PETITIONS FOR DISCRETIONARY REVIEW PENDING IN THE TEXAS COURT OF CRIMINAL APPEALS

[AS OF JANUARY 26, 2000]

SAN ANTONIO BAR ASSOCIATION'S
37TH ANNUAL JUDGE ANEES A. SEMAAN
CRIMINAL LAW SEMINAR
MARCH 10, 2000

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ACCOMPLICE WITNESSES

a. Where the codefendant testifies in her own behalf in a joint trial

Nilda and Evangelica Aguilar v. State,
No. 13-97-00339-CR & 13-97-00348-CR
(Tex. App.--Corpus Christi May 6, 1999, pet. granted)
PDR No. 99-0817
Appellant's Petition

Nilda and Evangelica Aguilar were jointly tried for the murder of Juan Aguilar. Appellants raised several points of error on appeal, two of which are germane to their petitions for discretionary review.

First, appellants complain that the trial court erred in denying their motions for severance. The court of appeals disagreed. "Motions for severance not made prior to the announcement of ready are not considered timely and will not be addressed by the trial court. No error is presented where the trial court fails to grant an untimely motion to sever." [citations omitted]

Second, Nilda complains that the trial court erred in refusing to instruct the jury on the accomplice witness rule with regard to Evangelica, who testified as a witness in her own defense. The court of appeals disagreed. The accomplice witness rule applies only where the state calls the witness and relies on that testimony. Here, Evangelica testified in her own defense, and not as a witness for the state. "The jury was instructed that it could not use Evie's testimony as evidence against Nilda. We hold the accomplice-witness rule is inapplicable in this situation."

Grounds for Review:

1. **Must a motion to sever codefendants joined for trial be made before trial begins or may it be urged in response to evidence at trial?**

2. **Is a defendant who is jointly tried with a codefendant entitled to an accomplice-witness instruction when the codefendant testifies in his own behalf and implicates the defendant?**

APPEALS

a. The test for harmless error

Llamas v. State,
991 S.W. 2d 64
(Tex. App.--Amarillo 1998, pet. granted)
PDR No. 98-1799

State's Petition

The court of appeals held that the trial court erred when it denied appellant's motion to sever trials on indictments for possession of a motor vehicle with obliterated identification numbers and possession of a controlled substance. Under article 3.04 of the penal code, a defendant has an absolute right to sever these offenses. The court further held that this non-constitutional error affected a substantial right of appellant's and could therefore not be disregarded under Rule 44.2(b) of the rules of appellate procedure. The error in denying appellant his mandatory severance pursuant to legislative command was one that defies harm analysis. "Under *Cain*, the error in such instance is not proven harmless."

Ground for Review: Whether the court of appeals erred in failing to conduct the appropriate harm analysis to the trial court's error in failing to grant a motion to sever.

Johnson v. State,
984 S.W. 2d 736
(Tex. App.--Waco 1998, pet. granted)
PDR No. 99-0389
State's Petition

Appellant was convicted in a bench trial of cruelty to an animal. On direct appeal he contended that he had not waived in writing his right to a jury trial. He conceded that the judgment and sentence recite that he waived a trial by jury.

The court of appeals held that the trial court erred in proceeding to a non-jury trial without a written jury waiver signed by appellant. The court decided that this was statutory, not constitutional error. "In the case before us, the record in no way reflects that Johnson personally and expressly waived his right to a jury trial in open court. Accordingly, we conclude that his 'substantial rights' have been affected. TEX. R. APP. P. 44.2(b). We sustain his sole point."

Grounds for Review:

1. **Whether the court of appeals erred by concluding the absence of a written jury waiver was non-constitutional error under Tex. R. App. P. 44.2(b), but then applying a federal test designed to evaluate constitutional error?**

2. **Whether the federal test applied by the court of appeals improperly changed appellant's complaint from a statutory compliance issue into a constitutional issue of whether appellant waived a jury?**

3. **Whether the court of appeals disregarded the presumption of**

regularity of the judgment, which recited that appellant waived a jury?

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b. Reformation, remand or acquittal

Barfield v. State,
999 S.W. 2d 23
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 99-1303
State's Petition

Appellant was charged with felony DWI, but the state did not offer the prior convictions for DWI until the punishment phase. The court of appeals held that the two priors were elements of the felony offense and that the state had erred in not proving them at the guilt-innocence phase. The court further held that the evidence was legally insufficient, and reversed the conviction and ordered an acquittal.

Grounds for Review:

1. **Whether the court of appeals erred in ordering a judgment of acquittal on the primary driving while intoxicated offense, where the evidence clearly supported a finding of guilt as to the primary offense and appellant never challenged the sufficiency of the evidence to support that finding on appeal.**

2. **Whether the court of appeals erred in failing to order a reformation of the judgment to reflect a finding of guilt on the primary driving while intoxicated allegation of the indictment.**

3. **Whether the court of appeals erred in failing to remand this case to the trial court, after reformation of the judgment, for assessment of the appropriate punishment for a first offender violation of Tex. Penal Code § 49.04.**

4. **Where the trial court finds the defendant guilty of the charged offense, but the court of appeals determines the evidence to be legally insufficient to sustain the conviction, is the court of appeals authorized to reform the trial court's judgment to reflect a conviction for a lesser-included offense for which the**

evidence is sufficient?

c. Waiver of appeal

Blanco v. State,
996 S.W. 2d 345
(Tex. App.--Texarkana 1999, pet. granted)
PDR No. 99-1404
Appellant's Petition

Following the jury's verdict of guilty, the state and appellant reached an agreement. The state would recommend 16 years imprisonment, and appellant would waive his right to appeal. Appellant was sentenced to 16 years imprisonment, then appealed, contending that waiver of his right to appeal before sentencing was invalid.

The court of appeals disagreed. It is well established that a defendant may waive many of his rights, including his right to appeal. "Blanco was faced with a range of punishment between five to ninety-nine years, or life, and he decided to make a deal rather than to leave the decision of punishment in the hands of the judge. We think that Blanco should be held to his bargain. Accordingly, we find Blanco's waiver of appeal is valid and dismiss the appeal."

Ground for Review: Whether a waiver of appeal made after judgment of conviction but before sentencing is valid.

State v. Seidel,
2 S.W. 3d 524
(Tex. App.--San Antonio 1999, pet. granted)
PDR No. 99-1790
State's Petition

The district court dismissed the defendant's driving while intoxicated case for an untimely indictment pursuant to articles 28.061 and 32.01 of the Texas Code of Criminal Procedure. The state then filed the case in county court as a misdemeanor, but that court granted habeas relief, holding that the district court's dismissal barred the state from filing a lesser included offense. The state appealed.

The court of appeals held that both the county court and the district court were in error in dismissing the case with prejudice under articles 28.061 and 32.01, since, at the time of defendant's arrest, dismissal with prejudice was not required. The court, however, affirmed the judgment of the county court, holding that the state waived its right by not appealing from the district court's dismissal.

Ground for Review: Does the state waive its right to appeal an order dismissing an

information by failing to appeal an earlier void order that purported to dismiss the prosecution "with prejudice"?

d. Can the state appeal from an order granting deferred adjudication?

State v. Wilcox,
993 S.W. 2d 848
(Tex. App.--Austin 1999, pet. granted)
PDR No. 99-1079
State's Petition

Appellant pleaded guilty before a jury and was found guilty. After that, the trial court dismissed the jury and granted appellant deferred adjudication. The state appealed, contending that this was an illegal sentence because the trial court was not allowed to impose deferred adjudication after a conviction by a jury.

The court of appeals did not "endorse" the action of the trial court, but did not reach the merits of the state's argument. Article 44.01(b) of the code of criminal procedure authorizes the state to appeal an illegal sentence. "The State in this cause does not seek to appeal a sentence, but something else. Because an order deferring adjudication does not constitute or contain a sentence, article 44.01(b) does not apply. As a consequence, the State is not entitled to appeal, and we are without jurisdiction."

Ground for Review: Does a court of appeals have jurisdiction, pursuant to Code of Criminal Procedure art. 44.01(b), to consider the state's appeal of a trial court's imposition of deferred adjudication following a jury verdict of guilty?

e. The state's right to appeal from an order holding hypnotically enhanced testimony inadmissible

State v. Medrano,
987 S.W. 2d 600
(Tex. App.--El Paso 1999, pet. granted)
PDR No. 99-0527
State's Petition

The trial court granted the defendant's pre-trial motion to suppress hypnotically enhanced testimony, and the state appealed. The court of appeals dismissed the state's appeal for want of jurisdiction. The court of appeals may only hear a state's appeal if authorized by statute or constitution. Here, the state says that its appeal was statutorily authorized both because the trial court's ruling effectively dismissed the indictment, and because it constituted a ruling on a motion to suppress evidence of substantial importance to the state's case. The court disagreed.

As to the state's first claim, the ruling did not dismiss the indictment. The ruling left the indictment, and the state is free to continue the prosecution in the prosecutor's discretion. "We cannot equate an evidentiary ruling with dismissal of the case for purposes of a State's interlocutory appeal."

As to the state's second claim, the court concluded that its authority to conduct an interlocutory review of a trial court's ruling on a motion to suppress is limited to those rulings which exclude evidence because it was illegally obtained. "We discern no allegation in the record that defendant Medrano's rights were somehow violated by the hypnosis of the witness; rather, the motions to exclude evidence are based upon the unreliability of hypnotically enhanced testimony in general, and the unreliability of the identification of Medrano under the facts of this case in particular. Here, we do not see that the Legislature intended the court of appeals to undertake "instant replay" of the trial court's decision that the probative value of J.E.'s identification was substantially outweighed by the dangers which would result from allowing it before the jury."

Grounds for Review:

1. **Whether the court of appeals erred in holding that under *State v. Roberts*, 940 S.W. 2d 655 (Tex. Crim. App. 1996), it had no jurisdiction to consider the state's appeal in this case?**
2. **Whether the court should reconsider its decision in *State v. Roberts*, 940 S.W. 2d 655 (Tex. Crim. App. 1996)?**

f. Lost record

Daniels v. State,
1999 WL 592395
(Tex. App.--Dallas 1999, pet. granted)
PDR No. 99-1612
Appellant's Petition

Appellant pled guilty and was placed on deferred adjudication. Four years later, the court entered an adjudication of guilt, and appellant appealed. The court reporter's notes from the plea hearing had been lost by the time of the appeal. Appellant complained that he was entitled to a new trial because the fact that the record had been lost or destroyed through no fault of his own prevented him from appealing the voluntariness of his original plea.

The court of appeals disagreed. A defendant must appeal the voluntariness of his plea at the time he is originally placed on deferred adjudication and cannot wait until an adjudication is entered. Because appellant did not do so, the court of appeals had no jurisdiction over the appeal.

Ground for Review: The court of appeals erred in holding that the appellate tribunal lacked jurisdiction to consider whether appellant was entitled to a new trial because part of the reporter's record as been lost or destroyed without his fault.

g. Does a general notice of appeal confer jurisdiction to consider an involuntary guilty plea?

Fernandez v. State,
1999 WL 212700
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 99-0885
State's Petition

Appellant pleaded guilty to failure to stop and render aid at which time the trial court admonished him that the range of punishment was two to five years imprisonment and a fine not to exceed $10,000.00. In fact, the range of punishment was one to five years imprisonment, and a fine not to exceed $10,000.00. In a motion for new trial, appellant complained that his plea was involuntary because he had been improperly advised as to the range of punishment. At the hearing on the motion, appellant testified that he would not have pleaded guilty had he known that the minimum punishment he faced was one year imprisonment. The trial court denied the motion for new trial and appellant appealed.

The court of appeals reversed. "[W]e find appellant was misled as to the actual value of the plea bargain and was harmed by the court's admonishment; his plea of guilty was therefore not voluntarily entered."

Grounds for Review:

1. **By reversing this case based on appellant's own assertion that he would not have entered a plea had he been properly admonished about the range of punishment, did the court of appeals failed to give proper deference to the trial court as factfinder?**

2. **Does the court of appeals have jurisdiction to consider the voluntariness of a plea when a defendant files a general notice of appeal after pleading guilty or nolo contendere under art. 1.15, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant. (Reconsider *Flowers*, 935 S.W. 2d 131) (*Cooper*, no. 1100-99 granted on same issue).**

Terry Wayne Cooper v. State,

No. 02-98-00350-CR
(Tex. App.--Fort Worth April 1, 1999, pet. granted)
PDR No. 1100-99
Appellant's Petition

Appellant pleaded guilty to a state jail felony, then appealed asserting that his plea was involuntary. The court of appeals dismissed the appeal for want of jurisdiction, holding that the notice of appeal did not comply with the special notice requirements of Rule 25.2(b)(3) of the Texas Rules of Appellate Procedure.

Ground for Review: Does the court of appeals have jurisdiction to consider the voluntariness of a plea when a defendant files a general notice of appeal after pleading guilty or nolo contendere under art. 1.15, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant. (Reconsider *Flowers*, 935 S.W. 2d 131).

h. Does a general notice of appeal confer jurisdiction after a contested revocation hearing?

