# RECENT OPINIONS:
# EVERYBODY HAS ONE

## The Defense Lawyers's View

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## SCOPE OF PAPER

This paper discusses cases decided in the last year which, in my very subjective opinion, are important to those who practice criminal law in Texas. Only a few particularly important or unusual cases from the court of criminal appeals are included, so as not to duplicate Judge Baird's presentation. The primary focus of the paper is on recent decisions from the courts of appeals, especially where the court of criminal appeals has granted, but not yet decided, a petition for discretionary review. Some older cases are also discussed, when necessary to explain the recent decisions.

## ACCOMPLICE WITNESSES

***Bingham v. State,***
**___ S.W. 2d ___ No. 0891-92**
**(Tex. Crim. App. December 21, 1994)**

The trial court admitted as a declaration against interest an out-of-court statement from appellant's wife, who the state concedes was an accomplice. The wife herself, however, did not testify. Appellant's request that the jury be charged that the wife was an accomplice was overruled. This was error. The court finds that "testimony" broadly includes at least some out-of-court statements not made under oath. "Testimony," as it is used in article 38.14, can fairly be understood to include the out-of-court statements of codefendants made to third parties.

The state's motion for rehearing was granted in this case on February 8, 1995, and a decision is pending.

## APPEALS

a. Rule 40(b)(1)

### Tex. R. App. Proc. 40(b)(1)

Appeal is perfected in a criminal case by giving timely notice of appeal; except, it is unnecessary to give notice of appeal in death penalty cases. Notice of appeal shall be given in writing filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order; *but if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to Article 1.15, Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, in order to prosecute an appeal for a nonjurisdictional defect or error that occurred prior to entry of the plea the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial.* The clerk of the trial court shall note on copies of the notice of appeal the number of the cause and the day that notice was filed, and shall

immediately send one copy to the clerk of the appropriate court of appeals and one copy to the attorney for the State. [emphasis supplied]

***Davis v. State*,**
**870 S.W. 2d 43**
**(Tex. Crim. App. 1994)**

1. Appellant pleaded nolo contendere and then challenged the sufficiency of the evidence on appeal. The court of appeals found the evidence insufficient, holding that it had jurisdiction to consider sufficiency under Rule 40(b)(1) because this was an error which occurred after entry of the plea. The court of criminal appeals disagreed, finding that this interpretation of Rule 40(b)(1) would give an appellant a greater scope of appeal than intended by the Legislature. Accordingly, absent permission from the trial court, the court of appeals has no jurisdiction to address the sufficiency of the evidence following a plea of nolo contendere.

2. Appellant also sought to appeal the trial court's ruling on her motion to suppress. The court of criminal appeals held that the court of appeals had no jurisdiction over this issue, because appellant filed only a general notice of appeal. A "general" notice of appeal -- that is, one which does not either recite that the trial court gave permission to appeal, or specify matters raised by written motion and ruled on before trial -- is insufficient to confer appellate jurisdiction to review a ruling on a pretrial motion to suppress in an appeal from a conviction based on a negotiated plea bargain.

3. The court of appeals did not err in refusing to permit appellant to amend her notice of appeal after the court of appeals handed down its opinion.

***Lyon v. State*,**
**872 S.W. 2d 732**
**(Tex. Crim. App. 1994),**
**cert. denied, 114 S. Ct. 2684 (1994)**

1. "Rule 40(b)(1) requires a defendant, in an appeal from a plea-bargained conviction, to obtain the trial court's permission to appeal any matter in the case except for those matters raised by written motion and ruled on before trial. A defendant's `general' notice of appeal confers no jurisdiction on a Court of Appeals to address nonjurisdictional defects or errors that occur before or after entry of the plea; a defendant's notice of appeal has to comply with the applicable provisions of the 'but' clause of Rule 40(b)(1) to confer jurisdiction on a Court of Appeals to address these types of defects or errors. A `general' notice of appeal confers jurisdiction on a Court of Appeals to address only jurisdictional issues." [citations omitted]

2. Since sufficiency of the evidence and ineffective assistance of counsel are not jurisdictional issues, the court of appeals had no jurisdiction to address them.

3. Whether the trial judge was disqualified to sit because of his relationship to the victim was a jurisdictional issue. Therefore, a general notice of appeal is sufficient to confer jurisdiction on the court of appeals.

***Jack v. State*,**
**871 S.W. 2d 741**
**(Tex. Crim. App. 1994)**

Appellant pleaded guilty pursuant to an agreement by which he would plead guilty, a PSI would be done, the trial court would assess punishment without a recommendation, and other pending accusations would be dismissed. At the sentencing hearing, the state presented evidence, over objection, of two unadjudicated extraneous offenses. The court of appeals held that it lacked jurisdiction to consider the admissibility of extraneous offenses on appeal because these nonjurisdictional issues were waived by a guilty plea.

The court of criminal disagreed. A nonnegotiated plea bargain only waives nonjurisdictional defects occurring *prior* to the entry of the plea. The defect at issue here occurred at the sentencing hearing, *after* the plea was entered. Appellate courts do have jurisdiction to consider the merits of issues that occur at or after the entry of a nonnegotiated plea of guilty or nolo contendere. *Davis* and *Lyon* only apply to *negotiated* plea bargains. They are inapplicable to the present case because, here, appellant's plea was nonnegotiated. "Under Article 44.02, V.A.C.C.P, the defendant who pleads guilty without benefit of a plea bargain has a right to appeal any claim of error below." Although a nonnegotiated plea may cause the waiver of nonjurisdictional error which occurs before the entry of the plea, this only means that the defendant will lose, not that the court lacks jurisdiction. Furthermore, there is no waiver for defects occurring at or after the plea, when the plea is nonnegotiated.

***Crawford v. State*,**
**___ S.W. 2d ___ No. 04-94-00286-CR**
**(Tex. App.--San Antonio December 28, 1994)**

Rule 40(b)(1) of the Texas Rules of Appellate Procedure applies only to negotiated plea bargains in which there is an agreement as to punishment. It does not apply to a situation, like the present, where the appellant pleaded guilty in return for a promise not to seek an affirmative finding, and to dismiss another pending case. Thus the court of appeals has jurisdiction to decide whether appellant's plea was involuntary.

***Montalbo v. State*,**
**885 S.W. 2d 160**
**(Tex. Crim. App. 1994)**

This case was decided in the court of appeals before *Davis* and *Lyon* were handed down. The court of appeals reversed the conviction, holding that the evidence was insufficient to

support appellant's nolo plea. Appellant's notice of appeal recited that the trial court gave permission to appeal.

*Davis* and *Lyon* were then decided, and the state filed a petition for discretionary review, arguing that the court of appeals had no jurisdiction to review the sufficiency of the evidence. The court of criminal appeals agreed that, after *Davis* and *Lyon*, a general notice of appeal did not confer jurisdiction on the court of appeals to review sufficiency. Here, however, appellant's notice was not general, but instead specifically recited that permission to appeal had been granted. The state asserts that, despite this recitation, the record does not reflect that permission was in fact granted. Appellant asserts that all Rule 40(b)(1) requires is a recitation that permission was granted, and that the record need not explicitly reflect such permission.

The opinion of the court of appeals was vacated and the cause was remanded to consider whether the mere recital that permission to appeal was granted is sufficient to confer jurisdiction to consider a sufficiency claim.

***Avila v. State*,**
**884 S.W. 2d 896**
**(Tex. App.--San Antonio 1994)**

Appellant pleaded guilty to misdemeanor DWI after the trial court overruled his motion to suppress. His notice of appeal reflected that there was a plea bargain, and that the matters being appealed had been raised and ruled upon before trial. The notice of appeal, though, was the only indication in the record that there was a plea bargain. The court of appeals considered, and overruled appellant's points of error, without resort to Rule 40(b)(1), apparently holding that that rule is inapplicable to misdemeanors. "We need not venture into the morass in felony cases concerning Rule 40(b)(1)."

b. <u>The Anders Brief</u>

***Johnson v. State*,**
**885 S.W. 2d 641**
**(Tex. App.--Waco 1994)**

1. In *Anders v. California*, 386 U.S. 738 (1967), the Court established the responsibilities of counsel appointed by the court to prosecute the first appeal from a criminal conviction who conscientiously determine that there is no merit to the appeal.

2. The *Johnson* case is useful because it outlines the Waco court's understanding of the *Anders* brief, and the duties of the bench and bar.

3. The duty to withdraw from <u>retained</u> representation does not invoke federal constitutional concerns. *Anders* only concerns appointed counsel.

4. "Frivolous" is not a decision to be reached lightly. Only arguments that cannot conceivably persuade the court should be considered frivolous. An arguable point is, by definition, not frivolous.

c. Timeliness

***Oldham v. State,***
**889 S.W. 2d 461**
**(Tex. App.--Houston [14th Dist.] 1994, pet. granted)**

The court of appeals held that the failure to appoint counsel for this indigent appellant until after the deadline for filing a motion for new trial had passed was a denial of the right to counsel at a critical stage of the proceeding. Pursuant to Rule 2(a), good cause is shown for the suspension of Rule 31(a) which requires a motion for new trial to be filed within 30 days. The appeal is abated to allow appellant time to file a motion for new trial.

The court of criminal appeals has granted discretionary review to determine whether a court of appeals may presume that appellant was not represented by counsel during the period in which the motion for new trial could be filed when appellate counsel was not appointed until after that period and the record is silent as to if or when trial counsel withdrew.

***Olivo v. State,***
**___ S.W. 2d ___ No. 04-94-00775-CR**
**(Tex. App.--San Antonio January 31, 1995)**

Appellant filed a late notice of appeal, but within the 15 day grace period. Later, outside the grace period, appellant filed a motion for extension of time to file a late notice of appeal. The San Antonio court of appeals dismissed the appeal, finding it had no jurisdiction since the notice of appeal was late. The court noted that other courts have held that a late notice of appeal may be granted if filed within 15 days of the due date, and if a motion to extend time is also filed at some later date. The San Antonio court, however, held that this interpretation was at odds with Rule 41(b)(2), which requires that both the notice of appeal and the motion for extension be filed within this 15 day period. The court cited a Texas Supreme Court case to support its position, but also noted that "[d]ifferent considerations are involved in criminal cases, however, and a definitive ruling from the Court of Criminal Appeals would be beneficial."

***Mendez v. State,***
**___ S.W. 2d ___ No. 06-94-00173-CR**
**(Tex. App.--Texarkana November 8, 1994)**

Appellant's motion for new trial was due on December 24, 1993, but the courthouse was closed on that date. He filed the motion the next day the courthouse was open, December 27, 1993. Although December 24 was not a legal holiday under the Government Code, the court

held the filing was timely. Citing a case from the Texas Supreme Court (and giving short shrift to one from the court of criminal appeals), the court held that a legal holiday includes a day on which the courthouse is closed by direction of the county commissioner's court.

***Buchanan v. State,***
**881 S.W. 2d 376**
**(Tex. App.--Houston [1st Dist.] 1994, pet. granted)**

The state moved to dismiss appellant's appeal because he did not file a notice of appeal following his conviction on a trial before the court. Appellant did file a request for a statement of facts, however, and he argued that this was sufficient to perfect the appeal. The court of appeals agreed. Appellant indicated his intent to appeal when he requested the transcript and the statement of facts. This is all that is required under rule 40(b)(1).

