PRACTICE BEFORE
THE FOURTH AND THIRTEENTH
COURTS OF APPEALS

PRIMER ON THE CRIMINAL APPEAL

Corpus Christi, Texas
May 9, 1997

Mark Stevens
310 S. St. Mary's, Suite 1505
San Antonio, Texas 78205
(210) 226-1433

TABLE OF CONTENTS

I. SCOPE OF PAPER 1

II. RESOURCES 1

III. THE LOCAL RULES 1

A. *Rule 1(b)* 1

B. *Practice Tips* 1

IV. COMPUTATION OF TIME 1

A. *Rule 5(a). Computation of Time* 1

B. *Prematurely Filed Documents* 2

V. ESCAPE HATCHES 2

A. *Rule 2(b): Suspension of Rules in Criminal Matters* 2

B. *Rule 74(p): Briefing Rules are to be Construed Liberally* 3

C. *Rule 80(c): Other Appropriate Orders Required By The Case* 4

D. *Rule 83: No Affirmance, Reversal or Dismissal for Want of Form or Substance* 4

VI. FILING BY MAIL 4

A. *Rule 4(b)* 4

B. *Case law* 5

VII. NUMBER OF COPIES 5

A. *Rule 4(c)(1)* 5

B. *Fourth Court of Appeals Local Rule 1(B)* 5

C. *Thirteenth Court of Appeals Local Rule II* 5

D. *Rule 4(c)(2)* 5

VIII. MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT 5

A. *Motions For New Trial* 5

B. *Motion In Arrest Of Judgment* 7

IX. NOTICE OF APPEAL 7

A. *Rule 40(b)(1)* 7

X. HABEAS CORPUS, BAIL, EXTRADITION 10

A. *Time For Filing The Record* 10

B. Hearing 10

C. Stay Of Mandate 10

XI. THE RECORD 10

A. Amendment Of The Record 10

XII. DISMISSAL 12

A. *Voluntary Dismissal* 12

B. *Involuntary Dismissal* 12

XIII. THE BRIEF 12

A. *Briefs Shall Be Brief* 12

B. *Rule 74(d): Points of Error* 12

C. *Rule 74(f): Argument* 14

D. *Length of Briefs* 14

E. *Number of Copies* 14

F. *Failure to File a Brief* 15

G. *Amended or Supplemental Briefs* 15

XIV. ORAL ARGUMENT 16

A. *Before the Court of Appeals* 16

B. *Before the Court of Criminal Appeals* 17

XV. REVERSIBLE ERROR IN CRIMINAL CASES 17

A. *Harmless Error* 17

XVI. OPINIONS 19

A. *Every Issue Raised Shall Be Addressed* 19

B. *To Publish or Not* 19

XVII. MOTION FOR REHEARING 20

A. *Timeliness* 20

B. *Not Required to File Petition for Discretionary Review* 20

C. *Discretion to Consider New Matters on Rehearing* 20

XVIII. RECONSIDERATION ON DISCRETIONARY REVIEW 20

A. *Reconsideration by the Court of Appeals: Rule 101* 20

XIX. COUNSEL'S DUTIES AFTER LOSING IN THE COURT OF APPEALS 21

A. *Rule 91* 21

B. *Counsel Has No Duty to File a Petition for Discretionary Review* 21

C. *Jarrett v. State: Counsel Does, However, Have a Duty to Notify Appellant of His Right to File a Petition* 21

XX. BAIL PENDING APPEAL 21

A. *Following Misdemeanor Conviction* 21

B. *Following Felony Conviction Where Sentence Exceeds 15 Years Confinement* 21

C. *Following Felony Conviction Where Sentence Does Not Exceed 15 Years Confinement* 21

D. *Trial Court May Increase or Decrease Amount of Bail* 22

E. *The Right to Appeal Bail Determination* 22

F. *When the State Appeals* 22

G. *When the Court of Appeals Affirms* 22

H. *When the Court of Appeals Reverses* 22

XXI. THE ANDERS BRIEF 23

A. *Anders v. California* 23

B. *Anders in Texas* 23

XXII. SOME COMMON DEADLINES 25

I. SCOPE OF PAPER

As I point out in the next section, there are other more comprehensive resources available to those who appeal criminal cases. Because these other materials are excellent and readily available, there is no need for duplication here. My paper is not a basic reference manual that a beginner could rely upon to answer every question that might arise during the appeal of a criminal case. Rather, its purpose is to point out those areas which commonly cause problems to the criminal lawyer practicing in the courts of appeals, and to suggest a few solutions.

II. RESOURCES

The *Texas Criminal Appellate Manual 1996* (State Bar of Texas, Criminal Justice Section), is a comprehensive work which can be ordered from CLEAR Publications, Box 16-1237, Austin, Texas, 78716-1237, (512) 327-6955. One of the contributing authors is Kerry Fitzgerald, a Dallas attorney, who each year prepares a paper for the Advanced Criminal Law Course which is sponsored by the State Bar of Texas and is held in July. Mr. Fitzgerald's paper is an essential reference.

III. THE LOCAL RULES

A. *Rule 1(b)*

1. "Each court of appeals may, from time to time, make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made shall before their promulgation be furnished to the Supreme Court and to the Court of Criminal Appeals for approval. When an appeal or original proceeding is docketed, the clerk shall mail a copy of the court's local rules to all counsel of record who request it." TEX. R. APP. P. 1(b).

B. *Practice Tips*

1. The clerk of the court will provide copies to you, or you can find the local rules of several of the courts of appeals, including the Fourth and Thirteenth Courts, in *Texas Rules of Court --State*, which is published annually by West Publishing Company. You *must* be familiar with the local rules of the appellate court you practice before, because the local rules sometimes vary significantly from the more general Texas Rules of Appellate Procedure. For example, local rules often provide specialized requirements concerning the number of copies of briefs which must be filed, the length of briefs allowed, the manner of effectively requesting oral argument, whether motions must be verified, the required contents of motions, and the length of oral argument. If you are unfamiliar with the local rules, you will undoubtedly violate one or more of them, to your client's detriment, and your own embarrassment.

IV. COMPUTATION OF TIME

A. *Rule 5(a). Computation of Time*

1. *Text*

"In computing any period of time proscribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, in which event the period extends to the end of the next day which is not a Saturday, Sunday or legal holiday." TEX. R. APP. P. 5(a).

2. *What is a legal holiday?*

a. A legal holiday includes only national and state holidays designated by §§ 662.003(a) and 662.003(b)(1) through(6), respectively, of the Texas Government Code. TEX. GOV'T CODE ANN. § 662.021 (Vernon 1994).

b. National legal holidays include only the following:

i. the first day of January, "New Years's Day";

ii. the third Monday in January, "Martin Luther King, Jr., Day" in observance of the birthday of Dr. Martin Luther King, Jr.;

iii. the third Monday in February, "Presidents' Day";

iv. the last Monday in May, "Memorial Day";

v. the fourth day in July, "Independence Day";

vi. the first Monday in September, "Labor Day";

vii. the 11th day of November, "Veterans Day," dedicated to the cause of world peace and to honoring the veterans of all wars in which Texans and other Americans have fought;

viii. the fourth Thursday in November, "Thanksgiving Day"; and

ix. the 25th day of December, "Christmas Day."

TEX. GOV'T CODE ANN. § 662.003(a)(Vernon 1994); TEX. GOV'T CODE ANN. § 662.021 (Vernon 1994).

c. A state legal holiday includes only the following:

i. the 19th day of January, "Confederate Heroes Day, " in honor of Jefferson Davis, Robert E. Lee, and other Confederate heroes;

ii. the second day of March, "Texas Independence Day";

iii. the 21st day of April, "San Jacinto Day";

iv. the 19th day of June, "Emancipation Day in Texas," in honor of the emancipation of the slaves in Texas in 1865;

v. the 27th day of August, "Lyndon Baines Johnson Day," in observance of the birthday of Lyndon Baines Johnson;

vi. every day on which an election is held throughout the state;

TEX. GOV'T CODE ANN. § 662.003(b) (Vernon 1994); TEX. GOV'T CODE ANN. § 662.021 (Vernon 1994).

3. *Case law*

a. In *Mendez v. State*, 914 S.W. 2d 579 (Tex. Crim. App. 1996), appellant's motion for new trial was due on Friday, December 24, 1993. Because this was Christmas Eve, the courthouse was closed, and appellant was unable to file his motion. So, he filed it the next day the courthouse was open, Monday, December 27, 1993. The state complained on appeal that the motion was not timely filed, and the court of criminal appeals agreed. "By the express provisions of the Texas Government Code, a legal holiday includes only a national holiday under Section 662.003(a) or a state holiday under Section 662.003(b)(1)-(6)." Since the motion for new trial was untimely, so was the notice of appeal. The case was remanded to the court of appeals to dismiss for lack of jurisdiction. *Id*. at 580.

B. *Prematurely Filed Documents*

1. *Rule 41(c)*

a. "No appeal or bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment or the time of the overruling of motion for new trial, if such a motion is filed. In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of an appealable order by the trial judge, provided that no notice of appeal shall be effective if given before a finding of guilt is made or a verdict is received." TEX. R. APP. P. 41(c).

V. ESCAPE HATCHES

A. *Rule 2(b): Suspension of Rules in Criminal Matters*

1. *Text*

a. "Except as otherwise provided in these rules, in the interest of expediting a decision or for other good cause shown, a court of appeals or the Court of Criminal Appeals may suspend requirements and provisions of any rule in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. Provided, however, that nothing in this rule shall be construed to allow any court to suspend requirements or provisions of the Code of Criminal Procedure." TEX. R. APP. P. 2(b).

2. *Case law*

a. In *State v. Garza*, 931 S.W. 560 (Tex. Crim. App. 1996), the appellant filed a motion for new trial after he was convicted and sentenced to ten years imprisonment. The trial court *orally* granted the motion and made a docket entry to that effect, but failed to sign a written order. A new trial was had and this time appellant was sentenced to 40 years imprisonment. He appealed, contending that his second trial was a nullity because the trial court had lost jurisdiction over the case when it failed to enter a written order granting the new trial, as required by TEX. R. APP. P. 31(e)(3). Among other things, the state argued that the court of appeals should suspend Rule 31(e)(3), pursuant to Rule 2(b). The court of appeals refused to invoke Rule 2(b), and reversed the conviction. The state's petition for discretionary review was granted, but the court of criminal appeals ultimately affirmed, finding that the

court of appeals correctly refused to utilize Rule 2(b) for three reasons. First, the state failed to show "good cause," since it could and should have appealed the trial court's erroneous decision to grant the new trial without entering a written order under Rule 31(e)(3). Second, even if the court of appeals could have suspended operation of Rule 31(e)(3), it was not *required* to do so. There have been boundaries set *precluding* the exercise of Rule 2(b) discretion, but the court of criminal appeals has never said that the courts of appeals must exercise that discretion. Third, Rule 2(b) authorizes the suspension of a rule in the interest of facilitating the processing of a case through the appellate court by expediting a decision or otherwise. "It does not authorize courts of appeals to reach back, after appeal has been perfected and the record filed, and alter the course of events at the trial court level, as the State asked the court of appeals to do here." *Id*. at 563.