Vidaurri v. State,
981 S.W. 2d 478
Tex. App.--Amarillo 1998, pet. granted)
PDR No. 99-0151
Appellant's Petition

Appellant pleaded guilty pursuant to a plea bargain and was placed on deferred adjudication probation. Later, the court entered an adjudication of guilt and sentenced appellant to imprisonment. Appellant filed a general notice of appeal and in his brief argued, among other things, that the trial court had erred in not affording him a punishment hearing prior to sentencing. The state argued that the court of appeals had no jurisdiction because appellant's notice of appeal was general and did not specify either that the appeal concerned written pre-trial motions, or that the trial court had given permission to appeal, or that the appeal involved a jurisdictional defect, as required by Rule 25.2(b)(3) of the Texas Rules of Appellate Procedure.

The court of appeals overruled this point of error for two reasons. First, the court agreed with the state and dismissed this portion of appellant's appeal, since his notice of appeal "contained none of the statements required by Rule 25.2(b)(3)." This sort of complaint is not jurisdictional, since it can be waived by failure to object. "Second, even if jurisdiction existed, we note that appellant neither objected to the error at the time it occurred nor otherwise brought it to the trial court's attention afterwards. Under such circumstances, the complaint was waived."

Grounds for Review:

1. **Should Rule 25.2(b)(3) of the Texas Rules of Appellate Procedure apply when the defendant is appealing from a contested probation revocation hearing?**

2. **If a defendant did not have an opportunity to object at trial, is the filing of a motion for new trial a prerequisite to presenting a point of error on appeal?**

i. The remedy for denial of counsel during time to file motion for new trial

Smith v. State,
990 S.W. 2d 893
(Tex. App.--Houston [1st Dist.] 1999, pet. granted)
PDR No. 99-1010
State's Petition

After finding that the trial court erroneously failed to appoint counsel until after the time for filing a motion for new trial, the court of appeals set about to craft a remedy. "Accordingly, without disturbing the trial court's judgment, we remand this case to the trial court for appellate timetables to begin anew. All applicable appellate timetables are to be calculated and are to begin upon the trial court's receipt of our mandate." [citations omitted]

Ground for Review: The First Court of Appeals erred in holding that it had the authority to restore jurisdiction of the trial court so that it could allow the appellant time to file an out-of-time motion for new trial.

j. Content of the state's notice of appeal

State v. Riewe,
997 S.W. 2d 644
(Tex. App.--Dallas 1999, pet. granted)
PDR No. 0699-99
State's Petition

The trial court granted the defendant's motion to suppress, and the state gave notice of appeal, but its notice did not certify that the appeal was not taken for delay or that the evidence was of substantial importance, as required by Rule 25.2(2) of the Texas Rules of Appellate Procedure. The state filed a request for leave to file an amended notice of appeal, correcting the defect, but this motion was denied by the court of appeals. "The State's notice of appeal must fully comply with Article 44.01 and be filed within fifteen days of the order appealed to invoke our jurisdiction." Because the rules were not complied with here, the court of appeals dismissed the state's appeal without reaching the merits of the case.

Ground for Review: In order to invoke the court of appeals' jurisdiction, must the state's notice of appeal of the granting of a motion to suppress certify that the appeal is not taken for delay and the evidence is of substantial importance? See art. 44.01(a)(5), V.A.C.C.P. & T.R.A.P. 25.2(2).

ASSISTANCE OF COUNSEL

a. Can ineffectiveness be raised for the first time on direct appeal, without an objection in the trial court below?

Dontae Robinson v. State,
No. 10-98-194-CR
(Tex. App.--Waco August 25, 1999 , pet. granted)
PDR No. 99-1701
Appellant's Petition

Appellant asserted on direct appeal five allegations of his trial counsel's ineffectiveness. The court of appeals refused to reach the merits of appellant's contention, and affirmed the conviction.

"These complaints have not been presented to the trial court. Review of Appellant's complaints is barred by Rule 33.1(a) of the Texas Rules of Appellate Procedure. TEX. R. APP. P. 33.1(a). This rule provides that, as a prerequisite to presenting a complaint for appellate review, the record must show (1) a timely request, objection, or motion was made to the trial court stating the grounds for the complaint; and (2) a ruling on the request, objection or motion, or a refusal to rule coupled with an objection to such refusal. Applying the clear language of the rule, we find that Appellant's complaints of ineffective assistance of counsel have not been preserved for our review."

Ground for Review: Can a claim of ineffective assistance of counsel be waived under Tex. R. App. P. 33.1(a)?

CAPITAL MURDER

a. Formation of intent

Elbert Michael Homan v. State,
No. 12-97-00046-CR
(Tex. App.--Tyler February 5, 1999, pet. granted)
PDR No. 0578-99
State's Petition

Appellant entered his ex-wife's home over her protests, they argued and fought for a while, then he strangled her. The state charged him with capital murder -- murder in the course of burglary. The court held that the evidence was insufficient. The state had to prove that appellant entered the home with the specific intent to commit murder or committed murder while in the course of committing a felony or theft. "We conclude that a murder cannot be used as the requisite felony under the burglary statute to make the entry a burglary, and at the same time use a burglary as the aggravating offense to make a murder a capital murder. In the instant case there is no evidence that Appellant murdered Stephanie while committing theft. Nor is there any evidence that at the time Appellant entered the trailer he had the specific intent to kill Stephanie."

Ground for Review: In a capital murder prosecution where the defendant is alleged to have killed the victim in the course of a burglary, is the state required to prove that the

defendant formed the intent to kill the victim before he entered the property?

b. Joinder

Graham v. State,
1999 WL 605519
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 99-1621
Appellant's Petition

Appellant was involved in a transaction that involved the death of three persons -- Heimar, Danny and Jesus -- and the state charged him with capital murder. "By its indictment, divided into three paragraphs, the State alleged appellant committed the offense of capital murder by causing (1) Heimar's death and Danny's death in the same episode; (2) Heimar's death in the course of robbing him; and (3) Jesus's death in the course of robbing him." Appellant's motion to sever these charges was denied, and he was convicted.

The court of appeals affirmed. Under the penal code, one commits capital murder either by committing murder in the course of robbery, or by murdering more than one person during the same criminal transaction. "We hold these paragraphs do not charge separate offenses, but are merely different methods of the commission of one offense, which may be charged in one indictment.

Ground for Review: Whether the lower court erred in holding that capital murder indictment with 3 paragraphs and 3 victims merely charged one offense.

CHARGING INSTRUMENTS

a. Must an indictment allege the state will proceed under the law of parties?

Marable v. State,
990 S.W. 2d 421
(Tex. App.--Texarkana 1999, pet. granted)
PDR No. 99-0765
Appellant's Petition

Officer Torsiello gave money to Whorley to buy drugs, and she bought them for him from appellant. Appellant was charged by indictment with the actual delivery of cocaine to Torsiello. The jury was instructed on the law of parties and convicted appellant. He complained on appeal that his indictment had not given him adequate notice of the theory of culpability under which the state would seek conviction for delivery.

The court of appeals disagreed. "Marable is really complaining that he did not receive adequate notice to prepare his defense because the State did not allege in the indictment that it

would prove actual delivery by the law of parties." The court held that "the indictment did not need to include a statement indicating the State would prove its case under the law of parties."

Ground for Review: Whether the appellant had sufficient notice of the theory of culpability by which the state would seek conviction for delivery of a controlled substance?

b. How is an indictment to be amended?

Riney v. State,
1999 WL 908904
(Tex. App.--Dallas 1998, pet. granted)
PDR No. 99-0800
State's Petition

Appellant was indicted for possession of amphetamine. The state moved to amend the indictment to charge possession of methamphetamine, and the trial court granted the motion, but the face of the indictment was not interlineated to reflect the amendment, as required by *Ward v. State*, 829 S.W. 2d 787 (Tex. Crim. App. 1992).

The court of appeals held that, since the indictment was not amended, the state had to prove possession of amphetamine, and that, because it failed to do so, the evidence was insufficient.

Grounds for Review:

1. **This court should reconsider *Ward v. State*, to the extent that *Ward* means that all amendments must be made on the original indictment, and precludes use of amending documents.**

2. **Did the court of appeals err and extend *Ward* to apply when a partial copy of the original indictment is interlineated?**

3. **Is the indictment defective when the state interlineates a partial copy of an indictment and does not alter the original indictment? If so, does a defect in the indictment or variance in statutory proceedings require analysis under Tex. R. App. Pro. 44.2?**

4. **If this is a defective indictment case when the state amends a partial copy of the indictment, and, if so is a remand required under art. 21.19 and Tex. R. App. Pro. 44.2?**

CONFESSIONS

a. The admissibility of a confession taken outside of Texas

Davidson v. State,
977 S.W. 2d 708
(Tex. App.--Fort Worth 1998, pet. granted)
PDR Nos. 98-1253/4
Appellant's Petition

While trying to cross the U.S.-Canada border, appellant was arrested by a customs officer who discovered an outstanding arrest warrant. The officer took an incriminating statement from appellant, not in compliance with article 38.22 of the code of criminal procedure. This statement was admitted against appellant over his objection, and he was convicted. He appealed contending that the statement was erroneously admitted since it did not comply with Texas law.

The court of appeals affirmed. Appellant did not contest the fact that he was given the *Miranda* warnings or that he made the statements attributed to him. Nor does appellant contest that the officer complied with the applicable laws in his jurisdiction. Texas officials did not participate in the interrogation, and the customs officer was not acting as an agent of Texas officials. " For these reasons, we find that public policy dictates that, under the narrow circumstances of this case, Texas should afford full faith and credit to appellant's otherwise lawful confession, despite the fact that it was not recorded pursuant to article 38.22. We note that our decision does not mean that any and all out-of-state confessions that fail to comply with article 38.22 will be given full faith and credit."

Ground for Review: Did the court of appeals err in affirming the trial court's denial of petitioner's motion to suppress testimony regarding oral statements made by petitioner which were governed by art. 38.22 of the Texas Code of Criminal Procedure?

b. Jackson v. Denno

Garcia v. State,
1998 WL 675869
(Tex. App.--Amarillo 1998, pet. granted)
PDR No. 99-0064
Appellant's Petition

Appellant claimed his written statement was not voluntarily made, and the state put on evidence which contradicted this. "Appellant's account of the taking of the statement is inconsistent with the version of the police. However, the trial court's resolution of the issue is supported by the record and as a consequence, we will not disturb the determination."

Grounds for Review:

1. **Whether appellant was entitled to remand for new suppression hearing or new trial? (For the failure of judge conducting *Jackson v. Denno* hearing to enter written findings of fact & conclusions of law, distinguishing *Bass*, 626 S.W. 2d 769).**

2. **Whether appellant's statement was inadmissible at trial and should have been suppressed?**

CROSS-EXAMINATION

a. The admissibility of prior false allegations of abuse

Lopez v. State,
989 S.W. 2d 402
(Tex. App.--San Antonio 1999, pet. granted)
PDR No. 0677-99
State's Petition

The complainant in this child molestation case had previously made an allegation, apparently false, that another person had physically abused him. Appellant sought to question him about this allegation, but the trial court prohibited this inquiry as irrelevant. Appellant was convicted and he appealed.

The court of appeals held that the trial court's action violated appellant's right to confront and cross-examine his accuser, and reversed the conviction. The state argued that this allegation is a specific instance of misconduct, and therefore was inadmissible under Rule 608(b) of the Texas Rules of Evidence. The court of appeals disagreed. "To the extent Rule 608(b) would prevent the appellant from confronting his accuser in this manner, the Rule must bow to the Constitution."

Grounds for Review:

1. **Does the exclusion of evidence, pursuant to Tex. R. Evid. 608(b), that the victim of a sexually-related offense made a previous unsubstantiated complaint of physical abuse against a third person, constitute a violation of the accused's federal constitutional right to confrontation of witnesses?**

2. **The court of appeals erred in holding that the appellant was entitled under the right of confrontation to impeach the complainant's credibility with evidence that complainant made**

a prior false or unfounded allegation of abuse, of a kind different than that for which appellant was prosecuted, and made against someone other than appellant.

DRIVING WHILE INTOXICATED

a. Invoking the right to counsel on the video

Carl Michael Griffith v. State,
No. 02-97-00-530-CR
(Tex. App.--Fort Worth September 10, 1998, pet. granted)
PDR No. 98-1957
Appellant's Petition

The state introduced a videotape on which appellant asked to speak to his attorney in order to determine whether to take the intoxilyzer. On appeal appellant complained that the trial court erred in admitting the audio portion of the videotape in which he invoked his right to counsel. The court of appeals disagreed. Appellant had no right to counsel to assist him in deciding whether to take the breath test. That is, he invoked a right to the tape which he did not have. Since appellant did not have a right to counsel for the purpose he requested, the trial court did not err in admitting this request.