## ASSISTANCE OF COUNSEL

a. <u>The Duties Of Appellate Counsel</u>

***Ex parte Jarrett,***
***___ S.W. 2d ___ No. 71,923***
***(Tex. Crim. App. February 8, 1995)***

Although an appellant has no right to discretionary review, he does have a right to prepare and file a petition for discretionary review. "Pursuant to Rule 91, appellate counsel has a duty to notify the appellant of the actions of the appellate court and to consult with and fully advise the appellant of the meaning and effect of the opinion of the appellate court. Finally, although appellate counsel has no duty to file a petition for discretionary review, . . . appellate counsel does have the duty, under art. 26.04, to advise the appellant of the possibility of review by this Court as well as expressing his professional judgment as to possible grounds for review and their merit, and delineating the advantages and disadvantages of any further review."

b. <u>Raising The Issue On Appeal</u>

***Pifer v. State,***
**___ S.W. 2d ___ No. 01-92-00948-CR**
**(Tex. App.--Houston [1st Dist.] January 5, 1995)**

The trial court did not determine appellant's motion for new trial within 75 days of his sentencing. Accordingly, the trial court had no jurisdiction to grant a new trial. At this untimely hearing, though, evidence was put on indicating that the complainant had told the prosecutor that appellant did not appear to be her attacker, and that she was never knocked to the ground as alleged in the indictment. The prosecutor never revealed this critical exculpatory evidence to

appellant. The record from the untimely hearing also reveals serious alleged deficiencies in appellant's trial representation and a possible conflict of interest.

The court of appeals abated the appeal for an evidentiary hearing concerning representation at trial and the state's failure to reveal exculpatory evidence. "The record of the out of time hearing demonstrates serious doubts as to whether the appellant was effectively represented, and whether or not the State revealed exculpatory evidence in conformance with *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Justice demands further inquiry, and judicial economy suggests it be made in the present proceeding rather than waiting for an inevitable writ of habeas corpus."

***Torres v. State*,**
**804 S.W. 2d 918**
**(Tex. App.--El Paso 1990, pet. ref'd)**

In this case, appellant requested the court of appeals to abate his appeal and return the case to the trial court so that he could develop a record to support his claim that counsel was ineffective. The court of appeals found itself in a "mild quandary." On the one hand, the rules do not permit an abatement of the appeal as requested by appellant. On the other hand, the court recognized that trial records frequently do not support an allegation of ineffectiveness of counsel.

> In recognition of the dilemma faced by both the Court and the Appellant, however, we make the following suggestions. Appellant could proceed with his direct appeal, unabated, raising such points of error as are justified by the record. He may concurrently initiate a writ of habeas corpus action in the trial court (not post-final conviction since the appeal is still pending) to pursue the making of an additional record on the issue of ineffective assistance of counsel. Should he encounter an unfavorable result in the trial court, his recourse is appeal to this Court, accelerated due to the habeas corpus nature of the proceeding. He could at that point move reasonably for a consolidation review of the two appellate matters.

***Mitchell v. State*,**
**762 S.W. 2d 916**
**(Tex. App.--San Antonio 1988, pet. ref'd)**

The court of appeals reversed this conviction, finding that appellant had been denied the effective assistance of trial counsel. The appeal was originally abated for an evidentiary hearing because the appellate court was "not in a position to evaluate the totality of trial counsel's performance from the record before" that court. *But see Bowler v. State*, 822 S.W. 2d 334, 335 (Tex. App.--San Antonio 1992, pet. ref'd)(court denies request for an out-of-time motion for new

trial hearing after considering, among other things, that the question of ineffectiveness is cognizable on a writ of habeas corpus).

***Reyes v. State*,**
**849 S.W. 2d 812**
**(Tex. Crim. App. 1993)**

Where appellant timely files a motion for new trial, supported by an affidavit, asserting that trial counsel was ineffective, the trial court is obligated to conduct a hearing.

c. Limited Representation

***Kozacki v. Knize*,**
**883 S.W. 2d 760**
**(Tex. App.--Waco 1994)**

Counsel filed a limited appearance of counsel in the trial court, requesting to appear only at the bail-reduction hearing. The trial court refused to permit counsel to appear for a limited purpose only, citing its local rule that counsel must appear altogether, or not at all. Mandamus is granted ordering the trial court to permit counsel to appear for the limited purpose of a bail reduction hearing only.

d. Proof Of A Single Deficiency Can Establish Ineffectiveness

***Ware v. State*,**
**875 S.W. 2d 432**
**(Tex. App.--Waco 1994, pet. ref'd)**

Appellant pled guilty and went to the jury for punishment. Although his entire strategy was to seek probation from the jury, trial counsel failed to elicit from appellant that he had never before been convicted of a felony. The question in this case was whether this single deficiency on the part of counsel could constitute ineffectiveness when, in every other respect, counsel was competent. The court of appeals held that counsel was ineffective. Because counsel's ineffectiveness was at the punishment phase of the trial, the governing standard was *Ex parte Duffy*, 607 S.W. 2d 507 (Tex. Crim. App. 1980), rather than *Strickland v. Washington*, 466 U.S. 668 (1984).

e. Protecting Counsel At The Expense Of The Client

***Albert Monreal v. State,***
**No. 04-92-00481-CR**
**(Tex. App.--San Antonio March 9, 1994, pet. granted)**

Appellant waived a jury and tried his cases for aggravated sexual assault and indecency with a child before the court. Immediately after the state rested, trial counsel questioned appellant regarding earlier plea bargaining negotiations, "[f]or purposes of perfecting the record." Specifically, she had appellant tell the judge, who had not yet decided guilt or innocence, that appellant had earlier asked her to try to negotiate a plea bargain in his behalf which would include a reduction in the charges and an offer of "something like eight years." Appellant also stated that he had rejected the deal because he was not guilty. Immediately after this exchange, counsel called her first witness.

On appeal, appellant asserted that counsel prejudiced his case by having him explain, on the record, that he had previously rejected a plea bargain. Appellant felt like counsel was protecting herself at his expense, and that her actions conveyed to the trial court her belief that appellant was going to be convicted. Appellant pointed out Rule 410 of the Texas Rules of Criminal Evidence which prohibit evidence of plea bargains later withdrawn.

The court of appeals found counsel's performance to be neither deficient nor prejudicial, and therefore rejected appellant's claim that trial counsel was ineffective.

The court of criminal appeals granted discretionary review to determine whether the court of appeals erred in using the *Strickland* test in overruling appellant's claim of ineffective assistance of counsel based on a conflict of interest because appellant's attorney had appellant testify to his knowledge of a pre-trial plea bargain.

The court also granted review to determine whether the court of appeals erred in failing to address appellant's point of error that he was compelled to testify in violation of his right against self-incrimination when his attorney called him to testify to make a record showing he was informed of a pre-trial plea bargain.

f. Attachment Of The Right To Counsel.

***Frye v. State,***
**___ S.W. 2d ___ No. 0261-CR**
**(Tex. Crim. App. March 8, 1995)**

On April 3, 1988, Frye was charged by complaint with misdemeanor theft. He retained counsel, and counsel appeared on his behalf. On May 16, 1988, the state dismissed the complaint, pending a continuing investigation. On August 5, 1988, the DA's office opened a new

file on the case, and on October 4, 1988, a student intern in the DA's office called Frye, questioned him about the case, and recorded the conversation. Frye told the intern he was represented by counsel. In December, another prosecutor called Frye and again taped the conversation with him. Again Frye told them he was represented by counsel, which the DA acknowledged knowing about. Subsequently, Frye was indicted for felony theft. The indictment included allegations contained in the misdemeanor complaint, and added others.

When Frye learned that he had been recorded, he moved to dismiss the indictment with prejudice, on the grounds that the conversations deprived him of his constitutionally guaranteed right to counsel. The trial court granted the motion to dismiss and the state appealed.

On appeal, the state made two arguments. First, the state contended that Frye had no right to counsel when the recordings were made, because, at that time, he was not charged with any offense. Second, the state argued that, even if it had violated Frye's right to counsel, the trial court was not authorized to dismiss the indictment. Both the court of appeals and the court of criminal appeals disagreed with the state, and affirmed the trial court's dismissal.

Clearly, Frye's right to counsel attached once the misdemeanor complaint was filed. Although the state later dismissed the charges, Frye was still represented by counsel. Even though the dismissal altered the positions of the parties, the dismissal was accomplished for the specific purpose of conducting a continuing investigation including this transaction. And, the charges set forth in the misdemeanor complaint were again alleged in the felony indictment. Thus, the subsequent charges were not new or additional. The court found that Frye's right to counsel remained when the telephone conversations occurred, and that the state violated his right to counsel by initiating questioning without counsel present.

The court also held that the trial court was authorized to dismiss the indictment upon a finding that Frye had revealed defensive evidence and strategies during the conversations, and that he suffered harm as a result. The trial court concluded that mere suppression of the evidence would be an insufficient remedy, and the court of criminal appeals refused to disturb that finding.

g. Replacement Of Trial Counsel On Appeal.

***Stotts v. Wisser*,**
**___ S.W. 2d ___ No. 71,962**
**(Tex. Crim. App. March 8, 1995)**

The trial court appointed counsel to represent appellant at trial, and ordered the appointment to run until the case is concluded, unless released by the court. After trial, the court replaced counsel with another. Both appellant and the first attorney objected. This was error. "[A]bsent a principled reason apparent from the record, a trial judge does not have discretion to replace appointed trial counsel over the objection of both counsel and the defendant." Here, there was no principled reason evident in the record which justified the replacement of counsel.

## BAIL

***Kozacki v. Knize,***
**883 S.W. 2d 760**
**(Tex. App.--Waco 1994)**

Mandamus is granted ordering the trial court to hold a hearing on defendant's motion to reduce bail. "Once properly filed and presented, the court does not have the option of refusing to hold a hearing on their motions to reduce bail."

## BURGLARY

***Richardson v. State,***
**888 S.W. 2d 822**
**(Tex. Crim. App. 1994)**

Appellant entered the vehicle, and committed burglary of a vehicle when he reached into the open bed of a pickup truck and removed four fishing rods. *Cf. Griffin v. State*, 815 S.W. 2d 576 (Tex. Crim. App. 1991)(removal of hubcaps and tires from the axle of a vehicle does not constituted burglary of a vehicle).

## CAPITAL MURDER

***Simmons v. South Carolina,***
**114 S.Ct. 2187**
**(1994)**

The Supreme Court held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."

***Penry v. State,***
**___ S.W. 2d ___ No. 71,130**
**(Tex. Crim. App. February 22, 1995)**

Appellant executed a document at trial purporting to waive his right to parole for the rest of his life. He then unsuccessfully sought an instruction that the jury should presume he would have to remain incarcerated for the rest of his life. The court of appeals held that the matter of parole is not a proper consideration for the jury in a capital case. Oddly, after making this bold pronouncement, the court made this citation: "*but see Simmons v. South Carolina*, ___ U.S. ___,

114 S.Ct. 2187 (1994)." Beyond this obscure reference, the court made no effort whatsoever to distinguish *Simmons*. What does this mean? Is this an acknowledgment that contrary Supreme Court authority exists, but that the court of criminal appeals is somehow not bound by it?

***Smith v. State*,**
**___ S.W. 2d ___ No. 71,433**
**(Tex. Crim. App. March 8, 1995)**

Two weeks after *Penry*, the court made a stab, at least, at distinguishing *Simmons*. In *Smith*, the court overruled a host of state and federal constitutional challenges to the trial court's refusal to instruct on the law of parole. The court seemed to distinguish *Simmons* by reasoning that that case "on its face seems to be limited to states which have life without parole and not to states which have life with parole eligibility." Anticipating this response, appellant pointed out that the Supreme Court had also vacated the lower court's decision in *Price v. North Carolina*, 114 S. Ct. 2777 (1994), and remanded for consideration in light of *Simmons*. Conceding that Mr. Price, unlike Mr. Simmons, was parole eligible in 20 years, our court of criminal appeals nonetheless found that *Price* neither had precedential value, nor signalled the proper disposition of Mr. Price's case. The court of criminal appeals further distinguished *Simmons* by noting that Texas, unlike South Carolina, has a number of safeguards to ensure that the law of parole is not discussed by the jury.