b. Rule 101 of the Texas Rules of Appellate Procedure permits the courts of appeals to reconsider their decisions within 15 days of the date appellant files a petition for discretionary review. In *Garza v. State*, 896 S.W. 2d 192 (Tex. Crim. App. 1995), the court of appeals first affirmed, but, 32 days after appellant filed his petition, the court withdrew its first opinion, and issued a new one reversing and remanding the cause for a new trial. The state's petition for discretionary review was granted, and the court of appeals reversed, holding that the court of appeals had no authority to act on the petition after 15 days. Appellant urged the court that Rule 2(b) gave the court of appeals authority to suspend Rule 101, but the court of criminal appeals disagreed. First, the court noted that the court of appeals had not purported to invoke Rule 2(b). Second, Rule 2(b) was not applicable. The 15 day time limit is jurisdictional, not discretionary. "The courts of appeals have no authority to suspend the operation of a rule of appellate procedure in order to create jurisdiction in the court of appeals where no jurisdiction exists." *Id*. at 194.

c. "Suspension of rules of appellate procedure by this Court is a serious matter, not to be undertaken lightly." *State ex rel. Cobb v. Godfrey*, 739 S.W. 2d 47, 49 (Tex. Crim. App. 1987)(court refuses to suspend Rule 31(e)(3) absent proof of good cause more substantial than to remedy respondent's own tardiness).

d. Do the courts of appeals have authority under Rule 2(b) to suspend Rule 31 and order out-of-time motions for new trial? Judge Baird recently criticized the majority of the court of criminal appeals for not deciding this question. *See State v. Adams*, 930 S.W. 2d 88, 92-96 (Tex. Crim. App. 1996)(Baird, J., dissenting). Meanwhile, the courts of appeals are split. The Texarkana, San Antonio, Beaumont, Houston and Dallas courts believe that out-of-time hearings are appropriate upon proof of good cause. The El Paso Court disagrees. *Compare Driggers v. State*, 1996 WL 673159 (Tex. App.--Texarkana November 22, 1996)(newly discovered evidence), slip op. 9; *Ditto v. State*, 898 S.W. 2d 383, 385 (Tex. App.--San Antonio 1995, no pet.)(counsel not appointed until six days before motion for new trial was to be overruled as a matter of law); *Oldham v. State*, 889 S.W. 2d 461, 463 (Tex. App.--Houston [14th Dist.] 1994, no pet.)(appeal abated where appellate counsel was not appointed until 62 days after sentencing, which was too late to file a motion for new trial); *Tuffiash v. State*, 878 S.W. 2d 197, 200 (Tex. App.--San Antonio 1994, pet. ref'd)(appeal abated to hear motion based on newly discovered evidence of perjury by state's witness Fred Zain); *Hilton v. State*, 870 S.W. 2d 209, 210-11 (Tex. App.--Beaumont 1994, no pet.)(ineffectiveness of counsel); *Harris v. State*, 818 S.W. 2d 231, 232-35 (Tex. App.--San Antonio 1991, no pet.)(newly discovered evidence of perjury); *Cox v. State*, 797 S.W. 2d 958, 959 (Tex. App.--Houston [1st Dist.] 1990, no pet.)(appeal abated where appellate counsel was not appointed until 33 days after sentencing, which was too late to file a timely motion for new trial); *McMillan v. State*, 769 S.W. 2d 675, 677 (Tex. App.--Dallas 1989, pet. ref'd)(to protect due process rights of appellant whose motion for new trial was improperly denied) *with Torres v. State*, 804 S.W. 2d 918, 920 (Tex. App.--El Paso 1990, pet. ref'd)(no authority to abate appeal to determine whether trial counsel was ineffective, particularly in the absence of allegation of specific deficiencies of counsel).

B. *Rule 74(p): Briefing Rules are to be Construed Liberally*

1. *Text*

"The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the court may require the case to be rebriefed." TEX. R. APP. P. 74(p).

2. *Case law*

See, e.g., Armstrong v. State, 845 S.W. 2d 909, 910 (Tex. Crim. App. 1993)(appellant substantially complied with the rules such that the court below should have addressed his contention under Rule 74(p)); *State v. Cantu*, 776

S.W. 2d 728, 730 (Tex. App.--Corpus Christi 1989, pet. ref'd)(court addresses point of error even though appellant's argument on appeal was ostensibly different than it was in the trial court); *Salinas v. State*, 773 S.W. 2d 779, 780 (Tex. App.--San Antonio 1980, pet. ref'd)(court addresses multifarious point of error rather than require rebriefing).

C. *Rule 80(c): Other Appropriate Orders Required By The Case*

1. *Text*

a. "In addition, the court of appeals may make any other appropriate order, as the law and the nature of the case may require." TEX. R. APP. P. 80(c).

2. *Case law*

Case law interpreting Rule 80(c) is as sparse as the rule is vague:

a. In *Tuffiash v. State*, 878 S.W. 2d 197, 198 (Tex. App.--San Antonio 1994, pet. ref'd), the court relied upon both Rules 2(b) and 80(c) for granting an out-of-time appeal. "In an appropriate case, for good cause shown, Rules 2(b) and 80(c) of the Texas Rules of Appellate Procedure allow this court to suspend requirements and provisions of any rule in a particular case on application of a party or on our own motion and may order proceedings in accordance with our direction." *See also Harris v. State*, 818 S.W. 2d 231, 232 (Tex. App.--San Antonio 1991, no pet.)

b. In his concurring opinion in *Johnson v. State*, 900 S.W. 2d 475, 494 (Tex. App.--Beaumont 1995), *aff'd*, 930 S.W. 2d 589 (Tex. Crim. App. 1996), Justice Brookshire suggests that, when trial counsel is alleged to be ineffective on direct appeal, a hearing under Rule 80(c) "is a superior, more reliable, and more economical solution to this thorny issue than a separate, later application for writ of habeas corpus proceeding."

c. In *Depew v. State*, 843 S.W. 2d 847 (Tex. App.--Dallas 1992, no pet.), both parties moved the court of appeals to remand the case for a punishment hearing only, citing Rule 80(c). The court of appeals held that Rule 80(c) applies only after submission of the case. Since that case had not yet been submitted, the court held that Rule 80(c) was inapplicable, and denied the joint motion. *Id*. at 88. "We cannot manipulate procedural rules in the name of expediency or stretch the rules to fit a situation at the whim of the Court." *Id*.

D. *Rule 83: No Affirmance, Reversal or Dismissal for Want of Form or Substance*

1. *Text*

a. "A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel." TEX. R. APP. P. 83.

2. Case Law

a. Appellant may not invoke Rule 83 to make an untimely amendment to his notice of appeal which was defective because it did not comply with Rule 40(b)(1). *Jones v. State*, 796 S.W. 2d 183, 187 (Tex. Crim. App. 1990).

b. In *C.F. v. State*, 897 S.W. 2d 464 (Tex. App.--El Paso 1995, no writ), counsel for a juvenile appellant filed only a notice of appeal, which did not properly perfect the appeal in a civil case. The court of appeals utilized Rule 83 to hold that, because appellant had made a bona fide attempt to invoke appellate jurisdiction with his first notice of appeal, the defect was cured when he later filed an affidavit of inability to pay appellate expenses. *Id*. at 468.

VI. FILING BY MAIL

A. *Rule 4(b)*

1. Rule 4(b) of the Texas Rules of Appellate Procedure provides, in pertinent part: "If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing."
TEX. R. APP. P. 4(b).

B. *Case law*

1. Judge Mansfield, in his concurring opinion in *Mendez* helpfully suggests that "appellant, upon finding the courthouse was closed, could have timely filed his appeal by mailing it that day." *Mendez v. State*, 914 S.W. 2d at 580 (Mansfield, J., concurring).

VII. NUMBER OF COPIES

A. *Rule 4(c)(1)*

1. "Each party shall file six copies of briefs, petitions, motions and other papers with the Clerk of the Court of Appeals in which the case is pending. Any court of appeals may by local rule authorize the filing of fewer or more copies." TEX. R. APP. P. 4(c)(1).

B. *Fourth Court of Appeals Local Rule 1(B)*

1. "Four signed copies of briefs, containing certificate of service, shall be filed." FOURTH COURT OF APPEALS LOCAL RULE 1(B).

C. *Thirteenth Court of Appeals Local Rule II*

1. "An original and three copies of briefs, motions, or any other papers directed to this Court shall be filed, unless otherwise requested by this Court." THIRTEENTH COURT OF APPEALS LOCAL RULE II.

D. *Rule 4(c)(2)*

1. "Each party shall file twelve copies of its application for writ of error with the Clerk of the Court of Appeals. In addition to filing an original petition for discretionary review with the *Clerk of the Court of Appeals*, the party shall deliver eleven copies. The State Prosecuting Attorney may deliver the eleven copies to the Clerk of the Court of Criminal Appeals." TEX. R. APP. P. 4(c)(2)(emphasis supplied).

VIII. MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT

A. *Motions For New Trial*

1. *Not required, except to adduce new facts*

a. "Except to adduce facts of a matter not otherwise shown on the record, a motion for new trial is not a requisite to presenting a point of error on appeal." TEX. R. APP. P. 30(a). *See also Ex parte Zigmond*, 933 S.W. 2d 666, 668 n.2 (Tex. App.--San Antonio 1996)("not a prerequisite to a criminal appeal unless evidence must be adduced").

b. Conversely, when new facts must be adduced, a motion for new trial is necessary:

i. Allegations of jury misconduct require a hearing for development. *See generally Vera v. State*, 868 S.W. 2d 433 (Tex. App.--San Antonio 1994, no pet.).

ii. "The only way to preserve error in the denial of a motion for continuance, based on absence of a material witness, is by a motion for new trial." *Patterson v. State*, 869 S.W. 2d 429, 431 (Tex. App.--Houston [1st Dist.] 1993, no pet.).

iii. A hearing was necessary to develop appellant's contention that his trial attorney failed to investigate his case and told witnesses not to appear for trial. *Ditto v. State*, 898 S.W. 2d 383, 386 (Tex. App.--San Antonio 1995, no pet.).

iv. Proof of entitlement to relief based on newly discovered evidence "may only be made at a hearing on the motion for new trial." *Burns v. State*, 844 S.W. 2d 934, 935 (Tex. App.--Amarillo 1992, no pet.).

2. *The right to counsel*

a. A motion for new trial is a critical stage in the proceeding at which a criminal defendant is entitled to representation. *Connor v. State*, 877 S.W. 2d 325, 326 (Tex. Crim. App. 1994)(court, however, refused to decide whether appellant was also entitled to have counsel to prepare the motion, since this issue had not been before the court of appeals).

b. Appointed counsel is entitled to at least 10 days to prepare for a new trial hearing. *Ditto v. State*, 898 S.W. 2d 383, 385 (Tex. App.--San Antonio 1995, no pet.). In this case, counsel was appointed just six days before the motion for new trial was overruled by operation of law. The appeal was abated to allow appellant to develop an out-of-time motion for new trial contending that his original trial counsel was ineffective. *Id*. at 386.

3. *Grounds for new trial*

a. Rule 30(b) enumerates several grounds for new trial, including trial in

defendant's absence; the denial of counsel; misdirection as to the law or other material error calculated to injure the defendant's rights; various forms of jury misconduct; preventing material defense witnesses from attending court; intentional destruction or withholding of exculpatory evidence; newly discovered evidence favorable to the defendant; and, a verdict contrary to the law or evidence. TEX. R. APP. P. 30(b).

b. The grounds enumerated in Rule 30(b) are not exhaustive. *See State v. Gonzalez*, 855 S.W. 2d 692, 694 (Tex. Crim. App. 1993(trial court has authority to grant motion for new trial in the interest of justice); *Reyes v. State*, 849 S.W. 2d 812, 815 (Tex. Crim. App. 1993)(trial court has authority to grant new trial based on ineffective assistance of counsel).