Ground for Review: Did the court of appeals err in holding that the trial court properly admitted the audio portion of the video tape in which appellant invokes his right to counsel?

b. Proving intoxication by a combination of alcohol and drugs when only alcohol is alleged in the indictment

Juan Flores Rodriguez v. State,
No. 01-97-01342-CR
(Tex. App.--Houston [14th Dist.] December 23, 1998, pet. granted)
PDR No. 99-0344
Appellant's Petition

Appellant's indictment for DWI alleged that he was intoxicated by reason of introduction of alcohol into his body. Appellant testified that he had not had anything to drink, but that he had taken a cold medication which had made him drowsy. Over objection, the state called a rebuttal witness who testified to the effects of the cold medication, and to the possible effects of mixing this medication with alcohol. The jury was authorized to convict appellant if it found that he introduced alcohol, or a combination of unknown drugs and alcohol into his body, and appellant was convicted.

On appeal, appellant complained first that the court erred in submitting to the jury a theory of guilt not alleged in the indictment, namely that intoxication could result from the combination of drugs and alcohol. The court of appeals held that a similar charge was approved in *Sutton v. State*, 899 S.W. 2d 682 (Tex. Crim. App. 1995), and overruled this point of error. Appellant also complained that the trial court had erred in permitting the rebuttal witness to testify to the effect of the combination, even though the indictment alleged only intoxication by alcohol. The court also overruled this point, holding that, pursuant to *Sullivan v. State*, 831 S.W. 2d 533, 535 (Tex. App.--Houston [14th Dist.] 1992, pet. ref'd), the "failure to allege the specific method of intoxication in an indictment does not limit the admissibility of evidence at trial."

Grounds for Review:

1. **Whether the court of appeals erred in relying on *Sutton v. State*, 899 S.W. 2d 682, in overruling the jury instruction issue, because the presentation of the evidence came from a different direction.**

2. **Whether the court of appeals erred in relying on *Sullivan v. State*, 831 S.W. 2d 533, to support its decision on the admission of expert testimony on an issue not charged, because the case involved a differently worded indictment.**

DRUG-FREE ZONE

a. Proof that premises are owned, leased or rented by a school or institution of higher learning

Young v. State,
1999 WL 39032
(Tex. App.--Amarillo 1999, pet. granted)
PDR Nos. 99-0314 & 99-0319
State's Petitions

Appellant was convicted of selling drugs from a motel room in Lubbock. The indictment alleged that this sale occurred "in, on, or within 1,000 feet of premises owned, rented, or leased by an institution of higher learning, or a playground further described as Cavazos Junior High School." The state called two witnesses to support its charge that the sale had occurred in a drug-free zone. Officer Rocap admitted that he had no legal document showing Cavazos to be owned, leased or rented by a school or institution of higher learning, but claimed that he knew it to be so from having worked in the juvenile section. Officer Trevino, who worked for the Lubbock Independent School District, testified that Cavazos was a school within his district, and, when asked whether he had ever seen a deed or lease to show that the school is owned, leased or rented by a school or school board, said that he knew it was owned by "LISD." The jury found that the

offense had occurred in a drug-free zone, and the appellant appealed, contending that the evidence on this issue was legally and factually insufficient. The court of appeals agreed with appellant that the evidence was legally insufficient.

> "Officer Rocap admitted that he had no legal document showing that the area of Cavazos Junior High School was owned, leased or rented by a school or institution of higher learning, albeit he expressed the unsupported conclusion that he knew it to be so. Officer Trevino, who had worked for the Lubbock Independent School District for six years, identified Cavazos Junior High School as one of the schools in his district. Neither the testimony of the officers, nor any other evidence of record, constitutes probative proof that the premises of Cavazos Junior High School is owned, leased or rented by a school or an institution of higher learning."
>
> "The description of the premises as Cavazos Junior School is no proof that the premises are owned or rented by or leased to that school; indeed, the name of the school, and Trevino's testimony, give rise to the presumption that it is a public school in an independent school district, the trustees of which, and their successors in office, are vested with title to the real and personal property of the district. Tex. Educ. Code Ann. § 11.151(c) (Vernon 1996)."

Ground for Review: Whether the evidence is legally and factually sufficient to prove the offense occurred in a drug-free zone?

ENTRAPMENT

a. Proper application of the subjective/objective test

Freeman v. State,
998 S.W. 2d 379
(Tex. App.--Texarkana 1999, pet. granted)
PDR No. 99-1475/6
Appellant's Petition

The trial court denied appellant's special requested instruction on entrapment, he was convicted of delivery of cocaine, and he appealed.

The court of appeals affirmed the conviction. "Freeman admitted the drug sales to Kelly, as required in claiming an entrapment defense. [citations omitted] He also testified that he was addicted to crack cocaine and bought the drugs for Kelly because Kelly allowed him to 'get a little taste of it off the top' for free. When asked what pressure Kelly exerted on him to get him to go purchase the cocaine, Freeman answered that Kelly did not have to exert any pressure because he had lost his job and the purchases provided him with a way to support his habit. The

evidence fails to show that Freeman was induced by law enforcement officers to commit the crime. Freeman simply took advantage of an opportunity to support his drug habit by delivering cocaine to the informant."

Grounds for Review:

1. **Does an admission of guilt as part of an entrapment defense negate the state's *Brady* duty to disclose impeachment evidence concerning its only witness to the sale of crack cocaine?**

2. **Did the court of appeals misapply the mixed subjective/objective test of entrapment as established by *England v. State*?**

ESCAPE

a. How is "arrest" defined for purposes of the escape statute?

Medford v. State,
990 S.W. 2d 799
(Tex. App.--Austin 1999, pet. granted)
PDR No. 0521-99
State's Petition

The police approached appellant on the street, asked his name, and frisked him, finding crack cocaine in his pocket. The officer informed appellant he was under arrest and told him to put his hands behind his back. He touched appellant's left arm and was about to handcuff him when appellant lunged forward and ran. He was subdued a few blocks later and the police charged him with escape. Appellant was convicted of escape and he appealed, contending that the evidence was legally insufficient and that the jury was improperly instructed. The court of appeals agreed and reversed.

As to sufficiency, article 15.22 of the code of criminal procedure states that a person has been arrested when he has been actually placed under restraint or taken into custody. Here, the state failed to prove that appellant had been placed under restraint or taken into custody. By the officer's own admission, he *attempted* to gain physical control of appellant but was unsuccessful. This proved evading arrest, but absent proof of a completed arrest, it does not show escape.

As to the instruction issue, the jury was charged that actual, physical, hands-on restraint is not a prerequisite to a showing of custody, and that a person is under arrest or in custody if a reasonable person in the arrestee's position would have believed he was not free to leave. The court rejected these definitions of custody, and found that it was error to so instruct the jury.

Grounds for Review:

1. **When deciding whether an individual is guilty of the offense of escape, is the jury authorized to employ a meaning of the term**

"arrest" that is acceptable in common parlance?

2. When reviewing the sufficiency of the evidence to sustain a conviction for escape, should the reviewing court employ the definition of arrest found at Vernon's Ann. C. C. P. art. 15.22?

EVADING ARREST

a. Mistake of fact

Grant v. State,
1998 WL 809413
(Tex. App.--Beaumont 1998, pet. granted)
PDR No. 99-0053
State's Petition

Appellant was charged with evading arrest. She testified that she did not know that the person she evaded was a peace officer, and that she fled because she thought this person was trying to arrest her. Her request for a jury charge on mistake of fact was denied.

On appeal the state argued that appellant was not entitled to an affirmative submission of mistake of fact because "knowledge" is an element of the offense of evading arrest. The court of appeals disagreed and reversed the conviction. "It has been consistently held that an accused is entitled to an instruction on every defensive issue raised by the evidence."

Ground for Review: The court of appeals erred in holding that the omission of a wholly redundant "mistake of fact" instruction is harmful.

EXCULPATORY EVIDENCE

a. Does Brady apply to the guilty?

Freeman v. State,
998 S.W. 2d 379
(Tex. App.--Texarkana 1999, pet. granted)
PDR No. 99-1475/6
Appellant's Petition

Appellant testified in his own behalf and admitted to delivering cocaine to an informant, but tried to establish the defense of entrapment. The state failed to disclose that its informant was on deferred adjudication for solicitation of prostitution at the time of trial. The state admitted that appellant could have used this evidence for impeachment, but argued that the trial court did not abuse its discretion in denying appellant's motion for new trial.

The court of appeals agreed with the state and affirmed the conviction. The failure to disclose this exculpatory evidence to appellant was not such as would undermine confidence in the conviction because, in addition to the informant's testimony, appellant admitted that he had delivered the cocaine. Additionally, a videotape of these transactions was shown to the jury.

Grounds for Review:

1. **Does an admission of guilt as part of an entrapment defense negate the state's *Brady* duty to disclose impeachment evidence concerning its only witness to the sale of crack cocaine?**

2. **Did the court of appeals misapply the mixed subjective/objective test of entrapment as established by *England v. State*?**

EXPERT WITNESSES

a. Eyewitness testimony

Weatherred v. State,
985 S.W. 2d 234
(Tex. App.--Beaumont 1999, pet. granted)
PDR No. 99-0291
State's Petition

On original submission the court of appeals held that the trial court erred in excluding expert testimony concerning the unreliability of eyewitness identification testimony. The court of criminal appeals remanded the case to reconsider its examination in light of *Nenno v. State*.

"We must admit we are puzzled by the Court's directive to engage in this analysis as the holding in *Nenno*, unless we are entirely misreading it, appears to *lessen* the scrutiny in examining scientific evidence for the *Kelly* factors of relevance and reliability." Under *Nenno*, the appropriate questions are "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." The court found the evidence reliable and clearly relevant, and therefore that the trial court had erred under *Nenno* in excluding it. The state filed a petition for review.

Ground for Review: Whether the court of appeals erred in holding that *Nenno v. State*, 970 S.W. 2d 549, lessens the scrutiny in examining scientific evidence.

b. Supervisors and the hearsay rule

Martinez v. State,
993 S.W. 2d 751
(Tex. App.--El Paso 1999, pet. granted)
PDR No. 99-1182
State's Petition

The state relied on the testimony of Rudd, a laboratory supervisor from DPS, to testify to chemical analyses on drugs actually performed by other chemists. Appellant's hearsay objection was overruled and Rudd's opinion was admitted. Appellant appealed.

The court of appeals reversed. An expert may rely on lab reports prepared by subordinates in forming his opinion without violating the hearsay rule, provided that the proponent of such evidence proves by a preponderance that the witness is an expert under rule 702. Here, the trial court implicitly found that Rudd was an expert, but this finding was not supported by the record.

"The only evidence of Mr. Rudd's qualifications as an expert are his length of service at the Department of Public Safety, his position with the Department, and the number of trials that he has testified as an expert witness. Appellant correctly notes that the State offered no evidence regarding Rudd's education, training, or experience in the field. Similarly, no evidence was provided regarding the qualifications of the lab technicians who actually performed the tests. Finally, there is no indication that the hearsay evidence was the type of evidence relied upon by experts."

Grounds for Review:

1. **Did the court of appeals err by reversing the trial court's implicit ruling that the witness qualified as an expert, when appellant did not object to the qualifications of the witness?**

2. **Is the present opinion of a testifying witness hearsay?**

EXTRANEOUS OFFENSES

a. Opening the door with an expert; rebuttal of the "frame-up" defense

Wheeler v. State,
988 S.W. 2d 363
(Tex. App.--Beaumont 1999, pet. granted)
PDR No. 99-0815
State's Petition

Appellant was charged with aggravated sexual assault of a nine year old. Appellant

called a CPS case worker who testified that she had made an assessment of appellant's home, and had determined that there was no abuse or neglect there. The state was allowed to ask her if she had heard about appellant having molested his niece. Later, the state called the niece who testified that appellant had molested her some nine years earlier. Appellant was convicted and he appealed.

The court of appeals reversed. The CPS worker's testimony did not create a false impression about appellant's nature as a law abiding citizen or his propensity for committing criminal acts. Even if appellant opened the door somewhat, the scope of the state's evidence clearly exceeded the scope of the false impression testimony.

Grounds for Review:

1. **Did the court of appeals err in holding that expert testimony that appellant was not a sexual abuse risk did not open the door to a similar extraneous molestation?**

2. **Did the court of appeals err by refusing to find that an extraneous offense is admissible to rebut a defensive claim that the defendant was a victim of a "frame-up?"**

GUILTY PLEA

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

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

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

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

merits of Wilson's suppression motion, according to Broddus, we may not do so." [citations omitted]

Grounds for Review:

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

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

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

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

The court of appeals held that Rule 40(b)(1), which permits the appeal of pre-trial matters following a guilty plea, does not apply here because there was no plea bargain between the state and the defense. An agreement by the state not to challenge appellant's desire to appeal the rulings on the pre-trial motions is not a "plea bargain." Under *Broddus v. State*, where there is no agreement between the defendant and the state under which the defendant agrees to plead guilty in exchange for a punishment recommendation, the defendant who pleads guilty waives appeal on all nonjurisdictional defects. Even so, appellant is entitled to relief on appeal. "Appellant pleaded guilty with mistaken assurances from the trial court that he would still be able to appeal the court's rulings on his motions to suppress. Under these circumstances, the defendant's plea is not considered to have been given voluntarily or knowingly, and the defendant is entitled to a new trial."