## CHARGING INSTRUMENTS

***McCoy v. State*,**
**889 S.W. 2d 354**
**(Tex. App. -- Houston [14th Dist.] 1994)**

The indictment was not amended until it was physically altered, and that was on the day of trial, which is too late. The addition of a complainant is a matter of substance. Changing the manner of deception is also a matter of substance. Harm is immaterial.

***Hilton v. State*,**
**879 S.W. 2d 74**
**(Tex. App.--Houston [14th Dist.] 1994)**

Prior to trial, the prosecutor got the trial court's permission to amend the indictment, but it did not physically do so until after appellant's motion for instructed verdict. Under article 28.10, this amendment came too late.

***State v. Turner*,**
**868 S.W. 2d 351**
**(Tex. App.--Houston [14th Dist.]1993 , pet. granted)**

Appellant moved on the day of trial to dismiss the indictment, contending that it was barred by limitations. The trial court dismissed the indictment, overruling the state's objection that appellant's motion was untimely under article 1.14(b) of the Texas Code of Criminal Procedure. The court of appeals affirmed, holding that the statute of limitations is a defense, not a defect, and that it can be brought to the court's attention on the day of trial. Article 1.14(b) logically applies to defects or errors that can be corrected, not to defenses.

The state's petition for discretionary review was granted to determine whether a pretrial objection pursuant to article 1.14(b) is required to complain about an indictment which on its face is barred by limitations.

***Larry Neil Cook v. State*,**
**No. 04-93-00111-CR**
**(Tex. App.--San Antonio January 5, 1994, pet. granted)**

Undoubtedly, article 1.14(b) of the Texas Code of Criminal Procedure is very strict, requiring that defendants object to defects in indictments and informations before trial. This case will determine just how strict that provision is.

In *Cook*, trial counsel was apparently asleep at the wheel. The indictment seemed to want to allege theft, but it did not allege the defendant's name, or mention the concept "unlawful appropriation". Despite these rather glaring deficiencies, the court of appeals upheld the indictment on appeal, because appellant had not challenged it prior to trial pursuant to article 1.14(b).

The court of criminal appeals granted discretionary review to determine whether one may successfully challenge for the first time on appeal a charging instrument so defectively drawn that it does not constitute an "indictment" as that term is defined in Article V, § 12(b) of the Texas Constitution. This case will truly test the breadth of article 1.14(b).

***Huynh v. State*,**
**874 S.W. 2d 184**
**(Tex. App.--Houston [14th Dist.]1994, pet. granted)**

Appellant complained for the first time on appeal that the *complaint* charging him with creating a public nuisance was defective for various reasons. The court of appeals held that appellant waived his right to object to the complaint when he did not raise it at trial, according to article 1.14(b) of the Texas Code of Criminal Procedure. The court found that article 1.14(b)

applies to complaints, even though its text refers only to indictments and informations.

The court of criminal appeals granted discretionary review to determine whether article 1.14(b) applies to complaints in municipal court?

## CONFESSIONS

***Garcia v.State*,**
**___ S.W. 2d ___ No. 71,417**
**(Tex. Crim. App. December 21, 1994)**

"The plain language of art. 38.22, § 2(b), as drafted by the Legislature, requires that, before a written statement of an accused may be admissible, the statement itself, on its face, must show the defendant received the statutory warnings set out in art. 38.22, § 2(a) and, that he knowingly, intelligently, and voluntarily waived those rights."

Here, appellant's written confession was inadmissible because it did not contain, on its face, the knowing, intelligent and voluntary waiver of each of the rights of article 38.22, § 2(a), as required by article 38.22, § 2(b). Waiver is not shown by the fact that appellant initialed each warning on the statement. At best, this only shows that appellant read and understood the warnings. The court has not yet considered whether substantial compliance will satisfy § 2(b), and need not do so here, because there is nothing resembling substantial compliance here. Nor is the error harmless.

Rehearing has been granted in Garcia.

***Stansbury v. California*,**
**114 S.Ct. 1526**
**(1994)**

The undisclosed opinion of the police officer that the defendant was not in custody for the purposes of the *Miranda* warnings is not relevant. Instead, the test is how a reasonable person would have understood the situation.

## DIMINISHED CAPACITY

***Penry v. State*,**
**___ S.W. 2d ___ No. 71,130**
**(Tex. Crim. App. February 22, 1995)**

In this case, appellant sought a jury instruction on the defense of diminished capacity, which was refused by the trial court. Judge Clinton, concurring, agreed that such an *instruction*

would have been an impermissible comment on the weight of the evidence. He further noted, however, that it is appropriate to present *evidence* and *argument* concerning diminished capacity, insofar as such evidence might tend to negate the element of mens rea. Judge Clinton cited two Texas cases to support the notion that diminished capacity evidence is properly admitted to negate specific intent: *Wagner v. State*, 687 S.W. 2d 303 (Tex. Crim. App. 1984); *Cowles v. State*, 510 S.W. 2d 608 (Tex. Crim. App. 1974).

## DOUBLE JEOPARDY

***Bauder v. State*,**
**880 S.W. 2d 502**
**(Tex. App.--San Antonio 1994, pet. granted)**

The court of appeals held that the federal constitutional rule, that retrial is jeopardy-barred only when governmental misconduct complained of was intended to goad the defendant into moving for a mistrial, is also the law under Article I, §14 of the Texas Constitution.

The court of criminal appeals has granted discretionary review to determine whether the federal constitutional rule is incompatible with the state constitutional rule.

***Department of Revenue v. Kurth Ranch*,**
**114 S. Ct. 1937**
**(1994)**

In Kurth Ranch, the question was "whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense." *Id.* at 1941. Several members of the Kurth family were initially prosecuted for trafficking in marijuana. Subsequently, the State of Montana sought to collect some $900,000.00 from the Kurths pursuant to a state law which authorized a tax on the possession and storage of dangerous drugs. The trial court held that a tax assessment of $181,000.00 was authorized, but further held that such an assessment would constitute double jeopardy. *Id.* at 1942-43. The United States Supreme Court agreed.

The Court very clearly stated that the only question it had to resolve was whether the Montana tax was "punishment" in the constitutional sense: "Here, we ask *only* whether the tax has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause." *Id.* at 1945 (emphasis supplied). A careful examination of that tax convinced the Court that it was in fact punitive. Since the tax was punitive, the Double Jeopardy Clause prevented its imposition subsequent to the initial criminal punishment.

*Ward v. State*,
**870 S.W. 2d 659**
**(Tex. App.--Houston [1st Dist.] 1994, pet. ref'd),**
**vacated, 115 S. Ct. 567 (1994)**

The court of appeals held that the assessment of a drug tax did not amount to punishment under the double jeopardy clause.

The Supreme Court granted certiorari and vacated the judgment of the court of appeals. The case was remanded to that court for consideration in light of *Kurth Ranch*. *Ward v. Texas*, 115 S. Ct. 567 (1994).

*Ex parte Fant*,
**881 S.W. 2d 830**
**(Tex. App.--Houston [14th Dist.] 1994, pet. granted)**

Here, appellant was arrested for possession of a controlled substance with intent to deliver. Thereafter, a forfeiture action was initiated against appellant, and appellant and the state entered into an agreed judgment for the forfeiture of $3,823.00 in cash and one cellular telephone. Appellant argued that the forfeiture was "punishment" for double jeopardy purposes, and that the state was therefore precluded from punishing him for possession. Appellant's pretrial writ of habeas corpus was overruled by the trial court, and he appealed to the court of appeals.

The court of appeals found the issue to be simple: "is forfeiture under Chapter 59 `punishment'?" That court considered that, historically, forfeiture has been considered punishment; that the presence of the statutory "innocent owner" defense resembles a punishment; and, that the placement of the forfeiture provisions in the code of *criminal* procedure indicates its purpose is to punish. Based on these factors, the court found the Texas forfeiture statute to be punitive. Accordingly, further punishment by criminal prosecution was barred.

*Ex parte Johnson*,
**882 S.W. 2d 17**
**(Tex. App.--Houston [1st Dist.] 1994, pet. granted)**

The First Court of Appeals disagrees with the Fourteenth Court of Appeals, holding that a forfeiture of property does not work a double jeopardy bar on a subsequent criminal prosecution, under either the federal or state constitutions. Appellant, who was indicted for possession of at least 400 grams of cocaine, had forfeited $11,547.00 cash. This court agreed that the forfeiture statute constituted punishment, but further held that double jeopardy was not implicated because the forfeiture was not "overwhelmingly disproportionate to the damages appellant caused." *Accord, Ex parte Camara, ___ S.W. 2d ___ No. 13-94-048-CR (Tex. App.--Corpus Christi*

*December 1, 1994)*(double jeopardy not implicated absent proof that forfeiture of homestead worth $19,682.00 was not rationally related to the state's loss).

*Broxton v. State*,
888 S.W. 2d 23
(Tex. Crim. App. 1994)

The use of an unadjudicated extraneous offense as evidence in the punishment phase of a capital murder trial, where the death penalty was assessed, does not bar the subsequent prosecution of that offense under either the federal or state double jeopardy clauses.

*Ex parte Smith*,
884 S.W. 2d 551
(Tex. App.--Austin 1994)

Appellant was indicted separately for the aggravated robberies of Bilderbeck, Trevino and Martinez, and was tried first for robbing Martinez. At the punishment phase of this trial, the state proved the robberies of Bilderbeck and Trevino. When the state later tried to prosecute appellant for robbing Bilderbeck and Trevino, appellant complained that this would violate double jeopardy. The court of appeals disagreed.

*Watson v. State*,
877 S.W. 2d 826
(Tex. App.--Fort Worth 1992, pet. granted)

Appellant was arrested and found to be in possession of both heroin and cocaine, and the state prosecuted him for both. On appeal, he argued that possession of heroin and cocaine are in fact possession of a controlled substance, and that this is only one offense. According to appellant, then, he could not be sentenced for both offenses.

The court of appeals disagreed. To determine whether appellant received multiple punishments for the same offense, the court employed the test in *Blockburger v. United States*, 284 U.S. 299 (1932), examining whether the legislature intended that each violation be a separate offense. The court noted that § 481.112(a) of the Health and Safety Code provides that:"Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1." Heroin and cocaine are both Penalty Group 1 substances. Holding that the legislature did not intend to make the Penalty Group, rather than the individual controlled substance, an essential element of the offense, the court of appeals held that jeopardy did not bar the prosecution of both offenses here.

The court of criminal appeals granted discretionary review to determine whether separate convictions for possession of a controlled substance with intent to deliver for both heroin and

cocaine resulting from a single incident of possession violate a defendant's double jeopardy protections.

## DRIVING WHILE INTOXICATED

***Sutton v. State*,**
**858 S.W. 2d 648**
**(Tex. App.--Amarillo 1993, pet. granted)**

In its information the state alleged that appellant drove while intoxicated by reason of the introduction of alcohol into his body. Appellant testified at trial that he had two beers and several drugs, including Prozac, Xanax and Klonopin. Another witness testified that Klonopin causes symptoms that resemble intoxication, and that alcohol enhances its effects. Over appellant's objections, the trial court instructed the jury that it was authorized to convict if it believed that appellant was intoxicated by reason of the introduction of alcohol, either alone, or in combination with Klonopin.