4. *Newly discovered evidence*

a. Rule 30(b)(6) states the following as a ground for new trial: "Where new evidence favorable to the accused has been discovered since trial."

b. Article 40.001 of the Texas Code of Criminal Procedure states the following as a ground for new trial: "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial."

5. *Timeliness*

a. The motion for new trial must be filed within 30 days after the date sentence is imposed or suspended in open court. TEX. R. APP. P. 31(a)(1).

b. A motion for new trial may be heard if timely filed, even if a notice of appeal has been previously filed. *Ex parte Drewery*, 677 S.W. 2d 533, 534 (Tex. Crim. App. 1984).

6. *Amendment*

a. Rule 31(a)(2) provides: "Before a motion or an amended motion for new trial is overruled it may be amended and filed without leave of court within 30 days after date sentence is imposed or suspended in open court."

b. "A motion for new trial cannot be amended after the mentioned 30 day period, even with leave of court." *Belton v. State*, 900 S.W. 2d 886, 901 (Tex. App.--El Paso 1995, pet. ref'd). *See also Drew v. State*, 743 S.W.2d 207, 222-23 (Tex. Crim. App.1987); *Dugard v. State*, 688 S.W. 2d 524, 530 (Tex. Crim. App. 1985).

7. *Presentment*

a. The motion for new trial must be *presented* to the trial court within ten days of its filing. TEX. R. APP. P. 31(c)(1).

b. The rules do not tell us what presentment means. Two cases now pending before the Texas Court of Criminal Appeal may shed light on this concept:

i. In *David Carranza v. State*, No. 04-93-00619-CR (Tex. App--San Antonio February 28, 1996, pet. granted), the court of appeals held that the trial court did not abuse its discretion in denying appellant's motion for new trial where there was nothing to show that the motion was presented within 10 days, as required by Rule 31(c)(1). Appellant's petition for discretionary review was granted to decide: "Whether the Court of Appeals erred in holding that appellant's motion for new trial was not timely presented to the trial court in accordance with Tex.R.App.P. 31(c)."

ii. In *James Musgrove v. State*, No. 04-92-00407-CR (Tex. App.--San Antonio February 15, 1995, pet. granted), the court of appeals held that there was nothing in the record to show that the motion for new trial was presented within 10 days. Appellant's petition for discretionary review was granted to decide: "Did the Court of Appeals err in holding the record did not show appellant's motion for new trial was presented to the trial court?"

8. *Verification*

a. "We observe that nowhere in the Rules of Criminal Procedure governing motions for new trial, nor any of the predecessor code provisions governing motions for new trial, is it provided that such motions be verified or supported by affidavits. That requirement has been judicially imposed." *Connor v. State*, 877 S.W. 2d 325, 328 n.3 (Tex. Crim. App. 1994). *See also Bearden v. State*, 648 S.W.2d 688, 690 (Tex.Crim.App.1983) (without verification or an affidavit, a motion for new trial based on matters outside of the record is insufficient).

9. *A timely filed motion for new trial extends the record due date*

a. Without a motion for new trial, the transcript and statement of facts are to be filed within 60 days of the date sentence is imposed or suspended in open court. "If a timely

motion for new trial is filed, the transcript and statement of facts shall be filed within one hundred twenty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed." TEX. R. APP. P. 54(b).

10. *Insufficient evidence*

a. "[W]hen a jury returns a guilty verdict and the trial court grants the defendant's motion for new trial based upon insufficiency of the evidence under Texas Rule of Appellate Procedure 30(b)(9), double jeopardy prevents the trial court from entering any other judgment than an acquittal." *State v. Savage*, 933 S.W. 2d 497, 499 (Tex. Crim. App. 1996).

B. *Motion In Arrest Of Judgment*

1. Texas Rules of Appellate Procedure 33, 34 and 35 deal with motions in arrest of judgment.

2. The following has been said about the motion in arrest of judgment: "Motions in arrest of judgment are rather archaic and are seldom filed. The thing to keep in mind is that if counsel files a motion in arrest of judgment, he or she must make sure it does not cause a conflict with any motion for new trial that might also be filed. If a motion in arrest is filed and overruled, that will start the time running for giving notice of appeal, and the ruling on the motion in arrest may deprive you of the right to obtain a ruling on your motion for new trial. It will certainly inject problems into the case that need never be there." D. Richards & J. Keck, I *Texas Criminal Appellate Manual 1996*, Preliminary Steps of the Appeal (State Bar of Texas, Criminal Justice Section).

IX. NOTICE OF APPEAL

A. *Rule 40(b)(1)*

1. *Text*

a. "Appeal is perfected in a criminal case by giving timely notice of appeal; except, it is unnecessary to give notice of appeal in death penalty cases. Notice of appeal shall be given *in writing* filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order; *but if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to Article 1.15, Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, in order to prosecute an appeal for a nonjurisdictional defect or error that occurred prior to entry of the plea the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial.* The clerk of the trial court shall note on copies of the notice of appeal the number of the cause and the day that notice was filed, and shall immediately send one copy to the clerk of the appropriate court of appeals and one copy to the attorney for the State." TEX. R. APP. P. 40(b)(1)(emphasis supplied)

2. *The notice must be written*

a. Rule 40(b)(1) clearly requires that the notice of appeal be "in writing." There is no such thing as an oral notice of appeal in a criminal case. *See Brunswick v. State*, 931 S.W. 2d 9, 11 (Tex. App.--Houston [1st Dist.] 1996)("an oral notice of appeal, no matter how many times it is memorialized in documents signed by clerks or trial courts, is still an oral notice of appeal").

3. *The desire to appeal*

a. In *Craig Rosales v. State*, 1996 WL 489195 (Tex. App.--Corpus Christi 1996), appellant filed his notice of appeal late, and the state sought to have the appeal dismissed. The court of appeals denied the state's motion, finding that appellant's timely filed appeal bond was sufficient to show his desire to appeal, as required by Rule 40(b)(1).

b. In this case, the fact that the trial court appointed counsel on appeal did not substitute as a written notice of appeal. *Cooper v. State*, 917 S.W. 2d 474, 477 (Tex. App.--Fort Worth 1996, no pet.).

4. *Appeals from pleas of guilty and nolo contendere pursuant to plea bargain*

a. The court of criminal appeals instructs that we must read Rule 40(b)(1) as follows: "in order to prosecute an appeal for (1) nonjurisdictional defect [occurring before or after the plea], or (2) error that occurred prior to entry of the plea, the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial." *Davis v. State*, 870 S.W. 2d 43, 46 (Tex. Crim. App. 1994). According to this reading, then, Rule 40(b)(1) expressly limits appeals to three situations for the appellant who pleads guilty or nolo contendere at trial pursuant to a negotiated plea bargain, and to whom the trial court assesses no more punishment than that recommended by the prosecutor: (1) where there is a jurisdictional defect;

(2) where the trial court grants permission; or, (3) where the appeal challenges matters raised by written motion and ruled on before trial.

i. Compliance with Rule 40(b)(1) is jurisdictional. *Jones v. State*, 796 S.W. 2d 183, 187 (Tex. Crim. App. 1990).

ii. "Our caselaw on how a defendant, in an appeal from a plea-bargained conviction, confers jurisdiction on a Court of Appeals to address certain issues is not exactly a model of clarity and concise legal analysis." *Lyon v. State*, 872 S.W. 2d 732, 734 (Tex. Crim. App. 1994).

iii. A trial court's order granting appellant a free statement of facts does not constitute implied permission to appeal, where the record clearly reflects the court refused permission. *Lyon v. State*, 872 S.W. 2d at 736.

iv. Sufficiency of the evidence and ineffective assistance of counsel are not jurisdictional issues. *Lyon v. State*, 872 S.W. 2d at 736.

v. Whether a trial judge is disqualified to sit in the case *is* jurisdictional. *Lyon v. State*, 872 S.W. 2d at 736.

vi. Whether a trial judge is biased, absent disqualification, is not a jurisdictional issue. *Lyon v. State*, 872 S.W. 2d at 737.

vii. Rule 40(b)(1) "is not applicable to appeals from revocation of regular probation . . . ." *Manganello v. State*, 915 S.W. 2d 158, 159 (Tex. App.--San Antonio 1996, no pet.).

viii. Appeals from orders deferring adjudication are also governed by Rule 40(b)(1). *Watson v. State*, 924 S.W. 2d 711, 714 (Tex. Crim. App. 1996).

ix. The trial court errs in denying bond pending appeal based on its conclusion that the court of appeals has no jurisdiction to hear the appeal because of a failure to comply with Rule 40(b)(1). It is for the court of appeals, not the trial court, to determine the jurisdiction of the court of appeals. *Ex parte Zigmond*, 933 S.W. 2d 666, 668 (Tex. App.--San Antonio 1996). *But cf.*, *Gonzalez v. State*, 888 S.W. 2d 84, 85 (Tex. App.--Amarillo 1994, no pet.)(trial court did not abuse its discretion in denying bail pending appeal where there were no issues to appeal in light of Rule 40(b)(1)).

x. An appeal contending that sentences were improperly cumulated requires that this issue have been raised by written motion prior to trial or permission of the trial court to appeal. *Haller v. State*, 932 S.W. 2d 262, 263 (Tex. App.--Corpus Christi 1996).

xi. "[T]he failure to enter a plea renders the trial a nullity and is a jurisdictional defect. . . ." *White v. State*, 929 S.W. 2d 502, 505 (Tex. App.--Texarkana 1996).

xii. There is a division among the courts of appeals about whether a failure to admonish as to the consequences of a plea as required by article 26.13 of the code of criminal procedure can be appealed despite non-compliance with Rule 40(b)(1). The Houston Fourteenth Court and the El Paso Court have held that they do have jurisdiction to hear such complaints. *Ramos v. State*, 928 S.W. 2d 157, 159 (Tex. App.--Houston [14th Dist.] 1996); *Rodriguez v. State*, 850 S.W.2d 603, 606 (Tex.App.--El Paso 1993, no pet.). The Fort Worth and Dallas Courts disagree. *Tillman v. State*, 919 S.W.2d 836, 838-39 (Tex.App.--Fort Worth 1996, pet. ref'd); *Penny v. State*, 880 S.W.2d 59, 61 (Tex.App.--Dallas 1994, no pet.).

xiii. A complaint that the trial court improperly enhanced appellant's punishment so as to impose an unauthorized sentence states a jurisdictional defect. *Tate v. State*, 921 S.W. 2d 496, 497 (Tex. App.--Waco 1996, no pet.).

xiv. That the trial court allegedly convicted appellant of a non-existent offense -- attempted retaliation -- is jurisdictional. *Jacobs v. State*, 903 S.W. 2d 848, 850 (Tex. App.--Texarkana 1995, no pet.).

b. The court of criminal appeals has recently recognized that an appellant is also "entitled to have the issue of the voluntary nature of his plea addressed by the Court of Appeals because its appealability is not dependant on following Rule 40(b)(1) requirements." *Flowers v. State*, 935 S.W. 2d 131, 134 (Tex. Crim. App. 1996).