Grounds for Review:

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

2. Whether a defendant's guilty plea should be considered involuntary when he pleads with a mistaken assurance from

the trial court that he will be able to appeal the court's ruling on a pre-trial motion?

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

HABEAS CORPUS

a. Confinement

Ex parte Eric Brian Schmidt,
No. 14-97-01398-CR
No.14-97-0116-CR
(Tex. App.--Houston [14th Dist.] April 1, 1999, pet. granted)
PDR Nos. 99-1104/5
Appellant's Petitions

Appellant was charged with a state jail felony, which was enhanced by a prior misdemeanor conviction. He filed a petition for writ of habeas corpus alleging that he was entitled to relief because the trial court had not obtained a jury waiver in the misdemeanor.

The court of appeals dismissed the appeal for want of jurisdiction. Article 11.09 of the code of criminal procedure requires that a person filing a writ must be confined on a charge of misdemeanor. Here, the conviction complained of occurred more than 15 years ago, and the petition alleges that appellant is subject to detention in another cause, a state jail felony. "Thus, appellant was not confined for a misdemeanor at the time he brought the writ."

Ground for Review: Whether the trial court committed reversible error in failing to grant habeas corpus relief, where the record shows that appellant did not knowingly and intelligently waive his federal constitutional right to trial by jury.

HARASSMENT

a. An ultimate sex act

Lefevers v. State,
1998 WL 887545
(Tex. App.--Dallas 1998, pet. granted)
PDR No. 0540-99
Appellant's Petition

Appellant was charged with harassment because he called the complainant and told her that he wanted to feel her breasts. He was convicted and complained on appeal, among other things, that the evidence was insufficient because the phrase, I want to feel your breasts, does not describe an ultimate sex act.

The court of appeals disagreed and affirmed the conviction. "The complainant . . . testified that she considered the comment, 'I want to feel your breasts,' obscene and that she was annoyed and harassed by the comment. In our view, the statement, 'I want to feel your breasts,'

describes an ultimate sex act because it is language that explicitly describes an act that is necessarily sexual in nature and was clearly offensive to the complainant. [citations omitted] We find, based on the complainant's testimony, there was sufficient evidence of a communication initiated by appellant, describing an ultimate sex act, that a rational trier of fact could find patently offensive."

Ground for Review: Whether the court of appeals erred in holding that the phrase "I want to feel your breasts" describes an ultimate sex act under 42.07(b)?

HEARSAY

a. The admissibility of a videotpae of child witness available to testify

Matz v. State,
989 S.W. 2d 419
(Tex. App.--Fort Worth 1999, pet. granted)
PDR No. 0665-99
Appellant's Petition

The seven year old complainant testified that appellant sexually abused her in a variety of ways. In addition to the child's testimony, the state played for the jury a videotape of the child made by child protective services. Appellant objected that, under article 38.071 § 1, the videotape of the child is not admissible if the child is available to testify.

The court of appeals affirmed the conviction. "Assuming that the trial court erred in admitting the videotape, Matz nevertheless failed to preserve anything for our review on this issue. It is well-settled that where substantially the same evidence complained of on appeal is admitted before the jury without objection, any error is waived. [citations omitted] In his appellate brief, Matz concedes that the CPS videotape 'essentially repeated the testimony of [T.M.],' and the record reflects that he never objected to T.M.'s testimony about the abuse. Because substantially the same evidence that appeared in the videotape was admitted elsewhere without objection, any error in admitting the tape was waived."

Ground for Review: The trial court erred in allowing the state to play for the jury a videotaped interview of the complaining party after the child testified live, in that such evidence is hearsay.

JURY CHARGE

a. Is Geesa mandatory?

Paulson v. State,
991 S.W. 2d 907

(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 0829-99
State's Petition

The trial court did not give the jury the definitional instruction of reasonable doubt required by the *Geesa* case, but appellant did not object. The court of appeals, while agreeing that the *Geesa* instruction contained as clear a definition as any, expressed serious doubt that it should be mandatory, or that it should be immune from a harmless error analysis. Nonetheless, the court bowed to stare decisis. "As an intermediate appellate court we must defer to the decisions of the Court of Criminal Appeals. Accordingly, we reluctantly sustain appellant's first point of error." The conviction was reversed and remanded for a new trial.

Grounds for Review:

1. **The court of appeals erred by holding that the failure of the trial court to submit a definition of reasonable doubt in the jury charge was not subject to harmless error analysis where neither party objected to the absence of this charge?**

2. **Is the failure to instruct the jury on the definition of "reasonable doubt" at guilt-innocence subject to a harm analysis.**

b. Proof beyond a reasonable doubt at punishment

Huizar v. State,
966 S.W. 2d 702
(Tex. App.--San Antonio 1998, pet. granted)
PDR No. 98-0794
State's Petition

The state introduced several acts of extraneous misconduct at the punishment phase of this aggravated sexual assault trial, but the jury was not instructed on the burden of proof. The state argued at punishment that it had no burden of proof at that phase of the trial. Appellant was convicted and sentenced to 99 years imprisonment.

The court of appeals stated that "fundamental unfairness and considerations of due process involved in this case require us to address whether the jury must be instructed on the burden of proof during the punishment phase." The court went on to hold that the "trial judge *must* instruct the jury on the burden of proof whenever the State introduces evidence of extraneous bad acts during the sentencing phase. Failure to instruct, then, is error." The court also held that the reasonable doubt instruction standard is a constitutional right and that therefore, harm is to be judged according to Rule 44.2 of the Texas Rules of Appellate Procedure.

Initially, the court of criminal appeals reversed the ruling of the court of appeals. On its

own motion, the court granted rehearing.

Grounds for Review:

1. **Must the trial court sua sponte instruct the jury that before it may consider extraneous offenses admitted during the punishment phase, it must believe beyond a reasonable doubt that the defendant committed them, or does a defendant waive such an instruction by failing to request it?**
2. **Is any error in the failure to submit the above instruction constitutional error subject to a harm analysis under Rule 44.2 of the Texas Rules of Appellate Procedure?**

c. Preservation of fundamental error in the jury charge

Stephanie Faye Navratil v. State,
No. 05-97-01404-CR
(Tex. App.--Dallas April 27, 1999, pet. granted)
PDR No. 99-0905
Appellant's Petition

Appellant pleaded guilty to intoxication manslaughter with a deadly weapon and went to the jury for punishment. The jury was instructed that appellant would be eligible for parole when her actual time plus her good time equaled one-half of the sentence imposed. This was erroneous, because, since there was a deadly weapon finding, she was not entitled to good conduct time in computing her parole eligibility.

The court of appeals affirmed. When asked if he had any objections to the court's charge, counsel said "No objection, Your Honor." The court held that, "by affirmatively endorsing the charge, appellant relinquished his right to complain about the charge and we will not engage in fundamental error analysis."

Ground for Review: Did the court of appeals err in holding that appellant waived the right to complain on appeal about a fundamentally defective charge because trial counsel affirmatively stated that he had no objection to the charge?

Franklin v. State,
986 S.W. 2d 349
(Tex. App.--Texarkana 1999, pet. granted)
PDR No. 99-0324
Appellant's Petition

Appellant contended for the first time on appeal that the trial court erred in not instructing

the jury on the state's burden at the punishment phase of proving beyond a reasonable doubt that he had committed certain extraneous offenses presented by the state. As noted, no request for such an instruction was made in the trial court.

The court of appeals affirmed. "This Court has concluded that a reasonable doubt instruction requiring the State to prove the defendant committed extraneous offenses should be given at punishment. However, if the defendant does not requires such language in the charge, the error is waived."

Grounds for Review:

1. **Does a defendant who does not request an instruction on the definition of "reasonable doubt" at punishment waive any error on appeal.**
2. **Must a trial court instruct the jury on the definition of "reasonable doubt" at punishment even in the absence of a request for such an instruction?**
3. **Is a failure to instruct on the definition of "reasonable doubt" at punishment constitutional error subject to a harm analysis under Rule 44.2(a) of the Texas Rules of Appellate Procedure.**
4. **Has a juror withheld material information when it is discovered for the first time during trial, that the juror was the assistant girl scout troop leader of the child victim of the sexual assault.**
5. **Whether the court of appeals erred in concluding that petitioner waived error by failing to include a statement of what the anticipated testimony of a juror, who withheld information concerning her relationship with the victim, would have been, when an offer of proof was made which summarized the questions appellant would have asked the juror if allowed to inquire further.**

d. Voluntariness and harm

Payne v. State,
985 S.W. 2d 682
(Tex. App.--Houston [1st Dist.] 1999, pet. granted)
PDR No. 0624-99
State's Petition

The court of appeals held that the evidence raised the issue whether appellant acted voluntarily when he shot the deceased, and that therefore the trial court erred in refusing to so instruct the jury. The court reversed the conviction without conducting a harm analysis. The state filed a petition for discretionary review.

Ground for Review: Is the trial court's error in failing to instruct the jury on voluntariness of conduct subject to a harm analysis?

e. What is the test for harm when constitutional error is found in the jury charge?

Jimenez v. State,
992 S.W. 2d 633
(Tex. App.--Houston [1st Dist.] 1999, pet. granted)
PDR No. 99-1090
Appellant's and State's Petitions

Appellant was convicted of aggravated assault, and elected the jury to decide punishment. The jury was charged at the punishment phase pursuant to article 37.07 § 4(a), that appellant could earn credit off his sentence for good time. He did not object to this charge, and the jury sentenced him to 15 years imprisonment.

Appellant complained for the first time on appeal that the trial court erred in instructing the jury concerning good time because, since he had been convicted of aggravated assault, he was not eligible for good time credit.

The court of appeals held that article 37.07 § 4(a) is unconstitutional, in violation of due process and due course of law, when, as in appellant's case, the accumulation of good time cannot result in early release. Since appellant did not object at trial, however, it was his burden to show egregious harm under *Almanza v. State*. "Considering the record as a whole, the entire charge, the nature of the offense, and the punishment assessed, we hold that appellant has not shown the erroneous charge resulted in such egregious harm that he did not receive a fair and impartial trial." The conviction was affirmed, and both appellant and the state filed petitions.

Grounds for Review:

1. **Whether the court of appeals applied the wrong harm analysis after holding that the parole charge provided for in article 37.07, 4(a), V.A.C.C.P., was unconstitutional, because the court of appeals failed to properly apply the harm analysis provided in Tex. R. App. P. 44.2(a) and instead erroeously determined the error did nt amount to egregious harm under *Almanza*.**

2. **Whether the court of appeals erred in holding that appellant's**

rights to due process and due course of law were violated when the trial court instructed the jury under art. 37.07, 4(a), , V.A.C.C.P.

JUVENILE

a. Failure to serve summons and copy of petition

Light v. State,
993 S.W. 2d 740
(Tex. App.--Austin 1999, pet. granted)
PDR No. 99-0761
State's Petition

Appellant was charged as a juvenile by a petition which alleged that he committed aggravated sexual assault and indecency with a child. The petition also requested that the juvenile court waive its jurisdiction and transfer appellant to the criminal court. The record reflected that appellant was not personally served with the summons or the petition. He appeared at the certification hearing, though, and when the court asked if he had been served, he answered in the affirmative. The court entered an order reflecting service had been made, and appellant was certified.

On appeal, appellant claimed, among other things, that the juvenile court never obtained jurisdiction to enter the certification order, and that therefore, the district court had no jurisdiction to try him. The court of appeals agreed and vacated the judgment below. The certification statutes are mandatory. A juvenile cannot waive the personal service of a summons in a certification hearing. No waiver under § 51.09(a) of the Texas Family Code appears in the record. Texas appellate courts have refused to apply a presumption of regularity to discretionary transfer proceedings. There is evidence in the record contrary to the order reflecting that service had been made.

Ground for Review: Whether the court of appeals erroneously failed to address the state's argument that appellant admitted on the record that he had been personally served before an adult certification hearing was held.

LESSER INCLUDED OFFENSES

a. Drug sampling

Enriquez v. State,
988 S.W. 2d 899
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 99-0724
State's Petition

The state seized approximately 500 pounds of marijuana from appellant and indicted him for delivering 50-2000 pounds. At trial the chemist who identified the marijuana testified that it

was packaged in 105 different bundles, and that she tested less than eight pounds of it. She did not chemically test, or even unwrap and visually inspect the rest of the marijuana.

The court of appeals reversed, holding that the trial court erred in not instructing the jury on the lesser included offense of delivery of five to fifty pounds of marijuana. "The manner of sampling goes directly to the weight that a jury may give that an untested substance is the same as a tested substance. Thus, if the jury is inclined to believe that the untested substance is either unknown or not the same as the tested substance due to an inadequate sampling or investigation, the jury is free to do so. In reviewing all the evidence, there is evidence that only 7.44 pounds of marijuana was present. Therefore, some evidence existed that if appellant is guilty, then he is only guilty of lesser included offense."