On appeal, appellant argued that the trial court's instruction was defective because it authorized a conviction on a theory not alleged in the information. The court of appeals disagreed. Once appellant introduced evidence that his intoxication was the result of drugs, the trial court was obliged to instruct the jury on the applicable law. "In doing so, the court did not authorize appellant's convictions on a theory not alleged in the information; instead, the court merely applied the law to the facts of this prosecution."

The court of criminal appeals granted discretionary review to determine whether the "synergistic charge," which instructed the jury to convict if it found appellant was intoxicated by alcohol alone or in combination with a controlled substance, impermissibly authorized conviction on a theory not charged in the information, which alleged only alcohol as the intoxicant.

***Stevenson v. State*,**
**___ S.W. 2d ___ No. 17-94**
**(Tex. Crim. App. March 8, 1995)**

The state introduced the intoxilyzer test record through the technical supervisor, as a business record. The officer who administered the test was not called as a witness. Appellant's objection -- that the test results were hearsay, not subject to the business records exception under *Cole v. State*, 839 S.W. 2d 798 (Tex. Crim. App. 1992) -- was overruled.

The court of appeals did not reach appellant's hearsay argument, holding instead that the test results were governed by, and admissible under, article 6701l-5, § 3 of the revised civil statutes.

Discretionary review was granted to determine whether intoxilyzer results are admissible under article 67011-5, even though they are hearsay. The court of criminal appeals vacated the judgment, and remanded to the court of appeals. Article 67011-5, § 3 does not provide for blanket admissibility of evidence of breath test results in cases of driving while intoxicated, regardless of the form of the evidence. Specifically, that statute does not dispense with the hearsay rule. The case is remanded so the court of appeals can determine whether the test results were objectionable as hearsay.

## ENTRAPMENT

### *State v. Taylor*, 886 S.W. 2d 262 (Tex. Crim. App. 1994)

Because a pretrial determination of the defense of entrapment favorable to the accused does not impact the charging instrument, but is, instead, a finding in the nature of an acquittal, the appropriate order is one dismissing the prosecution with prejudice, and is therefore not appealable by the state under article 44.01(a)(1).

### *England v. State*, 887 S.W. 2d 902 (Tex. Crim. App. 1994)

1. "The hallmark of the purely objective test for entrapment is the hypothetical person. Once the defendant can show he has been the target of persuasive police conduct, regardless of whether he was in fact persuaded to commit an offense, the focus is directed to the police conduct itself. The question becomes whether the persuasion used by the law enforcement agent was such as to cause a hypothetical person -- an ordinarily law-abiding person of average resistance -- to commit the offense, *not* whether it was such as to cause the accused himself, given his proclivities, to commit it."

2. The court rejects its former categorical conclusion that evidence of extraneous misconduct can never be admissible to rebut entrapment.

3. The court also re-examines its former views and holds that § 8.06 of the Penal Code "does codify a mixed subjective/objective test for entrapment after all." "We therefore hold that § 8.06 requires an accused who claims entrapment to produce evidence that he was actually induced to commit the charged offense; that is to say, that he committed the offense 'because he was induced to do so.'" That is, entrapment embraces both subjective and objective components.

4. Accordingly, evidence of prior sales are admissible it they are relevant to the question whether appellant was actually induced by the informant's persistent conduct. Evidence that

appellant readily agreed on previous occasions to sell drugs through this informant is relevant to the fact that he agreed to do so on this occasion without persuasion.

5. Extraneous offenses may also be admissible to show context. Here, the prior sales were not relevant to the question of later persuasion.

## EVIDENCE

***Kipp v. State*,**
**876 S.W. 2d 330**
**(Tex. Crim. App. 1994)**

A party has the absolute right to make bill of exception in question and answer form.

## EXPERT WITNESSES

***Jordan v. State*,**
**877 S.W. 2d 902**
**(Tex. App.--Fort Worth 1994, pet. granted)**

There is a long line of Texas cases affirming the trial court's decision not allowing the defense to present expert testimony as to the reliability of eyewitness testimony. *Pierce v. State*, 777 S.W. 2d 399, 414-416 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2603 (1990); *accord*, *Rousseau v. State*, 855 S.W.2d 666, 685-86 (Tex. Crim. App. 1993).

There is reason to believe, however, that this issue may not be definitively decided in Texas. *Pierce* was expressly based on an interpretation of Rule 702 given by several federal courts. *Pierce v. State*, 777 S.W. 2d at 415. Interestingly, both before and after *Pierce* was decided, the Fifth Circuit has held that expert testimony on the reliability of eyewitness testimony is "proper." The test on appeal is whether the trial court abused its discretion in excluding this evidence. *See United States v. Moore*, 786 F. 2d 1308, 1312-1313 (5th Cir. 1986)(no abuse of discretion shown); *accord, Cantu v. Collins*, 967 F. 2d 1006, 1016 (5th Cir. 1992). Additionally, *Pierce* noted that the failure of the expert to "fit" his testimony with the evidence in the trial further reduces the likelihood that the jury would have been measurably assisted by the evidence. Finally, the court said this in a footnote: "In this case, we do not hold that expert testimony concerning eyewitnesses should be excluded in *all* cases nor confused with a situation in which a party complains when such testimony <u>is</u> admitted into evidence." *Pierce v. State*, 777 S.W. 2d at 416(emphasis in original); *see also Rousseau v.State*, 855 S.W.2d 666, 685-86 (Tex. Crim. App. 1993)("failure to fit [expert's] testimony to the evidence in this case greatly reduced the likelihood that the jury would be reasonably aided by this testimony")

In *Jordan*, the court of appeals agreed that the expert did fit his testimony more closely than did the expert in *Rousseau*. Still, the court affirmed the trial court's decision to exclude the expert. "The failure of the expert to conduct a thorough, fact specific analysis of the eyewitness identifications adversely affected the value of the testimony to the jury, and the trial court could properly have found that cross-examination of the witnesses provided the jury with the same information without creating unnecessary confusion."

The court of criminal appeals granted discretionary review to determine whether the court of appeals erroneously upheld the exclusion of an expert on the factors affecting eyewitness identification.

***Aguilar v. State*,**
**887 S.W. 2d 27**
**(Tex. Crim. App. 1994)**

1. Experts may rely on information not within their personal knowledge.

2. "Before we adopted the Texas Rules of Criminal Evidence, our case law held that an expert opinion was not admissible if based entirely upon hearsay. Rule 703 now provides otherwise."

***Williams v. State*,**
**___ S.W. 2d ___ No. 0592-93**
**(Tex. Crim. App. December 14, 1994)**

The trial court did not err in this telephone harassment case in excluding expert testimony concerning appellant's psychological profile. The court recognized that this evidence was "potentially helpful" to the jury. It was not helpful in fact, though, because the psychologist did not specifically apply his psychological profile testimony to actual characteristics possessed by appellant. The psychologist did not connect his generic testimony to the facts of the case.

***Gabriel v. State*,**
**842 S.W. 2d 328**
**(Tex. App.--Dallas 1992, pet. granted)**

The state seized 54 small baggies containing rocks of suspected crack cocaine weighing 35.2 grams. The chemist scientifically tested only five of these baggies, discovering 2.237 grams of cocaine. She opined that, based on a visual inspection of the remaining baggies, they too contained cocaine. The court of appeals held that the evidence was sufficient to support appellant's conviction for possessing more than 28 grams of cocaine. The court also concluded that the trial court did not err in permitting the chemist to give her opinion as to the contents of the untested material after a visual inspection.

The court of criminal appeals granted appellant's petition for discretionary review to determine whether the state may examine only samples of the alleged contraband and extrapolate as to the rest of the substance to establish its weight and purity. The court held that the state "met its minimum burden of proof" here. "The State showed the random samples were the alleged controlled substance, and the total weight of the substance seized was within the range of that alleged. It was rational for the fact finder to conclude that identically packaged substances, which appear to be the same substance, are in fact the same substance. The manner of testing the substances by random sampling goes only to the weight the jury may give to the tested substances in determining the untested substance is the same as the tested substance. In addition, appellant could have conducted independent chemical tests on all fifty-four baggies to show they did not contain the same substance." *Gabriel v. State*, ___ S.W. 2d ___, ___ No. 0088-93 (Tex. Crim. App. March 8, 1995), slip op. 2.

## EXTRANEOUS OFFENSES

***Pavlacka v. State,***
**___ S.W. 2d ___No. 346-93**
**(Tex. Crim. App. December 14, 1994)**

The complainant in this aggravated sexual assault case was impeached. The state argues that this impeachment made extraneous assaults against the same complainant admissible. The court disagrees.

First, the evidence is not admissible to rebut defensive evidence that the complainant 's testimony was the product of improper influence or motive. Appellant did not suggest influence or motive. Also, the state did not argue this at trial.

Second, the extraneous evidence was not admissible to rebut appellant's emphatic denials that he committed the instant offense. This is not a permissible use of extraneous evidence under Rule 404(b).

Third, an impeached complainant in a sexual assault case cannot logically rehabilitate himself with testimony of other crimes, wrongs or acts under Rule 404(b). The question is credibility. The mere repetition of allegations from a source of dubious credibility does not render that source any more credible.

***Harrell v. State,***
**884 S.W. 2d 154**
**(Tex. Crim. App. 1994)**

1. For years, the court has held that the standard for admissibility of extraneous offenses is "clear" proof, without clarifying what is meant by "clear" proof. The logical interpretation is

that clear proof means proof beyond a reasonable doubt. Thus, the standard of admissibility for extraneous offense evidence is proof beyond a reasonable doubt.

2. While the trial court might not be compelled to make a preliminary finding under Rule 104(a) as to the proof of extrinsic evidence, under Rule 104(b) it must nevertheless make an initial determination as to the relevancy of the evidence, dependent upon the fulfillment of a condition of fact.

3. "We therefore hold that in deciding whether to admit extraneous offense evidence in the guilt/innocence phase of trial, the trial court must, under rule 104(b), make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense."

***England v. State*,**
**887 S.W. 2d 902**
**(Tex. Crim. App. 1994)**

The court rejects its former categorical conclusion that evidence of extraneous misconduct can never be admissible to rebut entrapment. Evidence of prior sales are admissible it they are relevant to the question whether appellant was actually induced by the informant's persistent conduct. Evidence that appellant readily agreed on previous occasions to sell drugs through this informant is relevant to the fact that he agreed to do so on this occasion without persuasion. Extraneous offenses may also be admissible to show context. Here, the prior sales were not relevant to the question of later persuasion.

***George v.State*,**
**890 S.W. 2d 73**
**(Tex. Crim. App. 1994)**

"Thus, we hold, if the defendant so requests at the guilt/innocence phase of trial, the trial court must instruct the jury not to consider extraneous offense evidence admitted for a limited purpose unless it believes beyond a reasonable doubt that the defendant committed the extraneous offense."

***Buchanan v. State*,**
**881 S.W. 2d 376**
**(Tex. App.--Houston [1st Dist.] 1994, pet. granted)**

Appellant complained at trial that extraneous offense evidence was inadmissible because the state had not given him notice, as required by rule 404(b) of the Rules of Criminal Evidence. The state argued that it provided sufficient notice by giving appellant a copy of an offense report which referred to the extraneous offense in question. The court of appeals agreed. "We agree that the notice requirement is fulfilled by giving defendant access to the evidence of extraneous

offenses via the State's open files policy." Appellant cannot claim surprise because he had actual notice of the extraneous offense.

The casual reader of rule 404(b), however, will note that that rule does not provide an actual notice exception. Rather, it requires that the state give reasonable notice "of *intent to introduce* in the State's case in chief such evidence other than that arising in the same transaction."

