart*, 875 S.W. 2d 319 (Tex. Crim. App. 1994) and Tex.R.Crim.Evid 901.**

2. **Did the court of appeals err in holding the "proof was not evident" under Art. I, §11 of the Tex.Const. in order to allow the trial court to deny appellant bail?**

CHARGING INSTRUMENTS

a. "On or about"

Garcia v. State,
907 S.W. 2d 635
(Tex. App.--Corpus Christi 1995, pet. granted)
PDR No. 95-1176/8
Appellant's Petition

Appellant was charged in three separate indictments with indecency with a child, alleging that the offenses occurred "on or about October 5, 1987," and "on or about August 15, 1989," and "on or about May 15, 1990." Appellant filed motions to quash, alleging that the "on or about" allegations where not specific enough to give him adequate notice of the time periods for which he needed to defend.

The court of appeals disagreed. "We hold that the 'on or about' dates as alleged in the indictments were sufficient to give appellant notice of the time period for which he needed to defend."

Ground for Review: Whether an allegation that a sexual offense against a child occurred "on or about" a certain date provides sufficient notice to a defendant who files a motion to quash requesting that the state plead a more specific date?

b. Notice in a barratry case

State v. Mays,
942 S.W. 2d 84
(Tex. App.--Corpus Christi 1997, pet. granted)
PDR No. 97-0367
State's Petition

Appellee was charged with illegally soliciting employment for himself and others in violation of the barratry statute. The trial court granted his motion to set aside the indictment because it failed to specify the manner and means by which appellee allegedly solicited employment, and the state appealed.

The court of appeals affirmed. "In the present case, the statute does not define how an inherently innocent 'communication' rises to the level of criminal activity. While the State certainly has an interest in curbing the truly illegal solicitation of clients, a statute which purports to threaten a person's liberty and livelihood demands exactness. We hold that in the face of a motion to quash, the State must allege, in terms more specific than this statute's definition, how the defendant allegedly illegally communicated with prospective clients."

Ground for Review: Whether the court of appeals erred in holding that the barratry indictment which tracked the statutory definition of "solicit employment" set forth in Tex.Penal Code Ann. § 38.01(11) is inadequate to properly notify a defendant charged with barratry of the specific conduct of which he is charged? See also, *State v. Edmond*, 933 S.W. 2d 120 (Tex. Crim. App. 1996).

CONFESSIONS

a. Application of Edwards v. Arizona

State v. Consaul,
1997 WL 169304
(Tex. App.--El Paso 1997, pet. granted)
PDR No. 97-0832
State's Petition

During an interview with the police, appellee asked for a lawyer, and the police suggested that she needed a preacher, but they did terminate the interview, and took appellee home. Later, the state returned and asked appellee to take a polygraph, and if she wanted to talk about the results. At this point, appellee gave an incriminating statement. The trial court suppressed the statement and the state appealed.

The court of appeals affirmed. Appellee was in custody, and she unequivocally invoked her right to counsel. Once this happens, the state is forbidden to interrogate further, unless the accused reinitiates the conversation. This did not happen here. The burden is clearly on the state to prove affirmatively that the accused reinitiated contact. The appellate court found some evidence in the record that the police, not appellee, reinitiated the contact to take the polygraph, and that the police, not appellee, reinitiated the contact by asking appellee if she wanted to make a statement after knowing she had invoked her right to counsel. In light of that, the court found that the state failed to meet its burden of demonstrating that appellee reinitiated contact.

Grounds for Review:

1. **Does the rule of *Edwards v. Arizona* apply prospectively when there is a break in the period of custody in which the accused invokes his fifth amendment right to counsel?**

2. **Can the Fifth Amendment right to counsel be invoked anticipatorily, in a context other than custodial interrogation?**

3. **Did the court of appeals erroneously apply a presumption of correctness to the trial court's legal conclusions concerning custody?**

4. **Did the court of appeals consider all relevant evidence in the record in holding that appellee was in custody?**

CONTROLLED SUBSTANCES

a. Foreign prescriptions in Frio County

Wright v. State,
955 S.W. 2d 393
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 1595-97
State's Petition

Appellant obtained a prescription for valium and diethypropion from a licensed physician in Nuevo Laredo, bought the drugs there, and returned to Texas, where she was stopped for speeding in Frio County. She was prosecuted there for felony possession of controlled substances and sentenced to two years probation.

The court of appeals reversed her conviction. "This appeal presents the question of whether an individual is subject to prosecution under the Texas Controlled Substances Act for possession of a scheduled drug prescribed by a foreign physician." Under § 481.117(a) of the Texas Health and Safety Code, possession of certain substances is a crime "unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice." Under § 481.002(39), a practitioner is one who is licensed to prescribe drugs in Texas or who holds a current DEA registration number and who may prescribe drugs in another state. Appellant argued in the trial court that her possession was legal because it was authorized by § 481.002(24), because federal law expressly authorizes such behavior. Under 21 U.S.C. § 844(a), a person is in lawful possession of a controlled substance if the substance was obtained from a practitioner acting in the lawful course of his professional practice. Under § 802(21), a practitioner is one who is licensed in the United States or the jurisdiction in which he practices. Under 21 U.S.C. § 956, persons may lawfully enter the United States with controlled substances lawfully obtained for personal medical use. Appellant was in lawful possession of her medication as defined by federal law. "It is axiomatic that one who is in

lawful possession of a substance should not be indicted for and convicted of unlawful possession of a controlled substance." The case was remanded with instructions to dismiss the indictment.

Grounds for Review:

1. **Does the court of appeals have the authority to instruct the trial court to dismiss an indictment after finding that the statute for which appellant was prosecuted for violating was not void for vagueness?**

2. **Did the court of appeals correctly conclude that the evidence was sufficient to show appellant met the requirements of 21 U.S.C. § 956 and thus also met the requirements of § 481.117 and § 481.002(24)?**

3. **Did the court of appeals correctly decide the evidence was sufficient to prove the prescription was a "valid prescription" and was from a "fully licensed physician?"**

CROSS-EXAMINATION

a. Can the state establish bias or motive in the defendant by showing that he is on deferred adjudication?

Moreno v. State,
944 S.W. 2d 685
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0710
State's Petition

Appellee was charged with DWI, and, when he testified in his own behalf, the state was allowed to impeach him with the fact that he was then on deferred adjudication for attempted murder. The theory was that this pending case gave him a bias or motive to testify, since, if he were convicted, his probation could be revoked. Also, a police officer testified that, in his opinion, appellant had a blood alcohol concentration greater than 0.10.

The court of appeals reversed. There was no proof of any circumstances supporting bias or interest other than that the pending adjudication that *could* result in a conviction *if* the state filed a motion to adjudicate. "Accordingly, the state has failed to establish 'a specific connection between the witness' [appellant's] testimony and the cause, disclosing an *actual bias or motive*." therefore, the evidence was not relevant and the trial court abused its discretion in admitting it.

The court of appeals also held that the trial court had erred in admitting the officer's opinion of appellant's alcohol concentration. Appellant did not take a breath test, and the officer

was not qualified to express his opinion on what the result would have been based on his observations. The state argued that appellant waived error because he did not object to an unresponsive answer given by the witness. The court of appeals disagreed. This answer was unresponsive, and did not actually state an opinion about appellant himself. Nor did appellant waive the error by failing to reurge his objection later, because an objection at this time would have been futile, in light of the trial court's earlier ruling.

Grounds for Review

1. **Whether the court of appeals erred in holding the state is not allowed to cross-examine the defendant about a pending probation in order to establish bias or motive for testifying.**

2. **Did the court of appeals err in holding appellant preserved error as to admission of officer's objectionable testimony that he believed appellant's blood alcohol level exceeded .10 % based solely on his observations of appellant and his performance on field sobriety tests?**

b. Impeachment of a defense witness for bias or motive

Dixon v. State,
955 S.W. 2d 898
(Tex. App.--Fort Worth 1997, pet. granted)
PDR No. 98-0021/2
Appellant's Petition

Witness Pelfrey testified in behalf of the appellant, that he and his wife has socialized with appellant and that, before appellant was charged, he had planned to marry. On cross-examination the state was permitted to elicit from Pelfrey that he was facing sexual charges himself. The trial court overruled appellant's objection, finding that the pending charges were admissible to prove bias and motive.

The court of appeals affirmed. Although Rule 608(b) provides that credibility may not be impeached with specific instances of conduct other than a criminal conviction, Rule 612(b) permits impeachment with proof of circumstances or statements showing bias or interest. "Thus the plain language of Rule 612(b) creates an exception to Rule 608(b) where the evidence shows bias or a motive for the witness to testify untruthfully." Here, no objection was made below under Rule 612(b). The general objection under Rule 608(b) does not suffice. But even if a proper objection had been made, the evidence would still have been admissible. "The fact that Pelfrey had charges pending against him for the same type of offense gives rise to the possibility that Pelfrey testified on Dixon's behalf because he was either antagonistic towards the State or because he empathized with Dixon."

Ground for Review:

1. Whether a trial objection that evidence is inadmissible under TRCE 608(b) preserves error in a claim that evidence is not admissible under TRCE 612, because that rule does not apply.

2. Whether the state may impeach a defense witness with pending criminal charges to show motive or bias?

c. Impeachment of a state's witness for bias or motive stemming from a pending federal indictment

Carpenter v. State,
952 S.W. 2d 1
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-1250/1
Appellant's Petition

Appellant wanted to cross-examine a state's witness with evidence that he had federal conspiracy charges then pending against him, but the trial court disallowed this impeachment. The court of appeals affirmed. This evidence, although relevant, was properly excluded under Rule 403, in light of the danger that the jury would have been confused or used the evidence improperly.

Ground for Review: Was appellant properly precluded from cross-examining a state's witness concerning a pending federal criminal charge? Considering *Carroll v. State*, 916 S.W. 2d 494 (Tex. Crim. App. 1996).

d. Impeachment for bias or motive stemming from pending civil litigation

Humberto Hoyos v. State,
951 S.W. 2d 503
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 98-0050
Appellant's PDR

Appellant was accused of robbing the complainant in her apartment. The trial court would not allow appellant to impeach the complainant concerning her bias or motive by proving that she had retained a civil attorney to pursue a civil claim against the apartment complex.

Appellant was convicted and he appealed.

The court of appeals affirmed. "In conclusion, we find that the probative value of the cross-examination appellant sought to solicit was very low and that introduction of the evidence could create confusion for the jury."

Ground for Review: Whether the court of appeals erred by holding that prohibiting an accused from cross-examining the complaining witness about a civil suit for damages arising from the criminal action does not deny the accused's constitutional right to confrontation unless the accused is an actual party to the civil suit.

Minervo Hoyos v. State,
1997 WL 427048
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-1499
Appellant's Petition

The trial court refused to permit appellant to elicit from the complainant that she had retained an attorney to sue the apartment where the robbery took place. The court of appeals affirmed. "Because the excluded evidence had little or no probative value in impeaching the complainant's testimony, we do not believe appellant's Sixth Amendment rights were infringed. However, even if we were to assume an infringement under the facts of this case, the error was harmless."

Grounds for Review:

1. Whether the trial court correctly denied appellant the right to confront and cross-examine the complaining witness concerning her possible motive, bias or prejudice when the trial court was made aware appellant wished to elicit testimony that the complainant had retained an attorney and was pursuing a civil claim for damages against the apartments where the aggravated robbery occurred?