5. *The "general" notice of appeal*

a. "A defendant's 'general' notice of appeal confers no jurisdiction on a Court of Appeals to address nonjurisdictional defects or errors that occur before or after entry of the plea; a defendant's notice of appeal has to comply with the applicable provisions of the 'but' clause of Rule 40(b)(1) to confer jurisdiction on a Court of Appeals to address these types of defects or errors. A 'general' notice of appeal confers jurisdiction on a

Court of Appeals to address only jurisdictional issues." *Lyon v. State*, 872 S.W. 2d 732, 736 (Tex. Crim. App. 1994)(citations omitted).

b. "A 'general' notice of appeal is insufficient to confer jurisdiction on a Court of Appeals to review a trial court's ruling on a pretrial suppression motion in an appeal from a conviction based on a negotiated plea bargain." *Davis v. State*, 870 S.W. 2d 43, 46 (Tex. Crim. App. 1994).

c. "A defendant may not be permitted to amend a notice of appeal out of time." *Davis v. State*, 870 S.W. 2d 43, 47 (Tex. Crim. App. 1994).

d. In *Riley v. State*, 825 S.W. 2d 699 (Tex. Crim. App. 1992), although appellant's written notice stated only that she wished to appeal, there was an order in the record reciting the information required by Rule 40(b)(1). "We hold that, under the facts of this case, when all the information required by Rule 40(b)(1) is contained in an order by the trial court and the order is in the appellate record along with a timely filed a notice of appeal, the Court of Appeals has jurisdiction to address jurisdictional and also those non-jurisdictional defects recited in the order." *Id*. at 701.

e. In *Ross v. State*, 931 S. W. 2d 633 (Tex. App.--Dallas 1996), appellant's notice of appeal claimed he had permission, and appellant testified that he understood that the judge had given him permission to appeal. "Because both the uncontradicted evidence and appellant's notice of appeal indicate the court granted permission to appeal, we conclude appellant has complied with rule 40(b)(1)." *Id*. at 634.

f. A signed docket entry reflecting that appellant gave notice of appeal challenging denial of his motion to suppress is sufficient to comply with Rule 40(b)(1). *Flores v. State*, 888 S.W. 2d 193, 196 (Tex. App.--Houston [1st Dist.] 1994, no pet.).

g. At least one court of appeals has complained that the specificity requirement of Rule 40(b)(1) is unnecessarily harsh, and has asked the court of criminal appeals either to repeal it, or to permit the incorrect notice of appeal to be amended pursuant to authority of Rule 83. *See White v. State*, 920 S.W. 2d 675, 676 (Tex. App.--Houston [1st Dist.] 1995, no pet.)(dismissing appeal where notice of appeal did not specify that the trial court had overruled a motion to suppress, even though the trial court had).

6. *The Helms rule*

a. The so-called *Helms* rule provides that when a guilty plea is voluntarily and understandingly made, all nonjurisdictional defects that occurred prior to the entry of the guilty plea, including claimed deprivation of federal due process, are waived. *Helms v. State*, 484 S.W. 2d 925 (Tex. Crim. App. 1972).

b. *Helms* only applies to open or non-negotiated pleas. *Flowers v. State*, 935 S.W. 2d 131, 133 (Tex. Crim. App. 1996). *See also Jack v. State*, 871 S.W. 2d 741, 744 (Tex. Crim. App. 1994)("we have never extended the *Helms* rule to cover asserted error occurring at or after entry of a nonnegotiated plea," and nothing in Rule 40(b)(1) changes that).

c. "[B]y its very terms, the *Helms* rule does not apply to bar appeal in open plea cases in which a defendant claims the plea was involuntary." *Flowers v. State*, 935 S.W. 2d at 133.

d. In *Crawford v. State*, 890 S.W. 2d 941 (Tex. App.--San Antonio 1994, no pet.), appellant's agreement to plead guilty did not encompass an agreed recommendation as to punishment. As such, the agreement does not fall within Rule 40(b)(1), and appellant has not waived the question of the voluntariness of his plea, since this occurred at or after entry of the plea. *Id*. at 943.

e. The Texas Court of Criminal Appeals recently granted discretionary review to determine whether the *Helms* rule should be "reconsidered." *Shermain Nadine Young v. State*, No. 09-95-00212-CR (Tex. App.--Beaumont 09-95-212-CR, pet. granted)(PDR No. 1579-96).

7. *Post conviction relief is still available*

a. "While we are barred from addressing the merits of appellant's complaints because he neither raised them pretrial nor obtained the trial court's permission to appeal, we point out that the matters may be raised through post-conviction writ of habeas corpus." *Haller v. State*, 932 S.W. 2d 262, 263 (Tex. App.--Corpus Christi 1996).

8. *When must the appeal be perfected?*

a. The defendant must file written notice of appeal within 30 days of the date sentence is imposed or suspended in open court or the day an appealable order is signed, when no motion for new trial is filed. TEX. R. APP. P. 41(b)(2).

b. When a motion for new trial is timely filed, the notice of appeal must be filed within 90 days after the date sentence is imposed or suspended in open court. TEX. R. APP. P. 41(b)(1).

c. "An extension of time for filing notice of appeal may be granted by the court of appeals if such notice is filed within fifteen days after the last day allowed and within the same period a motion is filed in the court of appeals reasonably explaining the need for such extension." TEX. R. APP. P. 41(b)(2).

d. Rule 41(b)(2) is *strictly* construed. "Therefore, we agree with the San Antonio and El Paso Courts of Appeals that a late notice of appeal may be considered timely so as to invoke a court of appeals' jurisdiction if (1) it is filed within fifteen days of the last day allowed for filing, (2) a motion for extension of time is filed in the court of appeals within fifteen days of the last day allowed for filing the notice of appeal, and (3) the court of appeals grants the motion for extension of time. When a notice of appeal is filed within the fifteen-day period but no timely motion for extension of time is filed, the appellate court lacks jurisdiction." *Olivo v. State*, 918 S.W. 2d 519, 522 (Tex. Crim. App. 1996)(citations omitted). In *Olivo*, appellant filed his notice of appeal within the 15 day grace period, but not his motion for leave to file late notice of appeal. The San Antonio Court of Appeals dismissed the appeal for want of jurisdiction, because the motion for leave was tardy under Rule 41(b)(2). On discretionary review, appellant tried a variety of arguments, including that the rules should be suspended under Rule 2(b) and 83, and that the criminal courts should adopt the more liberal policy adopted by the Texas Supreme Court. The court of criminal appeals disagreed with all of appellant's suggestions, and affirmed the court of appeals's dismissal.

e. Notices of appeal are not ineffective because prematurely filed. TEX. R. APP. P. 41(c). "In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of an appealable order by the trial judge, provided that no notice of appeal shall be effective if given before a finding of guilt is made or a verdict is received." *Id*.

X. HABEAS CORPUS, BAIL, EXTRADITION

A. *Time For Filing The Record*

1. The transcript and statement of facts are to be filed within 15 days from the date notice of appeal is filed in habeas corpus or bail proceedings, unless this time is shortened or extended by the court of appeals. TEX. R. APP. P. 44(a).

B. *Hearing*

1. These cases "shall be heard at the earliest practicable time." TEX. R. APP. P. 44(b). "The only design of the appeal is to do substantial justice to the party appealing." *Id*.

C. *Stay Of Mandate*

1. When the appellate court affirms the judgment of the court below in an extradition matter sanctioning the extradition of the appellant, or reverses the lower court's judgment in a bail matter, granting or reducing the amount of bail, any party seeking discretionary review must file with the clerk a motion to stay the mandate, "appending thereto his petition for discretionary review showing reasons for review of the judgment of the appellate court by the Court of Criminal Appeals." TEX. R. APP. P. 44(d).

XI. THE RECORD

A. *Amendment Of The Record*

1. *Rule 55*

"(a) *Inaccuracies on the Statement of Facts*. Any inaccuracies may be corrected by agreement of the parties; should any dispute arise, after filing in the appellate court as to whether the statement of facts accurately discloses what occurred in the trial court, the appellate court shall submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts conform to what occurred in the trial court.

(b) *Before Submission*. If anything material to either party is omitted from the transcript or statement of facts, before submission the parties by stipulation, or the trial court, upon notice and hearing, either before or after the record has been transmitted to the appellate court, or the appellate court, on a proper suggestion or on its own initiative, may direct a supplemental record to be certified and transmitted by the clerk of the trial court or the official court reporter supplying such omitted matter. The appellate court shall permit it to be filed unless the supplementation will unreasonably delay disposition of the appeal.

(c) *Defects Appearing At or After Submission*. Should it be apparent during the submission or afterwards that the case has not been properly prepared as shown in the transcript, or properly presented in the brief or briefs, or that the

law and authorities have not been properly cited, which will enable the court to decide the case, it may decline to receive the submission; or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case; or should it appear to the court after submission of the cause, that the statement of facts has been prepared in violation of the rules, the court may require the appellant to furnish a proper statement of facts, and upon his failure to do so may disregard it." TEX. R. APP. P. 55.

2. *Case law*

a. In *County v. State*, 812 S.W. 2d 303 (Tex. Crim. App. 1989), appellant moved to quash the indictment on the ground that the state had breached its agreement not to prosecute him for capital murder if he gave a statement to the prosecutor. On original submission the court of criminal appeals affirmed appellant's conviction and death sentence, holding that the record supported a finding that there was no agreement barring capital murder prosecution. On appellant's motion, the court abated the appeal to determine whether there were inaccuracies in the record. The trial court made specific corrections to the record, and also stated that he would have added to the record that he had *intended* to find that the state had agreed not to prosecute appellant for capital murder, which was the opposite of what the court of criminal appeals had understood the trial court to have found. The question on rehearing was whether the trial judge was allowed under Rule 55 to add additional information which explained what he did or intended to do at trial. "Judge Priest's corrections and additional explanatory statements are encompassed under Rule 55(a) as requested by our order to Judge Priest. Thus, we find the corrections and additions made by Judge Priest are cognizable with regard to the issues raised on rehearing. *Id*. at 316.

b. Rule 55(b) "permits supplementation of the record only with material that existed when the record was prepared but was not included in the record forwarded to the appellate court." *Jeffrey Lynn Williams v. State*, 1996 WL 724669 (Tex. Crim. App. 1996), slip op 7(disallowing appellant's request to supplement record with a transcription which was not taken by the court reporter at the time of trial).

c. Rule 55 does not provide authority for the trial court to draft findings of fact and conclusions of law as required by article 38.22 of the Texas Code of Criminal Procedure, and to file them after the appellate record has been filed. Rule 55 permits supplementation with omitted matters; the term "omitted" implies that the material in question was in existence at the time the appellate record was created, but was not included. *Green v. State*, 906 S.W.2d 937, 940 n.3 (Tex. Crim. App. 1995). *See also Goodin v. State*, 750 S.W. 2d 857, 860 (Tex.App.--Corpus Christi 1988, pet. ref'd.)(record will not be supplemented with bills of exception that were not in existence until the trial court lost jurisdiction).

d. The court of criminal appeals has authority under Rule 55 to order the trial court to forward a video tape that was introduced into evidence and played to the jury. *Schwenk v. State*, 733 S.W. 2d 142, 149 (Tex. Crim. App. 1981).

e. "[A] request to supplement the record submitted in a supplemental brief is not proper under Rule 55(b), and [we] decline to add the judgment and sentence to the record." *Jackson v. State*, 880 S.W. 2d 432, 434 (Tex. App.--Houston [14th Dist.] 1994, pet. ref'd).

f. Although Rule 55 grants to the court of appeals wide discretion to supplement the record, "such discretion should not be exercised, in the absence of some unusual circumstance, so as to permit new material to be filed after the appellate court has written its opinion and rendered its judgment." *Guilder v. State*, 794 S.W. 2d 765, 771-72 (Tex. App.--Dallas 1990, no pet.).

g. "After the record is filed in the appellate court, any request for supplementation or correction must be addressed to that court." *Winkfield v. State*, 792 S.W. 2d 727, 729 (Tex. App.--Corpus Christi 1990, no pet.). The appellate court may abate the appeal and instruct the trial court to supplement the record, thus properly returning jurisdiction to the trial court for that purpose. *Burns v. State*, 761 S.W.2d 486, 487 (Tex. App.--Corpus Christi, pet. ref'd).