The court of criminal appeals granted discretionary review to determine whether the state's open file policy prior to trial is sufficient compliance with a request under Tex. R. Crim. Evid. 404(b) for notice of intent to use extraneous offense evidence.

***Brown v. State*,**
**880 S.W. 2d 249**
**(Tex. App.--El Paso 1994)**

The trial court erred in admitting impeachment evidence of a prior conviction of which the state failed to notify appellant, despite his request for notice under Rule 609(f). The phrase "is not admissible" means mandatory exclusion in those instances where the state fails to give notice of its intent to introduce extraneous evidence. It is immaterial whether appellant himself had actual knowledge of the conviction. Unfortunately for appellant, she failed to preserve error with a timely and specific objection when the evidence was admitted.

***McGlothlin v. State*,**
**___ S.W. 2d ___, No. 022-94**
**(Tex. Crim. App. March 8, 1995)**

Various extraneous offenses were admitted at the guilt/innocence phase, over appellant's objection. Appellant did not testify at the first phase of the trial, but he did at punishment, at which time he admitted both the instant offense, as well as the extraneous offenses. On direct appeal appellant contended that the extraneous offenses were erroneously admitted.

There has long been a rule of law in Texas, akin to the law of curative admissibility, which has come to be known as the *DeGarmo* doctrine. Under the *DeGarmo* doctrine, all error which occurs at the guilt/innocence phase of the trial is deemed waived if the defendant admits his guilt to the charged offense. This case purports to re-examine the *DeGarmo* doctrine, and, after doing so, to reaffirm its validity. "After the complainant testified and the jury found appellant guilty, appellant testified at the punishment phase in support for his application for probation. Had appellant chosen to not testify, he would not be faced with the issue of waiver. However, when appellant admitted the charged offense the *DeGarmo* doctrine controlled and he waived all error committed during the guilt/innocence phase of his trial."

Error that occurs at punishment is *not* waived. Also, the court must carefully examine the

elements of the offense to ensure that a judicial confession, was, in fact, given.

***Rankin v. State*,**
**872 S.W. 2d 279**
**(Tex. App.--Houston [14th Dist.] 1994, pet. granted)**

Appellant requested a limiting instruction at the time the trial court admitted extraneous offenses. The trial court denied this contemporaneous instruction, instead giving the standard instruction later, in the court's charge to the jury. On appeal, appellant did not complain of the wording of the instruction given, only of its timing, contending that he was entitled to a contemporaneous limiting instruction under Rule 105 of the Texas Rules of Criminal Evidence. The court of appeals disagreed, and affirmed the conviction. "Although we agree with Appellant that the better practice would be to give limiting instructions at the time evidence is admitted, Rule 105 contains no such requirement. It is left to the sound discretion of the trial court to determine when to give the limiting instruction to the jury."

Appellant's petition for discretionary review was granted to determine whether appellant was entitled to a limiting instruction concerning extraneous offenses at the time the evidence is admitted.

According to one commentator, Rule 105 represents a "marked change in procedure in limiting testimony. . . . The trial court now, upon request, *at the time of admission* of evidence of limited admissibility *shall* restrict the evidence to its proper scope and instruct the jury accordingly." 8 M. McCormick & T. Blackwell, Texas Criminal Forms and Trial Manual, § 88.00 (Texas Practice 9th Ed. Supp. 1994)(emphasis in original); *see also Thompson v. State*, 795 S.W.2d 177, 178 (Tex. Crim. App. 1990)(Judge Miller, joined by Judges Clinton and Teague, dissenting to the dismissal of the petition for discretionary review, assert that the "trial judge who decides not to follow this 'better practice' in the future runs the risk of being reversed for abuse of discretion should an appellate court find that the failure to timely instruct the jury resulted in harm under Tex. R. App. Proc. 81(b)(2) . . . .").

## GUILTY PLEAS

***Morales v. State*,**
**872 S.W. 2d 753**
**(Tex. Crim. App. 1994)**

Appellant pleaded guilty and the trial court completely failed to admonish him regarding immigration consequences as required by article 26.13(a)(4) of the code of criminal procedure. This is reversible error. There is no need for appellant to show harm where there is a total failure to admonish.

***Dixon v. State,***
**___ S.W. 2d ___No. 3-94-431-CR**
**(Tex. App.--Austin January 18, 1995)**

In *Morales*, the record was silent as to the defendant's citizenship. In *Dixon*, the court inquired of the defendant's citizenship, and learned that he was a U.S. citizen. The district court substantially complies with article 26.13(a)(4) when it inquires of defendant's citizenship and receives his assurance on the record that he is a U.S. citizen. In such a case, the immigration admonishment is immaterial to the defendant's guilty plea. *Accord, Cain v. State*, ___ S.W. 2d ___, ___ No. 2-94-044-CR (Tex. App.--Fort Worth January 11, 1995), slip op. 9.

***Ray v.State,***
**877 S.W. 2d 425**
**(Tex. App.--Eastland 1994, pet. granted)**

Appellant pleaded guilty to theft, and the trial court placed him on deferred adjudication, without warning him of the possible consequences of a revocation of deferred adjudication, in violation of article 42.12, § 5 of the Texas Code of Criminal Procedure. When his deferred was later revoked and he was sentenced to life imprisonment, he appealed.

The court of appeals reversed, holding that appellant's guilty plea was not knowing and voluntary. Article 42.12, § 5, unlike article 26.13, does not contain a substantial compliance provision, nor is one implied. Moreover, there was a total failure to admonish here. This is a mandatory provision, not subject to harmless error analysis.

The court of criminal appeals granted discretionary review to determine the following questions: Was it error to hold that no admonishment of the consequences of deferred adjudication probation was given to appellant by the trial court? 2. Was appellant's plea rendered involuntary due to the trial court's failure to give him the art. 42.12 § 5(a) admonishment? 3. If failure to admonish as required by article 42.12 § 5(a) is error, is said error subject to a harm analysis?

The Fourteenth court of Appeals sitting in Houston disagrees with *Joyner*. Discretionary review has also been granted in this case. *Joyner v. State, 882 S.W. 2d 59 (Tex. App.--Houston [14th Dist.] 1994, pet. granted).*

## HABEAS CORPUS

*Ex rel. Holmes v. Third Court of Appeals*,
885 S.W. 2d 389
(Tex. Crim. App. 1994)

The good news is that the court overrules a long line of cases and holds that factual innocence may be raised by writ of habeas corpus as a violation of federal due process.

The bad news is that the standard for relief is impossibly high. First, in order to be entitled just to present the evidence in habeas, the applicant bears a high threshold burden. "[A]n applicant seeking habeas relief based on a claim of factual innocence must, as a threshold, demonstrate that the newly discovered evidence, if true, creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different. Once that threshold has been met the habeas court must afford the applicant a forum and opportunity to present his evidence." Once the threshold has been met, appellant really bears a high burden. "Therefore, we hold that in order to be entitled to relief on a claim of factual innocence the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt." As Judge Clinton notes, "any evidence sufficient to support a jury's verdict beyond a reasonable doubt at trial will also be sufficient to support a rational jury's guilty verdict even after adding the most compelling newly discovered evidence to the mix."

## INDIGENTS

*Brooks v. State*,
893 S.W. 2d 604 No. 2-91-305-CR
(Tex. App.--Fort Worth December 21, 1994)

The trial court erred, under Rule 614, in not providing to appellant a transcription of the testimony of eyewitness Madewell, given at the trial of appellant's co-defendant. The statement was in the state's possession because it was readily accessible to the state. Appellant had a particularized need for the transcript to impeach the

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## INJURY TO A CHILD

***Collins v.State,***
**___ S.W. 2d ___ No. 08-93-00404-CR**
**(Tex. App.--El Paso December 22, 1994)**

Appellant, a crack cocaine addict, smoked cocaine during her pregnancy, which caused her unborn child to be born in a state of addiction. In a case of first impression, the El Paso court of appeals holds that a woman cannot be prosecuted for reckless injury to a child for conduct committed while pregnant which causes injury to her subsequently born child. The statute, § 22.04 of the Texas Penal Code, is unconstitutionally vague, because it does not give appellant notice that her conduct was prohibited.

## JOINDER

***Watson v. State,***
**877 S.W. 2d 826**
**(Tex. App.--Fort Worth 1992, pet. granted)**

Appellant was arrested and found to be in possession of both heroin and cocaine. He was convicted of possession with intent to deliver both drugs. On appeal he contended that it was illegal to convict him of separate convictions for two counts in a single indictment.

The court of appeals disagreed, holding that joinder is permitted under the Texas Health and Safety Code if the joined offenses arise out of the same criminal episode.

Discretionary review has been granted to determine whether separate convictions for two counts in a single indictment violate the prohibition against multiple convictions arising out of a single charging instrument.

## JURY

***Price v.State,***
**887 S.W. 2d 949**
**(Tex. Crim. App. 1994)**

In a case of first impression, the court of criminal appeals holds that the trial court does not abuse its discretion in permitting jurors to take notes. As a procedural safeguard, the court suggested a lengthy process, including a detailed jury instruction.

*Hubbard v. State*,
___ S.W. 2d ___ No. 793-91
(Tex. Crim. App. February 15, 1995)

The trial court allowed the jury to take notes and to use the notes during jury selection. "Although the trial court's ruling may not have been in full compliance with this Court's suggested procedures of Price, supra, there was no abuse of discretion on the part of the trial court." The court of appeals "correctly addressed the issue presented under the law extant at that time."

*Huynh v. State*,
874 S.W. 2d 184
(Tex. App.--Houston [14th Dist.] 1994, pet. granted)

Appellant complained that the municipal court erred in proceeding to trial without a written jury waiver, in violation of article 1.13(a) of the Texas Code of Criminal Procedure. The court of appeals held that article 1.13(b) does not apply to prosecutions in municipal court where the maximum punishment is no more than a fine. There is no requirement that the jury waiver be in writing in municipal court.

The court of criminal appeals granted discretionary review to determine whether article 1.13(a) requires a written jury waiver in class C misdemeanor trials?

## JURY CHARGE

*England v. State*,
887 S.W. 2d 902
(Tex. Crim. App. 1994)

Where extraneous offenses were admitted as relevant to rebut the persuasion element of appellant's entrapment defense, he was entitled to a limiting instruction under Rule 105(a) to the effect that the jury limit its consideration of these offenses to the issue of whether he in fact engaged in the conduct charged because he was induced to do so by a law enforcement agent. Additionally, appellant could have the jury instructed that it not consider the extraneous misconduct when determining whether the persuasion was likely to cause ordinary law abiding citizens to commit the crime. Finally, the jury should be instructed that it is not to consider the extraneous misconduct when determining the primary question whether appellant in fact committed the alleged offense.

*Moore v. State*,
874 S.W. 2d 671
(Tex. Crim. App. 1994)

The jury requested a read-back of certain testimony, but appellant objected, because the jury

did not certify that there was a dispute as to a particular part of the testimony. The trial court overruled the objection and the read-back occurred. This was error. Article 36.28 of the Texas Code of Criminal Procedure is clear and requires that the jury certify their disagreement about a specified part of the testimony before it will be read back. "A simple request for testimony does not, by itself, reflect disagreement, implicit or express, and is not a proper request under Art. 36.28."