2. Whether the court of appeals correctly concluded that the excluded testimony of the pecuniary interest of the complaining witness in a civil case stemming from the facts of the aggravated robbery was of little or no probative value and therefore properly excluded?

3. Whether the court of appeals correctly applied the harmless error analysis of *Delaware v. Van Arsdall* in the case.

e. Does the statute authorizing admission of videotaped testimony of the victim of

the offense permit videotaped testimony by a child who is not the victim of the offense alleged?

Lively v. State
940 S.W. 2d 380
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-0282
Appellant's Petition

The state indicted appellant for aggravated sexual assault of his niece, alleging that he had induced his five year old son to have sex with the complainant. The trial court admitted a videotape of appellant's son, in lieu of his live testimony, and appellant was convicted.

The court of appeals affirmed the conviction. The court acknowledged that, on its face, the videotape statute, article 38.071, authorizes videotaped testimony only from the victim, and that in this case, the son was not the victim of the offense alleged. Even though the son was not the victim of the offense alleged, he was still a victim. Public policy considerations support the trial court's decision to let the son testify by videotape, and this did not violate the appellant's right to confront or cross-examine witnesses against him.

Ground for Review: Whether admission of videotaped interview with child witness who was not the victim violated appellant's rights to confrontation under both Texas and United States Constitutions?

f. When the "victim" is older than 12

Marx v. State,
953 S.W. 2d 321
(Tex. App.--Austin 1997, pet. granted)
PDR No. 97-0994
Appellant's Petition

Appellant was indicted for the aggravated sexual assault of B. J., who was 13 at the time of the offense. The trial court permitted B. J. to testify by closed-circuit television. The court also permitted the televised testimony of J.M., even though she was not the victim of the offense alleged.

The court of appeals affirmed. Article 38.071 of the Texas Code of Criminal Procedure authorizes closed-circuit testimony of victims of the offense who are 12 years or younger. The court acknowledged that here, article 38.071 applied to neither child since one was over 12, and the other was not the victim of the offense alleged. This statute is not the only basis for permitting closed-circuit testimony in Texas. The law simply requires that the trial court determine that the procedure is necessary to protect the child, that the child would be traumatized by live testimony, and that the trauma suffered by the trial is not merely *de minimis*.

Ground for Review: Did the trial court err in allowing two witnesses to testify via closed circuit television even though neither witness met the prerequisites of art. 38.071.

DRIVING WHILE INTOXICATED

a. Collateral estoppel

Headrick v. State,
948 S.W. 2d 554
(Tex. App.--Fort Worth 1997, pet. granted)
PDR No. 97-1082
Appellant's and State's Petitions

The administrative law judge presiding over the hearing to suspend appellant's driver's license found that reasonable suspicion to stop appellant did not exist, and that the department was not authorized to suspend or deny her license. Appellant then filed an application for pre-trial writ of habeas corpus, asserting that the state was collaterally estopped from relitigating the issues found in her favor by the administrative law judge. Relief was denied, and appellant appealed.

The court of appeals affirmed. The legislature has specifically provided in the Transportation Code that the state is not collaterally estopped from relitigating issues determined at a suspension hearing arising from the refusal to take a breath test. "Because the legislature specifically provided that collateral estoppel would not arise from the decisions of administrative law judges in cases involving breath test refusals, we hold that the trial judge did not abuse his discretion in denying habeas corpus relief."

Appellant's Ground for Review: Whether the court of appeals erred in failing to find that the trial court erred and abused its discretion in refusing to order the relief requested because the state was collaterally estopped from relitigating the issues and facts constituting reasonable suspicion and probable cause for the stop and arrest of the appellant.

State's Ground for Review: Did the court of appeals err by addressing the merits of appellant's claim in her pretrial habeas appeal when appellant had conceded that her

prosecution would not be barred and she would not be entitled to release from confinement if her appeal were successful?

b. Voluntariness of consent to take blood

Combest v. State,
953 S.W. 2d 453
(Tex. App.--Austin 1997, pet. granted)
PDR No. 97-1527
Appellant's Petition

Appellant was not under arrest at the time that, according to the state, he consented to give a sample of his blood to determine its alcohol content. The question was whether the consent was voluntary. The form the officer read to appellant to obtain his consent was inapplicable, since it concerned subjects who were under arrest, and appellant was not under arrest. The form also misstated the consequences of a refusal. The trial court admitted the blood test results and appellant was convicted.

The court of appeals affirmed. Although the inapplicable form might be considered a coercive factor, "there is no evidence in the record that appellant's consent was given as a result of the wording of these forms. Trial counsel's argument that the use of the forms coerced appellant's consent and rendered it involuntary was based on supposition, not evidence." The trial court was within its discretion in rejecting appellant's argument because it was conjecture and not based on evidence. "We conclude that the trial court did not abuse its discretion in finding by clear and convincing evidence that appellant's consent to furnish a specimen of his blood for analysis was voluntary."

Grounds for Review:

1. **Whether the court of appeals applied the wrong standard of appellate review in analyzing the trial court's ruling on the voluntariness of appellant's consent to submit to the warrantless seizure of his blood?**

2. **Did the court of appeals improperly place the burden of proof on appellant to prove his consent was involuntary when the record showed appellant consented only after being improperly told that he was under arrest for DWI and that his refusal would automatically result in a driver's license suspension and might be admissible against him in court? Does the court of appeals' opinion conflict with *Erdman*, 861 S.W. 2d 890 (Tex. Crim. App. 1993)?**

GRAND JURY

a. The impanelment of more than one grand jury per term of court

State v. Broaddus,
952 S.W. 598
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-1458/62
State's Petition

The district court appointed a special prosecutor to investigate appellant, who was a County Commissioner. Although a grand jury was already impaneled for the district court's regular term, the trial court summoned jury commissioners to impanel a second "special" grand jury to investigate appellant's activities. This grand jury indicted appellant, who moved to quash the indictments, contending that the district court had no authority to impanel a separate "special" grand jury during the court's regular term. The trial court agreed that the language of Chapter 19 of the code of criminal procedure reflected a legislative intent to limit the court's power to impanel only one grand jury during its regular term. Accordingly, the court quashed the indictments.

The court of appeals agreed and affirmed the order quashing the indictments. This is a case of first impression. "Absent any express statutory language or persuasive authority, we decline to hold that Chapter 19 authorizes a district court to impanel two grand juries during a regular term of court. We find the grand jury that returned the indictments against Broaddus was unlawfully impaneled, and the trial court did not err in quashing the indictments."

Grounds for Review:

1. **Whether the court of appeals erred in holding that a district court cannot impanel two grand juries during a regular term of court.**

2. **Whether the court of appeals erred in holding that the grand jury that returned the indictments against respondent was unlawfully impaneled and the trial court did not err in quashing the indictments.**

GUILTY PLEA

a. Pleading guilty upon the mistaken assurance that pre-trial matters may be appealed: The continued viability of Broddus v. State

Wilson v. State,
1997 WL 584728
(Tex. App.--Dallas 1997, pet. granted)
PDR No. 97-1578
State's PDR

Appellant was charged with driving while intoxicated, and he filed a pre-trial motion to suppress his blood test results. After this motion was overruled, he entered an open plea of nolo contendere. The trial court found him guilty and sentenced him to jail, and he appealed, asserting that the trial court had erred in overruling his motion to suppress, and that his plea was involuntary.

The court of appeals reversed. The record reflects that the defense and the trial court were operating under the mistaken impression that appellant was entitled to appeal from the denial of his motion to suppress. "Because Wilson entered his plea with the understanding that the denial of his motion to suppress could be appealed, we conclude that his plea was not entered voluntarily or knowingly. Although, in the interest of justice, we are inclined to review the merits of Wilson's suppression motion, according to Broddus, we many not do so." [citations omitted]

Grounds for Review:

1. Whether this Court should reconsider its decision in *Broddus v. State*, 693 S.W.2d 459 (Tex.Crim.App. 1985).

2. When a defendant pleads guilty with a mistaken assurance from the trial court that he will still be able to appeal the court's ruling on a pretrial motion, should the remedy be a remand for a new trial?

Fales v. State,
Nos. 13-96-35-CR & 13-96-36-CR
(Tex. App.--Corpus Christi February 13, 1997, pet. granted)
PDR No. 97-0295/6
State's Petition

After appellant's pre-trial motions to suppress his confession and certain physical evidence were denied, the parties announced to the trial court that it was agreed that appellant would plead guilty to the jury and preserve his right to appeal concerning the motions. The trial court acknowledged this agreement, and appellant then pleaded guilty to aggravated sexual assault, without an agreement as to punishment. The jury sentenced him to life in prison.

The court of appeals held that Rule 40(b)(1), which permits the appeal of pre-trial matters following a guilty plea, does not apply here because there was no plea bargain between the state

and the defense. An agreement by the state not to challenge appellant's desire to appeal the rulings on the pre-trial motions is not a "plea bargain." Under *Broddus v. State*, where there is no agreement between the defendant and the state under which the defendant agrees to plead guilty in exchange for a punishment recommendation, the defendant who pleads guilty waives appeal on all nonjurisdictional defects. Even so, appellant is entitled to relief on appeal. "Appellant pleaded guilty with mistaken assurances from the trial court that he would still be able to appeal the court's rulings on his motions to suppress. Under these circumstances, the defendant's plea is not considered to have been given voluntarily or knowingly, and the defendant is entitled to a new trial."

Grounds for Review:

1. **Whether this Court should reconsider its decision in *Broddus v. State*, 693 S.W. 2d 459 (Tex. Crim. App. 1985)?**

2. **Whether a defendant's guilty plea should be considered involuntary when he pleads with a mistaken assurance from the trial court that he will be able to appeal the court's ruling on a pre-trial motion?**

3. **When a defendant pleads guilty with a mistaken assurance from the trial court that he will still be able to appeal the court's ruling on a pre-trial motion, should the remedy be a remand for a new trial?**

b. The failure to admonish concerning immigration consequences

Carranza v. State,
1995 WL 379512
(Tex. App.--Dallas 1995, pet. granted)
PDR No. 95-0931
State's Petition

Appellant pleaded guilty to involuntary manslaughter and was sentenced to 10 years imprisonment. He was not admonished that a guilty plea could result in deportation, exclusion from admission or denial of naturalization, as required by article 26.13(a)(4) of the Texas Code of Criminal Procedure.

The court of appeals reversed. "We cannot agree that a complete failure to admonish is a nonjurisdictional defect. Without any warning at all of the consequences of a guilty plea on citizenship status, the danger appellant entered an unknowing and involuntary plea is so great we do not consider whether appellant was harmed." Although the evidence showed that appellant was in this country illegally, that did not change the result. "That appellant was residing in the United States illegally and could not be harmed by the trial court's omission ignores the possibility that by pleading guilty appellant might suffer consequences other than deportation-exclusion from admission or denial of naturalization. The State does not contend, nor does the record show, that appellant's illegal status necessarily precluded his admission to the United States or naturalization."

Ground for Review: Was appellant harmed by the trial court's failure to admonish him pursuant to art. 26.13(a)(4) when the record affirmatively demonstrates appellant was in this country illegally?