XII. DISMISSAL

A. *Voluntary Dismissal*

1. *Rule 59(b)*

"The appeal may be dismissed if the appellant withdraws his notice of appeal at any time prior to the decision of the appellate court. The withdrawal shall be in writing signed by the appellant and his counsel and filed in duplicate with the clerk of the court of appeals in which the appeal is pending, who shall immediately forward the duplicate copy to the clerk of the trial court in which the notice of appeal was filed. Notice of appeal may not be withdrawn after the decision of the court of appeals is delivered without the consent

of the State and approval of the court of appeals. If consent and approval are obtained, the opinion of the court of appeals shall be withdrawn and the appeal shall be dismissed. Notice of the dismissal shall be sent to the clerk of the trial court in which notice of appeal was filed." TEX. R. APP. P. 59(b).

B. *Involuntary Dismissal*

1. *Rule 60(b)*

"An appeal shall be dismissed on the State's motion, supported by affidavit, showing that appellant has escaped from custody pending the appeal and that to the affiant's knowledge, has not voluntarily returned to lawful custody within the State within ten days after escaping. The appeal shall not be dismissed, or, if dismissed, shall be reinstated, on filing of an affidavit of an officer or other credible person showing that appellant voluntarily returned to lawful custody within the State within ten days after escaping. If the appellant received a life sentence and is recaptured or voluntarily surrenders within thirty days after escaping, the appellate court, in its discretion, may overrule the motion to dismiss, or, if the motion has previously been granted, may reinstate the appeal." TEX. R. APP. P. 60(b).

2. *Case law*

a. The purpose of Rule 60(b) is to promote the efficient, dignified operation of the appellate court. *Luciano v. State*, 906 S.W. 2d 523, 525 (Tex. Crim. App. 1995).

b. When a defendant violates a condition of probation by absconding from mandatory residence at a community corrections facility he has "escaped from custody" as that term is used in Rule 60(b). *Luciano v. State*, 906 S.W. 2d at 526(dismissing appeal on state's motion).

c. In *Estep v. State*, 901 S.W. 2d 491, 495 (Tex. Crim. App. 1995), appellant was prematurely released from custody by a person in authority. The state moved to dismiss his appeal under Rule 60(b). The court of criminal appeals reversed. "In the absence of an affidavit from the sheriff pursuant to Art. 44.10 or some showing that Appellant departed from custody with awareness the departure was not authorized (which can usually be made by setting out the circumstances of the departure), it was improper to conclude that Appellant had escaped. Consequently, dismissal of this appeal was not authorized by Tex.R.App.Pro. 60(b)." *Id*. For those interested, this case provides an exhaustive historical analysis of Rule 60(b) and its predecessor statutes, going all the way back to the Civil War.

d. Rule 60(b) is not applicable when a defendant escapes when no appeal is pending. "If the appellant is back in custody when the record reaches the appellate court, the appeal will not be dismissed, but will be treated regularly." *Ortiz v. State*, 862 S.W. 2d 170, 172 (Tex. App.--San Antonio 1993, no pet.).

e. "An appeal will not be dismissed where the appellant is back in custody when the record reaches the appellate court. *Marquez v. State*, 795 S.W. 2d 346, 347 (Tex. App.--Waco 1990, no pet.).

XIII. THE BRIEF

A. *Briefs Shall Be Brief*

1. "Briefs shall be brief." TEX. R. APP. P. 74. If all the rules of appellate procedure were this straight-forward, papers like this one would be unnecessary.

B. *Rule 74(d): Points of Error*

1. *Text*

"A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. *A point of error is sufficient if it directs the attention of the appellate court to the error about which complaint is made*. In civil cases, complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon. *Complaints made as to several issues or findings relating to one ground of recovery or defense may be combined in one point, if separate record references are made*." TEX. R. APP. P. 74(d)(emphasis supplied).

2. The italicized portions of Rule 74(d) seem clear enough.

a. "[W]here a point of

error directs the attention of the appellate court to the error about which he complains, it is sufficient to require the Court of Appeals to address his contentions." *Imo v. State*, 822 S.W. 2d 635, 636 (Tex. Crim. App. 1991). In *Imo*, appellant raised Texas statutory and constitutional objections in his motion to suppress at trial, but argued only the state constitution on appeal. "This was sufficient to adequately raise the issue of suppression under State law for purposes of appeal. We hold that appellant substantially complied with the rules such that the court below should have addressed this contention raised in point of error number one which was necessary to the disposition of his appeal." *Id*. *See also Davis v. State*, 817 S.W.2d 345, 346 (Tex. Crim. App.1991).

b. In a single point of error, appellant complained of both the juror's and the county attorney's failure to disclose their relationship on voir dire. The court of appeals considered only the juror's failure. This was error. "Appellant adequately raised both the juror's and the prosecutor's failure to disclose the relationship in question. In addition, he provided separate references to the record regarding each of these contentions. This was sufficient to entitle him to review under Rule 74(d). We hold that appellant substantially complied with the rules such that the court below should have addressed his contention raised in point of error number one." *Armstrong v. State*, 845 S.W. 2d 909, 910 (Tex. Crim. App. 1993). *Accord, Coble v. State*, 871 S.W. 2d 192, 210 n.15 (Tex. Crim. App. 1993).

3. As it turns out, however, points of error must do more than simply direct the court's attention to the complaint made. Although the rules are silent, case law condemns "multifarious" briefing.

a. "Attorneys, when briefing constitutional questions, should carefully separate federal and state issues into separate grounds and provide substantive analysis or argument on each separate ground. If sufficient distinction between state and federal constitutional grounds is not provided by counsel, this Court may overrule the ground as multifarious." *Heitman v. State*, 815 S.W. 2d 681, 691 (Tex. Crim. App. 1991).

b. Appellant's point of error was rejected as multifarious where it complained of several instances of improper jury argument. *Melton v. State*, 713 S.W. 2d 107, 113 (Tex. Crim. App. 1986).

c. Where the appellant combines several legal theories in a single point of error, such that the appellate court is unable to determine what the complaint is, the point will be rejected as multifarious. *Williams v. State*, 605 S.W. 2d 596, 599 (Tex. Crim. App. 1980).

d. A point of error is multifarious if it challenges the legality of an arrest under Texas statute, Texas Constitution and the Federal Constitution. *Marvin Shipman v. State*, 1996 WL 624235 (Tex. App.--San Antonio 1996), slip op. 5.

e. A point is multifarious if it alleges 13 separate instances of prosecutorial argument. *Euziere v. State*, 648 S.W. 2d 700, 703(Tex. Crim. App. 1983)

f. In *Thomas v. State*, 723 S.W. 2d 696, 719, n.2 (Tex. Crim. App. 1986), appellant argued that evidence of his refusal to submit to the breath test should be excluded for various statutory and constitutional reasons. The court noted the general rule that appellant risked "rejection on the ground that nothing is presented for review" by combining more than one legal theory in a single appellate ground. The court refused to invoke the general rule, however, finding that, "[i]n the instant case, appellant's arguments are sufficiently clear for this Court to address."

i. *Hernandez v. State*, 914 S.W. 2d 226, 229 (Tex. App.--Waco 1996)(the court agreed to consider appellant's complaints concerning four different extraneous offense contentions raised in a single point of error).

ii. *Ruiz v. State*, 891 S.W. 2d 302, 305 n.1 (Tex. App.--San Antonio 1994, pet. ref'd)(court considered multiple complaints of prosecutorial misconduct raised in a single point of error).

iii. *Gantz v. State*, 661 S.W. 2d 213, 222 (Tex. App.--San Antonio 1983, pet. ref'd)(court considered 18 jury charge objections raised in one point of error).

g. Sometimes the courts disregard the rule against multifariousness because of the "gravity" of appellant's sentence. *E.g.*, *Morin v. State*, 682 S.W. 2d 265, 267 (Tex. Crim. App. 1983); *See also Smith v. State*, 676 S.W. 2d 379, 383 (Tex. Crim. App. 1984).

C. *Rule 74(f): Argument*

1. *Text*

"A brief of the argument may present separately or grouped the points relied

upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any part of the charge given or refused, such part of the charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the substance of such evidence so admitted or rejected shall be set out with references to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party." TEX. R. APP. P.74(f).

2. *Case law*

a. There are a plethora of cases in which the appellant's points of error were overruled because they were "inadequately briefed" under Rule 74. *E.g., Rhoades v. State*, 934 S.W. 2d 113, 119 (Tex. Crim. App. 1996); *Thomas v. State*, 932 S.W. 2d 128, 128 (Tex. App.--San Antonio 1996); *Barajas v. State*, 732 S.W. 2d 727, 730 (Tex. App.--Corpus Christi 1987, pet. ref'd).

b. In *Valdes-Fuerte v. State*, 892 S.W. 2d 103, 108 (Tex. App.--San Antonio 1994, no pet.), the court of appeals refused to consider appellant's contention that the court's charge did not comply with article 46.03 of the Texas Code of Criminal Procedure because the brief "failed to set forth the portion of the charge about which she is complaining. . . . in violation of Tex.R.App.P 74(f)."

c. Although the appellate record did not include the charge conference or appellant's objection, since the state did not dispute appellant's assertion that he objected and his objection was overruled, the court accepted appellant's "unchallenged assertion as correct pursuant to Rule 74(f) . . . ." *Henry Lee Jones v. State*, 1996 WL 656460 (Tex. App.--San Antonio 1996), slip op. 3. *See also Bachus v. State*, 803 S.W. 2d 402, 403-04 (Tex. App.--Dallas 1991, no pet.).

D. *Length of Briefs*

1. *Rule 74(h)*

This rule limits briefs in *civil* cases to 50 pages. There is no specific page limit imposed by the rule in *criminal* cases. The rule does permit the court of appeals may require a brief which "is unnecessarily lengthy" to be "redrawn."

2. *Local Rules*

a. The San Antonio Court limits original briefs, "exclusive of cover, index, and table of authority pages" to 50 pages. Reply briefs are limited to 25 pages. FOURTH COURT OF APPEALS LOCAL RULE 1(A).

b. The Corpus Christi Court mandates that "[a]ll briefs should be short and succinct." THIRTEENTH COURT OF APPEALS LOCAL RULE IV. "Appellate briefs in civil and criminal cases shall not exceed fifty pages, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The Court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the Court may strike the brief." *Id*.

E. *Number of Copies*

1. *Rule 74(i)*

"Each party shall file six copies of his brief in the court of appeals in which the case is pending. Any court of appeals may by rule authorize the filing therein of fewer or more copies of briefs." TEX. R. APP. P. 74(i).

2. *Local rules*

a. The San Antonio Court requires fours signed copies of briefs. FOURTH COURT OF APPEALS LOCAL RULE 1(B).

b. The Corpus Christi Court requires an original and three copies of the brief. THIRTEENTH COURT OF APPEALS LOCAL RULE II.