***Rankin v. State*,**
**872 S.W. 2d 279**
**(Tex. App.--Houston [14th Dist.] 1994, pet. granted)**

Appellant requested a limiting instruction at the time the trial court admitted extraneous offenses. The trial court denied this contemporaneous instruction, instead giving the standard instruction later, in the court's charge to the jury. On appeal, appellant did not complain of the wording of the instruction given, only of its timing, contending that he was entitled to a contemporaneous limiting instruction under Rule 105 of the Texas Rules of Criminal Evidence. The court of appeals disagreed, and affirmed the conviction. "Although we agree with Appellant that the better practice would be to give limiting instructions at the time evidence is admitted, Rule 105 contains no such requirement. It is left to the sound discretion of the trial court to determine when to give the limiting instruction to the jury."

Appellant's petition for discretionary review was granted to determine whether appellant was entitled to a limiting instruction concerning extraneous offenses at the time the evidence is admitted.

According to one commentator, Rule 105 represents a "marked change in procedure in limiting testimony. . . . The trial court now, upon request, *at the time of admission* of evidence of limited admissibility *shall* restrict the evidence to its proper scope and instruct the jury accordingly." 8 M. McCormick & T. Blackwell, Texas Criminal Forms and Trial Manual, § 88.00 (Texas Practice 9th Ed. Supp. 1994)(emphasis in original); *see also Thompson v. State*, 795 S.W.2d 177, 178 (Tex. Crim. App. 1990)(Judge Miller, joined by Judges Clinton and Teague, dissenting to the dismissal of the petition for discretionary review, assert that the "trial judge who decides not to follow this 'better practice' in the future runs the risk of being reversed for abuse of discretion should an appellate court find that the failure to timely instruct the jury resulted in harm under Tex. R. App. Proc. 81(b)(2) . . . .").

## LESSER INCLUDED OFFENSES

***Bignall v. State*,**
**887 S.W. 2d 21**
**(Tex. Crim. App. 1994)**

The trial court erred in not submitting the lesser included offense of theft in this aggravated robbery case. The *Royster* test was recently "refined" in *Rousseau*. The issue here is whether there

is *any* evidence in the record which would permit a rational jury to find the defendant guilty only of theft. "Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge." Here, appellant is entitled to an instruction because there was some evidence that would permit a rational jury to find that a gun was not used or exhibited. Although the clerk testified a gun was used, appellant and a co-defendant testified that no gun was used. The court of appeals erred in focusing on appellant's testimony that no offense at all was committed.

## MOTION FOR NEW TRIAL

***Lopez v. State*,**
**___ S.W. 2d ___No. 13-93-313-CR**
**(Tex. App.--Corpus Christi December 8, 1994)**

After pleading guilty and being sentenced to prison, appellant filed a motion for new trial alleging that his plea was involuntary because trial counsel had promised him probation. At the hearing on the motion for new trial, the state offered trial counsel's affidavit which denied any such promises. The trial court offered appellant the opportunity to cross-examine trial counsel, but, when he tried, counsel invoked the Fifth Amendment. The court of appeals abated the appeal and remanded the case to the trial court, holding that introduction of the affidavit denied appellant his right to cross-examination and confrontation.

***Jordan v. State*,**
**883 S.W. 2d 664**
**(Tex. Crim. App. 1994)**

If appellant asserts reasonable grounds for relief and not mere conclusions, a hearing on a motion for new trial is mandatory if these assertions are not determinable from the record.

***Hight v. State*,**
**879 S.W. 2d 111**
**(Tex. App.--Houston [14th Dist.] 1994, pet. granted)**

Trial courts have the power to grant new trials as to sentencing only. Contra State v. Bates, 833 S.W. 2d 643 (Tex. App.--Eastland 1992, pet. granted). The court of criminal appeals has granted discretionary review to resolve this dispute.

## OPENING STATEMENT

*Penry v. State,*
___ S.W. 2d ___ No. 71,130
(Tex. Crim. App. February 22, 1995)

The trial court denied appellant's request to make an opening statement preceding the punishment phase of his capital murder trial, and he appealed. The court of criminal appeals affirmed. First, article 36.01, which establishes the right to make an opening, does not apply to the punishment phase of trial. Second, the appellant only has the right to open if the state opens, which it did not.

## PRIVILEGES

*Ex rel. Healey v. McMeans,*
884 S.W. 2d 772
(Tex. Crim. App. 1994)

Tell your journalist friends that, in Texas, despite what they may have learned in journalism school, there is no journalist privilege.

*McBride v. State,*
1993 WL 368897
(Tex. App.--Houston [1st Dist.] 1993, pet. granted)

Appellant was hospitalized following a fatal car crash. The state obtained appellant's medical records by grand jury subpoena, and these records disclosed a blood alcohol level over the legal limit. These medical records were introduced at trial and appellant was convicted of involuntary manslaughter.

On appeal appellant contended that his medical records were protected by Tex. Rev. Civ. Stat. Ann. art. 4495(b), § 5.08(b), which provided that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section." Appellant also claimed he had a legitimate expectation of privacy in the records, as recognized by the case of *Comeaux v. State*, 818 S.W. 2d 46 (Tex. Crim. App. 1991). The court of appeals disagreed with both contentions. First, the court held that the medical records privilege found in art. 4495(b), § 5.08(b) was repealed when the court of appeals enacted Rule 509 of the Texas Rules of Criminal Evidence, which provides that there is no physician-patient privilege in criminal cases. This repeal also indicates that, contrary to *Comeaux*, society is no longer prepared to recognize a reasonable expectation of privacy in medical records. "Society can afford the physician-patient privilege in certain civil cases in order to protect personal privacy, but the need to protect the public from crime

requires disclosure of the same information in criminal cases."

Appellant's petition for discretionary review was granted to consider several issues: Does Rule 509 abrogate the doctor/patient privilege and the medical records privilege of article 4495(b), § 5.08(b)? Does Rule 509 abridge or modify the substantive rights of a litigant? Does an individual possess a state or federal constitutional right to privacy in his medical records? Does Rule 509 address records or only communications?

***Ludwig v. State*,**
**872 S.W. 2d 771**
**(Tex. App.--Waco 1994, pet. granted)**

Appellant was tried for the capital murder of two minor children, neither of whom was his or his former wife's child. The state presented testimony from his former wife that, while they were married, appellant had spoken of killing the two children. The state asserted that this testimony was not protected by the marital privilege, because it came under the exception provided by Rule 504(1)(d)(2), which applies when the "accused is charged with a crime against the person of any minor child or any member of the household of either spouse . . . ." Appellant objected that this exception was inapplicable because the two children were not "minor child[ren] . . . of either spouse." The trial court admitted the testimony, and appellant was convicted.

The court of appeals affirmed the conviction, holding that the phrase "of either spouse" does not modify "any minor child." That is, the marital exception is inapplicable whenever the trial is for a crime against a minor child, whether or not that child is a child of either spouse.

Discretionary review was granted to determine whether the Rule 504(1)(d)(2) exception, applies in any case involving any minor child, without regard to whether that child is the child "of either spouse."

## PROSECUTORIAL MISCONDUCT

***Powell v. State*,**
**___ S.W. 2d ___ No. 71,399**
**(Tex. Crim. App. December 7, 1994)**

Although the court felt no need to reach these issues, in light of its disposition on other grounds, it did make some interesting observations concerning "a pattern by the State and trial court of disregard for certain basic constitutional principles." "Points one and two, for example, complain of the lynch-mob atmosphere created by the single file entry into the courtroom of about eighty-five uniformed and armed police officers with mourning ribbon taped over their badges. It is particularly unsettling that the demonstration was apparently orchestrated by the prosecuting attorney to give effect to his closing argument. Appellant complains that the defense's closing argument was made

over the head of a police officer sitting on the floor within the bar because of the crowded condition of the court room."

***Brown v. State,***
**883 S.W. 2d 389**
**(Tex. App.--Fort Worth 1994, pet. granted)**

The trial court erred in permitting the prosecutor to continue as lead counsel in the case after she testified before the jury that no deals had been made with the chief witness against the state. The prosecutor was allowed to make the closing argument, in which she, in effect, testified that her version of the events was more credible than appellant's. This was erroneous.

The court of criminal appeals has granted discretionary review to determine whether the trial court erroneously allowed the prosecutor to continue prosecuting the case after she testified as a witness before the jury.

***Johnson v. State,***
**889 S.W. 2d 12**
**(Tex. App.--San Antonio 1994)**

The court "disapprove[s]" of the prosecutor urging the jury to return a quick verdict. The error was waived, however, by the failure to object.

## PUBLIC LEWDNESS

***Todd Bonham v. State,***
**1993 WL 524760**
**(Tex. App.--Dallas 1993, pet. granted)**

One way to commit public lewdness is to engage in sexual contact while being reckless about whether "another" who is present who might be offended or alarmed. Tex. Penal Code Ann. § 21.07. In this case, the information alleged that appellant touched complainant LaLonde's breast and that he was reckless about whether Ms. Lalonde was present and would be offended and alarmed by his acts. In other words, the complainant and the "another person" contemplated by the statute were one and the same person. Appellant contended that the public lewdness statute is meant to punish the commission of a sexual act which may be thrust upon an unwilling observer, not the complainant who is a participant in the act. Appellant also contended that the place where he did the touching -- within the treatment room of a dentist's office -- was not a public place.

The court of appeals disagreed with both contentions. "Another" is simply some person other than appellant. "Nothing in the language of section 21.07(a) limits `another' to third party observers, nor does the definition of `another' support such an interpretation. We conclude that the complainant

falls under the definition of `another' and that such an interpretation does not lead to an absurd result." The treatment room is a public place, even though the public does not have general access to it. Patients were brought to the room throughout the day. The room had no doors and anyone, including a member of the public, could readily see inside.

The court of criminal appeals granted discretionary review to decide: Under § 21.07(a), can the complainant be "another" who is offended by appellant's actions; and, Was the examining room a "public place" for purposes of the statute.

***Hines v. State,***
**880 S.W. 2d 178**
**(Tex. App.--Texarkana 1994, pet. granted)**

In this case, appellant engaged in sexual contact with a 13 year old. Inexplicably, the state did not charge him with indecency with a child, but instead, with public lewdness. Specifically, appellant was charged with engaging in sexual contact with the child while being reckless about whether the child was present and would be offended and alarmed by the act. The Texarkana court concluded that the evidence was insufficient to prove that appellant was reckless about whether another was present, because it showed only that the complainant was present. "The public lewdness offense is designed to protect members of the public from being offended or alarmed by what someone is doing." The state's position -- that the child complainant is the "other person present" -- is legally untenable.

The court of criminal appeals granted discretionary review to decide whether the legislature intended to limit the application of the public lewdness statute to only those situations in which a third party was present who witnessed and was offended by the defendant's reckless conduct.

## RESISTING ARREST

***Mayorga v. State,***
**876 S.W. 2d 176**
**(Tex. App.--Dallas 1994 , pet. granted)**

Mayorga was charged with resisting arrest. She argued in the trial court that the arrest she allegedly resisted was made without probable cause, and was therefore illegal. The trial court agreed that her arrest was illegal, and accordingly, that court suppressed the evidence that she resisted. The court of appeals reversed. "Because appellee's act of resistance, and consequently the distinct evidence of her resistance, did not exist before the illegal arrest nor was it the consequence of any police conduct purposely designed to elicit her resistance, it was not obtained through exploitation of the illegal arrest. Accordingly, because the evidence was not the product of the unlawful arrest, it was not obtained in violation of appellee's constitutional rights or state law. We hold that the trial court erred in applying the federal exclusionary rule and article 38.23 to the facts of this case to

suppress the challenged evidence."

The court of criminal appeals granted discretionary review to determine whether article 38.23 requires suppression of evidence of resisting arrest when the defendant has been illegally arrested?

