Cumulative Case Note Update for *Baker's Texas Handbooks* 2013 Edition

from decisions of the
Texas Court of Criminal Appeals
through June 2013

Compiled by Lang Baker

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Case Note Updates for Baker's Texas Penal Code Handbook

Title 1 - Introductory Provisions

Chapter 1 General Provisions

Sec. 1.05 Construction of Code

in pari materia

Conviction for fraudulent use or possession of identifying information [32.51(b)] did not violate doctrine of in pari materia on claim that it conflicts with statute defining offense of failure to identify [38.02(b)]. Given that 32.51 and 38.02 have different subjects and purposes and are aimed at different groups of people, it is clear that the two are not in pari materia, particularly in light of 32.51(e). Jones v State (April 17, 2013, PD-0282-12 and PD-0283-12)

The doctrine of in pari materia is a rule of statutory construction that seeks to carry out the Legislature's intent. Statutes are in pari materia when they deal with the same general subject, have the same general purpose, or relate to the same person or thing or class of persons and things. The statutes' purposes are the most significant factors. Jones v State (April 17, 2013, PD-0282-12 and PD-0283-12)

The doctrine of in pari materia arises where one statute deals with a subject in comprehensive terms and another deals with a portion of the same subject in a more definite way. In the context of penal provisions in particular, on a number of occasions two statutes have been found to be in pari materia where one provision has broadly defined an offense, and a second has more narrowly hewn another offense, complete within itself, to proscribe conduct that would otherwise meet every element of, and hence be punishable under, the broader provision. However, the adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will not justify applying the rule. Jones v State (April 17, 2013, PD-0282-12 and PD-0283-12)

When two statutes are in pari materia, the doctrine requires that the statutes be taken, read, and construed together, each enactment in reference to the other, as though they were parts of one and the same law. To that end, any conflict between their provisions will be harmonized, if possible, and effect will be given to all the provisions of each act if they can be made to stand together and have concurrent efficacy. Where such statutes irreconcilably conflict, however, the more detailed enactment will prevail, regardless of whether it was passed prior to or subsequently to the general statute, unless it appears that the legislature intended to make the general act controlling. Further, such conflict implicates due process rights that require the State to prosecute the defendant under the special statute where two statutes are in pari materia. Jones v State (April 17, 2013, PD-0282-12 and PD-0283-12)

Sec. 1.07 Definitions

definitions

NOTES

The word "apparent" as used in 1.07(11) means assent in fact that, while not communicated expressly, is no less "clear and manifest to the understanding" for not having been explicitly verbalized. Baird v State (May 8, 2013, PD-0159-12)

Chapter 2 Burden of proof

Sec. 2.04 Affirmative Defense

SUFF OF EVIDENCE REVIEW

Decision in Brooks v State, 323 S.W.3d 893 (Tex. Crim. App. 2010), did not affect line of cases that traditional Texas civil burdens of proof and standards of review in the context of affirmative defenses apply where the rejection of an affirmative defense is established by a "preponderance of the evidence." Matlock v State (February 27, 2013, PD-0308-12)

In reviewing the legal sufficiency of the evidence to support an adverse finding on the affirmative defense of an inability to pay in a nonsupport prosecution, court first looks for evidence ("more than a mere scintilla") that supports jury's implied finding that the defendant could pay child support, and disregards all evidence of defendant's inability to pay unless a reasonable factfinder could not disregard that evidence. If no evidence supports jury's finding that defendant could pay child support, then court searches the record to see if defendant had established, as a matter of law, that he did not have the ability to pay his child support. If record reveals evidence supporting defendant's position that he did not have the ability to pay, but that evidence was subject to a credibility assessment and was evidence that a reasonable jury was entitled to disbelieve, reviewing court will not consider that evidence in matter-of-law assessment. Only if appealing party establishes that the evidence conclusively proves his affirmative defense and "that no reasonable jury was free to think otherwise," may reviewing court conclude that the evidence is legally insufficient to support jury's rejection of defendant's affirmative defense. Applying that standard to criminal cases, defendant is entitled to an acquittal on appeal despite the jury's adverse finding on his affirmative

defense only if the evidence conclusively establishes his affirmative defense under the modified two-step Sterner test. Matlock v State (February 27, 2013, PD-0308-12)