State v. Jimenez,
957 S.W. 2d 596
(Tex. App.--El Paso 1997, pet. granted)
PDR No. 98-0071
State's Petition

Appellee pleaded guilty to misdemeanor theft and was given probation. Later she filed a post conviction writ of habeas corpus seeking to set aside her conviction because she had not been warned of the immigration consequences of her plea. The state argued that the Texas statute which controls applies only to felony cases. The trial court granted the writ and allowed appellee to withdraw her plea. The state appealed.

The court of appeals affirmed. A misdemeanor defendant has due process and due course of law rights to be advised of the immigration consequences of a plea separate and apart from the Texas statute. Here, the lack of immigration admonitions deprived appellee of her constitutional rights.

Ground for Review: Does a misdemeanor defendant have a federal or state constitutional due process right to be admonished of the immigration consequences of a guilty plea?

HARMLESS ERROR

a. The denial of the right to make a timely opening statement

Twine v. State,
929 S.W. 2d 685
(Tex. App.--Eastland 1996, pet. granted)
PDR No. 96-1500 & 96-1501

Appellant's Petition

The trial court denied appellant's request to make an opening statement immediately after the state opened. Appellant opened after the state rested its case. The state agreed this was error, but argued it was harmless. The court of appeals agreed, concluding beyond a reasonable doubt that the timing of appellant's opening did not contribute to the conviction or sentence. Appellant's petition for discretionary review was granted.

Ground for Review: Whether the court of appeals erred in holding that the trial court's error in refusing to allow petitioner's counsel to make an opening statement upon request immediately following the opening statement of the prosecutor was harmless error pursuant to Tex. R. App. P. 81(b)(2)?

b. The exclusion of admissible evidence

Kevin W. Hasty v. State,
No. 02-96-00336-CR
(Tex. App.--Fort Worth 1997, pet. granted)
PDR No. 97-1139
Appellant's Petition

When the police arrested him, appellant stated that the complainant "had a rape fantasy." Appellant offered evidence from his mother that the complainant's father had called her to say that his daughter was filing a rape charge. The state objected that this was hearsay, and the objection was sustained.

The court of appeals affirmed. The trial court erred in excluding the offered testimony. It was not hearsay since it was not offered to prove that charges were, in fact, being filed. Rather, the evidence was relevant to show appellant's state of mind when the police arrested him, namely that he had been charged with rape even though he had not yet been accused. Even though the court erred in excluding the evidence, the error was harmless under Rule 81(b)(2) and the *Harris* case.

Ground for Review: Whether the court of appeals reversibly erred in holding that the trial court's error in excluding admissible testimony made no contribution to appellant's conviction or punishment beyond a reasonable doubt?

HEARSAY

a. Declarations against interest

Bingham v. State,
1997 WL 531190

(Tex. App.--Dallas 1997, pet. granted)
PDR No. 1587-97
State' Petition

Appellant was charged with arson. Paul Raleeh, a McKinney Police Department criminal investigator, testified that appellant's wife admitted to her that she and appellant planned the fire and that appellant actually lit the match which started the fire. The trial court overruled appellant's hearsay objection and admitted Raleeh's testimony.

The court of appeals reversed. The admission was not admissible as a declaration against interest because the surrounding circumstances do not indicate its trustworthiness. The wife may well have been trying to curry favor with the investigator or to shift blame from herself. Additionally, the wife's statement was not admissible against appellant in appellant's trial. Nor was the statement admissible under the co-conspirator's exception to the hearsay rule, since it was made after the conspiracy terminated.

Grounds for Review:

1. Did the court of appeals err in holding that a declarant's hearsay statements against interest are admissible in the criminal trial of that declarant only, never in the trial of any co-conspirator or accomplice?

2. Did the court of appeals err in its conclusion of what constitutes "corroborative circumstances" under a Tex. R. Crim. Evid. 803(24) trustworthiness analysis?

3. Did the court of appeals err in conducting a de novo, subjective review in its consideration of the admissibility of Tex. R. Crim. Evid. 803(24) hearsay evidence?

INSANITY

a. Does Texas law recognize the defense of "diminished capacity?"

Warner v. State,
944 S.W. 2d 812
(Tex. App.--Austin 1997, pet. granted)
PDR No. 97-0726
Appellant's Petition

Appellant was charged with two specific intent crimes -- aggravated kidnapping and arson. Prior to trial he gave notice that he wanted to introduce evidence that he suffered from post traumatic stress disorder as a result of his experiences in Vietnam. Appellant offered this

evidence, not to support an insanity defense, but instead to negate the specific intent elements of aggravated kidnapping and arson. The trial court ruled that this evidence was inadmissible at the guilt/innocence phase of the trial.

The court of appeals affirmed. Appellant relied on dicta in *Cowles v. State*, 510 S.W. 2d 608 (Tex. Crim. App. 1974), in support of his argument that mental infirmity not rising to the level of insanity is admissible to negate a specific intent element. "We disagree, however, that the '*Cowles* exception' is alive in today's criminal jurisprudence."

Ground for Review: Whether Texas law recognizes a diminished capacity defense in the case of specific intent crimes? Looking at whether *Cowles*, 510//608, provides an exception to the general rule that evidence of mental disturbance that does not rise to the level of insanity is not admissible at guilt/innocence phase of trial.

JEOPARDY

a. The standard of review

Bauder v. State,
936 S.W. 2d 19
(Tex. App.--San Antonio 1996, pet. granted)
PDR No. 97-0079
Appellant's Petition

The trial court granted appellant's motion for mistrial, and appellant filed an application for writ of habeas corpus, contending that retrial was barred under the Texas Constitution because of the prosecutor's reckless misconduct. The court of criminal appeals agreed that reckless misconduct might bar a retrial under the Texas Constitution and remanded the case to the court of appeals for an application of this new standard to the facts of the case. The court of appeals denied relief, concluding that the trial court "need not have granted" appellant's motion for mistrial.

Ground for Review: What is the proper standard of review when the appellate court determines whether retrial is barred because of prosecutorial misconduct under Article I, §14 of the Texas Constitution?

b. Does a prior sentence for criminal contempt initiated by a private party bar the state from a subsequent criminal prosecution for the same conduct?

State v. Rhodes,
938 S.W. 2d 192
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0357
Appellant's Petition

Appellant was charged with interference with child custody. Previously, he had been held in contempt of court for wilfully changing his child's place of residence in violation of the child custody provisions of his divorce decree. Prior to his criminal trial, appellant filed an application for a writ of habeas corpus arguing that his prosecution was barred by the double jeopardy clause of the Fifth Amendment because he was previously adjudged guilty of contempt of court for the same conduct. The trial court agreed and granted relief.

The court of appeals reversed, holding that a contempt finding initiated by a private party will not bar a subsequent criminal prosecution.

Ground For Review: Whether the double jeopardy clause bars a criminal prosecution following a criminal contempt finding for the same conduct when the contempt action was initiated and prosecuted by a private party and not by the state.

c. Collateral estoppel

State v. Sauceda,
1997 WL 197889
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0672/3
Appellant's Petition

Appellee was separately indicted for the murders, during the same occurrence, of Rene and Rodney Arismendez. He was first tried for the murder of Rene Arismendez as a party, and the jury acquitted him. The state then re-indicted appellee for the murder, as a party, of Rodney. The trial court granted appellee's motion to dismiss the first indictment pertaining to Rodney, and it granted appellee's writ of habeas corpus the second indictment pertaining to Rodney, both based on collateral estoppel. The state appealed.

The court of appeals reversed. As to the first indictment, the court of appeals found that there is "no authority for or useful purpose in allowing double jeopardy relief to be sought in a motion to dismiss." As to the second indictment, the court found that collateral estoppel relief was inappropriate because the acquittal verdict could have been grounded in an issue other than that which appellee sought to foreclose.

Grounds for Review:

1. **Whether the court of appeals erred in holding that the district court did not have authority to dismiss the indictment based on constitutional principles of double jeopardy.**

2. **Whether the court of appeals erred in holding that the doctrine of collateral estoppel did not preclude further prosecution of**

the defendant herein who had been previously tried and acquitted of the offense of murder of one complainant which arose out of the same criminal episode and transaction as the second complainant.

3. **Whether the court of appeals erred in considering arguments advanced by the prosecution for the first time during oral argument on appeal that had not been raised in the trial court below, nor in its brief in the court of appeals.**

d. Persons "unknown to the grand jury"

Manrique v. State,
943 S.W. 2d 115
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-0589
State's Petition

Appellant and another person were accused of randomly firing a weapon into a house, resulting in the injury to two persons in the house. Appellant was charged in two separate indictments with attempted murder. The first indictment, in cause number 5702A, alleged the attempted murder of (a) "a person unknown to the grand jury," or (b) Edward Avilez. The second indictment, in cause number 5703A, alleged the attempted murder of (a) "a person unknown to the grand jury," or (b) Donnie Avilez. He was convicted under both indictments and sentenced to concurrent terms of imprisonment.

The court of appeals held that, since the trial court's instruction to the jury did not apply the doctrine of transferred intent to the facts of the case in the application paragraph, the law of transferred intent was not available to the state to support the conviction. Accordingly, the court only considered the sufficiency of the evidence as it related to the allegation that appellant attempted to murder unknown persons. Appellant argued then, that the two indictments alleged "the exact same conduct," namely, the attempted murder of a person unknown to the grand jury. The court of appeals agreed. "The application of the *Blockburger* test to these facts produces the inescapable conclusion that there were two prosecutions for the same offense." Appellant was therefore punished twice for the same offense. The court ordered one conviction reversed with instructions to the trial court to dismiss.

Grounds for Review:

1. **Does the fact that indictments resulting in multiple convictions are identically worded show a double jeopardy violation or must a defendant prove the convictions were for the same offense in order to sustain his claim of double jeopardy?**

2. **Does the appellate principle of sufficiency of the evidence, namely, that a jury is presumed to have based its verdict on a theory for which the evidence was legally sufficient, apply to review of a double jeopardy claim such that only a theory of culpability that is supported by legally sufficient evidence may be considered for a jeopardy analysis?**

3. **Is transferred intent applicable when a defendant is convicted of attempted murder by discharging a firearm randomly into an occupied house, and the identity of the victim is not known to the defendant?**

e. Lesser included offenses

Ochoa v. State,
955 S.W. 2d 389
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-1571
State's Petition

The trial court submitted ten charges to the jury -- five alleged aggravated assault and five alleged indecency with a child. The jury found appellant guilty of one count of aggravated assault and one count of indecency with a child and sentenced him to 35 and 20 years, respectively. Appellant contended on appeal that the trial court erred in not instructing the jury that the indecency charges were lesser included offenses of the aggravated sexual assaults.

The court of appeals affirmed the conviction and sentence for aggravated sexual assault, but vacated the conviction and sentence for indecency with a child. When the state proved penetration, it also proved the necessary elements for indecency. Therefore, indecency was a lesser included offense of aggravated sexual assault. By failing to instruct the jury on lesser included offenses, appellant was prejudiced because it caused the jury to convict appellant of two crimes arising from the same transaction. Had the jury been properly instructed, it would not have convicted appellant of the lesser offense. "For these reasons, we find that the jury found Appellant guilty of the greater offense of aggravated sexual assault and not of the lesser offense of indecency with a child."

Ground for Review: The court of appeals erred in determining defendant's rights against double jeopardy would be violated by the submission of both aggravated sexual assault and indecency with a child, charge in separate counts of the indictment and arising from the same criminal transaction.