F. *Failure to File a Brief*

1. *Rule 74(l)(2)*

"In criminal cases, appellant's failure to file a brief in the time prescribed shall not authorize dismissal of the appeal or, except as herein provided, consideration of the appeal without briefs. When the appellant's brief has not been filed within such time, the clerk of the appellate court shall notify counsel for the parties and the trial judge that appellant's brief has not been filed. If no satisfactory response is received within ten days, the appellate court shall order the trial judge to immediately conduct a hearing to determine whether the appellant desires to prosecute his appeal, whether

the appellant is indigent, or if not indigent, whether retained counsel has abandoned the appeal, and to make appropriate findings and recommendations. For this purpose the trial judge shall conduct such hearings as may be necessary, make appropriate findings and recommendations, and prepare a record of the proceedings. If the appellant is indigent, the judge shall take such measures as may be necessary to assure effective representation of counsel, which may include the appointment of new counsel. The record so made, including any orders and findings of the trial judge, shall be sent to the appellate court, which may take appropriate action to insure that the appellant's rights are protected, including contempt proceedings against counsel. If the trial judge finds that the appellant no longer desires to prosecute the appeal, or that he is not indigent but has failed to make necessary arrangements for filing a brief, the appellate court may consider the appeal without briefs, as justice may require." TEX. R. APP. P. 74(l)(2).

G. *Amended or Supplemental Briefs*

1. *Rule 74(o)*

"Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented." TEX. R. APP. P. 74(o).

2. *Case law*

a. The general rule requires that all points of error are to be included in the original brief. "Supplemented or amended briefs bringing new matters to the appellate court may be filed later, but only 'as justice requires' or 'in the interest of justice' and under reasonable terms imposed by the court. The implication is that such briefs may be filed and considered only with leave of the appellate court. The idea that a party may force a new issue on an appellate court after briefs have been filed is foreign to the rules, although constitutional restraints such as due process may so require in a given case. The same is true for compelling matters that rise to the level of 'in the interest of justice'. Short of those situations, the decision whether to consider new matters raised in a supplemented or amended brief should be left to the sound discretion of the appellate court." *Rochelle v. State*, 791 S.W. 2d 121, 124 (Tex. Crim. App. 1990)(citations omitted).

b. A good justification for seeking leave to file a supplemental brief is that the court of criminal appeals decided a question that was undecided when the original brief was filed. *See Gonzalez v. State*, 852 S.W. 2d 102, 106 (Tex. App.--Austin 1993, pet. ref'd). *see also Horst v. State*, 758 S.W. 2d 311, 317 (Tex. App.--Amarillo, pet. ref'd)("because of the proximity of the *Zani* decision to the submission of this case, we have granted appellant's motion and will consider his supplemental brief and its point of error"). *But see Tindel v. State*, 748 S.W. 2d 593, 598 (Tex. App.--Beaumont 1988, pet. ref'd)(fact that brief was filed before dispositive court of criminal appeals decision did not compel consideration of supplemental point in the interest of justice).

c. In *Nichols v. State*, 754 S.W. 2d 185, 204 n.2 (Tex. Crim. App. 1988), the opinion noted that the court had permitted a supplemental brief from counsel who had substituted on the case.

d. In *Alvarado v. State*, 818 S.W. 2d 100, 106 (Tex. App.--San Antonio 1991, no pet.), appellant filed a supplemental brief six months after his original brief was filed. In stating the general rule, the court of appeals warned that "except under extremely limited circumstances, all points of error must be included in the original appellate brief." The court went on to add: "We hold that all waivable errors, which are not included in the original appellate brief, are waived and present nothing to review." Nonetheless, the court addressed the supplemental point, because it had previously addressed the same point of error in a co-defendant's

brief. *Id*.

e. In *Tobias v. State*, 884 S.W. 2d 571, 585 (Tex. App.--Fort Worth 1994 , no pet.), *cert. denied*, 115 S. Ct. 2285 (1995), after recognizing that appellant has no right to hybrid representation, the court agreed to consider as a supplemental brief the matter raised in appellant's *pro se* brief, "in the interests of justice."

f. In *Randle v. State*, 878 S.W. 2d 318, 319 (Tex. App.--Houston [1st Dist.] 1994, no pet.), the court of appeals refused leave to file a supplemental brief which would have alleged new reasons to find trial counsel ineffective. "We do not see a 'compelling matter' that rises to the level which would justify granting leave to file an additional point of error." *Id*.

g. In *Mazuera v. State*, 778 S.W. 2d 192, 193 (Tex. App.--Houston [1st Dist.] 1989, no pet.), the court of appeals noted that appellant's counsel had previously lost on the identical issue he raised in the instant appeal, and that he had not advised the court, as required by his ethical duties, of this contrary authority. The court chastised counsel for filing a "form" brief, and ordered him to file another, "showing proper authority and to comply with the rules of professional ethics." *Id*.

XIV. ORAL ARGUMENT

A. *Before the Court of Appeals*

1. *Do you have a right to oral argument in the Court of Appeals?*

a. Rule 75(a) is subtitled "Right to Argument." It provides that any party who has filed a brief and who has timely requested oral argument "may . . . submit an oral argument to the court." Rule 75(f) provides that the Court "may, in its discretion, advance *civil* cases for submission without oral argument where oral argument would not materially aid the court in the determination of the issues of law and fact presented in the appeal." Inferentially, at least, it appears that a party to a criminal case who files a brief and timely requests oral argument is entitled to argument as a matter of right.

2. *How much time is allowed?*

a. Rule 75(d) allows each side thirty minutes, "with fifteen minutes more in conclusion by the appellant."

b. "In cases involving difficult questions, the time allotted may be extended by the court, provided application is made before argument begins. The court may, in its discretion, shorten the time allowed for oral argument." TEX. R. APP. P. 75(d).

c. The Fourth Court of Appeals has shortened the time in criminal cases. "In criminal cases, oral argument will be limited to twenty (20) minutes per side. Appellant may divide his twenty (20) minutes between presentation and rebuttal. If appellant desires to divide his argument, he must advise the Court at the beginning of argument, and keep his own time." FOURTH COURT OF APPEALS LOCAL RULE 2(C).

d. The Thirteenth Court of Appeals has adopted a flexible time rule. "In an effort to make oral argument meaningful and beneficial, when announcements are requested at submission, the Court may advise the parties or their counsel the time it estimates will be appropriate for the presentation of the issues by oral argument. Should the parties or their counsel feel more or less time is needed, the Court may consider changing its estimate; otherwise, oral presentations will be limited to the time allotted." THIRTEENTH COURT OF APPEALS LOCAL RULE V.

3. *How to request oral argument*

a. "A party to the appeal desiring oral argument shall file a request therefor *at the time he files his brief* in the case. Failure of a party to file a request shall be deemed a waiver of his right to oral argument in the case. Although a party waives his right to oral argument under this rule, the court of appeals may nevertheless direct such party to appear and submit oral argument on the submission date of the case." TEX. R. APP. P. 75(f)(emphasis supplied).

b. "A party desiring oral argument shall file a request therefor *at the time he files his brief by so indicating on the outside cover of the brief*." FOURTH COURT OF APPEALS LOCAL RULE 2(A)(emphasis supplied).

c. "If any party desires oral argument, THAT PARTY shall file a request for argument *at the time of the filing of the brief*. Pursuant to Tex. R. App. P. 75(f), a party to the appeal desiring oral argument shall file a request therefor at the time he files his brief in the case. The request for argument should be *typed on the bottom left-hand corner of the brief*. Failure of a party to file a request at the proper time shall be deemed a waiver of his right to oral argument in the case." THIRTEENTH COURT OF APPEALS LOCAL RULE

IV(emphasis supplied).

B. *Before the Court of Criminal Appeals*

1. *Rule 202(d)(2): Statement regarding oral argument*

a. "Counsel shall include in the petition a short statement of the reasons why oral argument would be helpful in the event the petition is granted, or a statement that oral argument is waived. If a reply or cross-petition is filed, counsel shall likewise include a statement of why oral argument should or need not be had. The court will accord these statements due, not controlling, weight in determining whether oral argument will be heard in the case." TEX. R. APP. P. 202(d)(2).

2. *Rule 221: Oral argument*

a. "Unless extended by the Court of Criminal Appeals in a special case, the total maximum time for oral argument shall be 20 minutes per side. Counsel for the appellant or petitioner is entitled to open and conclude the argument. Counsel will not be permitted to read at length from the briefs, records, or authorities. Counsel may make an oral correction to his brief, but multiple additional citations should not be made orally; they should be reduced to writing and filed with the clerk." TEX. R. APP. P. 221.

3. *Rule 220: Notification*

a. "Oral argument will be permitted only on those causes designated by the Court of Criminal Appeals. Notification of such designation will be issued by the Clerk of the Court of Criminal Appeals along with notification of submission of the cause. Should counsel in a not so designated cause desire oral argument, they may petition the Court of Criminal Appeals within 30 days of submission notification. Said petition should contain specific reasons why oral argument is desired. The clerk is directed to use all reasonable diligence to notify counsel of record of settings, but failure to receive notice will not necessarily prevent submission of the cause on the day it is set." TEX. R. APP. P. 220.

4. *Rule 230(e): Rehearings*

a. If a motion for rehearing is granted, the court may resubmit the case without oral argument. If oral argument is permitted, counsel will be limited to 15 minutes per side. The movant is entitled to open and conclude the argument. The clerk will notify all parties of the time for such resubmissions." TEX. R. APP. P. 230(e).

XV. REVERSIBLE ERROR IN CRIMINAL CASES

A. *Harmless Error*

1. *TEX. R. APP. P. 81(b)(2)*

a. "If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment." TEX. R. APP. P. 81(b)(2).

2. *FED. R. APP. P. 52*

"(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. APP. P. 52

3. *Federal constitutional error*

a. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

4. *Harris v. State: The test for harmless error in Texas*

a. The court recognized in *Harris v. State*, 790 S.W. 2d 568, 584-85 (Tex. Crim. App. 1989), that Rule 81(b)(2) "is expressed in conclusory terms," and endeavored to "articulate a coherent standard for determining when an error is harmless." According to the court, that coherent standard is the following: "In summary, a reviewing court in applying the harmless error rule should not focus upon the propriety of the outcome of the trial. Instead, an appellate court should be concerned with the integrity of the process leading to the conviction. Consequently, the court should examine the source of the error, the nature of the error, whether or to what extent it was emphasized by the State, and its probable collateral implications. Further, the court should consider how much weight a juror would probably place upon the error. In addition, the Court must also determine whether declaring the error harmless would encourage the State to repeat it with impunity." *Id*. at 587.

5. *The future of Harris*

a. In *Enos v. State*, 909 S.W. 2d 293 (Tex. App.--Fort Worth 1995, pet. granted), the court of appeals held that the trial court erred under *Gaskin v. State* in not ordering the victim impact statement disclosed to appellant after the witness testified, but held that the error was harmless pursuant to the *Harris* test. The dissent argued that the *Harris* test was applied to determine harm from the introduction of extraneous offenses, and that the court of criminal appeals never intended that test to apply to all errors. The dissent believed that it is time to admit that many of the *Harris* factors have no relevance to a harm analysis for some errors, including *Gaskin* violations. The critical analysis is whether the error might possibly have prejudiced the juror's decision making. Because the dissent believed that the defense could have used the victim impact statement advantageously, it would have reversed. The court of criminal appeals has granted appellant's petition for discretionary review to determine whether all questions of harm are to be measured by the test provided in *Harris*, regardless of the variety of facts or issues presented.