In the factual-sufficiency review of a rejected affirmative defense, an appellate court views the entirety of the evidence in a neutral light, but it may not usurp the function of the jury by substituting its judgment in place of the jury's assessment of the weight and credibility of the witnesses' testimony. Therefore, an appellate court may sustain a defendant's factual-sufficiency claim only if, after setting out the relevant evidence and explaining precisely how the contrary evidence greatly outweighs the evidence supporting the verdict, the court clearly states why the verdict is so much against the great weight of the evidence as to be manifestly unjust, conscience-shocking, or clearly biased. If an appellate court conducting a factual-sufficiency review finds that the evidence supporting the affirmative defense so greatly outweighs the State's contrary evidence that the verdict is manifestly unjust, then the appellate court may reverse the trial court's judgment and remand the case for a new trial. The remedy in both civil and criminal cases for an appellate reversal based upon a factual-sufficiency claim that the jury's verdict is against the great weight of the evidence is a new trial, not an acquittal. Matlock v State (February 27, 2013, PD-0308-12)

Chapter 3 Multiple Prosecutions

Sec. 3.03 Sentences for Offenses Arising Out of Same Criminal Episode

On convictions under three counts, where trial court cumulated all three, but one of the three could not be cumulated, cumulation order reformed to delete cumulation of the count that could not be cumulated, and to stack the other two counts to conform with trial court's intent as expressed in oral pronouncement. Sullivan v State (January 9, 2013, PD-1678-11 and PD-1679-11) **ERROR TO STACK SENTENCES**

Title 2 - General Principles of Criminal Responsibility

Chapter 6 Culpability Generally

Sec. 6.04 Causation: Conduct and Results

6.04(b): transfered intent

Habeas corpus relief denied, where def claimed that holding in his prior direct appeal was overruled in a subsequent case, where that subsequent ruling did not invalidate separate rationale, stated in concurring opinion in def's direct appeal, for upholding def's conviction. Holding at issue concerned point of error on direct appeal complaining that submission of transferred intent to jury was error because law of transferred intent did not apply to capital murder in which def killed a mother and her baby; separate instances of conduct in def's offense occurred very close in time but were still sufficiently separate to involve separate intents. First, he fatally shot the child in the head, either (1) intending to kill the child or (2) intending to kill the mother but killing the child instead. Even if the latter were the case, his intent transferred to the child. Then, realizing that he had killed the child, he continued to shoot at the mother, thus engaging in conduct with a separate intent to kill. Norris v State (December 12, 2012, WR-72,835-02) **CONSTRUCTION**

Chapter 7 Criminal Responsibility for Conduct of Another

Subchapter A Complicity

Sec. 7.02 Criminal Responsibility for Conduct of Another

evidence insufficient

In conv for murder evid was insuff to support conv under law of parties where verdict was based on pure speculation and was not sufficiently based upon facts or evidence. Even when evidence is viewed cumulatively, a rational jury could not find beyond a reasonable doubt that def was involved in a plan to shoot victim, either prior to or contemporaneously with the act. Gross v State (October 10, 2012, PD-1688-11) **EVIDENCE INSUFF: CHAPTER 19**

Trial judge may not arbitrarily refuse to submit an alternative statutory method of committing the offense if that method were in the charging instrument and supported by the evidence. The same is true with respect to the law of parties: Regardless of whether it is pled in the charging instrument, liability as a party is an available legal theory if it is supported by the evidence; if party liability can legally apply to the offense at issue and is supported by the evidence, then the state is entitled to its submission. If multiple theories of party liability are supported by the evidence, the trial judge may not arbitrarily limit the state to one of the theories, and the trial judge may not restrict the presentation of a theory of party liability if the restriction is not required by the charging instrument or by the evidence. In re State of Texas ex rel Weeks (January 16, 2013, AP-76,953 and AP-76,954) **CHARGE**

CHARGE: APPLYING LAW TO FACTS OF CASE

A general reference to the law of parties in application paragraph is sufficient and is not error when def does not object and request a narrowing of the specific statutory modes of conduct that constitute party liability. But if def does request that application paragraph refer only to those specific party-liability acts that are supported by the evidence, then he is entitled to such a narrowing. The failure to narrow the specific modes of party-liability conduct when properly requested is reversible error if the defendant has suffered actual harm to his rights. The harm analysis under Almanza applies to all jury-charge error, including the failure to specifically apply the law of parties in the application paragraph. Vasquez v State (October 3, 2012, PD-0321-11)

If the law of parties is correctly defined in the abstract section, it is unlikely that any error in failing to copy and paste all of that definitional language into the application paragraph makes any practical difference to a jury. This is especially true if the law of parties is the focus of the evidence and is correctly argued. Vasquez v State (October 3, 2012, PD-0321-11)

In pros for aggravated robbery, assuming it was error for trial court to fail to name actual robbers in application paragraph and to cut and paste abstract definition of law of parties into application paragraph, over def's objection, error was harmless under Almanza test where (1) a reasonable jury would refer to the abstract definition of the law of parties without needing to have it repeated again in the application paragraph; (2) under evidence presented at trial there is no question that the only theory of def's liability was that of being a party; and (3) in jury arg state and defense were clear in their respective positions: def either was the getaway driver who helped hatch the robbery scheme the night before or he was a simple dupe who merely drove car to site of robbery and innocently followed truck down the street. Def did not suggest how jury might have been confused by application paragraph and its reference to the law of parties, and nothing in record suggested that they were confused or misled. Vasquez v State (October 3, 2012, PD-0321-11) **CHARGE ERROR HARMLESS**