JUDICIARY

a. Waiver of the right to complain about a visiting judge

Wilson v. State,
944 S.W. 2d 444
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0585
Appellant's Petition

The visiting trial judge who presided over appellant's case was a former judge who had been assigned by the presiding judge for a period of five weeks. Appellant did not object at trial, but on appeal he contended that the judge lacked jurisdiction, since his assignment had expired three days before trial commenced.

The court of appeals affirmed. The proper way to attack the authority of a judge is to bring a direct action through quo warranto, rather than by collateral attack on appeal. "By failing to object in a proper and timely manner, appellant has waived his right to complain about the validity of the judge's assignment."

Ground for Review: The court of appeals erred by holding a former judge had authority to act as the presiding judge.

b. Collateral attacks for failure to take the required oaths

Prieto Bail Bonds v. State,
Saenz v. State,
948 S.W. 2d 69
(Tex. App.--El Paso 1997, pet. granted)
PDR No. 97-1335
Appellant's Petition

The trial court which granted a judgment nisi against the appellant was a retired judge who was assigned by the presiding judge of the judicial region. The judge met all the statutory requirements for the assignment, but he had not taken the two oaths required by TEX. CONST. art. XVI, § 1. The first oath is the anti-bribery oath, and the second is the oath in which the judge swears to faithfully execute his duties and to preserve, protect and defend the state and federal constitutions.

The court of appeals affirmed. The judge was at least a de facto judge. As such, his acts may not be challenged collaterally, on appeal, but rather must be challenged directly, through quo warranto. Therefore, his acts were not void.

Grounds for Review:

1. **Did retired/ visiting judge have authority to act on judgment nisi since he has not taken the anti-bribery oath required by the Texas Constitution?**

2. **Did the court of appeals err in holding that the only means of challenging the judge's authority to act was through a quo warranto action in which the state is an indispensable party?**

JURY CHARGE

a. Is an alibi instruction required?

Giesberg v. State,
945 S.W. 2d 120
(Tex. App.--Houston [1st Dist.] 1996, pet. granted)
PDR No. 97-0696
Appellant's Petition

Appellant and his friends testified that he was elsewhere at the time of the offense. The trial court refused to instruct on alibi, and appellant was convicted of murder.

The court of appeals affirmed. Although appellant is entitled to an instruction on every defensive theory raised by the evidence, "[a]libi evidence merely negates an element of the offense. Therefore, no instruction on alibi need be given." [citations omitted]

Ground for Review: Whether the court of appeals erred in holding that the trial court correctly denied appellant's request for a jury instruction on alibi when the evidence raised the issue?

b. Is Geesa error automatically reversible?

Toney v. State,
942 S.W. 2d 750
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0538
State's Petition

The trial court failed to instruct the jury on the definition of proof beyond a reasonable

doubt at the guilt/innocence phase of the trial, in violation of *Geesa v. State*. The court of appeals held that this requires automatic reversal, without a harm analysis.

Ground for Review: Did the court of appeals err to hold that it was automatic reversible error for the trial court to fail to instruct the jury in accordance with the judicially mandated definition of "reasonable doubt," without considering whether appellant objected and whether the evidence established appellant's guilt beyond a reasonable doubt?

c. Is the court's failure to read the charge to the jury automatically reversible?

Tatum v. State,
1997 WL 351235
(Tex. App.--Dallas 1997, pet. granted)
PDR No. 97-1096
Appellant's Petition

The trial court distributed copies of the final charge to the jury and instructed it to read the charge. The court then asked the jury if they had read it and no one indicated otherwise. The defense requested that the charge be read to the jury, but the court refused, stating that the law requires jurors to be able to read.

On appeal appellant contended that the trial court erred in refusing his request to read the charge, pursuant to article 36.16 of the Texas Code of Criminal Procedure. The court of appeals agreed that this was error. The court went on, however, to find that this error was harmless and affirmed. The record here affirmatively indicates that the jury read the charge. There is no indication that anyone had any difficulty understanding the charge. "Appellant does not point to anything in the record to show that he suffered any prejudice as a result of the jury reading the charge, as opposed to having it read to them. Based on this record, we cannot conclude that appellant suffered any actual harm as a result of the trial court's failure to read the charge to the jury."

Ground for Review: Did the trial court commit reversible error in failing to read the charge to the jury?

JUVENILE LAW

a. Advance notice of psychological examination is not required

Hidalgo v. State,
945 S.W. 2d 313
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-0744
Appellant's Petition

Appellant, a juvenile at the time of the offense, was tried as an adult after being certified to stand trial. Before the certification, the juvenile court signed an order that he be examined psychologically. The examination took place before appellant's court-appointed counsel was notified. Appellant objected on appeal that his transfer to adult court was invalid because, among other things, his court-appointed attorney received no notice of his scheduled psychological examination.

The court of appeals disagreed and affirmed the conviction. Since the Sixth Amendment is not violated when an attorney is excluded from the examination itself, it stands to reason that it is not illegal to fail to notify the attorney until after the examination has taken place. The failure to notify counsel did not deny appellant the right to consult with counsel prior to deciding to submit to the examination. Since the Family Code mandates the examination, there is no decision to be made. Appellant was not denied the right to assistance of counsel in determining the purpose of the examination, since the psychologist's report reflects that appellant was so apprised. "In light of the above, we conclude that [appellant's] right to counsel was not violated when his court-appointed counsel was not notified of the psychological examination until after it had taken place."

Ground for Review: Must defense counsel be given advance notice of a psychological examination of a juvenile which is to be used later by the state in its case against the juvenile in adult charges?

LESSER INCLUDED OFFENSES

a. Harmless error

Graham v. State,
950 S.W. 2d 724
(Tex. App.--Beaumont 1997, pet. granted)
PDR No. 97-1124
Appellant's Petition

The court of appeals held that the evidence did not raise the lesser included offense of reckless conduct in this attempted murder case. The trial court did instruct the jury on the lesser of intentional or knowing aggravated assault, but it refused to include the option of reckless aggravated assault. Again, the court held that there was no evidence of recklessness. Even if the court had erred in failing to include the requested definition of recklessness in the charge, the error was harmless. "[C]onviction for the greater inclusive offense nullifies any possible harm that might be derived from the defective lesser included offense instruction."

Grounds for Review:

1. **Did the court of appeals err in holding the evidence did not raise the issue of reckless conduct?**

2. **Did the court of appeals err in holding that there was no harm since the jury convicted of the greatest charged offense?**

Forest v. State,
1997 WL 524157
(Tex. App.--Dallas 1997, pet. granted)
PDR No. 97-1548
State's Petition

Appellant was indicted for murder. He testified that the deceased threatened him, that he was afraid, and that he fired at him once, intending only to hit him, not to kill him. Appellant objected that the court's instruction failed to include the lesser included offense of aggravated assault. The objection was overruled, appellant was convicted of manslaughter and he appealed.

The court of appeals reversed. "Reviewing the entire record, we conclude that the evidence raised aggravated assault, a lesser included offense of murder. Appellant testified that he was afraid and intended to hit the deceased, not kill him. The trial court erred in not charging the jury on the lesser included offense of aggravated assault." The court also held that this error was harmful, in light of appellant's timely objection. "This Court has previously held that when the jury is not allowed to consider the lesser included offense of aggravated assault in conjunction with the charge of murder, appellant is clearly harmed."

Grounds for Review:

1. **Whether the court of appeals erred in finding the evidence met the second prong of the Royster test because aggravated assault cannot be a lesser included offense under the second prong of the Royster test?**

2. **Whether the court of appeals failed to properly analyze harm by the trial court's failure to include a charge on aggravated assault?**

b. Retrial for the greater offense after a plea to the lesser

Windom v. State,
1997 WL 297569
(Tex. App.--Houston [1st Dist.] 1997, pet. granted)
PDR No. 97-0909
State's Petition

Appellant was originally indicted for aggravated robbery, but he pled to the lesser offense of robbery. The same day he was sentenced, the trial court granted his motion for new trial, and he was retried for aggravated robbery. The jury convicted him of the lesser of robbery and he appealed.

The court of appeals held that the aggravated robbery charge ought not to have been submitted to the jury after he was convicted of the lesser on his plea. Following his acquittal, he was protected from reprosecution for aggravated robbery.

Grounds for Review:

1. Whether the court of appeals erred by holding that article 37.14, V.A.C.C.P., barred appellant's prosecution for aggravated robbery?

2. Whether the court of appeals' opinion conflicts with *Shannon*, 708 S.W.2d 850 (Tex. Crim. App. 1986)?

3. Did the court of appeals err by failing to conduct a harm analysis?

c. Authority to reform sentence upon reversal

Ramirez v. State,
1997 WL 583562
(Tex. App.--Amarillo 1997, pet. granted)
PDR No. 97-1554
State's Petition

Appellant was indicted for the felony offense of driving while intoxicated. Appellant admitted that he had twice previously been convicted of misdemeanor DWI, he was convicted of the instant offense, and sentenced to a term of imprisonment.

On appeal, appellant contended that the state failed to prove that one of the offenses was final. The court of appeals agreed. Even though appellant admitted the prior convictions, the state still had the burden of proving that they were final. Although, by definition, all DWI convictions after 1984 are final, there was no evidence in this record, either that this prior was final, or when it occurred. Accordingly, the state failed to meet its burden. Since the trial court did not instruct the jury on the lesser included offense of misdemeanor DWI with one enhancement, the court of appeals was without authority to reform the judgment to show conviction for the lesser. The judgment was reversed and the cause remanded with instructions to enter an acquittal.

Ground for Review:

1. **Where the jury finds the defendant guilty of the charged offense, but the court of appeals determines the evidence to be legally insufficient to sustain such verdict, must there have been a jury instruction relating to a lesser-included offense in order for the court of appeals to be authorized to reform the trial court's judgment to reflect a conviction for such lesser-included offense?**

2. **Where the jury finds the defendant guilty of the charged offense, but the court of appeals determines the evidence to be legally insufficient to sustain such verdict, but sufficient to support a conviction for a lesser-included offense, is the proper disposition of the case a remand to the trial court, instead of an acquittal of the charged offense and dismissal of the indictment?**

d. Can a defendant raise a lesser where he denies committing the offense?

Jones v. State,
1997 WL 722817
(Tex. App.--Houston [1st Dist.] 1997, pet. granted)
PDR No. 98-0101
State's Petition

Appellant was charged with robbery. The state's witnesses testified that he shoplifted a few items and left the store, and that when they brought him back to the store, he fought with them. Appellant testified that he did not intend to steal anything, and that he was acting in self-defense. Appellant requested lesser included offenses on theft and assault and the trial court denied the requests. He was convicted of robbery and appealed.

The court of appeals reversed. Testimony from the state's witnesses raised the lesser included offenses of theft and assault, and appellant was harmed by the court's refusal to so instruct.

Ground for Review: Whether a defendant's testimony can raise a lesser included offense when he denies committing any offense?

MOTIONS FOR NEW TRIAL

a. Rescinding an order for a new trial

Awadelkariem v. State,
1997 WL 155372
(Tex. App.--Dallas 1997, pet. granted)
PDR 97-0570
State's Petition

After the trial court found appellant guilty and sentenced him to eight years probation, it granted him a new trial. Apparently, the trial court was under the impression that appellant would then enter a plea for deferred adjudication. For whatever reasons, that plea did not take place, and, the same day, the trial court rescinded its order granting the new trial.