6. *Some errors are not subject to a harm analysis*

a. The United States Supreme Court has recognized that some errors are not subject to a harmless error analysis:

i. *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986)(discrimination in the grand jury undermines the structural integrity of the criminal tribunal and is therefore not subject to harmless error review).

ii. *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984)(denial of the right to a public trial).

iii. *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984)(denial of the right of self-representation).

iv. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)(judge had a financial interest in conviction).

v. *But see Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)(the improper admission of a coerced confession may be harmless, since it is "trial error" and not a structural defect which affects the framework within which the trial proceeds).

b. The Texas Court of Criminal Appeals has found a variety of errors not subject to the harmless error analysis:

i. *Sodipo v. State*, 815 S.W. 2d 551, 554 (Tex. Crim. App.)(the requirement in article 28.10(a) of the code of criminal procedure giving counsel 10 days to object to an amended charging instrument "cannot be subjected to a harm analysis in any meaningful manner, because the record will not reveal any concrete data from which an appellate court can meaningfully gauge or quantify the effect of the error").

ii. *Stine v. State*, 908 S.W. 2d 429, 431 (Tex. Crim. App. 1995)(holding a part of the trial in a hospital outside the county seat is not subject to a harmless error analysis because the constitutional requirement is clear, unambiguous, mandatory and non-waivable).

iii. *Morales v. State*, 872 S.W. 2d 753, 755 (Tex. Crim. App. 1994)(complete failure to admonish on the immigration consequences of guilty plea).

iv. *Miller v. State*, 866 S.W. 2d 243, 247 (Tex. Crim. App. 1993)("appointment of a special judge not in compliance with statutory authority is not the type of error that we can meaningfully analyze under TEX.R.APP. P. 81(b)(2)").

v. *Warmoski v. State*, 853 S.W.2d 575, 580 (Tex. Crim. App.1993) (abridgement of right to sever indictments not subject to harmless error rule).

vi. *Meek v. State*, 851 S.W.2d 868, (Tex. Crim. App.1993) (waiver of right to trial by jury not subject to harmless error rule).

vii. *Marin v. State*, 851 S.W.2d 275, 282 (Tex. Crim. App. 1993)(violation of rule concerning number of days for preparation for trial too speculative to be subject to harmless error rule).

viii. *Chappell v. State*, 850 S.W.2d 508, 513 (Tex. Crim. App.1993) (denial of proper request for jury shuffle).

ix. *Morrison v. State*, 845 S.W.2d 882, 889 (Tex. Crim. App.1992) (permitting jurors to question witnesses).

x. *Brown v. State*, 828 S.W. 2d 762, 764 (Tex. Crim. App.

1991)(amendment of charging instrument, over objection, after trial had commenced).

xi. *Perez v. State*, 824 S.W.2d 565, 568 (Tex. Crim. App.1992) (failure to provide complete statement of facts for purposes of appeal).

xii. *Nunfio v. State*, 808 S.W.2d 482, 485 (Tex. Crim. App.1991) (denial of proper voir dire question that prevents intelligent exercise of peremptory challenges not subject to harm analysis).

xiii. *Ex parte McAtee*, 599 S.W.2d 335, 336 (1980)(complete failure to admonish as to range of punishment at guilty plea proceedings).

XVI. OPINIONS

A. *Every Issue Raised Shall Be Addressed*

1. *Rule 90(a)*

a. "The court of appeals shall hand down a written opinion which shall be as brief as practicable but which *shall address every issue raised and necessary to final disposition* of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion." TEX. R. APP. P. 90(a)(emphasis supplied).

2. *Case law*

a. "If an issue or argument is timely asserted in the court of appeals, but goes unaddressed there even though resolution of that issue is necessary to disposition of the appeal, this Court will typically grant a petition for discretionary review and remand the cause for the court of appeals to address it in the first instance. In like vein we now hold that the proper disposition of a petition for discretionary review that correctly asserts that the lower court has failed to consider a complaint as to the propriety of its ultimate disposition is for this Court, in the exercise of its supervisory authority, to remand the cause to the court of appeals to reach a 'decision' on that question in the first instance." *Sotelo v. State*, 913 S.W. 2d 507, 510 (Tex. Crim. App. 1995)(remanded to the court of appeals to determine whether new punishment hearing would violate double jeopardy)(citations omitted).

b. Where appellant properly challenges an action under both the state and the federal constitutions, the court of appeals errs in not separately addressing both issues. In such a case, appellant's petition for discretionary review will be summarily granted, the cause will be vacated and remanded to the court of appeals. *E.g., Lockett v. State*, 861 S.W. 2d 253, 253 (Tex. Crim. App. 1993); *Muniz v. State*, 852 S.W. 2d 520, 521 (Tex. Crim. App. 1993); *Imo v. State*, 822 S.W. 2d 635, 636 (Tex. Crim. App. 1991).

B. *To Publish or Not*

1. *Rule 90(c)*

a. "A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to 'publish' or 'do not publish.' Any party may move the appellate court to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief. The Supreme Court or the Court of Criminal Appeals may on request of any party or non-party to a court of appeals decision order a court of appeals opinion published at any time." TEX. R. APP. P. 90(c).

2. *Rule 90(d): Standards for publication*

a. "An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority." TEX. R. APP. P. 90(d).

3. *Rule 90(i)*

a. "Unpublished opinions shall not be cited as authority by counsel or by a court." TEX. R. APP. P. 90(i).

b. "Unpublished opinions are not to be cited as authority." *Ditto v. State*, 898 S.W. 2d 383, 386 n.1 (Tex. App.--San Antonio 1995, no pet.).

XVII. MOTION FOR REHEARING

A. *Timeliness*

1. Any party desiring a rehearing of any matter determined by a court of appeals or any panel thereof must, within fifteen days after the date of rendition of the judgment or decision of the court, file with the clerk of the court a motion in writing for a rehearing, in which the points relied upon for the rehearing shall be distinctly specified." TEX. R. APP. P. 100(a).

2. "An extension of time may be granted for late filing in a court of appeals of a motion or a second motion for rehearing, if a motion reasonably explaining the need therefor is filed with the court of appeals not later than fifteen days after the last date for filing the motion. Any order of the court of appeals denying a motion for an extension of time to file a motion for rehearing in a civil case shall be reviewable by the Supreme Court." TEX. R. APP. P. 100(g).

B. *Not Required to File Petition for Discretionary Review*

1. "A motion for rehearing in the court of appeals shall not be a prerequisite to the granting of discretionary review, with or without petition, by the Court of Criminal Appeals." TEX. R. APP. P. 200(d).

2. "While a motion for rehearing in the court of appeals is not a prerequisite for our granting discretionary review, Tex.R.App.Pro. Rule 200(d), there will be instances where it is a helpful tool for focusing attention on an adverse determination of an issue, see id., Rule 100(a), and if it draws a responsive opinion from the court so much the better, Rule 100(c)." *Tallant v. State*, 742 S.W. 2d 292, 294 (Tex. Crim. App. 1987).

3. "Where an appellate court fails to address issues of whether error has been preserved or forfeited by the parties, the parties may call to the court's attention such failure in a motion for rehearing. This notice gives appellate courts opportunity to examine an issue possibly overlooked, thus promoting efficiency in our legal system. Just as a trial judge has certain independent duties to perform at a trial, when she fails to perform any of those duties the parties may object. Likewise, the parties in an appellate setting may object, through a motion for rehearing, to an appellate court's failure to address systemic requirements on original submission. This objection after the fact is not unfair to one party or the other, but rather it maintains the essential integrity of our system by forcing appellate courts to observe their systemic requirements." *Hughes v. State*, 878 S.W. 2d 142, 151 (Tex. Crim. App. 1992).

C. *Discretion to Consider New Matters on Rehearing*

1. "If a party raises a new ground for the first time on motion for rehearing, we believe the clear import of the rules is that the decision of whether to consider that new matter is left to the sound discretion of the appellate court." *Rochelle v. State*, 791 S.W. 2d 121, 124 (Tex. Crim. App. 1990).

2. *Bonilla v. State*, 933 S.W. 2d 538, 543 (Tex. App.--Houston [1st Dist.] 1995)(court exercised its discretion not to review alleged materiality of false statement because it was uncontested at trial and on appeal).

XVIII. RECONSIDERATION ON DISCRETIONARY REVIEW

A. *Reconsideration by the Court of Appeals: Rule 101*

1. "Within fifteen days after a petition for discretionary review to the Court of Criminal Appeals has been filed with the Clerk of the Court of Appeals which delivered the decision, a majority of justices who participated in the decision may summarily reconsider and correct or modify the opinion or judgment of the court and shall cause the clerk to certify a copy thereof and include it among the materials forwarded to the Clerk of the Court of Criminal Appeals in accordance with Rule 202(f). See Rule 202(j)." TEX. R. APP. P. 101.

2. In *Garza v. State*, 896 S.W. 2d 192 (Tex. Crim. App. 1995), the court of appeals withdrew its original opinion and issued a new opinion 32 days after appellant filed his petition for discretionary review. The court of criminal appeals reversed, holding that the 15 day time limit provided by Rule 101 is jurisdictional. After the 15 days expires, the court of appeals has no authority to

modify its opinion. *Id*. at 194.

XIX. COUNSEL'S DUTIES AFTER LOSING IN THE COURT OF APPEALS

A. *Rule 91*

1. Rule 91 provides the procedure by which the appellant is to be notified of the appellate proceedings after the appeal is decided. "On the date an opinion of an appellate court is handed down, the clerk of the appellate court shall mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to the State and each of the defendants in a criminal case, and to each of the parties to the trial court's final judgment in a civil case, a copy of the opinion handed down by the appellate court and a copy of the judgment rendered by the appellate court as entered in the minutes. Delivery to a party having counsel indicated of record shall be made to counsel. The clerk of the trial court shall file a copy of the opinion among the papers of the cause in such court. When there is more than one attorney for a party, the attorneys may designate in advance the one to whom the copies of the opinion and judgment shall be mailed. In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals. TEX. R. APP. P. 91.

B. *Counsel Has No Duty to File a Petition for Discretionary Review*

1. Counsel has no duty to file a petition for discretionary review. *Ayala v. State*, 633 S.W. 2d 526, 528 (Tex. Crim. App. 1982).

2. The rule established in *Ayala* is still true, despite language in article 26.04(a) of the Texas Code of Criminal Procedure which purports to require an appointed attorney to represent appellant until the appeals are exhausted. *See Ex parte Jarrett*, 891 S.W. 2d 935, 939 (Tex. Crim. App. 1994).

C. *Jarrett v. State: Counsel Does, However, Have a Duty to Notify Appellant of His Right to File a Petition*

1. In *Ex parte Jarrett*, 891 S.W. 2d 935 (Tex. Crim. App. 1994), the court acknowledged the rule in *Ayala*, but further held that appellant's right to file a petition for discretionary review may not be abridged by counsel's actions. "Accordingly, failure to notify the appellant of the right to file a petition for discretionary review prejudices the rights of the appellant and constitutes a violation of the constitutional right to effective assistance of counsel." *Id*. at 939. The court then set forth in detail counsel's duty to notify. "Pursuant to Rule 91 appellate counsel has a duty to notify the appellant of the actions of the appellate court and to consult with and fully advise the appellant of the meaning and effect of the opinion of the appellate court. Finally, although appellate counsel has no duty to file a petition for discretionary review, . . . appellate counsel does have the duty, under art. 26.04, to advise the appellant of the possibility of review by this Court as well as expressing his professional judgment as to possible grounds for review and their merit, and delineating the advantages and disadvantages of any further review." *Id*. at 940.

XX. BAIL PENDING APPEAL

A. *Following Misdemeanor Conviction*

1. "Pending the determination of any motion for new trial or the appeal from any misdemeanor conviction, the defendant is entitled to be released on reasonable bail, and if a defendant charged with a misdemeanor is on bail, is convicted, and appeals that conviction, his bond is not discharged until his conviction is final or in the case of an appeal to a court where a trial de novo is held, he files an appeal bond as required by this code for appeal from the conviction." TEX. CODE CRIM. PROC. ANN. art. 44.04(a)(Vernon Supp. 1997).