Ground for Review: Was appellant entitled to a jury instruction on the lesser included offense of possession of a lesser amount based on the manner of sampling of the marijuana done by the chemist?

b. The predicate

Eric Jerome Gilmore v. State,
No. 11-96-00383-CR
(Tex. App.--Eastland February 11, 1999, pet. granted)
PDR No. 99-0469
State's Petition

Appellant was indicted for aggravated assault by causing serious bodily injury. The complainant testified he fought with appellant and that during the fight he was stabbed. A doctor testified that the injury inflicted involved a substantial risk of death. Appellant testified that he hit the complainant three times, but that he did not stab him. He stated that the wound might have been self-inflicted. The trial court refused appellant's request to submit the lesser included offense of assault bodily injury.

The court of appeals reversed the conviction. "Anything more than a scintilla of evidence is sufficient to entitle a defendant to a charge on a lesser included offense. The testimony of appellant raised the issue of the lesser included offense of assault. The trial court erred by refusing to submit the requested charge." [citations omitted]

Grounds for Review:

1. **Whether evidence of a lesser offense necessarily raised a lesser-included offense of the charged offense such as to require a lesser-included offense instruction to the jury?**

2. **Whether evidence of a lesser offense alone is sufficient to**

require a lesser-included instruction, or whether the lesser offense must be included in the proof necessary to establish the charged offense?

MISUSE OF GOVERNMENT PROPERTY

a. Sufficiency

Margraves v. State,
996 S.W. 2d 290
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 99-1354
State's Petition

Appellant, chairman of the Board of Regents of Texas A & M University, used a university airplane to fly to Baton Rouge, Louisiana to attend his son's graduation from Louisiana State University. According to appellant, he also conducted university business while at the graduation ceremony. The jury found him guilty of misuse of government property, in violation of § 39.02 of the Texas Penal Code, and he appealed.

The court of appeals found the evidence legally insufficient and reversed the conviction. "It is our opinion that, under a proper construction of section 39.02, the mixed use of state property does not violate the statute as a matter of law."

The court also found § 39.02 unconstitutionally vague. "We hold that section 39.02(a)(2) provided insufficient notice to appellant and to law enforcement personnel as to whether an obvious 'mixed use' of state property can be considered to be criminal."

Grounds for Review:

1. **Should the court of appeals adopt appellant's version of the facts when deciding a legal sufficiency case?**

2. **Is the official misconduct statute unconstitutionally void for vagueness?**

3. **Is penal code 39.02(a)(2) unconstitutionally vague?**

4. **In reviewing the legal sufficiency of the evidence, did the court of appeals err by disagreeing with the proposition that the jury was entitled to reject the defendant's exculpatory evidence?**

5. **When judging the rationality of a jury's verdict under *Jackson***

***v. Virginia*, may an appellate court reweigh the defendant's evidence to find that it conclusively establishes his defensive theory?**

MOTION FOR NEW TRIAL

a. Can a new trial be granted after the cause is remanded for retrial on punishment only?

Lopez v. State,
1998 WL 741588
(Tex. App.--San Antonio 1998, pet. granted)
PDR No. 99-0132
Appellant's Petition

Appellant's conviction for attempted murder was reversed and remanded for a new trial on punishment only, pursuant to article 44.29 of the Texas Code of Criminal Procedure. Appellant appealed again after the sentence was assessed on remand, arguing, among other things, that the trial court erred in denying his motion for new trial because of error that occurred during his original trial. "In this appeal, we are limited to reviewing error that allegedly occurred during the punishment retrial. [citations omitted] Since none of Lopez's complaints are directed at error that we can properly consider in this appeal, his points of error are overruled. [citations omitted] The proper remedy for Lopez is to file a post-conviction writ of habeas corpus."

Ground for Review: Whether, after a cause is remanded for retrial on punishment only pursuant to art. 44.29(b), V.A.C.C.P.., a trial court has the jurisdiction to grant a motion for new trial.

OBSCENITY

a. Proof of knowledge; relevant evidence from the internet

Burden v. State,
1999 WL 562585
(Tex. App.--Dallas 1999, pet. granted)
PDR No. 99-1698
Appellant's Petition

Appellant was a clerk in a videotape store. Undercover officer Reynerson removed an empty video box off the shelf and presented it to the clerk, who, according to store procedure, retrieved the videotape corresponding to the empty box, and sold it to the officer. The empty box had on it pictures depicting sexual acts. Appellant testified at his trial that he had not watched the video before selling it to the officer and that he did not know its contents. Appellant tried to offer evidence of different kinds of pornography available on the internet, but the trial court excluded it as irrelevant and prejudicial. Appellant appealed his conviction, arguing that the evidence was legally insufficient to prove that he knew the depictions on the videotape were so patently offensive on their face as to affront current standards of decency. Appellant also complained that the trial court erred in excluding his internet evidence.

The trial court affirmed the conviction. As to sufficiency, the court held that "[t]he videotape boxes displayed at the video store where appellant worked showed a variety of sex acts, including sexual intercourse, oral sodomy, anal intercourse, and masturbation. Reynerson selected a videotape entitled 'Hardcore Schoolgirls No. 5.' The back cover of the box contains sixteen pictures, nine of which depict various sex acts. When Reynerson presented the box to appellant, he retrieved the videotape, put it in the box, and sold the tape to Reynerson. From both the circumstantial and direct evidence the jury could conclude that appellant knew the character and content of 'Hardcore Schoolgirls No. 5' at the time he sold it to Reynerson." As to the internet evidence, the court held that the trial court did not abuse its discretion. "The State's own witness testified that pornographic material was available on the internet. Further, the pornographic material appellant sought to introduce consisted of computer files displaying still pictures, not movies of the sort appellant sold in this case. Finally, appellant emphasizes the availability of pornography at the Dallas Public Library and argues Wilder's evidence and testimony should have been admitted to show community standards of obscenity in Dallas County. However, Wilder merely testified that the pornography he displayed could be accessed at the Dallas County Library. He did not testify that he retrieved the images he showed from computers at the Dallas County Library. In fact, Wilder testified that the sites from which he retrieved the images were actually located in Amsterdam or South America or other countries. Further, he stated he did not know what efforts, if any, the Dallas Public Library had taken to censor access to the internet."

Grounds for Review:

1. **The evidence is constitutionally insufficient to support the conviction, because the evidence fails to establish that petitioner knew the depictions of sexual acts in the videotape were so patently offensive on their face as to affront current community standards of decency.**

2. **The absence of any evidence from which the jury reasonably might have inferred, beyond a reasonable doubt, that petitioner knew the depictions of sexual acts in the videotape were so patently offensive on their face as to affront current community standards of decency rendered petitioner's conviction violative of the First and Fourteenth Amendments to the Constitution of the United States, since petitioner could have had fair notice that the sale of the tape would constitute a criminal offense.**

3. **The trial court committed reversible error by excluding, as legally irrelevant or cumulative, testimonial and pictorial evidence that graphic, sexual explicit images are accessible on the internet from the city of Dallas Public Library computers,**

and that the library imposes no limitations or restrictions on such internet access.

PLEA BARGAINING

a. Dismissal with prejudice

Smith v. State,
979 S.W. 2d 379
(Tex. App.--Amarillo 1998, pet. granted)
PDR No. 98-1862
Appellant's Petition

Appellant was originally indicted with several others for capital murder. He agreed to testify against the others and the prosecutor agreed not to oppose dismissal of his indictment. The indictment was dismissed, but, after a new prosecutor was elected, the case was reopened and appellant was reindicted. Prior to trial he complained that the first prosecutor had agreed to dismiss the indictment with prejudice, and that his second indictment was barred by this agreement. This motion was overruled and appellant was convicted of murder.

The court of appeals affirmed. Since the order dismissing the original indictment did not state that the dismissal was with prejudice, the grand jury was not barred from reindicting appellant. Assuming there was an oral agreement for immunity, the evidence shows that the agreement was not approved by the trial court. "Agreements for immunity must be supported by the approval of the trial court."

Grounds for Review:

1. **If a defendant and the state enter into an agreement that an indictment returned against the defendant will be dismissed with prejudice, and if the defendant upholds his end of the bargain, can a subsequent indictment charging the same transaction be brought against the defendant solely because the order of dismissal signed by the court did not state the dismissal was with prejudice?**
2. **If a defendant and the state enter into an agreement that an indictment returned against the defendant will be dismissed with prejudice, and if the defendant upholds his end of the bargain and the court signs an order of dismissal, can a subsequent indictment charging the same transaction be brought against the defendant solely because the court was not aware of the specific terms of the agreement not to prosecute?**

PROSECUTORIAL MISCONDUCT

a. Will Bauder survive?

State v. Lee,
971 S.W. 2d 553
(Tex. App.--Dallas 1997, pet. granted)
PDR No. 00168-98
State's Petition

In its opening statement, the state told the jury that before any charges were filed, the investigating officer called appellee and asked to talk, at which time appellee said he was not interested in talking and that the officer should call his attorney. Appellee objected that this statement improperly commented on appellee having invoked his right to remain silent and his right to counsel. Appellee's objection was sustained, and the trial court granted his motion for mistrial. When the state sought to retry appellee, he filed an application for writ of habeas corpus, arguing that prosecutorial misconduct barred retrial pursuant to the double jeopardy clause of the Texas Constitution and *Bauder v. State*, 921 S.W. 2d 696 (Tex. Crim. App. 1996).

The court of appeals agreed. The trial court's conclusion that mistrial was properly granted because an instruction to disregard could not have cured the error is supported by the record. And, the trial court's conclusions that the prosecutor was aware of but consciously disregarded the risk that her misconduct would require the mistrial was also supported by the record. "The State is barred from retrying appellee for the offense charged."

Grounds for Review:

1. **Whether a statement referring to an attorney is an impermissible comment on an accused's right to counsel, when the statement is made by an individual pre-arrest, during a police investigation, prior to the instigation of any formal proceedings?**
2. **Whether the *Bauder* doctrine is properly applied in dismissing an indictment because of a comment made during the prosecutor's opening statement which referenced a pre-arrest statement made by an individual which refers to an attorney?**
3. **Should this court reconsider its decision in *Bauder v. State*?**
4. **Is the mere showing that a prosecutor recklessly engaged in conduct that required the declaration of a mistrial, without showing that the prosecutor intended to induce such mistrial, sufficient to order a double jeopardy bar to reprosecution for that offense?**

SEARCH AND SEIZURE

a. Credibility choices

State v. Ross,
999 S.W. 2d 468
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 99-1618
State's Petition

The trial court granted appellee's motion to suppress because officer Darnell did not have probable cause to arrest him for public intoxication. The state appealed, and the court of appeals affirmed.

"In this case, Darnell's description of Ross's speech, physical condition, and odor were sufficient to warrant a reasonable belief that appellant was intoxicated. In addition, Darnell's testimony that Ross stated he was going to drive the children home himself in that condition warranted a reasonable belief that he was likely to endanger himself and his children by doing so."

"Therefore, the evidence established that the officers had probable cause to arrest Ross for public intoxication after Ross made that statement."

"This case provides an example of how the seemingly contradictory precedent on the standard of review can produce conflicting determinations. On the one hand, a de novo review of this case based on the State's uncontroverted evidence leads to the conclusion that granting the motion to suppress could only have resulted from misapplying the law to the facts. On the other hand, if the trial court did not believe any material portions of the State's evidence, such as whether Ross actually exhibited signs of intoxication, it had discretion to grant the motion on that basis."

"In seeking to resolve this apparent conflict, the fundamental importance of the trier of fact's discretion to evaluate credibility and demeanor and to believe or disbelieve any witness's testimony, even if uncontroverted, persuades us that case law describing when a case turns on an evaluation of credibility and demeanor should not be interpreted to infringe on that discretion. Accordingly, we conclude that it was within the trial court's discretion to grant the motion to suppress, and we affirm the judgment of the trial court."

Ground for Review: Can an appellate court uphold a trial court's decision to suppress evidence as within its "discretion," instead of conducting a de novo review, merely because the judge might have disbelieved some or all of the state's uncontroverted evidence?

b. Canine searches without reasonable suspicion

Walter v. State,
997 S.W. 2d 853
(Tex. App.--Austin 1999, pet. granted)
PDR No. 99-1321
State's Petition

The police got a tip from an unknown person that drugs were being sold in a park. Upon arrival at the park, they witnessed appellant commit a traffic violation, and they stopped his truck. The first officer detained appellant while he conducted a warrant check, at the same time requesting that a canine officer make the scene. The canine officer arrived before the warrant check was completed, and he conducted an exterior examination of the truck, to make sure the dog would not hurt himself. While conducting this examination, the canine officer saw marijuana in plain view in the truck. Appellant was arrested for this offense, and a search incident of his person revealed cocaine for which appellant was prosecuted and convicted.

The court of appeals reversed. Although the state may detain while conducting a warrants check, it may not conduct a canine search during that time, unless it has at least reasonable suspicion to do so. Here the facts did not give rise to reasonable suspicion.