The court of appeals reversed. The record is clear that the trial court did not rescind its order based on a clerical error. Accordingly, the court was without authority to rescind.

Ground for Review: Whether this court should reconsider the principle that a trial court cannot rescind an order granting a new trial?

b. Punishment error

Rent v. State,
949 S.W. 2d 418
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-1231
Appellant's Petition

Appellant filed a motion for new trial contending that his sentence of 730 days in jail exceeded the maximum of one year which the governing law provided for. The motion was overruled, and appellant appealed.

The court of appeals agreed that punishment assessed by the jury exceeded maximum allowable under law, and remanded the case for a new trial as to punishment. The court disagreed with appellant that the trial court had erred in overruling his motion for new trial. "[Since it] cannot order a new trial as to punishment only . . . the trial court did not err in not granting a new trial on this ground."

Ground for Review: Whether the court of appeals erred in holding that the trial court did not commit reversible error overruling appellant's motion for new trial based on jury error punishment, where the court of appeals agreed with the appellant that the jury was instructed on the wrong range of punishment, and where this issue was raised in appellant's motion for new trial.

c. Knowledge

OPEN MEETINGS LAW

Tovar v. State,
949 S.W. 2d 370
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-1031/2
Appellant's Petition

"In this appeal we are asked to determine whether conviction of a government official under the Texas Open Meetings Act for calling or participating in a closed meeting not permitted under the Act requires the fact finder to first determine that the official knew the closed meeting was impermissible. We hold that under the plain language of the Open Meetings Act, a government official can be found guilty of violating the Act by calling or participating in an impermissible closed meeting, even when the official is unaware of the illegality of the meeting."

Ground for Review: Whether the court of appeals erred in holding that a public official can be found guilty of violating the Open Meetings Act (Tex.Gov't.Code, § 551.144), when the official is unaware that the meeting is not permitted under the act.

PARTIES

a. Argument based on an improper parties charge

Jesse Alvarez Renteria v. State,
No. 08-95-155-CR
(Tex. App.--El Paso 1997, pet. granted)
PDR No. 97-0656
State's Petition

The jury charge contained only an abstract reference to the law of parties; that is, there was no reference to parties in the application paragraph. The application paragraph obligated the state to prove that appellant caused the death of the complainant by beating and running over him. The state did not object to this application paragraph. In closing, the prosecutor argued that, even if the jury did not believe that appellant was an active participant, it could find him guilty as a party. Appellant's objection was overruled and he was convicted.

The court of appeals reversed. Since the charge did not contain any language applying the law of parties to the facts of the case, criminal responsibility as a party was not properly before the jury. "Thus, we conclude that the trial court erred in allowing the State to argue that the jury could find appellant guilty as a party."

Ground for Review: Where a parties instruction is set forth in the abstract portion of the charge but not in the application paragraph, is it improper for the prosecutor to argue that the jury can convict the defendant as a party?

SEARCH AND SEIZURE

a. Inventory or search incident to arrest

State v. Mercado,
944 S.W. 2d 42
(Tex. App.--El Paso 1997, pet. granted)
PDR No. 97-0626
Appellant's Petition

The trial court granted appellant's motion to suppress on the ground that the warrantless search of a closed container was an invalid inventory search under the *Autran* case. The state appealed, arguing that the search was really incident to arrest, and therefore *Autran* was not controlling.

The court of appeals agreed with the state and reversed the suppression order. "We conclude that the officers conducted a valid search incident to a custodial arrest. As a result, the trial court abused its discretion in granting the motion to suppress."

Grounds for Review:

1. **Did the court of appeals err in holding the trial court abused its discretion in granting a motion to suppress based on a theory of law not presented at the trial level, but raised for the first time on appeal? Compare *Romero*, 800 S.W. 2d 539.**

2. **Is the plurality opinion in *Autran* limited to inventory searches, or does it also extend to searches incident to arrest?**

b. The community caretaking function

Hulit v. State,
947 S.W. 2d 707
(Tex. App.--Fort Worth 1997, pet. granted)
PDR No. 97-0877
Appellant's Petition

The police received a report of a woman possibly having a heart attack. Responding, they found a pickup in the left turn lane on an interstate service road, stopped some 50 feet short of the intersection. Appellant was slumped over the wheel, and initially did not respond to the

officer. Eventually he exited the vehicle and was arrested for driving while intoxicated. The trial court overruled appellant's motion to suppress, he was convicted, and he appealed.

The court of appeals affirmed. "The issue before us, then, is whether when an officer reasonably believes that the safety of an individual, or the public, is threatened, he may perform a 'community caretaking' function, unrelated to the detection or investigation of crime, by detaining the individual without a warrant." The court of criminal appeals has never decided whether there is a "community caretaking" exception to the warrant requirement in Texas. The court of appeals holds that there is such an exception. The court further found that in this case, the officer's brief, warrantless intrusion was an objectively reasonable exercise of his community caretaking function.

Ground for Review: Whether the court of appeals correctly held that the warrantless detention of appellant was a reasonable exercise of the officer's "community caretaking function?"

c. Automobile searches

Cerda v. State,
951 S.W. 2d 119
(Tex. App.--Corpus Christi 1997, pet. granted)
PDR No. 97-1476
State's Petition

The police made a traffic stop on appellant and obtained her consent to search her vehicle. It was moved to a garage and the police entered a large compartment and found marijuana. The trial court overruled appellant's motion to suppress, she was convicted, and she appealed.

The court of appeals reversed. The police did not have probable cause to cause to suspect criminal activity when he conducted his limited search on the roadside. It was only because of appellant's consent to follow the police to the garage that probable cause to search developed. In order to conduct a warrantless search, there must not only be probable cause, but also exigent circumstances. Here, because the van was in police custody, there were no mobility concerns sufficient to justify a warrantless search.

Grounds for Review:

1. **Did the court of appeals err in holding that an officer must secure a search warrant to conduct a search of an automobile even if consent**

to search the automobile and its contents has been given by the owner, if the search is conducted at a site different from the initial detention site?

2. **Did the court of appeals err in holding that exigent circumstances must be present before an officer can remove a portion of the air conditioning housing under the dash of an automobile, and then remove a fiberglass door to a manufactured compartment found therein, if the owner of the automobile has given consent to search the automobile and its contents?**

3. **Did the court of appeals err in holding that an officer must get a search warrant to search a manufactured fiberglass compartment found in the air conditioning housing under the dash of the automobile even though the owner of the automobile had given consent to a search of the automobile and its contents?**

4. **Did the court of appeals err in holding that where an owner gives consent to search an automobile and its contents, the scope of the search is exceeded by removing a portion of the air conditioning housing under the dash and removing a fiberglass covering found therein?**

SELF-DEFENSE

a. Application of law to facts

Barrera v. State,
951 S.W. 2d 153
(Tex. App.--Corpus Christi 1997, pet. granted)
PDR No. 97-1069
State's Petition

Appellant was charged with attempted murder. The jury was instructed on the law of self-defense, but the instruction did not apply the law of self-defense to the facts of the case. Appellant raised this complaint for the first time on appeal.

The court of appeals reversed. An instruction on self-defense is not required if the evidence, viewed in the light most favorable to the defendant, does not establish a case of self-defense. Here, the court held that self-defense was raised by the evidence. The court also held that appellant was entitled to an instruction which clearly applies the law to the facts of the case, and not merely states mere propositions of law and general statements of principles. The jury must be instructed to acquit if they believe that the defendant was acting in self-defense or have a

reasonable doubt thereof. Here, neither application paragraph incorporated self-defense nor instructed the jury to acquit the appellant if it had a reasonable doubt on the issue of self-defense. "The jury was left with mere abstract propositions of law or general statements of principles to apply to the case; that was insufficient."

Grounds for Review:

"Holding that the trial court committed reversible error by failing to apply the law of self-defense to this case's facts, slip op., at 8, 11, the court of appeals:

(1) has rendered a decision in conflict with another decision on the same matter. *McFarland v. State*, 834 S.W.2d 481 (Tex. App.--Corpus Christi 1992, no pet.); Tex. Penal Code 9.31, 9.32.

(2) has, by viewing the evidence in a light favorable to appellant, *Dyson v. State*, 672 S.W. 2d 460 (Tex. Cr. App. 1984, en banc), rendered a decision in conflict with another decision on the same matter. *Tanguama v. State*, 721 S.W. 2d 408 (Tex. App.--Corpus Christi 1986, pet. ref'd).

(3) has, by applying *Dyson*'s analysis, raised important questions of state law that have not been settled by this court but should be.

(4) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of discretionary review by this court.

b. Harmless error

Reich-Bacot v. State,
957 S.W. 2d 892
(Tex. App.--Texarkana 1997, pet. granted)
PDR No. 0003-98
Appellant's PDR

The trial court denied appellant's request for an instruction on self-defense and he was convicted of murder. The court of appeals found this error to be harmless.

Ground for Review: The court of appeals erred in holding that the trial court's refusal to charge the jury on self-defense constituted harmless error.

SENTENCING

a. Notice of intent to offer extraneous offenses

Mitchell v. State,

948 S.W. 2d 62
(Tex. App.--Fort Worth 1997, pet. granted)
PDR No. 97-1205
State's Petition

Approximately a year before trial, appellant filed his "Motion to Give Notice of Extraneous Acts Under Art. 37.07, Code of Criminal Procedure." A certificate of service was attached certifying service on the district attorney. After the voir dire concluded, the state notified appellant that it intended to offer extraneous misconduct at punishment. Appellant objected that compliance was untimely, but the trial court admitted the evidence.

"The question presented . . . is . . . whether the delivery by a defendant, to the attorney for the State, of a copy of a motion directed to the trial court requesting a listing of extraneous offenses constitutes a proper request for notification of those offenses under article 37.07, section 3(g)." Although this motion was directed toward the court, "it also contained a specific request to the State for confirmation of compliance with article 37.07, section 3(g). We believe this request constituted adequate compliance with section 3(g) . . . ." The court concluded that this request was "both adequate and timely and that the state's response, coming after the completion of voir dire, was untimely because 'reasonable notice [must be] given in advance of trial.'"

Ground for Review: Whether the defendant's motion requesting the court order the state to provide notice of its intent to offer evidence of extraneous offenses was a proper request for notice under art. 37.07, §3(g)?

b. Collaterally attacking a deadly weapon finding in an enhancement count

Fielder v. State,
1997 WL 312412
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0923
Appellant's Petition

Appellant was convicted of a state jail felony and the court used a prior conviction for voluntary manslaughter with a deadly weapon to enhance this conviction. At trial appellant claimed that the deadly weapon finding in the prior conviction was infirm, and that therefore it should not have been used for enhancement. The trial court overruled this complaint.

The court of appeals affirmed. Appellant's complaint is that the court in the manslaughter case, rather than the jury, improperly made a finding of the use of a deadly weapon. The court of appeals found that this was the sort of complaint that should have been made on direct appeal of the manslaughter case, and that a collateral attack in the instant case was not supportable.