Chapter 8 General Defenses to Criminal Responsibility

Sec. 8.02 Mistake of Fact

An instruction on mistake of fact is limited to any culpable mental state required for the offense. Celis v State (May 15, 2013, PD-1584-11 and PD-1585-11) **CHARGE**

NOT ERROR TO DENY CHARGE ON MISTAKE OF FACT

In pros for falsely holding oneself out as a lawyer it was not error to fail to give charge on a mistake-of-fact defense because def's requested instruction did not negate the culpability required for the offense. Celis v State (May 15, 2013, PD-1584-11 and PD-1585-11)

Sec. 8.06 Entrapment

When a definition or instruction on a defensive theory of law (such as entrapment) is given in the abstract portion of the charge, the application paragraph must list the specific conditions under which a jury is authorized to acquit. Vega v State (March 20, 2013, PD-1438-12) **CHARGE**

In prosecution for drug offenses, jury charge on entrapment was erroneous where it failed to apply law of entrapment to X acting as a law enforcement agent, or by X and Y acting together (where X, an informant, was an agent acting under the control of law-enforcement officers, and def testified that it was X who suggested that he deliver drugs to Y), instead of applying law only to Y; but error did not cause egregious harm where, although the entrapment application paragraph should have listed X as well as Y, the jurors were well aware of X's role as a law-enforcement agent acting at Y's behest from (1) the definitional section of the entrapment charge, (2) the evidence, and (3) the parties' arguments. Vega v State (March 20, 2013, PD-1438-12) **CHARGE HARMLESS ERROR**

Chapter 9 Justification Excluding Criminal Responsibility

Subchapter C Protection of Persons

Sec. 9.32 Deadly Force in Defense of Person

It was not error for trial court to deny defense charge on the Castle Doctrine where there was no evidence to support a rational inference that offense was committed on or after Sept. 1, 2007. Before that date deadly force under 9.32(a) was justified only "if a reasonable person in the actor's situation would not have retreated." The Castle Doctrine was made effective on Sept. 1, 2007. It relieves a person of the duty to retreat when he is justified in using deadly force against another if (1) he has a right to be present at the location where the deadly force is used, (2) he has not provoked the person against whom the deadly force is used, and (3) he is not engaged in criminal activity at the time that the deadly force is used [see 9.32(c)]. Krajcovic v State (March 6, 2013, PD-1632-11) **NOT ERROR TO DENY CHARGE**

Title 3 - Punishments

Chapter 12 Punishment

Subchapter D Exceptional Sentences

Sec. 12.42 Penalties for Repeat and Habitual Felony Offenders

There is no requirement under 12.42(c)(2)(B)(v) that the elements of the other state's law parallel the elements of a single Texas offense. Outland v State (September 12, 2012, PD-1400-11)

Utah offense met requirements for enhancement under 12.42(c)(2)(B)(v) where both the Utah and Texas statutes are directed at the same individual and public interests: protecting children from sexual exploitation and the public from the dissemination of child pornography. Outland v State (September 12, 2012, PD-1400-11)

No merit to claim statutes did not have substantially similar elements under 12.42(c)(2)(B)(v) because the Utah statute requires that material depicting a child be produced "for the purpose of sexual arousal of any person or any person's engagement in sexual conduct with the minor" while the Texas statute does not, and that the Texas statute applies only to images that depict sexual conduct while the Utah statute contains no such requirement. Outland v State (September 12, 2012, PD-1400-11) **CONSTR UCTION**

Def's prior North Carolina conviction for Indecent Liberties was not "substantially similar" [under 12.42(c)(2)(B)(v)] to the Texas offense of Indecency with a Child. (1) The North Carolina offense is much broader than the Texas offense, criminalizing a significant amount of conduct that is lawful in Texas. (2) The elements of the two offenses are not "substantially similar with respect to the individual or public interests protected." The North Carolina offense is more concerned with preventing children from being exposed to any form of "lewd" conduct and with punishing the "immoral, improper, or indecent" minds of adults than with proscribing specific sexual acts against children, which is the focus of the Texas statute. (3) The class, degree, and range of punishment for Indecent Liberties is much less than for the Texas offense of Indecency with a Child. Moreover, the North Carolina offenses (Sexual Offense with a Child, and Indecent Exposure) most analogous to the Texas offense specifically exclude the offense for which def was previously convicted. Anderson v State (March 27, 2013, PD-0986-12) **PRIOR CONV FROM ANOTHER JURISDICTN**