Grounds for Review:

1. **When an individual is detained because of a traffic stop and a warrant check incidental to the traffic stop, may the officer seize suspected narcotics that he sees in plain view inside the individual's vehicle?**

2. **When an individual is detained because of a traffic stop and a warrant check incidental to the traffic stop, but no reasonable suspicion exists to believe the individual is engaged in criminal activity, does the officer's subjective intention to conduct an exterior sweep of the vehicle with a drug-sniffing dog vitiate the officer's seizure of suspected narcotics observed in plain view during the lawful detention?**

c. Standing

Taylor v. State,
995 S.W. 2d 279
(Tex. App.--Texarkana 1999, pet. granted)
PDR No. 99-1194/5
Appellant's Petitions

Appellant arrived at a close friend's (Hall's) house with several bags, put the bags in the back bedroom, and took a shower. After a few hours, appellant left in his car, and was stopped for a traffic offense. Later the police got a warrant for the house, and searched it, finding cocaine in appellant's bags. The trial court ruled he had no standing to contest the search, and refused to consider the merits of his motion to suppress. Appellant was convicted and he appealed.

The court of appeals affirmed. "The evidence shows that Taylor had not truly been an overnight guest, and had left his unsecured bags in the residence, and that he had left bags there before in a type of storage. There is no proof that he intended to promptly return. The court could reasonably have concluded that any visit had terminated and that the bags had simply been left in Hall's care. This situation differs sufficiently from the cases involving an "overnight guest" to permit the trial court to conclude that Taylor no longer had an objectively reasonable expectation of privacy as to the property, or alternatively that Taylor's acts did not adequately show a genuine intention to preserve the items as being truly private. We find no error."

Ground for Review: Did the court of appeals err in holding that appellant did not have standing to contest an illegal intrusion and search of a residence in which he was an overnight guest?

d. Protective sweeps; consent searches

Reasor v. State,
988 S.W. 2d 877
(Tex. App.--San Antonio 1999, pet. granted)
PDR No. 0681-99
State's Petition

The police stopped and arrested appellant, found cocaine in his car, then conducted a "protective sweep" of his residence. While in handcuffs and in the presence of several armed police officers, appellant "consented" to a search of the residence. Appellant was prosecuted for the drugs found in his car and residence and was convicted. He appealed.

The court of appeals reversed. The initial stop and arrest were supported by probable cause and were legal. The consent to search the residence, however, was not freely given, where appellant was arrested at gun point by four officers and handcuffed and he was in custody when the "consent" was given. Furthermore, the protective search was illegal, since it was not accompanied by "articulable facts" leading the police to believe there might be someone else inside the residence. This illegal search further tainted the subsequent consent search.

Grounds for Review:

1. The court of appeals erred by holding that the protective sweep engaged in by the officers was illegal.

2. The court of appeals erred by holding that appellant's consent to search his residence was fatally tainted.

e. Constitutionality of Water Safety Act

Schenekl v. State,
996 S.W. 2d 305
(Tex. App.--Fort Worth 1999, pet. granted)
PDR No. 99-1529
Appellant's Petition

A game warden stopped and boarded appellant's boat to check for water safety equipment pursuant to § 31.124(a) of the Texas Water Safety Act. After conducting field sobriety tests, he arrested appellant for BWI, appellant was convicted, and he appealed.

The court of appeals held that the Water Safety Act is constitutional and does not violate the Fourth Amendment to the United States Constitution. "Balancing the State's substantial interest in recreational water safety against the intrusion involved, the enforcement provision of the Act does not authorize searches and seizures that violate the Fourth Amendment."

Ground for Review: Is Parks and Wildlife Code § 31.124 (allowing the random, suspicionless stopping and inspection of boats) constitutional?

f. Routine pat-down searches

O'Hara v. State,
989 S.W. 2d 132
(Tex. App.--San Antonio 1999, pet. granted)
PDR No. 99-0412
State's Petition

A trooper stopped appellant's 18 wheeler truck for a traffic violation and asked him to sit in his patrol car while he wrote an inspection report. He told appellant he was going to allow him to sit in the front seat of the car, but first he had to pat him down to make sure he did not have any weapons. When he attempted to pat-down his front left pocket, appellant stepped back, which caused the trooper to become scared and made him believe there was a weapon. He handcuffed appellant, searched his person, and found marijuana and cocaine. Appellant was convicted of possession of cocaine and he appealed.

The court of appeals reversed the conviction. An officer conducting a weapons search must have specific articulable facts which would cause a reasonably prudent person to believe he or others were in danger. The officer here testified that he routinely performs pat-down searches before allowing persons in his patrol car. He did not testify that he was afraid of appellant or that

he thought he was armed. "In this case, Trooper Muhler's only basis for the pat-down search was that it was his routine to pat-down someone before allowing him into his patrol car. However, . . . routine does not justify a pat-down search. Therefore, we find no specific articulable facts to suggest that Trooper Muhler reasonably believed that O'Hara was armed and dangerous. Thus, we find that the pat-down search was illegal."

Grounds for Review:

1. **Can a pat-down search be justified even if the officer does not say he feared for his safety or the safety of others?**

2. **Can a pat-down search be justified as a matter of routine before an individual is allowed into a patrol car?**

SENTENCING

a. Must the jury's verdict on sudden passion be unanimous?

Sanchez v. State,
1999 WL 173986
(Tex. App.--Dallas 1999, pet. granted)
PDR No. 99-0906
State's Petition

The jury found appellant guilty of murder, and the jury considered evidence of sudden passion at punishment. "At punishment, the trial court instructed the jury that '[a]n affirmative ('yes') answer on the issue [of sudden passion] submitted must be unanimous, but if the jury is not unanimous in reaching an affirmative answer, then the issue must be answered 'no'.' The jury voted nine "no" and three "yes" on the issue of sudden passion and assessed a twenty-five year sentence." Appellant appealed, arguing that this instruction violated the unanimous verdict requirement of the Texas Constitution.

The court of appeals reversed, but found it unnecessary to reach appellant's constitutional claim. Article 37.07 requires the jury to agree on a punishment verdict and agreement requires unanimity. "[W]e conclude that if the jury's answer is not unanimous on the issue of sudden passion, the jury has not 'agreed' on punishment. To allow a charge such as the one given in this case would, in theory, allow a single juror to determine the range of punishment. We conclude that such a proposition is without any basis in law."

Ground for Review: Whether the court of appeals erred in holding that the trial court committed fundamental error by charging the jury that it was not required to render a unanimous verdict on the punishment issue of sudden passion.

b. Can the state attempt to prove an enhancement on retrial after it failed to prove it at the first trial?

Rodney Thompson, Jr. v. State,
No. 01-07-00369-CR
(Tex. App.--Houston [1st Dist.] April 1, 1999, pet. granted)
PDR No. 1025-99
State's Petition

The court of appeals found that the state had failed to prove that appellant had been finally convicted of burglary, as alleged in one of the enhancement counts. The court reversed the conviction and remanded the case for a new punishment hearing, and noted that the state was prohibited from again attempting to use for enhancement the alleged prior conviction which it had failed to prove at the first trial.

Ground for Review: Where a cause is reversed and remanded for a new punishment hearing because of the state's failure to sufficiently prove a conviction alleged for enhancement, is the state prohibited, as a matter of federal law, from again attempting to use and prove the same allegation on remand? *See Monge v. California*, 118 S.Ct. 2246, 141 L. Ed.2d 615 (1998).

c. Enhancing state jail felonies

State v. Webb,
980 S.W. 2d 924
(Tex. App.--Fort Worth 1998, pet. granted)
PDR No. 98-1901
State's Petition

Appellant was charged with the state jail felonies of delivery of less than one gram of heroin and one gram of cocaine, but was convicted of the lesser included offenses of possession of heroin and cocaine. At punishment the trial court found that appellant had two prior felony convictions, but refused to conclude that his punishment for an enhanced state jail felony was subject to the habitual offender provisions of section 12.42(d) of the penal code. The state appealed.

The court of appeals affirmed. "We . . . conclude that the trial court was correct to find that Webb's enhanced state jail felony conviction was not subject to further enhancement."

Ground for Review: May a state jail felony conviction, enhanced to a second degree felony under penal code § 12.42(a)(2), be further enhanced as a habitual under § 12.42(d)?

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

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

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

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

Grounds for Review:

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

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

e. The relevance of a dismissed indictment

Mendiola v. State,
995 S.W. 2d 175
(Tex. App.--San Antonio 1999, pet. granted)
PDR No. 1199-99
Appellant's Petition

At the punishment phase, the state offered evidence of an unadjudicated extraneous offense that appellant had previously molested another child. Appellant sought to prove that the state had indicted appellant for this earlier offense, but that it had subsequently dismissed the indictment. The trial court held that evidence of the dismissal was irrelevant and appellant appealed.

Ground for Review: When the trial court admits punishment evidence that appellant has molested another child, is it a "matter . . . relevant to sentencing" under article 37.07 3(a) that the state indicted appellant for this conduct, then dismissed the indictment?

f. Is Estelle v. Smith applicable to a juvenile diagnostic evaluation?

Cantu v. State,
994 S.W. 2d 721
(Tex. App.--Austin 1999, pet. granted)
PDR No. 99-1279
State's Petition

Dr. Ezell was ordered to conduct a diagnostic evaluation of the juvenile appellant in conjunction with the decision to certify him as an adult. Appellant was certified and he was convicted of murder, and Dr. Ezell provided damaging testimony about appellant at punishment. Appellant's objection, that the principles of *Estelle v. Smith* dictate that the protections of the Fifth and Sixth Amendments apply to this situation, were overruled, and appellant was sentenced to 40 years imprisonment.

The court of appeals reversed. The court held that the admission of Ezell's testimony violated appellant's Fifth Amendment right against self-incrimination because appellant was not advised before the examination that he had the right to remain silent and that any statement he made could be used against him at sentencing. Admission of this testimony also violated appellant's Sixth Amendment right to consult with counsel about the exam before it took place.

Ground for Review: Is the testimony of a psychiatrist or psychologist concerning the demeanor or lack of remorse of a juvenile during a pre-transfer diagnostic study inadmissible at punishment unless the juvenile was warned prior to the diagnostic study that his statements could be used against him at trial.?

g. Stacking

Pettigrew v. State,
1999 WL 345456
(Tex. App.--Tyler 1999, pet. granted)
PDR No. 99-1417
State's Petition

Appellant was placed on 10 years probation in October, 1995 for aggravated sexual assault of a child. In August, 1997, appellant was convicted of murder and sentenced to 75 years. Appellant's probation was later revoked because of the murder, which had been committed on September 2, 1996, and because he failed to perform community service in 1996. The court

ordered this 10 year sentence to run consecutively with the 75 year sentence that appellant received for the 1996 murder.

The court of appeals reversed the cumulation order. Article 42.08 allows cumulation of sentences for subsequent convictions, not subsequent sentences. "Consequently, since Appellant's conviction for aggravated assault preceded his conviction for murder, the aggravated assault sentence should not have been cumulated with the murder sentence." The judgment revoking probation is modified to delete the cumulation order.

Grounds for Review:

1. **Where a defendant is placed on community supervision for a felony offense and thereafter community supervision is revoked and sentence imposed, can the sentence for said offense be ordered to run consecutively with the sentence for another offense that was imposed after the community supervision was ordered in the first case but prior to the revocation of probation and imposition of sentence in the first case?**

2. **The court of appeals erred in removing the cumulation order because the sentence imposed by the trial court, after the revocation of the suspended sentence in this case was a subsequent sentence to the sentence for the murder and authorized by statute.**

Miller v. State,
1999 WL 1076648
(Tex. App.--Tyler 1999, pet. granted)
PDR No. 99-1692
Appellant's Petition

Following his conviction, the trial court ordered appellant's sentence to run consecutively with the sentence in a former conviction, even though there was no evidence in the record showing that appellant was serving a prison sentence at the time of his conviction and sentencing in this case. Appellant appealed, relying on *Turner v. State*, 733 S.W.2d 218, 221 (Tex. Crim. App. 1987), for the proposition that "[a] cumulation order is void if it fails to properly identify a defendant as the person previously convicted and thus subject to cumulated sentences."

The court of appeals disagreed and affirmed. *Turner* is distinguishable because there the cumulation order arose from a conviction before a different court. "[T]he trial judge in the instant case, being the sitting judge in both cases, properly took judicial notice of the first conviction when she cumulated the sentences."

Ground for Review: Must an art. 42.08(a), V.A.C.C.P. cumulation order be supported by record evidence of the prior sentence upon which the new one is stacked?

h. Punishment recommendation by the victim in a PSI

Fryer v. State,
993 S.W. 2d 385
(Tex. App.--Fort Worth 1999, pet. granted)
PDR No. 99-1474
Appellant's Petition

Appellant was convicted of sexual assault and elected for the court to punish him. The pre-sentence investigation report stated that the victim had stated her opposition to the appellant receiving probation. Appellant's objection to the trial court considering this statement was overruled and appellant was sentenced to eight years imprisonment.

The court of appeals affirmed the sentence. "Because article 42.12, section 9(a) does not prohibit a PSI from containing the victim's recommendation of punishment, and a trial court is statutorily authorized to consider the contents of the PSI prior to sentencing, we hold that the trial court did not err by considering the PSI prior to sentencing."