Grounds for Review:

1. **Whether the court of appeals erred by upholding the trial court's enhancement of a state jail felony with a prior judgment and sentence that contained a judicial finding of use of a deadly weapon that clearly violated this court's decision in *Polk v. State*, 693 S.W. 2d 391.**

2. **Whether the court of appeals erred by ruling that petitioner could not raise the foregoing challenge because the judicial finding did not render the prior judgment and sentence void *pro tanto*.**

c. Is restitution limited by the degree of the offense?

Campbell v. State,
942 S.W. 2d 738
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-0552
State's Petition

Appellant pleaded nolo to theft more than $20,000.00 but less than $100,000.00 and was ordered to make restitution in the amount of $100,000.00 if paroled. On appeal appellant claimed that, since he was convicted of theft less than $100,000.00 he could not be required to pay restitution in an amount more than $99,999.99. The court of appeals agreed, holding that the amount of restitution exceeded the parameters of the offense.

Ground for Review: Is the amount of restitution that can be ordered for a theft conviction limited by the upper limit of the category of theft for which a defendant is convicted?

d. Are the details of a deferred adjudication probation admissible at punishment?

Davis v. State,
952 S.W. 2d 20
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-1252
State's Petition

At the punishment phase of appellant's trial for aggravated assault, the state introduced details of a prior aggravated robbery for which he was then serving deferred adjudication. Appellant objected that admission of the details of the offense, over and above the mere fact that he had received deferred adjudication, violated article 42.12 § 5(c)(1). The state argued that details were admissible under article 37.07 § 3(a), and the trial court agreed.

The court of appeals reversed. "[W]e conclude that the trial court erred in admitting the testimony of the victim of the offense for which Davis was serving deferred adjudication. probation. Since the State is limited to presenting the fact of the deferred adjudication upon successful completion of the deferred adjudication probation, we hold the State is similarly limited in its presentation of evidence regarding a pending deferred adjudication."

Ground for Review: Whether the court of appeals erred in holding that testimony about details of an extraneous offense were not admissible at the punishment phase because they concerned an offense for which appellant had received deferred adjudication probation which appellant was serving at the time of trial? See arts. 37.07, § 3(a) and 42.12, § 5(c)(1).

e. Deadly weapons

Williams v. State,
946 S.W. 2d 432
(Tex. App.--Fort Worth 1997, pet. granted)
PDR No. 97-1198
State's Petition

Appellant was stopped for driving on the interstate highway at five to ten miles per hour and arrested for felony DWI. His truck did not collide with any person or object. No other vehicles were present, other than the truck and the police car. The police officer stated the situation was very hazardous and that he himself felt threatened. The jury found appellant guilty and also found that his truck was a deadly weapon.

The court of appeals reversed for a new punishment hearing. To find the truck capable of causing death or serious bodily injury requires proof that when the DWI offense occurred, there was someone present who was placed in danger of serious bodily injury or death. Here, there was no evidence that any other motorist was on the highway at the time appellant drove. "[O]n the facts in evidence in this case, the State did not prove that in the manner of its use, or intended use, Williams' truck was capable of causing death or serious bodily injury and therefore was a deadly weapon."

Grounds for Review:

1. Is a pickup truck being driven on an interstate highway ever

"incapable" of causing death or serious bodily injury.

2. **Must someone actually be placed in danger of death or serious bodily injury before a deadly weapon finding is available.**

3. **Is a deadly weapon finding unavailable simply because the endangered (but uninjured) victim was a law enforcement officer.**

4. **Whether the trial court, consistent with Tex. Penal Code Ann. §1.07(a)(17)(b)(Vernon 1994), *Tyra v. State*, 897 S.W.2d 796, 798(Tex. Crim. App. 1995); *Ex parte McKithan*, 838 S.W. 2d 560, 561 (Tex. Crim. App. 1992), and *Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989), is authorized to submit a deadly weapon issue to the jury in a felony DWI case in the absence of serious bodily injury or death.**

5. **Whether the Fort Worth court's opinion failed to employ the proper standard when reviewing the sufficiency of the evidence supporting the jury's deadly weapon finding.**

6. **Whether the Fort Worth court should have reformed the judgment to delete the deadly weapon finding after it concluded the evidence was insufficient to support the affirmative finding.**

7. **Whether a harmless error test was required before the Fort Worth court ordered a new trial on punishment.**

f. When oral and written sentencing pronouncements vary

Coffey v. State,
No. 05-96-00181-CR
Tex. App.--Dallas 1997, pet. granted)
PDR No. 97-1387
State's Petition

The trial court revoked appellant's probation and the written judgment shows that the court assessed punishment at five years confinement and a $750.00 fine. The court orally pronounced a sentence of five years imprisonment, apparently saying nothing about the fine. The court of appeals reformed the sentence to delete the fine.

Ground for Review: Did the court of appeals err in reforming appellant's judgment to delete the fine after his probation was revoked when the trial court's oral pronouncement of sentence mentioned only confinement, but the fine had not been

probated? Conflicts with *Fair v. State*, 710 S.W. 2d 188.

g. Plea bargaining for a term of years of deferred adjudication

Ditto v. State,
1997 WL 634512
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 96-1617
State's Petition

Appellant pleaded guilty to a second degree felony and the state recommended that the punishment not exceed ten years imprisonment. The state was silent on appellant's application for probation and deferred adjudication. The court granted ten years deferred adjudication. Later, the court entered an adjudication of guilt and sentenced appellant to 20 years imprisonment.

The court of appeals reversed. The plea agreement set a cap on the number of years the appellant could be sentenced to. By exceeding this term of years, the court violated the plea bargain. The court should have either followed the plea bargain or permitted appellant to withdraw his plea.

Ground for Review: Does a plea bargain which allows for deferred adjudication probation to be assessed preclude a higher sentence being assessed upon violation of that probation, in derogation of art. 42.12, §5(b)?

Ervin v. State,
955 S.W. 2d 416
(Tex. App.--San Antonio 1997, pet. granted)
No. 1618-97
State's Petition

Appellant plea bargained for a sentence of 10 years cap and a $1,000.00 fine if probation was granted. The court deferred adjudication for a period of ten years. Later the court entered an adjudication of guilt and assessed 20 years imprisonment.

Appellant complained on appeal that the trial court had violated his right to due process when it gave him 20 years imprisonment. The court of appeals agreed. The trial court was required either to sentence him to no greater than 10 years imprisonment, in accordance with the plea bargain or to allow him to withdraw his plea.

Ground for Review: Does a plea bargain which allows for deferred adjudication probation to be assessed preclude a higher sentence being assessed upon violation of that probation, in derogation of art. 42.12, §5(b)?

h. Special prosecutor fees as a condition of probation

Busby v. State,
951 S.W. 2d 928
(Tex. App.--Austin 1997, pet. granted)
PDR No. 97-1284
State's Petition

Bell County paid a special prosecutor $230,926.71 to prosecute an attorney for misapplication of fiduciary property. Appellant pleaded guilty and was placed on probation, but was ordered, as a condition of probation, to reimburse the county for the special prosecutor. On appeal appellant complained that this condition was not authorized by law.

The court of appeals agreed and reversed. "All payments ordered as a condition of supervision must be expressly authorized by law." Here, "the district court was not expressly authorized to order appellant, as a condition of supervision, to pay the prosecutor pro tem's fees as a cost of court or to otherwise reimburse the county for those fees."

Ground for review: Did the court of appeals err in holding that the trial court was not authorized to impose as a condition of community supervision the payment of the fee of a special prosecutor as costs of court?

i. When does a prior conviction "occur?"

State v. Frederick DeWayne Mason,
No. 14-97-0189-CR
(Tex. App.--Houston [14th Dist.] 1997, pet. granted)
PDR No. 97-1300
State's Petition

The indictment alleged that appellee possessed a firearm away from his premises on September 6, 1996, and that prior to that date, on July 10, 1991, he had been convicted of the offense of burglary of a motor vehicle. Prior to September 1, 1994, the law provided that, to violate this law, one had to have been previously convicted of a violent crime. Effective September 1, 1994, the law was amended to cover all those previously convicted of a felony. The savings clause to the new statute provided that it applied only to offenses committed on or after September 1, 1994, and that an offense was committed before the effective date if any element of the offense occurred before the effective date. Appellee filed a motion to quash his indictment, alleging that the allegation that he had been previously convicted was an "element" of his instant offense, and that, since this element had occurred before September 1, 1994, the former law applied. As a result, according to appellee, his indictment had to comply with the former law, which required proof that the former conviction was for one of violence. Since his indictment did not allege that his prior was for a violent crime, it should be quashed. The trial court agreed and the state appealed.

The court of appeals affirmed. The underlying conviction is an element of the offense. The court also rejected the state's argument that, because appellee was a felon on the date he unlawfully possessed the firearm, all the elements occurred after September 1, 1994. "A plain reading of Section 46.04 reflects that felony status as well as the date of the conviction and the anniversary of the person's release from confinement . . . form part of the conduct element of the offense." Felony status occurs at the time the conviction is obtained." Consequently, the pre-1994 version of the code applies. "Under the pre-1994 version, the State is required to allege and prove appellee's conviction involved violence or a threat of violence. Because the indictment does not contain such an allegation, it is deficient." The indictment was properly quashed.

Ground for Review: Did the court of appeals err by holding that the "element" of appellant's prior conviction "occurs" on the date of that conviction?

j. Privilege against self-incrimination

Carroll v. State,
946 S.W. 2d 879
(Tex. App.--Fort Worth 1997, pet. granted)
PDR No. 97-0935/6
State's Petition

Appellant pleaded guilty and waived her privilege against self-incrimination. Her case was then set for sentencing. At the sentencing hearing, the state called the appellant, and, when counsel asked if she had to testify, the court stated: "Well, I think if you don't, it's going to reflect very seriously on the Court's decisions here." The appellant then testified and she was vigorously cross-examined by the state. The court announced that it believed she had lied to the probation officer and during her hearing. Based on its belief that she lied and would therefore be unable to comply with conditions of probation, the court sent her to prison. She appealed, complaining that she had been coerced into testifying at punishment.

The court of appeals reversed. The court's warning to appellant in this case conflicts with the well established law that a sentence may not be increased due to the accused's failure to testify. Here, as a matter of law, the trial court improperly coerced appellant into testifying at the punishment phase of her trial. Appellant's waiver of her privilege against self-incrimination at the guilt innocence phase did not carry over to the sentencing phase. Nor was she required to object to the trial court's error. And, the error was not harmless.

Grounds for Review:

1. Whether an unlimited waiver of one's right not to testify and an agreement to testify if called as a witness, executed in conjunction with a plea of guilty, applies to

the entire proceeding.

2. Whether the court of appeals erred in holding that the trial court improperly coerced the appellant into testifying at the punishment phase of a plea proceeding.

k. Appeal from a deferred adjudication

McCullough v. State,
1997 WL 36938
(Tex. App.--Dallas 1997, pet. granted)
PDR No. 97-0501
Appellant's Petition

After being placed on deferred adjudication, appellant filed a preconviction writ of habeas corpus challenging the constitutionality of his plea on several grounds. The trial court denied relief and appellant appealed.

The court of appeals held that it had no jurisdiction to consider the merits of the appeal because, since appellant was on deferred, he had not been convicted.