Even when a defendant receives notice of prior conviction for enhancement after he has been convicted, his due-process rights are not violated as long as notice is sufficient to enable him "to prepare a defense to them," and he is afforded an opportunity to be heard. Ex parte Parrott (January 9, 2013, AP-76,647) **insuff notice harmless**

Title 4 - Inchoate Offenses

Chapter 15 Preparatory Offenses

Sec. 15.01 Criminal Attempt

The text of the criminal-attempt statute does not define an allowable unit of prosecution, nor does it change the allowable unit of prosecution of the offense attempted. Given that a criminal attempt to commit an offense is simply an act amounting to more than mere preparation of the intended offense, criminal-attempt offenses acquire their allowable unit of prosecution from the offense attempted. Ex parte Milner (February 13, 2013, AP-76,481)

JEOPARDY

The allowable unit of prosecution for attempted capital murder under sections 19.03(a)(7)(B) and 15.01 is the attempted murders of "more than one person" in the same scheme or course of conduct, and the attempted killing of more than one person allows the state to charge a single count of attempted capital murder. Ex parte Milner (February 13, 2013, AP-76,481)

Sec. 15.02 Criminal Conspiracy

EVIDENCE INSUFF

In conv for conspiracy to commit capital murder evid was insuff where record did not contain evidence on which a reasonable jury could find that def agreed with one or both of the alleged co-conspirators that one or more of them would engage in conduct that would constitute the alleged capital murder or that one or more of them performed an overt act in pursuance of such an agreement. Winfrey v State (February 27, 2013, PD-0943-11)

Sec. 15.031 Criminal Solicitation of a Minor

constr uction 15.031(c)

The plain language of Sec. 15.031(b) incorporates the Sec. 22.011(e) affirmative defense. Sec. 15.031(b) looks to the facts as the defendant "believes them to be." The within-three-years affirmative defense negates an offense from having been committed under Sec. 22.011. Thus, if the circumstances surrounding the defendant's conduct were such that he believed the minor's age to be within three years of his own, then he would not have committed an offense at all, provided he raised and proved the within-three-years affirmative defense. Sanchez v State (June 12, 2013, PD-1289-12)

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charge

In pros under 15.031(b) predicated on 21.011, it was error to deny charge on affirmative defense under 22.011(e) where evidence raised issue [remanded to court of appeals for harm analysis]. Fact that c/w was fictitious and not a real person did not prevent possibility of affirmative defense where evid raised issue that def believed c/w was a real person. Sanchez v State (June 12, 2013, PD-1289-12)

Title 5 - Offenses Against the Person

Chapter 19 Criminal Homicide

Sec. 19.02 Murder

evidence sufficient

In conv for murder of def's wife, circ evid was legally suff to support conv where evid showed possible motive (def was unhappy in his marriage and having an extra-marital relationship with X); def had opportunity to commit offense; there were several inconsistencies in def's story; evid supported inference of staged burglary at crime scene; location and timing of the alleged burglary was suspicious; def lacked emotion after discovering his wife had been shot; shortly after her murder def resumed his relationship with X; def confronted and threatened two grand jury witnesses in the case; and def had history of shotgun use [details in opinion]. Temple v State (January 16, 2013, PD-0888-11)

EVIDENCE SUFFICIENT

charge

In pros for murder it was not error to instruct jury on "unknown" manner and means. Each of the three theories included in jury charge could be supported by the evidence given by medical expert at trial; the means unknown theory was supported by the fact that victim's injuries did not conclusively point to a manner and means of asphyxiation; rather her injuries could have pointed to a variety of possibilities. Therefore, the indictment correctly alleged an unknown manner and means as well as all options supported by the evidence, and because manner and means remained unknown at the conclusion of the evidence, the instruction on unknown manner and means was properly submitted to the jury. Moulton v State (March 6, 2013, PD-1889-11)

CHARGE NOT ERROR

charge included offense

MANSLAUGHTER CHARGE

Manslaughter was lesser included offense of murder under 19.02(b)(2); causing death while consciously disregarding a risk that death will occur differs from intending to cause serious bodily injury with a resulting death only in the respect that a less culpable mental state establishes its commission, Art. 37.09(3). Cavazos v State (October 31, 2012, PD-1675-10)

To raise issue of included offense of manslaughter in pros for murder under 19.02(b)(2), there must be some affirmative evidence that def did not intend to cause serious bodily injury when he shot the victim, and must be some affirmative evidence from which a rational juror could infer that he was aware of but consciously disregarded a substantial and unjustifiable risk that death would occur as a result of his conduct. At this point in the analysis, anything more than a scintilla of evidence may be sufficient to entitle a defendant to a charge on a lesser offense. Meeting this threshold requires more than mere speculation - it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense. Cavazos v State (October 31, 2012, PD-1675-10)