Ground for Review: May the trial court consider a victim's punishment recommendation in a PSI?

i. Waiver; "previously convicted"

Jordan v. State,
979 S.W. 2d 75
(Tex. App.--Austin 1998, pet. granted)
PDR No. 0156-99
State's Petition

Appellant was originally placed on deferred adjudication for delivery of one to four grams of cocaine. Later the state filed a motion to adjudicate based on various violations, and appellant was also charged with unauthorized use of a motor vehicle. At the same proceeding, the court adjudicated appellant guilty of the drug offense and sentenced him to six years imprisonment, and appellant pleaded guilty to the unauthorized use case, for which he received two years in the state jail.

Appellant complained for the first time on appeal that the trial court was required to impose probation upon conviction of the state jail felony offense of unauthorized use of a motor vehicle. The state argued, first that appellant waived any error by not raising his complaint in the

trial court, and second, that a sentence of confinement was permissible, since appellant had been previously convicted.

The court of appeals disagreed with the state and reversed the sentence. The state's second contention, that appellant had been previously convicted because the court adjudged appellant guilty of the delivery before finding him guilty of the unauthorized use, is incorrect. The court construed article 42.12 § 15(a) to require proof of a previous *final* felony conviction before a sentence of confinement is authorized on a state jail felony conviction. A conviction is not final until it is affirmed and the mandate issues. Here, the conviction for delivery was not final at the time of the conviction for unauthorized use. As such, the sentence of confinement was unauthorized. This answers the state's waiver argument. "An unauthorized punishment, however, is void and may be challenged even in the absence of a trial objection."

Grounds for Review:

1. **Did appellant's failure to object in the trial court to unauthorized punishment foreclose his challenge on appeal to the unauthorized punishment?**

2. **Does "previously convicted" in article 42.12, 15(a), V.A.C.C.P.., mean "previously finally convicted?"**

j. Serious bodily injury

Fleming v. State,
987 S.W. 2d 912
(Tex. App.--Beaumont 1999, pet. granted)
PDR No. 99-0636
State's Petition

Appellant was in an automobile accident in which two others were injured. Appellant was charged with two counts of intoxication assault, which required the state to prove serious bodily injury. On appeal, appellant argued that the evidence was legally insufficient to prove that either man suffered serious bodily injury.

The court of appeals agreed with the appellant concerning one man's injuries, and disagreed about the other's. As to Mr. Howard, although finding it "a very close call," the court held that a broken leg, a broken hip and a fractured pelvis did constitute serious bodily injury, in light of the surgical procedures involved. There was at least some evidence of protracted loss or impairment of Mr. Howard's leg and pelvis. Mr. Bivin's injuries, though, were another matter. Bivins testified that his knee suffered cartilage damage and that his hand was severely jammed. His testimony did not even permit the inference of protracted loss or impairment of either his knee or his hand as a result of the collision. The court cited *Webb v. State* for the proposition that

surgery is not evidence of serious bodily injury, *per se*.

Grounds for Review:

1. **Whether the court of appeals erred in focusing on evidence the state did not produce, instead of the evidence the state did introduce, to determine the sufficiency of the evidence supporting the jury's finding of "serious bodily injury."**

2. **Whether this court should reconsider its decision in *Webb v. State*, 801 S.W.2d 529 (Tex. Crim. App. 1990), that surgery and its after effects should not be considered in determining the sufficiency of the evidence supporting a finding of "serious bodily injury."**

k. Instructing the jury on good time credit when appellant is ineligible for same

Jimenez v. State,
992 S.W. 2d 633
(Tex. App.--Houston [1st Dist.] 1999, pet. granted)
PDR No. 99-1090
Appellant's and State's Petitions

Appellant was convicted of aggravated assault, and elected the jury to decide punishment. The jury was charged at the punishment phase pursuant to article 37.07 § 4(a), that appellant could earn credit off his sentence for good time. He did not object to this charge, and the jury sentenced him to 15 years imprisonment.

Appellant complained for the first time on appeal that the trial court erred in instructing the jury concerning good time because, since he had been convicted of aggravated assault, he was not eligible for good time credit.

The court of appeals held that article 37.07 § 4(a) is unconstitutional, in violation of due process and due course of law, when, as in appellant's case, the accumulation of good time cannot result in early release. Since appellant did not object at trial, however, it was his burden to show egregious harm under *Almanza v. State*. "Considering the record as a whole, the entire charge, the nature of the offense, and the punishment assessed, we hold that appellant has not shown the erroneous charge resulted in such egregious harm that he did not receive a fair and impartial trial." The conviction was affirmed, and both appellant and the state filed petitions.

Grounds for Review:

1. **Whether the court of appeals applied the wrong harm analysis**

after holding that the parole charge provided for in article 37.07, 4(a), V.A.C.C.P., was unconstitutional, because the court of appeals failed to properly apply the harm analysis provided in Tex. R. App. P. 44.2(a) and instead erroeously determined the error did nt amount to egregious harm under *Almanza*.

2. **Whether the court of appeals erred in holding that appellant's rights to due process and due course of law were violated when the trial court instructed the jury under art. 37.07, 4(a), , V.A.C.C.P.**

SEVERANCE

a. When must severance be sought?

Nilda and Evangelica Aguilar v. State,
No. 13-97-00339-CR & 13-97-00348-CR
(Tex. App.--Corpus Christi May 6, 1999, pet. granted)
PDR No. 99-0817
Appellant's Petition

Nilda and Evangelica Aguilar were jointly tried for the murder of Juan Aguilar. Appellants raised several points of error on appeal, two of which are germane to their peititons for discretionary review.

First, appellants complain that the trial court erred in denying their motions for severance. The court of appeals disagreed. "Motions for severance not made prior to the announcement of ready are not considered timely and will not be addressed by the trial court. No error is presented where the trial court fails to grant an untimely motion to sever." [citations omitted]

Second, Nilda complains that the trial court erred in refusing to instruct the jury on the accomplice witness rule with regard to Evangelica, who testified as a witness in her own defense. The court of appeals disagreed. The accomplice witness rule applies only where the state calls the witness and relies on that testimony. Here, Evangelica testified in her own defense, and not as a witness for the state. "The jury was instructed that it could not use Evie's testimony as evidence agaisnt Nilda. We hold the accomplice-witness rule is inapplicable in this situation."

Grounds for Review:

1. **Must a motion to sever codefendants joined for trial be made before trial begins or may it be urged in response to evidence at trial?**

2. Is a defendant who is jointly tried with a codefendant entitled to an accomplice-witness instruction when the codefendant testifies in his own behalf and implicates the defendant?

SPEEDY INDICTMENT

a. Article 32.01, for the last time?

Ex parte Cathcart,
982 S.W. 2d 540
(Tex. App.--San Antonio 1998, pet. granted)
PDR No. 99-0129
State's Petition

Appellant was arrested on October 4, 1996 for DWI and intoxication assault and released on bond the next day. The state filed an information for DWI, which was dismissed in December 1996, with the notation that the case would be refiled as intoxication assault. In March, appellant filed an application for writ of habeas corpus complaining of a delayed indictment. A hearing was held on the writ, and the magistrate's court recommended that relief be denied. While this ruling was pending review in the district court, the state indicted appellant for intoxication assault. Relief was denied on the writ, and appellant filed an interlocutory appeal, complaining again of the delayed indictment under articles 28.061 and 32.01 of the Texas Code of Criminal Procedure.

The court of appeals held that the trial court erred in denying relief on the writ. "We hold that the trial court erred in denying relief and reverse that ruling. Because this habeas hearing was held on May 12, 1997, five months after our *Lawson* opinion issued, and the State did not put on any good cause evidence, the trial court is instructed to enter an order granting habeas corpus relief. All further prosecutions for intoxication assault shall be dismissed and further criminal prosecution stemming from the October 5, 1996 arrest is barred."

Grounds for Review:

1. **The court of appeals erred in reversing the judgment of the trial court and remanding with instructions to dismiss all further prosecution for intoxication assault and barring further criminal prosecutions stemming from the appellant's October 5, 1996 arrest as the court has misconstrued articles 32.01 and 28.061 of the Texas Code of Criminal Procedure.**
2. **The court of appeals erred in holding article 32.01 of the Texas Code of Criminal Procedure applies to bar prosecution of the defendant for a felony offense stemming from the same transaction as a previously charged but dismissed misdemeanor.**
3. **The court of appeals erred in holding that one accused of a felony is equivalent to one charged with a felony for purposes**

of invoking article 32.01 of the Texas Code of Criminal Procedure.

4. **The court of appeals erred in holding a defendant is (still) detained or in custody or held to bail for his appearance to answer any criminal accusation before a district court once the case is dismissed by the state, a release of liability is had and the appellant's bond is closed.**
5. **The court of appeals erred in holding a dismissal by the state is equivalent to a discharge by the court, sustaining a motion to set an indictment, information, or complaint for failure to provide a speedy trial, thus engaging article 28.061 of the Texas Code of Criminal Procedure and barring further prosecution under article 28.061 or article 32.01 of the Texas Code of Criminal Procedure.**
6. **The court of appeals erred in holding article 11.01 of the Texas Code of Criminal Procedure applies to one not restrained in his liberty.**

SUFFICIENCY

a. Will Clewis survive?

Johnson v. State,
978 S.W. 2d 703
(Tex. App.--Corpus Christi 1998, pet. granted)
PDR No. 98-1915
State's Petition

"From all of the evidence we hold that the state proved that the rape occurred but the evidence is not factually sufficient to prove beyond a reasonable doubt that Jimmie Lee Johnson is the guilty party. The in-court identification was not clear and unequivocal. The items cited by the state to incriminate appellant, i.e., the DNA testing, appellant's having lived in the area where the rape occurred, appellant's being uncircumcised, his escaping from jail, and his living an area near the victim's apartment could all apply to many people other than him."

"We do not substitute our judgment for that of the jury but we do find a manifest injustice. There is no greater 'manifest injustice' than to send a person to prison whose guilt has not been established beyond a reasonable doubt."

Grounds for Review:

1. **Did the court of appeals apply the correct standards of review**

for considering factual insufficiency of the evidence?

2. Should the court of criminal appeals re-examine its decision in *Clewis v. State*, 922 S.W. 2d 126, that courts of appeals must conduct reviews of the factual sufficiency of the evidence?

b. Variance; Lugers, Rugers and go-carts

Gollihar v. State,
991 S.W. 2d 303
(Tex. App.--Texarkana 1999, pet. granted)
PDR No. 0669-99
State's Petition

Appellant was charged -- in the indictment and the jury charge -- with stealing a go-cart, of a certain model number (136202). The go-cart the state proved was stolen, though, had a different model number by one digit (136203).

Appellant complained on appeal that the evidence was legally insufficient to prove the description of the go-cart, and the court of appeals agreed. "[T]he State was required to shoulder the burden of proof set out in the charge. The charge required the State to prove the model number specified in the description of the property stolen. This was not proved; therefore, we are mandated to find the evidence insufficient to support the jury's finding and sustain this point of error."

Ground for Review: What is the proper standard for reviewing sufficiency of the evidence when the state fails to prove an allegation in the indictment which is unnecessary, but descriptive of an element of the offense?

Michael Fuller v. State,
No. 10-98-00019-CR
(Tex. App.--Waco May 27, 1998, pet. granted)
PDR No. 1283-98
State's Petition

Appellant was charged with injury to an elderly individual, namely "Olen M. Fuller." At trial, the complainant was referred to only as "Mr. Fuller," or "Buddy." "Because there is no evidence that the victim who testified was the person alleged in the indictment, the jury was not authorized to convict Fuller of injuring Olen M. Fuller."

Ground for Review: Whether the court of appeals erred in acquitting appellant because the state failed to prove the victim's first name as alleged in the indictment, without first determining whether this variance misled appellant to his prejudice?

c. Legal sufficiency

Margraves v. State,
996 S.W. 2d 290
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 99-1354
State's Petition

Appellant, chairman of the Board of Regents of Texas A & M University, used a university airplane to fly to Baton Rouge, Louisiana to attend his son's graduation from Louisiana State University. According to appellant, he also conducted university business while at the graduation ceremony. The jury found him guilty of misuse of government property, in violation of § 39.02 of the Texas Penal Code, and he appealed.

The court of appeals found the evidence legally insufficient and reversed the conviction. "It is our opinion that, under a proper construction of section 39.02, the mixed use of state property does not violate the statute as a matter of law."

Grounds for Review:

1. **Should the court of appeals adopt appellant's version of the facts when deciding a legal sufficiency case?**

2. **Is the official misconduct statute unconstitutionally void for vagueness?**

3. **Is penal code 39.02(a)(2) unconstitutionally vague?**

4. **In reviewing the legal sufficiency of the evidence, did the court of appeals err by disagreeing with the proposition that the jury was entitled to reject the defendant's exculpatory evidence?**

5. **When judging the rationality of a jury's verdict under *Jackson v. Virginia*, may an appellate court reweigh the defendant's evidence to find that it conclusively establishes his defensive theory?**

THEFT

a. "Value obtained"

McClendon v. State,
994 S.W. 2d 706
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 99-0795
State's Petition

Appellant presented her electronic benefit food stamp card and, in exchange for $160.00 cash, the merchant placed transactions of $214.00 on the card. The state charge appellant with stealing more than $200.00 worth of property. Appellant argued that the value of the property stolen was the amount of cash she received, and that the evidence was therefore insufficient to prove that she stole more than $200.00.