Ground for Review: Whether the court of appeals erred in deciding that a person on deferred adjudication community supervision cannot appeal the ruling of a trial court denying habeas corpus relief because it is interlocutory.

l. Failure to order pre-sentence investigation

Johnson v. State,
1997 WL 599312
(Tex. App.--Houston [1st Dist.] 1997, pet. granted)
PDR No. 98-0045
Appellant's PDR

Appellant asked for a presentence investigation report before the court sentenced him after revoking his deferred adjudication for aggravated sexual assault. This request was denied and appellant was sentenced to 28 years imprisonment.

The court of appeals affirmed. Article 42.12 relates only to community supervision. Once appellant was found guilty of aggravated sexual assault, he was not eligible for community supervision. Therefore, the court did not err in not ordering a PSI.

Ground for Review: Whether the court of appeals erred in holding the trial court did not err in refusing appellant's request that the court order the preparation of a presentence investigation report.

SPEEDY INDICTMENT

a. The statute is not unconstitutional and the defendant does not lose merely because his challenge comes after the indictment is returned

State v. Norton,
918 S.W. 2d 25
(Tex. App.--Houston [14th Dist.] 1996, pet. granted)
PDR No. 96-0205
State's Petition

Appellant was indicted approximately 10 months after his arrest. More than two terms of the grand jury had passed before his indictment. After indictment, appellant filed a writ of habeas corpus contending that his indictment had been untimely and should therefore be dismissed with prejudice under articles 32.01 and 28.061. The trial court denied the writ and appellant appealed.

The court of appeals reversed. From the date of arrest until the date of indictment, a second term had run for the second term of the 23rd District Court. The court rejected the state's argument that the indictment was timely because the second term for another court in the county, the 239th, had not yet run. The indictment was out of the 23rd, and, absent a valid transfer order prior to indictment, that is the court that controls. The issue was not moot because relief was not sought before the indictment was obtained. Nor are the statutes unconstitutional pursuant to the reasoning of the *Meshell* case.

Grounds for Review:

1. **Whether the court of appeals erred in upholding the dismissal of the indictment with prejudice under articles 32.01 and 28.061 when the hearing on the matter was held after the indictment was returned?**

2. **Whether the court of appeals correctly held that article 32.01 did not violate the Separation of Powers doctrine under Article II, Sec. 1 of the Texas Constitution?**

b. The manner of the defendant's proof

State v. Ybarra,
942 S.W. 2d 35
(Tex. App.--Corpus Christi 1996, pet. granted)
PDR No. 96-1694
State's Petition

Appellee filed a writ of habeas corpus seeking dismissal pursuant to articles 32.01 and

28.061, asserting that he had been arrested on October 7, 1993, and that more than two terms of the grand jury had expired prior to his indictment. The indictment contained a notation that the date of the arrest was October 7, 1993. At the hearing, appellee's counsel stated that the arrest "occurred back in October of '93." The state did not suggest otherwise in the trial court. The trial court granted appellee's writ of habeas corpus and the state appealed.

The court of appeals affirmed. The court rejected the state's argument, made for the first time on appeal, that appellee did not prove the date of his arrest. The court also rejected the state's argument that appellee failed to identify the court which indicted him, and to cite the term of the court. The indictment states that appellee was indicted by the grand jury for Hidalgo County, and all seven of those courts have the same statutorily defined terms of court. Thus, the particular court term was established as a matter of law. The court also rejected the state's argument that article 32.01 has no application once an indictment is returned.

Ground for Review: Whether the court of appeals erred in upholding the trial court's dismissal of the indictment under article 32.01?

c. The Dallas court disagrees

State v. Condran,
951 S.W. 2d 178
(Tex. App.--Dallas 1997, pet. granted)
PDR No. 97-1152/3
Appellant's Petition

The court of appeals rejected appellee's speedy indictment complaints for two reasons. First, according to the court, article 28.061 is unconstitutional because it deprives the state of its right to perform exclusive prosecutorial functions thereby violating the separation of powers doctrine. Second, according to the court, appellee's article 32.01 complaint was moot since the grand jury returned its indictments before he obtained his ruling on his writ of habeas corpus.

1. Did the court of appeals err in holding that article 28.061 of the code of criminal procedure violates the separation of powers doctrine and is therefore unconstitutional?

2. Did the court of appeals err in holding that Condran's "32.01 complaint became moot" because Condran did not obtain a ruling on his application for a writ of habeas corpus before he was indicted?

SUFFICIENCY

a. Proof of the complainant's name

Grant v. State,

944 S.W. 2d 499
(Tex. App.--Beaumont 1997, pet. granted)
PDR No. 97-0684
State's Petition

The information alleged that appellant evaded arrest by fleeing from "Officer Lawson." At trial, the state presented testimony from a witness who identified himself as "Lieutenant Craig Lawson." There was no evidence that this witness was otherwise commonly known as "Officer Lawson."

The court of appeals reversed the conviction and ordered an acquittal. "The dispositive issue this appeal presents is whether or not there is a fatal variance between the charging instrument [information] allegation and proof of the complainant's name. We hold that article 21.07 requires the State to allege in the charging instrument the complainant's given name when known to the State and the use of an identifier with a surname only is insufficient."

Ground for Review: Did the court of appeals err in holding the evidence was insufficient because the state failed to prove the complainant's given name was "officer?"

b. Factual sufficiency

Perkins v. State,
940 S.W. 2d 365
(Tex. App.--Waco 1997, pet. granted)
PDR No. 97-0414
State's Petition

The court of appeals found the evidence *legally* sufficient to prove that he was driving while intoxicated, but went on to find that the evidence was *factually* insufficient to support the conviction. There was no evidence that appellant drank more than one beer. No beer cans were introduced into evidence. "Consumption of alcohol alone does not mandate a conclusion of intoxication." Testimony given by the officers was disputed by appellant and his witness. "The video tape demonstrated that Appellant was not intoxicated. From all the evidence, we hold that a finding of intoxication is so against the great weight and preponderance as to be unjust and manifestly wrong."

Grounds for Review:

1. **Did the court of appeals violate the procedural guidelines established by *Clewis v. State*, 922 S.W. 2d 126?**

2. **Does this court have jurisdiction to review an intermediate court's decision on factual sufficiency to determine if the intermediate court**

applied the correct legal standard?

3. **Did the court of appeals err in reversing for factual insufficiency without first detailing the relevant evidence and clearly stating how the verdict was against the great weight and preponderance of the evidence so as to be manifestly unjust?**

c. Party liability for delivery

Callis v. State,
1997 WL 351080
(Tex. App.--Houston [14th Dist.] June 26, 1997, pet. granted)
PDR Nos. 97-1191/2
Appellant's PDR

Undercover officer Goines negotiated the purchase of cocaine from Richards. While Goines waited in the car, Richards went to appellant's house and purchased cocaine from appellant, then delivered it to Goines. Appellant was indicted for and convicted of delivering cocaine to Goines.

On appeal, appellant contended that the evidence was legally insufficient to prove that he delivered cocaine to Goines because there was no evidence that he knew that Goines or anyone else besides Richards was involved in the transaction. Thus, according to appellant, there was no evidence that he encouraged or aided Richards in the delivery of drugs to Goines apart from his delivery to Richards. The court of appeals disagreed and affirmed the conviction, finding the evidence sufficient to support appellant's conviction as a party.

Ground for Review: Did the court of appeals err in finding the evidence sufficient to sustain appellant's conviction as a party to the delivery of cocaine to the undercover officer who remained in the car while the buyer dealt with appellant? See *Miller v. State*, 537 S.W. 2d 725.

d. Barratry

Satterwhite v. State,
952 S.W. 2d 613
(Tex. App.--Corpus Christi 1997, pet. granted)

PDR No. 97-1474
Appellant's PDR

Appellant was an attorney who represented a criminal defendant while he was under suspension for failure to pay his state bar dues. Later, after the trial, he paid the dues and was reinstated. He was indicted for and convicted of falsely holding himself out as a lawyer. He appealed claiming that, under *Hill v. State*, 393 S.W. 2d 901 (Tex. Crim. App. 1965) and the State Bar Rules, his late payment of dues became retroactively effective upon payment.

The court of appeals disagreed and affirmed the conviction. "An attorney who is retroactively returned to his pre-suspension status as an active member of the State Bar should not be absolved of liability for any misconduct occurring during the period of his suspension. Neither the case law, the Penal Code, nor the State Bar Rules support such a proposition."

Ground for Review: Whether the court of appeals erred in finding the evidence sufficient to prove an essential element of the offense under section 38.122, namely, that appellant was not in good standing with the state bar, because the court found neither *Hill v. State*, 393 S.W. 2d 901, nor State Bar Rules inapplicable?

e. Miscellaneous

Manrique v. State,
943 S.W. 2d 115
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-0589
Appellant's Petition

Appellant and another person were accused of randomly firing a weapon into a house, resulting in the injury to two persons in the house. Appellant was charged in two separate indictments with attempted murder. The first indictment, in cause number 5702A, alleged the attempted murder of (a) "a person unknown to the grand jury," or (b) Edward Avilez. The second indictment, in cause number 5703A, alleged the attempted murder of (a) "a person unknown to the grand jury," or (b) Donnie Avilez. He was convicted under both indictments and sentenced to concurrent terms of imprisonment.

The court of appeals held that, since the trial court's instruction to the jury did not apply the doctrine of transferred intent to the facts of the case in the application paragraph, the law of transferred intent was not available to the state to support the conviction. Accordingly, the court only considered the sufficiency of the evidence as it related to the allegation that appellant attempted to murder unknown persons. Appellant argued then, that the two indictments alleged "the exact same conduct," namely, the attempted murder of a person unknown to the grand jury. The court of appeals agreed. "The application of the *Blockburger* test to these facts produces the inescapable conclusion that there were two prosecutions for the same offense." Appellant was

therefore punished twice for the same offense. The court ordered one conviction reversed with instructions to the trial court to dismiss.

Ground for Review: Did the court of appeals fail to address an essential sufficiency argument raised by appellant?

THEFT

a. Trade secrets

Weightman v. State,
1996 WL 718465
(Tex. App.--Houston [14th Dist.] 1996, pet. granted)
PDR Nos. 97-0379/80
Appellant's Petition

"Viewing the evidence in the light most favorable to the verdict, we find that a rational jury could conclude beyond a reasonable doubt that the complainants maintained substantial secrecy of their trade secret drawings in Cause No. 635638."

Ground for Review: The court of appeals erred in holding that the evidence was sufficient to support conviction for theft of trade secrets in cause no. 635638.

McGowan v. State,
938 S.W. 2d 732
(Tex. App.--Houston [14th Dist.] 1996, pet. granted)
PDR No. 97-0381
Appellant's Petition

Appellant contended on appeal that the evidence was legally insufficient because it failed to show that the drawings he transmitted to his co-defendant were secret from their inception and remained secret throughout that entire time. The court of appeals disagreed and affirmed the conviction. This is a companion case to *Weightman*.

Ground for Review: The court of appeals erred in holding that the evidence was

sufficient to support conviction for theft of trade secrets in cause no. 635637

b. Aggregation and venue

State v. Weaver,
945 S.W. 2d 334
(Tex. App.--Houston [1st Dist.] 1997, pet. granted)
PDR No. 97-0893
Appellant's Petition

Appellant was charged with 32 incidents of theft by deception which were alleged to have occurred pursuant to a single scheme or continuing course of conduct, and were therefore aggregated into a single offense by § 31.09 of the penal code. Appellant moved to sever 24 incidents because they had occurred outside Harris County, and the trial court granted the motion. The state appealed.