## SEARCH AND SEIZURE

### *Autran v. State*, 887 S.W. 2d 31 (Tex. Crim. App. 1994)

1. The Texas Constitution provides more protection than the federal constitution with regard to inventory searches. Specifically, the inventory of closed containers within a trunk, and a plastic key box within the passenger compartment of the vehicle are prohibited.

2. "To determine whether our Constitution provides greater protection than its federal counterpart, we find the following factors helpful, although not independently dispositive: (A) a textual examination of the constitutional provision; (B) the Framer's intent; (C) history and application of the constitutional provision; (D) comparable jurisprudence from other states; and (E) the practical policy considerations behind the constitutional provision."

3. Textually, the two provisions are similar. The similarity, however, appears to be merely a coincidence of historical fact. More analysis is needed.

4. There is little evidence of the Framer's intent.

5. Similarities exist between the Massachusetts Constitution, Article I, section 9, and the Fourth Amendment. It is therefore significant that Massachusetts has provided that its constitution provides greater protection than the Fourth Amendment. This provides evidence that article I, section 9 was intended to provide broader protection as well.

6. Several other states have held that their constitutions are more protective regarding inventory searches.

7. Practical, policy reasons are to be considered.

8. "After considering the foregoing factors, we hold that art. I, § 9 provides a privacy interest in closed containers which is not overcome by the general policy considerations underlying an inventory." "The officer's interest in the protection of appellant's property, as well as the protection of the agency from claims of theft, can be satisfied by recording the existence of and describing and/or photographing the closed or locked container."

***Crittenden v. State,***
**No. 3-91-581-CR**
**(Tex. App.--Austin April 14, 1993, pet. granted)**

It is settled in Texas that there is no pretext arrest doctrine under the Fourth Amendment of the federal constitution. *See Garcia v. State*, 827 S.W. 2d 937 (Tex. Crim. App. 1992). *In this* case, the court of appeals avoided the related question under the Texas Constitution by holding that an issue of a pretext stop was not raised at all under these facts.

The court of criminal appeals granted discretionary review to determine whether this arrest was an impermissible pretext arrest under the Texas Constitution.

***Johnson v. State,***
**864 S.W. 2d 708**
**(Tex. App.--Dallas 1993, pet. granted)**

In *California v. Hodari D., 111 S. Ct. 1547 (1991)*, the Supreme Court held that, as a matter of federal constitutional law, physical evidence disposed of during a chase is not suppressible because the person being chased has not been seized.

In *Johnson*, the court of appeals held that, because appellant did not comply with the officer's command to stop running, the officers's show of authority in chasing him and shouting at him did not constitute a seizure under the Fourth Amendment. The court went on to adopt the *Hodari* standard under Article I, § 9 of the Texas Constitution.

The court of criminal appeals has granted discretionary review to determine whether the court of appeals erred in adopting *Hodari*, as a matter of state constitutional law.

***John Anthony Love v. State,***
**No. 03-92-00538-CR**
**(Tex. App.--Austin, pet. granted)**

In this case the court of criminal appeals granted discretionary review to decide whether the "totality of circumstances" test established in *Illinois v. Gates* for application under the federal constitution is also the test under Article I, § 9 of the Texas Constitution.

***Daugherty v. State,***
**876 S.W. 2d 522**
**(Tex. App.--Fort Worth 1994, pet. granted)**

In *Nix v. Williams*, 467 U.S. 431 (1984), the Supreme Court established the federal constitutional rule that evidence of a body discovered in violation of the Sixth Amendment right to counsel is admissible if the state can prove by a preponderance of the evidence that the body would

have inevitably been discovered anyway. The Fort Worth Court of Appeals held that there is no inevitable discovery exception to the exclusionary rule of article 38.23 of the Texas Code of Criminal Procedure.

The court of criminal appeals has granted discretionary review.

***Brimage v. State,***
**___ S.W. 2d ___ No. 70,105**
**(Tex. Crim. App. September 21, 1994)**

1. It is well established under *federal* constitutional law that a search by private persons does not require exclusion of evidence. "However, such a conclusion concerning our statutory exclusionary rule is by no means certain." *See Tex. Code Crim. Proc. Ann. art. 38.23.*

2. This warrantless search was not justified by the inevitable discovery doctrine. First, this contention rests upon unsubstantiated assumptions which were not raised below, and which appellant did not attempt to rebut. Also, the federal inevitable discovery doctrine is inapplicable because appellant sought suppression under article 38.23.

Rehearing has been granted.

## SENTENCING

***Flores v. State,***
**885 S.W. 2d 439**
**(Tex. App.-- Tyler 1993, pet. granted)**

Following his conviction for DWI, the trial court refused to grant appellant probation, finding that "there are no provisions in this county to help Spanish speaking people who are convicted of alcohol offenses." The court of appeals held that the trial court did not impermissibly discriminate against appellant because the requirement that he be able to understand, participate in and profit from the county's treatment program was rational and showed no animosity toward appellant's racial or ethnic group.

The court of criminal appeals granted discretionary review to determine whether the trial court impermissibly took appellant's race into account when determining whether to grant probation.

***Tyra v. State,***
**868 S.W. 2d 857**
**(Tex. App.--Fort Worth 1993, pet. granted)**

Appellant was convicted of involuntary manslaughter, by accident or mistake, while operating a motor vehicle while intoxicated. The jury made an affirmative finding *that a* deadly weapon had been used. On appeal, appellant contended that there can be no deadly weapon finding if the offense is committed by accident or mistake when operating a motor vehicle while intoxicated.

The court of appeals disagreed. "We hold that the intentional, reckless, or negligent operation of a motor vehicle, while intoxicated, resulting in death or serious bodily injury, will support a finding that the vehicle is a deadly weapon."

The court of criminal appeals granted discretionary review to determine whether the court of appeals erred in sustaining the entry of a deadly weapon finding following appellant's conviction for involuntary manslaughter under § 19.05(a)(2) of the Texas Penal Code. *See also Kenneth Linwood Walker v. State*, ___ S.W. 2d ___ (Tex. App.--pet. granted).

***Anderson v. State,***
**868 S.W. 2d 915**
**(Tex. App.--Fort Worth 1994, pet. granted)**

Article 37.07, § 3(a) was amended in 1993 to provide for the widespread admission of extraneous offenses at the punishment phase of a non-capital trial. This case, though, occurred before the effective date of that statute. The court of appeals held that, even under the old, more restrictive statute, the state was permitted to prove that appellant was a gang member. According to the court, such evidence was not necessarily proof of an extraneous offense, and could be introduced as evidence of character or reputation, if relevant to sentencing.

The court of criminal appeals granted discretionary review to decide whether evidence of appellant's gang membership admissible in the punishment phase under article 37.07, § 3, of the Texas Code of Criminal Procedure.

***Buchanan v. State,***
**881 S.W. 2d 376**
**(Tex. App.--Houston [1st Dist.] 1994, pet. granted)**

Appellant was convicted of aggravated kidnapping, and one question presented was whether he released the victim in a safe place. If so, then his crime was a second degree felony. If not, it was a first degree felony. The undisputed evidence presented at the *guilt phase of the trial* was that the victim was released safely. No such evidence was presented at the punishment phase of the trial, however, nor did appellant reoffer his guilt evidence at punishment. "Because we find that appellant failed to introduce any evidence at the punishment phase of the trial on the issue of safe release, he

was properly punished as a first-degree felon."

The court of criminal appeals granted discretionary review to determine whether an aggravated kidnapping defendant is required to reintroduce at the punishment stage of the trial evidence from the guilt stage which conclusively proved that he released the kidnapping victim alive and in a safe place.

***David Lopez v. State,***
**No. 03-92-00304-CR**
**(Tex. App.--Austin, pet. granted)**

The court of criminal appeals granted discretionary review to determine whether it was prosecutorial vindictiveness for the state to seek an affirmative finding of the use of a deadly weapon when one had not been sought at appellant's first trial. The court has also been asked to decide whether this is an ex post facto violation.

***Hill v.State,***
**881 S.W. 2d 897**
**(Tex. App.--Fort Worth, 1994 pet. granted)**

Appellants were tried for injuring their child by omission. Specifically, the evidence showed that they failed to provide the child with food and medical care. Appellants were convicted, and an affirmative finding of the use of a deadly weapon was entered. On appeal, appellant argued, among other things, that, because they were convicted of injury by *omission*, the state was precluded as a matter of law from seeking a deadly weapon finding during the *commission* of a crime.

The court of appeals disagreed, accusing appellants of "wag[ing] a battle of semantics." According to the court, appellants chained the child to a cabinet with a chain, a metal rod, some belts, and some locks. "Thus, these potential deadly weapons were used by appellants to 'facilitate' their goal of depriving [the child] of food, and the trial court did not err in permitting the State to seek an affirmative finding on the use of a deadly weapon."

The court of criminal appeals has granted discretionary review to determine, among other things, whether a deadly weapon finding is appropriate when the offense alleged is an omission.

## SPEEDY TRIAL

***State v. Empak,***
**889 S.W. 2d 618**
**(Tex. App.--Houston [14th Dist.] 1994)** pet. ref'd)

1. Corporations do have a right to a speedy trial.

2. Applying the four part test from Barker v. Wingo, the court finds that the corporation's speedy trial rights were violated.

3. The 28 month delay was presumptively prejudicial. "Most delays of eight months or longer are considered presumptively unreasonable and prejudicial."

4. Negligence, however innocent, militates against the state.

5. The corporation promptly demanded a speedy trial.

6. A showing of actual prejudice is not required. The corporation put on evidence of some potential prejudice to its business and to the defense from the delay. Although the evidence established only minimal potential prejudice, the state offered no controverting testimony.

**Tex. Code Crim. Proc. Ann. art. 32.01 (Vernon 1989)**

"When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation before the district court, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant at the next term of the court which is held after his commitment or admission to bail."

***Nguyen v. State,***
**882 S.W. 2d 471**
**(Tex. App. -- Houston [1st Dist.] 1994, pet. ref'd)**

Appellant was arrested for theft and released on bail the same day, during the January term of the 56th District Court. He was not indicted during the following term, the July term, either. Article 32.01 provides that the prosecution shall be dismissed if the indictment is not presented at the next term of the court after commitment or admission to bail. The state never contested this, or attempted to show good cause. The prosecution should be dismissed with prejudice.

***Nix v. State,***
**882 S.W. 2d 474**
**(Tex. App. -- Houston [1st Dist.] 1994, pet. ref'd)**

The state and the appellant agree that appellant was entitled to a dismissal under article 32.01, since appellant was not indicted at the next term of court held after her admission to bail. The only issue is whether the dismissal should be with or without prejudice. The court of appeals holds that it should be *with* prejudice.

***Wilkinson v. State,***
**___ S.W. 2d ___ No. 04-94-00573-CR**
**(Tex. App.--San Antonio February 8, 1995)**

It is undisputed that three grand jury terms expired between the time appellant was arrested and when he was indicted. Nonetheless, the trial court denied his motion to dismiss the indictment pursuant to article 32.01, and the court of appeals affirmed. After appellant filed his motion to dismiss, but before the motion was ruled upon, appellant was indicted. When the indictment was returned prior to the 32.01 hearing, the motion to dismiss became moot. "Thus, the key for the accused but unindicted is to seek and obtain a ruling on an article 32.01 motion prior to the return of an indictment." The court of appeals further held that appellant was not automatically entitled to a dismissal because the prosecutor presented sworn evidence of good cause for delay, unlike what the prosecutor did in Nguyen and Nix.

## SUFFICIENCY

a. Factual Sufficiency.