In pros for murder under 19.02(b)(2) it was not error to deny charge on included offense of manslaughter where there was no evidence directly germane to recklessness. Pulling out a gun, pointing it at someone, pulling the trigger twice, fleeing the scene (and the country), and later telling a friend "I didn't mean to shoot anyone" does not rationally support an inference that def acted recklessly at the moment he fired the shots. The evidence did not support a finding of recklessness and did not rise to level that would convince a rational jury to find that if def was guilty, he was guilty of only the lesser-included offense. Cavazos v State (October 31, 2012, PD-1675-10)

punishment - 19.02(d)

To justify a jury instruction on the issue of sudden passion at the punishment phase, the record must at least minimally support an inference: 1) that defendant in fact acted under immediate influence of a passion such as terror, anger, rage, or resentment; 2) that his sudden passion was in fact induced by some provocation by deceased or another acting with him, which provocation would commonly produce such a passion in a person of ordinary temper; 3) that he committed the murder before regaining his capacity for cool reflection; and 4) that a causal connection existed between the provocation, passion, and homicide. Wooten v State (June 12, 2013, PD-1437-12)

SUDDEN PASSION CHARGE

To assay harm from denial of charge on sudden passion, reviewing court focuses on the evidence and record to determine the likelihood that a jury would have believed that def acted out of sudden passion had it been given the instruction. Wooten v State (June 12, 2013, PD-1437-12)

On review of complaint of denial of sudden passion charge, if appeals court finds no harm, it need not address whether the trial court did, in fact, err not to include the instruction. Wooten v State (June 12, 2013, PD-1437-12)

Denial of charge on sudden passion did not harm def where jury had rejected his self-defense claim at guilt stage and success of his self-defense claim boiled down to whether the jury would accept that, when he shot at victim, he reasonably believed that deadly force was immediately necessary to protect himself from victim's use of deadly force. No other element of the self-defense claim was refuted by the evidence, which established without contradiction that a mutual gun battle took place. Moreover, trial court specifically admonished jury "not to consider whether [def] failed to retreat." Therefore, jury's rejection of self-defense claim demonstrated that jury simply did not believe his claim that he reasonably believed deadly force was immediately necessary. Wooten v State (June 12, 2013, PD-1437-12)

sudden passion charge harmless error

Sec. 19.03 Capital Murder

construction

Habeas corpus relief denied, where def claimed that holding in his prior direct appeal was overruled in a subsequent case, where that subsequent ruling did not invalidate separate rationale, stated in concurring opinion in def's direct appeal, for upholding def's conviction. Holding at issue concerned point of error on direct appeal complaining that submission of transferred intent to jury was error because law of transferred intent did not apply to capital murder in which def killed a mother and her baby; separate instances of conduct in def's offense occurred very close in time but were still sufficiently separate to involve separate intents. First, he fatally shot the child in the head, either (1) intending to kill the child or (2) intending to kill the mother but killing the child instead. Even if the latter were the case, his intent transferred to the child. Then, realizing that he had killed the child, he continued to shoot at the mother, thus engaging in conduct with a separate intent to kill. Norris v State (December 12, 2012, WR-72,835-02)

CONSTRUCTION 19.03 (a)(7) [was (6)]

In conv for capital murder evid was insuff where circ evid presented by state as indicia of def's guilt of capital murder appeared more speculative than inferential as to def's guilt, and merely raised a suspicion of def's guilt [details in opinion]. Winfrey v State (February 27, 2013, PD-0943-11)

EVIDENCE INSUFF

In pros for capital murder, where def complained on appeal of failure to charge on included offense of manslaughter, and under facts of the case there were three conceivable intermediate lesser-included offenses that are greater than manslaughter but are consistent with a culpable mental state of recklessness with respect to the victim's death, a complete analysis of whether a manslaughter instruction should have been given would include consideration of whether evidence relied on by def would have established one of those intermediate offenses and whether such a circumstance would have prevented her from being entitled to the submission of manslaughter. Hudson v State (March 27, 2013, PD-0768-12)

INCLUDED OFFENSE CHARGE

For capital murder under Section 19.03(a)(7)(B), the state must allege that at least two murders were committed: an intentional murder under section 19.02(b)(1) and at least one additional murder as the aggravating circumstance. Because the killing of at least two people allows the state to charge a single count of capital murder under section 19.03(a)(7)(B), the allowable unit of prosecution for this statute is not each individual, but the killing of more than one individual. Ex parte Milner (February 13, 2013, AP-76,481)