The court of appeals reversed. The severance statute, § 3.04 of the penal code, does not apply because appellant was charged under § 31.09, not § 3.02. "We believe, and hold, that if the offense created by section 31.09 is one offense for purposes of jurisdiction, limitation, and punishment, it is also one offense for purposes of venue."

Ground for Review: Did the court of appeals err in holding that the trial court could not sever incidents of theft having no nexus to Harris County? (See art. 31.09, V.A.C.C.P.).

TRANSFERRED INTENT

a. The applicability of transferred intent when a firearm is discharged randomly into an occupied house and the identity of the victim is unknown to the defendant

Manrique v. State,
943 S.W. 2d 115
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-0589
State's Petition

Appellant and another person were accused of randomly firing a weapon into a house, resulting in the injury to two persons in the house. Appellant was charged in two separate indictments with attempted murder. The first indictment, in cause number 5702A, alleged the attempted murder of (a) "a person unknown to the grand jury," or (b) Edward Avilez. The second indictment, in cause number 5703A, alleged the attempted murder of (a) "a person unknown to the grand jury," or (b) Donnie Avilez. He was convicted under both indictments and sentenced to concurrent terms of imprisonment.

The court of appeals held that, since the trial court's instruction to the jury did not apply the doctrine of transferred intent to the facts of the case in the application paragraph, the law of transferred intent was not available to the state to support the conviction. Accordingly, the court only considered the sufficiency of the evidence as it related to the allegation that appellant attempted to murder unknown persons. Appellant argued then, that the two indictments alleged "the exact same conduct," namely, the attempted murder of a person unknown to the grand jury. The court of appeals agreed. "The application of the *Blockburger* test to these facts produces the inescapable conclusion that there were two prosecutions for the same offense." Appellant was therefore punished twice for the same offense. The court ordered one conviction reversed with instructions to the trial court to dismiss.

Grounds for Review:

1. **Does the fact that indictments resulting in multiple convictions are identically worded show a double jeopardy violation or must a defendant prove the convictions were for the same offense in order to sustain his claim of double jeopardy?**

2. **Does the appellate principle of sufficiency of the evidence, namely, that a jury is presumed to have based its verdict on a theory for which the evidence was legally sufficient, apply to review of a double jeopardy claim such that only a theory of culpability that is supported by legally sufficient evidence may be considered for a jeopardy analysis?**

3. **Is transferred intent applicable when a defendant is convicted of attempted murder by discharging a firearm randomly into an occupied house, and the identity of the victim is not known to the defendant?**

VENUE

a. Evidence of venue in an appropriation of stolen property case

Jones v. State,
945 S.W. 2d 852
(Tex. App.--Waco 1997, pet. granted)
PDR No. 97-1000
State's Petition

Appellant was indicted in Brazos County for appropriating property he knew to be stolen by another. The proof showed that video cameras were stolen in Brazos County, that several

persons approached appellant in Burleson County with these cameras, and that appellant pawned them in Travis County.

Appellant contended on appeal that the evidence was legally insufficient to prove that any element of the offense occurred in Brazos County as alleged in the indictment. The court of appeals agreed and reversed the conviction with instructions to enter an acquittal. "The State must prove only that the property appropriated by the defendant was stolen; the State is not required to prove where the property was stolen. Because we will not require the State to prove more than is required, we conclude there is no evidence that any element of the charged offense occurred in Brazos County and, thus, venue there was improper."

Ground for Review: Does Tex. Code Crim. Proc. Art. 13.08, or in the alternative, art. 13.18 provide for venue in the county where the initial theft occurred even though the accused did not take part in the initial theft but instead received stolen property in another county.

b. Timeliness of a motion to change venue

Gutierrez v. State,
954 S.W. 2d 86
(Tex. App.--San Antonio 1997, pet. granted)
PDR No. 97-1477
State's Petition

Appellant filed a change of venue motion which was properly verified, but was not controverted by the state. This motion was filed on the day jury selection was scheduled to begin, well after the trial court had heard pre-trial motions. The trial court denied the motion as untimely filed, but granted a motion for continuance, and told counsel he could reurge the motion. Between then and trial, the state filed controverting affidavits, and at least two other pre-trial hearings were held, but appellant refused to reurge his motion for change of venue. The trial court never withdrew its ruling. Venue was not changed, appellant was convicted, and he appealed.

The court of appeals reversed. It was clear from the record that the trial court had not ruled on the contents of the motion for change of venue, but merely denied it because it was untimely filed. In *Revia v. State*, 649 S.W. 2d 625 (Tex. Crim. App. 1983), the court of criminal appeals held that article 28.01, which may impose time limits on the filing of pre-trial motions, does not apply to motion to change venue because these are of constitutional dimension. Here, appellant's motion complied with the change of venue statute in that it was written, supported by appellant's own affidavit, and those of two credible residents of the county, and based upon the reasons provided by statute. The motion was uncontroverted by the state when it was denied. Accordingly, the trial court erred in denying the motion without an evidentiary hearing.

Grounds for Review:

1. **Whether this Court should reconsider its decision in *Revia v. State*, 649 S.W.2d 625 (Tex. Crim. App. 1983) which holds that the time limitations set forth in art. 28.01, V.A.C.C.P. for filing pretrial motions does not encompass motions for change of venue?**

2. **Was the trial court's initial ruling denying the motion for change of venue absolute, such that the trial court could not later reconsider its motion?**

3. **Did appellant abandon his motion for change of venue when he failed to pursue it at a hearing?**

VOIR DIRE

a. Inability to consider the minimum range of punishment

Sadler v. State,
No. 2-95-434-CR
(Tex. App.--Fort Worth March 6, 1997, pet. granted)
PDR No. 97-0934
Appellant's Petition

Appellant was indicted for aggravated robbery. He asked each venireperson: "Who would not be able to consider the minimum punishment if you found somebody guilty and there was a child victim present?" Four venirepersons said they could not and they were challenged for cause. The trial court overruled the challenges.

The court of appeals affirmed. Although the question was permissible in order that appellant might intelligently exercise his peremptory challenges, the answers did not necessarily support a challenge for cause. The fact that a venireperson would not consider the minimum punishment under a specific set of facts does not mean that person is disqualified.

Ground for Review: Whether a venire person who cannot consider the minimum punishment for an offense if a child was present is biased against the range of punishment and disqualified from serving.

b. Inability to consider the full range of punishment

Samuel Lovert Johnson v. State,
No. 14-95-860-CR

(Tex. App.--Houston [14th Dist.] March 27, 1997, pet. granted)
PDR No. 97-0536
Appellant's Petition

Two venirepersons stated that they could not consider the minimum punishment -- five years imprisonment -- for one convicted of acting as a principal in an aggravated robbery case. Appellant's challenges for cause were overruled.

The court of appeals affirmed. The fact that a prospective juror cannot assess the minimum punishment against one acting as a principal does not alone render him unfit for jury service. "A prospective juror . . . must be able to consider the full range of punishment for the offense generally, and not for some specific manner and means of committing the offense."

Ground for Review: Whether the court of appeals erred in holding that the trial court did not abuse its discretion in failing to strike venirepersons for cause due to their stated inability to consider the full range of punishment for a person convicted of having committed aggravated robbery as a principal.

c. Shuffle

Johnson v. State,
944 S.W. 2d 739
(Tex. App.--Corpus Christi 1997, pet. granted)
PDR No. 97-0872
State's Petition

Before the jury was seated and qualified, the state announced that appellant had requested a shuffle. Apparently, the trial court did shuffle the jury at this time, after which the jury was sworn and qualified and removed from the courtroom. When the jury returned, appellant asked that the jury be shuffled again, and the trial court denied the request.

The court of appeals reversed. Although there was some reordering of the venire, a bona fide jury shuffle cannot take place until it is first determined which persons will constitute the jury panel. Whatever "shuffling" that occurred here occurred before the panel was qualified. "We hold that the trial court erred in denying appellant's motion for a 'reshuffle' of the jury, as the shuffle relied upon by the court for its ruling was legally incompetent."

Grounds for Review:

1. **Did the court of appeals err in concluding that a jury shuffle conducted at appellant's request before the panel was seated in the courtroom was a nullity, and appellant was entitled to a second shuffle?**

2. Did the court of appeals err in concluding that a shuffle cannot take place until it is first determined precisely which persons will constitute the jury panel for the case even if the shuffle is conducted at appellant's request?

3. Did the court of appeals err in holding that appellant did not waive the right to a jury shuffle after the jury was seated and qualified by requesting and receiving a jury shuffle before the jury was seated and qualified?

4. Did the court of appeals err in concluding that there must be a written pretrial motion requesting a jury shuffle in a certain manner before an appellant is bound by the procedure followed by the trial court at appellant's request?

5. Did the court of appeals err in concluding that appellant preserved for review the issue of whether or not appellant was entitled to a second jury shuffle when appellant did not object to the performance of the first jury shuffle which was conducted by the trial court at appellant's request?

6-9. Did the court of appeals err in finding that appellant did not request a jury shuffle prior to the time the panel was seated in the courtroom and qualified?

Bennie Earl Roberts v. State,
No. 12-94-00205-CR
(Tex. App.--Tyler, August 29, 1997, pet. granted)
PDR No. 1481-97
State's PDR

After the conclusion of voir dire, the court, on its own motion, and over appellant's objection, conducted a shuffle, which resulted in two jurors being moved into the "strike zone." Appellant exercised a peremptory challenge on one of these jurors.

The court of appeals reversed. "In the present case, the shuffle occurred after voir dire was completed. The persons seated in the last two seats, which may have been questioned less than other panel members, were shuffled into the strike zone and Appellant had to exercise a strike to remove one of them from the panel. Accordingly, we conclude that since the voir dire had already been completed when the shuffle was performed, and since the shuffle resulted in the shifting of two jurors from the back to the front of the panel, the trial court erred in conducting a *sua sponte* shuffle."

Ground for Review: Whether the court of appeals erred in reversing this case for jury shuffle error without conducting a harm analysis.

d. Scope of voir dire: Civil litigation and pretrial publicity

Antonio Mendoza Benavidez v. State,
No. 08-95-271-CR
(Tex. App.--El Paso 1997, pet. granted)
PDR No. 97-1357
State's and Appellant's Petition

The trial court refused to let appellant question venirepersons concerning the issue of impeachment of a witness due to a pending civil claim. The court also refused to permit appellant to ask the venire whether they had heard of a civil lawsuit between the state's witness and the appellant and his employer.

The court of appeals reversed. As to the first question, the court ruled against appellant, holding that he failed to preserve error since he posed no questions to the panel concerning impeachment. The trial court's ruling did not limit appellant from asking questions concerning the possible financial interest of a witness, it merely restricted reference to the pending civil suit. As to the second question, the court ruled with the appellant. Appellant was entitled to know what information the panel had concerning pretrial publicity. Although appellant was able to question what the venire had read about the case, he was not allowed to ask what they had heard of the suit from other sources.

Ground for Review: When the record fails to reflect a single question that the appellant wanted to ask the jury panel but was prevented by the trial court from asking, is an appellate court nevertheless correct in divining what the appellant might have wanted to ask and reverse the conviction based on an abuse of discretion even though the trail court never had an opportunity to rule on the question or exercise its discretion?