The court of appeals agreed with the appellant and reversed the conviction. There are two parties to a redemption transaction, the person giving and the persons receiving the food stamps. "The 'cash or exchange value obtained' applies to the person charged with the offense, and refers to the cash or exchange value obtained by the one charged." By this definition, appellant only obtained $160.00.

Ground for Review: Appellant received a total of $160.00 in cash in exchange for presenting electronic benefit transfer cards. The undercover officer who received the cards placed a total of $214.00 on the cards. Is the "value obtained," as defined in 33.011(f) of the Human Resources Code, the cash amount obtained by appellant or the amount put on the electronic benefit cards by the recipient?

VOIR DIRE

a. Convicted felons

Perez v. State,
973 S.W. 2d 759
(Tex. App.--Corpus Christi 1998, pet. granted)
PDR No. 98-1430
State's Petition

After appellant was convicted, the parties learned that one of the jurors was a convicted felon. Appellant objected by way of a motion for new trial, but the trial court overruled this motion, finding that he had not shown "significant harm," as required by article 44.46 of the Texas Code of Criminal Procedure.

The court of appeals reversed. This statute is in conflict with Article XVI, §2 of the Texas Constitution which guarantees the right to a fair and just trial before a jury composed of 12 qualified persons. 'It cannot be said that such purity and efficiency [of the right to trial by jury] is maintained by permitting juries to be composed of thieves, robbers, murderers, kidnappers,

perjurers, rapists, drug dealers and others convicted of felonies....'"

Ground for Review: Does Tex. Crim. Proc. Code art. 44.46 violate Tex. Const. Art. XVI, 2?

b. The test for harm

Johnson v. State,
996 S.W. 2d 288
(Tex. App.--Houston [14th Dist.] 1999, pet. granted)
PDR No. 1353-99
Appellant's Petition

The court of criminal appeals remanded appellant's case to the court of appeals, finding that the trial court had erroneously denied him the right to challenge for cause two venirepersons who could not consider the full range of punishment. On remand, the court of appeals held that the wrong done appellant forced him to use two peremptory challenges he would not otherwise have used. This was non-constitutional error and that, because appellant was unable to prove that a substantial right of his had been affected, the error was harmless under Rule of Appellate Procedure 44.2(b).

Grounds for Review:

1. **Whether the court of appeals misinterpreted the court of criminal appeals' directive on remand and erred by refusing to consider and analyze appellant's point for review number one?**

2. **Whether the court of appeals erred in disregarding the error pursuant to Tex. R. App. Proc. 44.2(b) where the appellant was statutorily prohibited from preserving the testimony necessary to determine whether his substantial rights were affected?**

Jose Barajas v. State,
No. 08-97-00405-CR
(Tex. App.--El Paso February 4, 1999, pet. granted)
PDR No. 99-0415
State's Petition

The trial court refused to permit appellant to ask the venire whether they could be fair and impartial in an indecency with a child case where the victim was eight to ten years old. Appellant was convicted and was assessed 10 years probation.

The court of appeals reversed the conviction. This was a proper voir dire question and

the trial court erred in prohibiting it. Because it was constitutional error and did not lend itself to a meaningful harmless error review.

Grounds for Review:

1. **When a defendant is allowed the opportunity to ask offense specific voir dire questions, namely, whether the jury panel could consider probation and be fair in an indecency with a child case where the victim is under age 17, does a trial court abuse its discretion in not allowing age-specific questions, namely, whether the jury could be fair and impartial and consider probation where the victim is eight to ten years old?**
2. **Does a court of appeals err in reversing for jury voir dire error without performing a harm analysis?**

Ford v. State,
977 S.W. 2d 824
(Tex. App.--Fort Worth 1998, pet. granted)
PDR No. 98-1649
State's Petition

The trial court denied appellant's timely request for a jury shuffle. the state acknowledged that this was error, but argued that it was harmless under Rule 44.2(b). The court of appeals disagreed. "Because a substantial right was violated when the trial court denied appellant's requested jury shuffle, and because we cannot measure whether this error had a substantial or injurious effect on the jury's verdict, we cannot disregard the error as harmless. We, therefore, reverse appellant's convictions and remand the case to the trial court for new trial."

Grounds for Review:

1. **Did the court of appeals err to hold that the statutory right to a jury shuffle is a substantial right under Tex. R. App. Proc. 44.2(b)?**
2. **Can an appellate court evaluate the effect on a jury's verdict, of the erroneous denial of the substantial right to a jury shuffle?**
3. **Did the court of appeals err by concluding it could not determine whether the erroneous denial of a jury shuffle had a substantial and injurious effect or influence in determining the jury's verdict?**

Howard v. State,
982 S.W. 2d 536
(Tex. App.--San Antonio 1998, pet. granted)
PDR No. 99-0193
State's Petition

The defense asked the state during voir dire for a list of its witnesses, at which time the state volunteered to read the names, and it did. The name "Corrie Helms" was not read. During its opening statement at the punishment phase, the prosecutor informed the jury that it would hear evidence concerning an extraneous rape of Ms. Helms. Shortly thereafter, one of the jurors advised the bailiff that Corrie Helms was her stepdaughter. She testified before the court that she had not known her stepdaughter had been raped when answering questions on voir dire. The defense's motion for mistrial was denied, and appellant was convicted. The state did not call Ms. Helms as a witness.

The court of appeals reversed and remanded the cause for a new punishment hearing. "The Sixth Amendment of the United States Constitution and article I, section 10 of the Texas Constitution guarantees the accused the right to a fair trial before an impartial jury. Although Juror Helms testified that she could be fair and impartial, based on the unique facts in this particular case we do not believe that Juror Helms could be fair and impartial upon learning that her step-daughter had been sexually assaulted by the defendant, especially in light of the details of the offense given in the State's opening argument. We think that it would be contrary to human nature for Juror Helms not to resent such treatment inflicted upon her step-daughter by the defendant. [citation omitted] We acknowledge that the court and the State took steps to minimize the impact of the relationship, but Juror Helms had already learned that Howard allegedly raped her step-daughter and, upon learning such information and based on these facts, she could no longer be unbiased and impartial. Thus, we find that the court erred in not granting Howard's motion for mistrial. Further, we cannot say beyond a reasonable doubt that the error did not contribute to his punishment.

Grounds for Review:

1. **Whether appellant failed to ask whether the jury panel knew a state's punishment phase witness when, during appellant's voir dire, when he asked if the state had a witness list, the state volunteered to read off the names of the witnesses to the venire and the prosecutor omitted punishment phase witnesses.**
2. **The court of appeals erred in holding that the relationship between a juror and a witness rendered the juror automatically biased.**
3. **The court of appeals erred in holding any error harmful where the relationship between a juror and a witness did not affect the juror's deliberations, the relationship was unknown to the rest of the jury, the witness did not testify, and the state's evidence was overwhelming.**

c. Commitment

Standefer v. State,
2 S.W. 3d 23
(Tex. App.--El Paso 1999, pet. granted)
PDR No. 99-0778
State's Petition

The court refused to let the defense ask the venire: "If someone refused to take a breath test, would you presume such person in your mind to be intoxicated by virtue of refusing a breath test alone?" According to the court, this was an improper attempt to commit.

The court of appeals disagreed and reversed. The question did not attempt to commit the venire in advance of trial to analyze refusal evidence in a particular way or to give it certain weight. "Instead, his question sought to discover whether any venireperson would have an automatic predisposition to find a person guilty simply because he refused to take the breath test, thereby rendering them unable or unwilling to consider all of the evidence in determining the intoxication issue. This is a proper area of inquiry."

Ground for Review: Does a question to a prospective juror as to whether the juror would presume someone guilty if he or she refused a breath test on his or her refusal alone constitute an improper commitment of the juror to a course of reasoning, or an attempt to discover the juror's mental processes or the weight he or she would give particular testimony?

d. Did the judge really say that?

Blue v. State,
983 S.W. 2d 811
(Tex. App.--Houston [1st Dist.] 1998, pet. granted)
PDR No. 99-1254
Appellant's Petition

Several remarks made by the trial judge to the venire, without objection, were at issue on this appeal. These remarks are reprinted at length because, frankly, readers of this summary would probably not believe in the accuracy of a paraphrase.

> The judge's first statement was made as he apologized to the venire for their long wait outside the courtroom. The judge discussed another case and then stated:
>
> > The second case [this one], which we are going on, is a situation where the attorney has been speaking to his client about what does he want to do. And when you are on the button like these cases, it's a question. *Frankly, an offer has been made by the State or do*

> *I go to trial. And he has been back and forth so I finally told him I had enough of that, we are going to trial. You have been sitting out here and this is holding up my docket and I can't get anything done until we know if we are going to trial or not.*
>
> *Frankly, obviously, I prefer the defendant to plead because it gives us more time to get things done* and I'm sure not going to come out here and sit. Sorry, the case went away and we were all trying to work toward that and save you time and cost of time, which you have been sitting here and *I apologize about that. I told the defendant that. Like I said, I have enough of this and going to trial*. (emphasis added)

In the second statement, the judge was explaining why a defendant, although innocent, might not testify. He stated:

> Because there are many reasons why defendants do not testify and I have seen many that have nothing to do with their guilt or innocence. I have seen defendants that are so nervous they could not hear the question much less respond to one. There are defendants that have speech impediments. There are defendants that, frankly, look guilty and they are not guilty and their attorney tells them I don't think you'd make a good witness because you cannot enunciate, not really set forth what you are trying to say very well. And you will be up there and stammering and stuttering, and it probably won't look good for you.
>
> *It's like I tell all the juries and I get Sister Teresa and I represent her for mass murder. And she is as guilty as driven snow and the jury doesn't know that but the defendant's attorney knows it because she admitted it privately. What am I going to do? I am going to put Sister Teresa on the stand because nobody thinks she would tell a lie. She looks like she would be a very honest person and I can put her on the stand.* I could have a defendant as innocent as can be and looks guilty and I wouldn't put her on the stand. (emphasis added).

Finally, while explaining the presumption of innocence, the judge stated:

> I can tell you *in the 40 years that this courthouse has been here*, in this courtroom, several people that have come through here *have been found not guilty by juries* and everyone of them are here by indictment. (emphasis added).

This last statement is not complained of on appeal.

A very divided court of appeals affirmed the conviction, holding that appellant failed to object to these comments, thereby waiving error.

Justice Cohen, dissenting, would have held that these remarks constituted fundamental error and were not waived by the failure to object. Three other justices agreed.

Ground for Review: Whether the court of appeals erred in determining that the trial court's misconduct in admonishing the jury panel that petitioner was guilty and that defense attorneys routinely suborn perjury was not properly preserved because no objection was made at trial.

WEAPONS

a. Use or exhibition

Dowdle v. State,
1998 WL 764691
(Tex. App.--Amarillo 1998, pet. granted)
PDR No. 99-0317
State's Petition

The jury found that appellant used and exhibited a deadly weapon in the course of committing (as a party) the offense of engaging in organized criminal activity. The court of appeals deleted the affirmative finding, holding that the evidence was legally insufficient to prove beyond a reasonable doubt that appellant knew that his co-party would use and exhibit a deadly weapon.

Ground for Review: Whether the court of appeals erred in finding the evidence was insufficient to support a deadly weapon finding.

b. Deadly weapons

McCain v. State,
987 S.W. 2d 134
(Tex. App.--Houston [14th Dist.] 1998, pet. granted)
PDR No. 99-0716
State's Petition

The complainant testified that appellant kicked in her door and began hitting her with his fist. During the attack she saw a long, dark object, which she thought was a knife, partly sticking out of appellant's back pocket. She was worried during the assault that appellant might use the knife, but she never saw it in his hands, and he never made a move for it. There was no evidence

that he touched, brandished, referred to or overtly displayed the knife in any way other than having it partly sticking out of his pocket. Appellant made no upon the complainant which the knife might have been used to coerce. Appellant was convicted of aggravated robbery and appealed, contending that the evidence was insufficient to prove that he used or exhibited a deadly weapon.

The court of appeals agreed with appellant and remanded the case for a new punishment hearing. The butcher knife was not a deadly weapon per se because it was not of the type designed to be used as a weapon. "[W]e find no authority that the mere visibility of a potentially deadly weapon during an offense is a sufficient use to support a finding it is a deadly weapon or that it has been used or exhibited in the offense."

Ground for Review: Where a knife is not designed solely for the purpose of inflicting death or serious bodily injury, but is capable of causing such, is it nevertheless to be considered a deadly weapon pursuant to V.C.T.A., Penal Code 1.07(a)(17)(a), if it is used to threaten or place another in fear of death or serious bodily injury?