JEOPARDY

Chapter 21 Sexual Offenses

Sec. 21.11 Indecency with a Child

Def's convictions for both indecency with a child by exposure for exposing his genitals to victim and indecency with a child by contact for causing same victim to touch his genitals did not violate double jeopardy clause because the Legislature intended to allow separate punishments under these circumstances. The gravamen of the indecency-with-a-child statute is the nature of the prohibited conduct, regardless of whether the accused is charged with contact or exposure; and because the commission of each prohibited act determines how many convictions may be had for a particular course of conduct, def's conduct violated the indecency-with-a-child statute two separate times. Loving v State (June 26, 2013, PD-1334-12)

Where def asserted double jeopardy violation by convictions for both indecency with a child by exposure for exposing his genitals to victim and indecency with a child by contact for causing same victim to touch his genitals, the proper analysis is not based on the Blockburger test and the cognate-pleadings approach (which applies only when the charged conduct involves multiple offenses in different statutory provisions that are the result of a single course of conduct); the proper analysis is to determine whether the Legislature intended for the separate statutory subsections in a single statute to constitute distinct offenses, i.e., what is the allowable unit of prosecution for indecency with a child by exposure and contact. Loving v State (June 26, 2013, PD-1334-12)

JEOPARDY

Chapter 22 Assaultive Offenses

Sec. 22.011 Sexual Assault

Def failed to prove that enhancement of punishment under 22.011(f) is facially unconstitutional violation of Equal Protection. State v Rosseau (April 17, 2013, PD-0233-12) **CONSTITU-TIONALITY**

Title 7 - Offenses Against Property

Chapter 29 Robbery

Sec. 29.03 Aggravated Robbery

charge included offense

IT WAS NOT ERROR TO REFUSE CHARGE ON INCLUDED OFFENSE OF:

: robbery; where the law of parties was contained in the abstract portion of the jury charge and was supported by sufficient evidence, it was an issue that should be taken into account for the purpose of determining whether to submit a lesser-included offense. Where there was no evidence, in light of the law of parties, that def committed only the crime of robbery, the trial court was correct to deny the submission of the lesser-included offense. Yzaguirre v State (March 27, 2013, PD-0799-12) **robbery**

Chapter 31 Theft

Sec. 31.01 Definitions

deception

In pros for theft of service by deception state is required to prove: (1) defendant had intent to avoid payment for a service that she knows is provided only for compensation, and (2) acting with that intent, she intentionally or knowingly (3) secured the other person's performance of a service (4) by deception. All of these elements must occur at the same time. The defendant must have "secured" the victim's services by an act of deception. That is, the proof must be that (1) victim relied upon def's prior act of deception when he performed his services, and (2) def had no intent to pay victim for his services at the moment that she committed that deceptive act. Daugherty v State (January 9, 2013, PD-1717-11)

The defendant's "deception" (issuing a check that she implicitly or explicitly claims will be honored by the bank) must be such as is likely to affect the judgment of the service provider, i.e., to induce him to perform the service. But once the service provider has completed his contractual performance, his judgment in what he has already completed cannot be retrospectively affected by any purported deception, such as issuing a worthless check. Daugherty v State (January 9, 2013, PD-1717-11) **CONSTR UCTION**

The deception must occur before the service is rendered, and that deceptive act must induce the other person to provide the service. The other person must rely upon the defendant's deceptive act in providing the service. Daugherty v State (January 9, 2013, PD-1717-11)

In conv for theft of service by deception, evidence was legally insufficient to prove an act of deception secured performance of the contractor's services. Def wrote a bad check after the service provider had completed his performance. That check could not have affected victim's judgment in performing his services to renovate def's office space; he was already done with the job. Daugherty v State (January 9, 2013, PD-1717-11) **EVIDENCE INSUFF**

Chapter 32 Fraud

Subchapter D Other Deceptive Practices

Sec. 32.51 Fraudulent Use or Possession of Identifying Information

Conviction for fraudulent use or possession of identifying information [32.51(b)] did not violate doctrine of in pari materia on claim that it conflicts with statute defining offense of failure to identify [38.02(b)]. Given that 32.51 and 38.02 have different subjects and purposes and are aimed at different groups of people, it is clear that the two are not in pari materia, particularly in light of 32.51(e). Jones v State (April 17, 2013, PD-0282-12 and PD-0283-12) **NOTES**

Title 8 - Offenses Against Public Administration

Chapter 38 Obstructing Governmental Operation

Sec. 38.122 Falsely Holding Onself Out as a Lawyer

In pros for falsely holding oneself out as a lawyer it was not error to instruct jury only as to the statutorily prescribed mental state of intent to obtain an economic benefit. Celis v State (May 15, 2013, PD-1584-11 and PD-1585-11) **NOTES**

In pros for falsely holding oneself out as a lawyer charge given on definition of "foreign legal consultant" was not an improper comment on the weight of the evidence. Celis v State (May 15, 2013, PD-1584-11 and PD-1585-11)