***Stone v. State,***
**823 S.W. 2d 375, 381**
**(Tex. App.--Austin 1992, pet. ref'd, untimely filed)**

Article V, § 6 of the Texas Constitution provides that decisions of the court of appeals "shall be conclusive on all questions of fact brought before them on appeal or error." In *Stone*, the Austin court of appeals held that it was duty-bound to conduct a factual sufficiency review when requested by a party. When conducting a factual sufficiency review, the court is not bound to consider the evidence in the light most favorable to the state. Instead, the court should consider the testimony of defense witnesses and the existence of alternative hypotheses.

> The court should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Before reversing a conviction on this basis, the court should detail the evidence and clearly state why the jury's verdict is so contrary to the overwhelming weight of the evidence as to be manifestly unjust, why it shocks the conscience, or why it clearly demonstrates bias; and further state how the evidence contrary to the jury's verdict overwhelming outweighs the evidence that supports the verdict.

***Clewis v. State,***
**876 S.W. 2d 428**
**(Tex. App.--Dallas 1994, pet. granted)**

Most of the courts of appeals which have considered the factual sufficiency question disagree with the *Stone* court's conclusion. The Dallas court of appeals expressed its disagreement with *Stone* in *Clewis*. The court of criminal appeals has granted discretionary review, hopefully to resolve the split between the courts of appeals on this question. *See also Homero Scott Martinez v. State*, ___ S.W. 2d ___, 1994 WL 454317 (Tex. App.--Houston [1st Dist.]1994, pet. granted)

***Williams v. State,***
**848 S.W. 2d 915**
**(Tex. App.--Texarkana 1993, no pet.)**

The Texarkana court of appeals agrees with *Stone*, believing it has jurisdiction to review factual insufficiency questions.

***White v. State,***
**890 S.W. 2d 131**
**(Tex. App.--Texarkana 1994)**

Although legally sufficient, the evidence was *factually* insufficient to prove that appellant possessed cocaine. This is the only case I know of in which the court of appeals has actually found the evidence to be factually insufficient.

b. The Affirmative Link Test, After *Geesa*.

***Green v. State,***
**___ S.W. 2d ___**
**No. 06-94-00167-CR**
**(Tex. App.--Texarkana January 6, 1995)**

At one time in Texas, the standard of review in circumstantial evidence cases was different from that in direct evidence cases. Specifically, in circumstantial evidence cases, the appellate courts would find the evidence insufficient if there was an outstanding reasonable hypothesis inconsistent with the guilt of the accused. In *Geesa v. State*, 820 S.W. 2d 154 (Tex. Crim. App. 1991), the court of criminal appeals abandoned the reasonable-hypothesis-of-innocence analytical construct, holding that the standard of review was the same whether the evidence was direct or circumstantial-- namely, evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

Since *Geesa*, some courts of appeals have also abandoned the "affirmative links" test

traditionally employed to determine whether the evidence is sufficient to prove that the defendant intentionally or knowingly possessed a controlled substance. According to these courts, the only test to be employed is that stated in *Jackson v. Virginia. See Brown v.State*, 878 S.W. 2d 695, 699 (Tex. App.--Fort Worth 1994, *pet. granted*).

The Texarkana court of appeals has found that the "usefulness" of the affirmative links analysis survives *Geesa*.

***Brown v. State,***
**878 S.W. 2d 695**
**(Tex. App.--Fort Worth 1994, pet. granted)**

In this case, the Fort Worth court of appeals held that *Geesa* overruled the affirmative links test. The court of criminal appeals has granted discretionary review to determine whether *Geesa* overruled the affirmative links analysis as a method of reviewing the sufficiency of the evidence?

c. Possession Of Tiny Amounts Of Drugs.

***King v. State,***
**857 S.W. 2d 718**
**(Tex. App.--Houston [14th Dist.] 1993, pet. granted]**

Appellant was convicted of possessing cocaine based on proof that he had a crack pipe in his pocket with residue on it. Traces of cocaine were found in the residue, but its amount was so minute that its weight could not be measured. Appellant contended that the evidence was insufficient to prove that he knowingly possessed cocaine.

The court of appeals disagreed. "There is no minimum weight required to sustain a conviction for possession of narcotics. Even if the quantity is too minute to be measured or seen, other evidence can prove that the defendant knew the substance in his possession was a controlled substance." [citations omitted] Here, that the cocaine was visible in a crack pipe and was still damp with saliva, is sufficient to prove that appellant knew the substance he possessed was cocaine.

The court of criminal appeals has granted discretionary review to consider whether there was sufficient evidence to show knowing possession of a controlled substance when appellant possessed only cocaine residue.

***Joseph v. State,***
**866 S.W. 2d 281**
**(Tex. App.--Houston [1st Dist.] 1993, pet. granted)**

Appellant was arrested in a crack house, about to inject himself with a needle and syringe.

The syringe was analyzed and found to contain 0.2 milligrams of pure cocaine. No witness for the state testified that cocaine or cocaine residue could be seen in the syringe. The court of appeals held this evidence was insufficient to prove knowing possession. "The State has failed to make a showing that the cocaine was seen or capable of being seen in this case. Therefore, the State has not produced sufficient evidence to establish that appellant knew the syringe he possessed contained a controlled substance."

The court of criminal appeals has granted discretionary review to decide whether there is a prerequisite in a prosecution for possession of a controlled substance that the contraband be visible to the naked eye.

## UNAUTHORIZED USE OF A MOTOR VEHICLE

***Denton v. State*,**
**880 S.W. 2d 255**
**(Tex. App.--Fort Worth 1994, pet. granted)**

The evidence showed that appellant broke into a truck and revved it up for several minutes trying to drive it away. The truck would not move, though, because of a faulty transmission. Appellant was caught behind the wheel, and later prosecuted for, and convicted of, unauthorized use of a vehicle. On appeal, he contended that the evidence was insufficient to prove that he operated the vehicle.

The court of appeals disagreed. Evidence that "appellant exerted power, influence and personal effort over [the] truck in his effort to drive the truck" was sufficient to support his conviction for unauthorized use of a vehicle.

The court of criminal appeals has granted discretionary review to determine whether the word "operate" as used in the unauthorized use of a motor vehicle statute, extends to the exertion of "power or influence" over the vehicle.

## VENUE

***Harvey v. State*,**
**887 S.W. 2d 174**
**(Tex. App.--Texarkana 1994)**

The first case I know of since Jack Ruby's to be reversed for erroneous refusal to change venue.

## VOIR DIRE

***J.E.B. v. Alabama ex rel. T.B.,***
**114 S.Ct. 1419**
**(1994)**

In *J.E.B*, a male defendant in a paternity action complained when the state used 9 of its 10 peremptory challenges to remove male jurors, resulting in an all-female jury. The Court held that "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man."

***Casarez v. State,***
**___ S.W. 2d ___ No. 1114-93**
**(Tex. Crim. App. December 14, 1994)**

The use of peremptory challenges to exclude venirepersons based on their religious beliefs violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Judges McCormick, Campbell, White and Meyers dissented.

The state's motion for rehearing was granted on March 1, 1995, and a decision is pending.

***Yarborough v. State,***
**868 S.W. 2d 913**
**(Tex. App. -- Fort Worth 1994, pet. granted)**

At trial the state claimed it struck the venireperson because he "had a very long, unhappy face, mouth down-turned at the corners, eyes downcast." This was a subjective reason, unsupported by any substantiating evidence in the record. "In addition, *the record* does not reveal the trial judge had an adequate opportunity to observe Martinez' demeanor because neither the State nor the defense extensively examined him during voir dire. Therefore, we find *the record* contains no evidence *corroborating* the prosecutor's statement." (emphasis in original).

The court of criminal appeals granted discretionary review to determine whether the prosecutor's statement as to his observation of a minority venireperson's demeanor is sufficient alone to provide a basis for exercising a peremptory strike if the fact of the demeanor is not contested, or must there be some other corroboration in the record as to the demeanor.

***Jimmy Earl Brown v. State,***
**___ S.W. 2d ___ No. 12-92-00351-CR**
**(Tex. App.--Tyler July 29, 1994, pet. granted)**

Is there any hope for successfully challenging an equivocating venireperson?

"Ms. Stagner candidly acknowledged her belief that the accused should and would testify unless he were guilty. She told the judge that if he instructed her that she could not consider the defendant's failure to testify she would have to follow his instructions. Finally, she said she 'would hope that I can, but that's all I can say.' Although she naturally refused to tell the judge she would not follow his instructions, a review of her entire examination leaves little doubt that, if chosen to serve on the jury, she would have expected Appellant to testify unless he were guilty."

Her last word on the subject was that she could only hope to follow the judge's instructions.

"No juror should be seated who harbors such deeply felt doubts about his or her ability to accord an accused the privilege against self-incrimination."

"[A]fter reviewing the entirety of Ms. Stagner's *voir dire* examination, we conclude that she had a bias or prejudice against a law applicable to the case upon which Appellant was entitled to rely, and that the trial court abused its discretion in denying Appellant's challenge for cause."

The court of criminal appeals granted the state's petition for discretionary review.

***Ryan v. State*,**
**874 S.W. 2d 299, 300**
**(Tex. App. -- Houston [1st Dist.] 1994)**

The trial court erred in not permitting appellant to question the venire about their feelings towards AIDS where this was an issue affecting the punishment stage of the trial.

***Armstrong v. State*,**
**850 S.W. 2d 230**
**(Tex. App.--Texarkana 1993, pet. granted)**

After trial, appellant learned that the prosecutor had been the best man at the jury foreperson's wedding and that her husband was the prosecutor's re-election campaign treasurer at the time of trial, as he had been at the last election. During voir dire, the judge and the prosecutor asked only general questions, and the foreperson honestly answered them. Appellant asked no questions touching on the relationship between the foreperson and the prosecutor. On appeal he contended that he was harmed by the prosecutor's and foreperson's failures to disclose their relationship.

The court of appeals affirmed the conviction. Appellant failed in his burden to ask questions calculated to bring out impartiality. Nor did the prosecutor have an affirmative duty to disclose his relationship with the jury foreperson.

The court of criminal appeals granted discretionary review to determine two questions: Did the court of appeals err in holding that a juror did not withhold material information about her relationship to the prosecutor? Did the prosecutor have a duty to reveal his relationship to a

prospective juror and her husband?

## WEAPONS

***Flores v.State,***
**___ S.W. 2d ___ No. 04-93-00554-CR**
**(Tex. App.--San Antonio February 8, 1995)**

The affirmative link analysis applies to possession of contraband cases. Possession is different from "carrying on or about a person" -- the standard which applies in weapons cases. There is no need to prove an affirmative link in weapons cases. Rather, the state must show asportation or conveyance, within such a distance of the defendant that he can reach it without materially changing his position. In this case, the state sufficiently proved that appellant unlawfully carried a pistol by proving that he was driving a Bronco which contained two handguns in an unlocked console beside the driver's seat and in a paper bag behind the driver's seat.

***Moosani v. State,***
**866 S.W. 2d 736**
**(Tex. App.--Houston [14th Dist.] 1993, pet. granted)**

It has long been recognized in Texas that a person is authorized to carry a pistol from his business to his home when he has on his person a considerable money, and when he does not deviate from the nearest, most practical route. In *Cortemeglia v. State*, 505 S.W. 2d 296 (Tex. Crim. App. 1974), the court of criminal appeals held that the above stated rule does not apply to one who *habitually* carries the weapon between work and home. In *Moosani*, the court of appeals applied *Cortemeglia* to find against the appellant who carried his gun to an from work almost every workday.

Discretionary review has been granted to reconsider the exception recognized in the *Cortemeglia* case.