B. *Following Felony Conviction Where Sentence Exceeds 15 Years Confinement*

1. "The defendant may not be released on bail pending the appeal from any felony conviction where the punishment exceeds 15 years confinement . . . but shall immediately be placed in custody and the bail discharged." TEX. CODE CRIM. PROC. ANN. art. 44.04(b)(Vernon Supp. 1997).

2. It is the number of years confinement assessed that governs eligibility for bail pending appeal. *See Ex parte Byers*, 612 S.W. 2d 534 (Tex. Crim. App. 1980)(appellant eligible for bail where sentence was 15 years plus a fine).

C. *Following Felony Conviction Where Sentence Does Not Exceed 15 Years Confinement*

1. "Pending the appeal from any felony conviction other than a conviction . . . where the punishment does not exceed 15 years confinement . . ., the trial court may deny bail and commit the defendant to custody if there then exists good cause to believe that the defendant would not appear when his conviction became final or is likely to commit another offense while on bail, permit the defendant to remain

at large on the existing bail, or, if not then on bail, admit him to reasonable bail until his conviction becomes final. The court may impose reasonable conditions on bail pending the finality of his conviction. On a finding by the court on a preponderance of the evidence of a violation of a condition, the court may revoke the bail." TEX. CODE CRIM. PROC. ANN. art. 44.04(c)(Vernon Supp. 1997).

2. For cases discussing the factors to consider in determining what bail is reasonable, *see, e.g., Ex parte Davila*, 623 S.W. 2d 408 (Tex. Crim. App. 1981); *Ex parte Spaulding*, 612 S.W. 2d 509 (Tex. Crim. App. 1981); *Ex parte Rubac*, 611 S.W. 2d 848 (Tex. Crim. App. 1981); *Burroughs v. State*, 611 S.W. 2d 106 (Tex. Crim. App. 1981).

D. *Trial Court May Increase or Decrease Amount of Bail*

1. "After conviction, either pending determination of any motion for new trial or pending final determination of the appeal, the court in which trial was had may increase or decrease the amount of bail, as it deems proper, either upon its own motion or the motion of the State or of the defendant." TEX. CODE CRIM. PROC. ANN. art. 44.04(d)(Vernon Supp. 1997).

E. *The Right to Appeal Bail Determination*

1. "The right to appeal to the Court of Appeals of this state is expressly accorded the defendant for a review of any judgment or order made hereunder, and said appeal shall be given preference by the appellate court." TEX. CODE CRIM. PROC. ANN. art. 44.04(g)(Vernon Supp. 1997).

F. *When the State Appeals*

1. "If the state appeals pursuant to this article and the defendant is on bail, he shall be permitted to remain at large on the existing bail. If the defendant is in custody, he is entitled to reasonable bail, as provided by law, unless the appeal is from an order which would terminate the prosecution, in which event the defendant is entitled to release on personal bond." TEX. CODE CRIM. PROC. ANN. art. 44.01(g)(Vernon Supp. 1997).

G. *When the Court of Appeals Affirms*

1. "When the judgment of the appellate court affirms the judgment of the court below in a case in which bail has been allowed, the clerk of the trial court shall send an acknowledgment to the clerk of the appellate court of the receipt of the mandate and immediately file the same and forthwith issue a capias for the arrest of the defendant for the execution of the sentence of the court, which shall recite the fact of conviction, setting forth the offense and the judgment and sentence of the court, the appeal from and affirmance of such judgment and the filing of such mandate, and shall command the sheriff to arrest and take into his custody the defendant and place him in jail and therein keep him until delivered to the proper authorities, as directed by said sentence. Such capias may issue to any county of this State, and shall be executed and returned as in felony cases, except that no bail shall be taken in such cases. The sheriff shall forthwith execute such capias as directed. The sheriff shall notify the clerk of the trial court and the clerk of the appellate court when the mandate has been carried out and executed." Tex. R. App. P. 87(b)(1).

H. *When the Court of Appeals Reverses*

1. "When the judgment of the appellate court reverses the judgment of the trial court and grants a new trial to the defendant, the cause shall stand as it would have stood in case the new trial had been granted by the trial court, and if in custody and entitled to bail the defendant shall be released upon his giving bail." TEX. R. APP. P. 87(b)(2).

2. "When the judgment of the appellate court reverses a judgment and orders the case to be dismissed, the defendant, if in custody, must be discharged." TEX. R. APP. P. 87(b)(2).

3. "When the judgment of the appellate court reverses a judgment and orders the acquittal of the defendant, the defendant, if in custody, must be discharged and no further order or judgment of the court below shall be necessary." TEX. R. APP. P. 87(b)(3).

4. "If a conviction is reversed by a decision of a Court of Appeals, the defendant, if in custody, is entitled to release on reasonable bail, regardless of the length of term of imprisonment, pending final determination of an appeal by the state or the defendant on a motion for discretionary review. If the defendant requests bail before a petition for discretionary review has been filed, the Court of Appeals shall determine the amount of bail. If the defendant requests bail after a petition for discretionary review has been filed, the Court of Criminal Appeals shall determine the amount of bail. The sureties on the bail must be approved by the court where the trial was has. The defendant's right to release under this subsection attaches immediately on the issuance of the Court of Appeals' final ruling as defined by Tex. Cr. App. R. 209(c)." TEX. CODE CRIM. PROC. ANN. art. 44.04(h)(Vernon Supp. 1997).

XXI. THE ANDERS BRIEF

A. *Anders v. California*

1. The issue in *Anders v. California*, 386 U.S. 738 (1967), concerned "the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." *Id*. at 739.

2. In *Anders*, counsel wrote a letter to the appellate court refusing to file the appeal and stating his opinion that there was no merit to the appeal. The Supreme Court held that counsel's simple "no-merit" letter was insufficient to discharge his duty to his client and to the court. "Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability." *Id*. at 744.

3. The Court then outlined the procedure to follow should counsel properly determine that the appeal would be frivolous. "Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. *Id*.

4. "If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id*.

B. *Anders in Texas*

1. "If grounds are deemed arguable, the Court of Appeals then must abate the appeal and remand the case to the trial court with orders to appoint *other* counsel to present those and any other grounds that might support the appeal." *Stafford v. State*, 813 S.W. 2d 503, 511 (Tex. Crim. App. 1991)(emphasis supplied).

2. The proper procedure for filing an *Anders* brief was set forth in *Johnson v. State*, 885 S.W. 2d 641 (Tex. App.--Waco 1995, pet. ref'd). The San Antonio Court adopted this procedure in *Bruns v. State*, 924 S.W. 2d 176 (Tex. App.--San Antonio 1996):

> If a court-appointed attorney determines an appeal to be frivolous, the attorney shall file a motion requesting permission to withdraw. Accompanying that motion shall be an *Anders* brief and an exhibit showing the attorney sent a copy of the motion and brief to the defendant and informed him of his right to review the record and file a pro se brief. We adopt the suggestion of the Waco court in *Johnson* that the attorney not only inform the defendant of his right to review the record but explain "the details of the procedure to be used in the particular court of conviction to gain access to the record." 885 S.W.2d at 647 n. 2.
>
> The court of appeals will then review the brief, and if it determines that the brief complies with the requirements of *Anders*, the motion to withdraw will be granted. *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App.1991). If the motion is granted, the appellant will then have thirty days following the granting of the motion to either file a pro se brief or a motion for extension of time. *See Johnson*, 885 S.W.2d at 647 & n. 3. After the filing of the pro se brief, or the lapse of time allowed for such filing, the court of appeals will independently review the record and determine whether there are arguable grounds for the appeal. *Stafford*, 813 S.W.2d at 511. If the court determines that there are legal points arguable on the merits, the appeal will be abated for the trial court to appoint new counsel to assist the indigent with briefing such points.

Bruns v. State, 924 S.W. 2d at 180 n.1.

3. The Corpus Christi Court requires that counsel's brief present a "professional evaluation of the record demonstrating why, in effect,

there are no arguable grounds to be advanced on appeal," that counsel's brief be delivered to counsel, and that appellant be "advised that he would be given an opportunity to examine the appellate record and that he has a right to file a pro se brief." *Flores v. State*, 853 S.W. 2d 139, 139 (Tex. App.--Corpus Christi 1993, no pet.).

4. The requirement of filing an *Anders* brief and observing the procedures dictated in that case fall only upon court-appointed counsel. *Johnson v. State*, 885 S.W.2d at 648.

XXII. SOME COMMON DEADLINES

A. **Motion for new trial**--must be *filed* within 30 days after the date sentence is imposed or suspended in open court. TEX. R. APP. P. 31(a)(1).

B. **Amended motion for new trial**--before the motion for new trial is ruled upon, within 30 days after the date sentence is imposed or suspended in open court. TEX. R. APP. P. 31(a)(2).

C. **Motion for new trial**--must be *presented* to the court within 10 days after the motion is filed. TEX. R. APP. P. 31(c)(1).

D. **Motion for new trial**--must be *determined* within 75 days after date sentence is imposed or suspended in open court. TEX. R. APP. P. 31(e)(1).

E. **Motion in arrest of judgment**--must be made within 30 days after sentence is imposed or suspended in open court. TEX. R. APP. P. 34(a).

F. **Defendant's notice of appeal (without motion for new trial)**--within 30 days after sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge. TEX. R. APP. P. 41(b)(1).

G. **Defendant's notice of appeal (with motion for new trial)**--within 90 days after sentence is imposed or suspended in open court. TEX. R. APP. P. 41(b)(1).

H. **State's notice of appeal**--within 15 days after sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge. TEX. R. APP. P. 41(b)(1).

I. **Extension of time to file notice of appeal**--within 15 days after the last day allowed if within the same period a motion is filed in the court of appeals reasonably explaining the need for such extension. TEX. R. APP. P. 41(b)(2).

J. **Transcript and statement of facts in habeas corpus and bail proceedings**--must be prepared and certified by the clerk of the trial court and sent to the court of appeals within 15 days of the filing of the notice of appeal. TEX. R. APP. P. 44(a).

K. **Written designation specifying matter for inclusion in transcript**--at or before the time for perfecting the appeal. TEX. R. APP. P. 51(b).

L. **Appellant's written request to the court reporter for the statement of facts**--at or before the time for perfecting the appeal. TEX. R. APP. P. 53(a).

M. **Appellant's motion for free statement of facts**--within the time prescribed for perfecting the appeal. TEX. R. APP. P. 53(j).

N. **Transcript and statement of facts (with no motion for new trial)**--must be filed in the appellate court within 60 days after sentence is imposed or suspended in open court or the order appealed from has been signed. TEX. R. APP. P. 54(b).

O. **Transcript and statement of facts (with motion for new trial)**--must be filed in the appellate court within 120 days after sentence is imposed or suspended in open court or the order appealed from has been signed. TEX. R. APP. P. 54(b).

P. **Extension of time to file record--**not later than 15 days after the last date for filing the record. TEX. R. APP. P. 54(c).

Q. **Appellant's brief**--must be filed within 30 days after the filing of the transcript and the statement of facts, except in accelerated appeals and habeas corpus appeals. TEX. R. APP. P. 74(k).

R. **Appellee's brief**--must be filed within 25 days after the filing of appellant's brief. TEX. R. APP. P. 74(m).

S. **Motion for rehearing**--must be filed within 15 days of the date of the rendition of the judgment or decision of the court. TEX. R. APP. P. 100(a).

T. **Petition for discretionary review**--must be filed within 30 days after the date judgment is entered or within 30 days after the day the last timely motion for rehearing is overruled. TEX. R. APP. P. 202(b).