Title 10 - Offenses Against Public Health, Safety and Morals

Chapter 49 Intoxiction and Alcoholic Beverage Offenses

Sec. 49.01 Definitions

Statutory subjective [49.01(2)(A)] and per se [49.01(2)(B)] definitions of intoxication overlap and are not mutually exclusive. The two definitions set forth alternative means by which the State may prove intoxication, rather than alternate means of committing the offense; they are purely evidentiary matters, and need not be alleged in the information or indictment to provide a defendant with sufficient notice - the State may simply allege that a person was "intoxicated" to satisfy the notice requirement. Crenshaw v State (September 26, 2012, PD-1252-11) **CONSTRUCTION**

In pros for DWI, where information alleged subjective definition of intoxication, and abstract portion of charge also included per se definition, no merit to claim case presented a variance. In a variance situation, "the State has proven the defendant guilty of a crime, but has proven its commission in a manner that varies from the allegations in the charging instrument." Although the State presented evidence of def's BAC and referred to the per se theory of intoxication in closing arguments, the State did not prove the commission of DWI in a manner that varied from the allegations in the charging instrument. Instead, due to the evidentiary nature of the intoxication definitions and the overlap between the two, the BAC evidence made it more probable that def was subjectively impaired at the time he was driving, thereby supporting the theory alleged in the information and applied to the facts in the charging instrument. Crenshaw v State (September 26, 2012, PD-1252-11) **EVIDENCE SUFFICIENT**

Where state alleged subjective theory of intoxication, state went beyond minimum notice requirement (state was not required to provide either definition in information), and including per se definition of intoxication in abstract portion of jury charge did not expand allegations against def. The per se definition was only in the abstract section of the jury charge, and not incorporated into the application paragraph; the application paragraph tracked the language of the information, which alleged the subjective theory of intoxication, and thus restricted the jury's consideration to only those allegations contained in the information. Also, the per se definition was not an incorrect or misleading statement of a law that the jury must understand in order to implement the commands of the application paragraph. Crenshaw v State (September 26, 2012, PD-1252-11) **CHARGE**

Case Note Updates for Baker's Texas Drugs & DWI Handbook

Chapter 481: Controlled Substances Act

Subchapter D. Offenses and Penalties

481.134 Drug-Free Zones

Habeas corpus relief denied on claim of no evidence to support cumulation under 481.134(h) where some evidence showed that jury increased punishment due to drug-free-zone violation because it found the allegation true, trial court included that affirmative finding in its judgment, and jury sentenced applicant at the higher punishment range. Although applicant may have arguments as to why the evidence did not show that jury actually increased her sentence due to drug-free-zone finding, those arguments have little weight in a habeas proceeding, which is limited to a review for some evidence rather than for sufficient evidence. Some evidence showed that punishment for the drug-possession offense was increased due to jury's drug-free-zone affirmative finding. Ex parte Knight (June 26, 2013, AP-77,007) **STACKING**

Transportation Code

Chapter 724. Implied Consent

Subchapter B. Taking and Analysis of Specimen

Sec. 724.013. Prohibition on Taking Specimen if Person Refuses; Exception

Consent being implied by law, a driver may not legally refuse breath test. A driver, however, can physically refuse to submit, and the implied consent law, recognizing that practical reality, forbids the use of physical force to compel submission. Fienen v State (November 21, 2012, PD-0119-12) **constr uction**

A driver's consent to a blood or breath test must be free and voluntary, and it must not be the result of physical or psychological pressures brought to bear by law enforcement. The ultimate question is whether the person's "will has been overborne and his capacity for self-determination critically impaired" such that his consent to search must have been involuntary. Fienen v State (November 21, 2012, PD-0119-12)

The fact finder must consider the totality of the circumstances in order to determine whether consent was given voluntarily. It follows that, because the fact finder must consider all of the evidence presented, no one statement or action should automatically amount to coercion such that consent is involuntary - it must be considered in the totality. Fienen v State (November 21, 2012, PD-0119-12)

Overruling Erdman v. State, 861 S.W.2d 890 (Tex. Crim. App. 1993): The Erdman Court failed to consider the circumstances surrounding the DPS officer's statements when analyzing voluntariness. Consequently, it failed to properly analyze the issue because voluntariness of consent must be analyzed based upon the totality of the circumstances. Fienen v State (November 21, 2012, PD-0119-12)

No statement - whether it refers to the consequences of refusing a breath test, the consequences of passing or failing a breath test, or otherwise - should be analyzed in isolation because its impact can only be understood when the surrounding circumstances are accounted for. In other words, allowing any statement by itself to control a voluntariness analysis contradicts the basic rule that voluntariness is to be determined based upon a case-specific consideration of all of the evidence. Fienen v State (November 21, 2012, PD-0119-12)

Law-enforcement officers are prohibited from using physical or mental compulsion to obtain consent, but statements made by law-enforcement officers to suspects must be analyzed under the totality of the circumstances. Moreover, it is the State's burden to prove voluntary consent by clear and convincing evidence. Fienen v State (November 21, 2012, PD-0119-12)

Viewing totality of the circumstances, it was not abuse of discretion for trial court to find def voluntarily consented to providing a breath sample. Officer's actions were not coercive, and if anything, def had greater information on which to base his decision. Officer's comments at issue occurred when she responded to def's own questions, and did not provide any information that was untrue. Although officer conveyed what would happen in more definite terms than suggested by the statute, she provided only the most basic information and did not linger or prolong the exchange by explaining in detail the intricacies of obtaining the search warrant. Furthermore, the language was not coercive when the surrounding circumstances are considered: Def was informed that he could refuse the breathalyzer test, and in fact, he had done so at least two times before his ultimate consent. Upon def's initial refusal, officer simply continued following standard protocol by contacting dispatch and preparing to go to the hospital and obtain a search warrant. She did so despite continued interruptions by def. Def heard officer call in the request for the judge and the mention of **evid of blood test admissible**

a blood search warrant, so he was aware of the general process to occur. It was only when def began questioning officer that she responded with the comments at issue. After def's interruptions and expressed intent to avoid the blood draw (and take the breathalyzer), officer repeated her question to clarify whether def wanted to give a breath or blood specimen. She was not going out of her way to prolong the exchange or exert psychological pressure; she did not use threats, deception, or physical touching, or a demanding tone of voice or language. Video recording supported conclusion that her demeanor was consistently professional and accommodating, and nothing about her comments or demeanor put undue psychological pressure on def. Further, def's expressed fear of needles did not change the fact that officer was entitled to seek a search warrant for his blood draw. Fienen v State (November 21, 2012, PD-0119-12)

Sec. 724.017. Blood Specimen

Witness was not an "emergency medical services personnel" under 724.017 who was thereby rendered unable to be a "qualified technician" authorized to take blood specimens in DWI cases, even though her job title was EMT-I, where her job did not involve emergencies, and her job was that of a phlebotomist, which is a technician who draws blood. Record showed she was trained to draw blood, and her primary duty at the hospital for the six years she was employed there was to draw blood [details in opinion]; functionally she was not emergency medical services personnel; from the perspective of the hospital, she was not treated as an EMT-I or part of its emergency medical services personnel, but instead as a de facto phlebotomist. Because she did not function as emergency services personnel, sec. 724.017(c) and its restrictions on emergency services personnel did not apply to instant case. Krause v State (May 8, 2013, PD-0819-12) **WHO**

Case Note Updates for
Baker's Texas Criminal Procedure Handbook

Chapter 1 General Provisions

Art. 1.04. Due Course of Law

various due process claims

Habeas corpus relief granted where def's due process rights were violated because a forensic scientist did not follow accepted standards when analyzing evidence used in def's drug case, and therefore results of his analyses were unreliable. DPS report showed the lab technician who was solely responsible for testing the evidence was the scientist found to have committed misconduct. While there was evidence remaining that was available to retest, that evidence was in the custody of the lab technician in question; his actions were not reliable and custody was therefore compromised, resulting in a due process violation. Ex parte Hobbs (March 6, 2013, AP-76,980) **ERROR**

Def's due process rights were violated because a forensic scientist did not follow accepted standards when analyzing evidence and therefore the results of his analyses were unreliable; DPS report showed that lab technician who was solely responsible for testing the evidence in the case was the scientist found to have committed misconduct, and the evidence had been destroyed and therefore could not be retested. Ex parte Turner (February 27, 2013, AP-76,973)

Right to Counsel

Effective Assistance of Counsel

effective assistance of counsel: the rules

In the context of ineffective assistance of counsel claims, the Texas Constitution usually does not supply any more protections than its federal counterpart, and it may supply less. Ex parte Argent (March 20, 2013, AP-76,891 and AP-76,892) **TEXAS CONSTITUTN**

Courts commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it. However, when no reasonable trial strategy could justify his conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of counsel's subjective reasons for his conduct. Therefore, the focus of appellate review is the objective reasonableness of counsel's actual conduct in light of the entire record. Okonkwo v State (May 15, 2013, PD-0207-12) **REVIEW OF RECORD**

The first prong of test for ineffective assistance of counsel need not be addressed first; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Cox v State (October 24, 2012, PD-1886-11)

The abandonment of alternative ways of implementing a particular trial strategy is reasonable only if trial counsel have undertaken reasonable efforts to pursue those alternatives - by conducting a reasonable investigation and then bringing a professionally appropriate level of knowledge and skill to bear - before deciding to abandon them. Frangias v State (February 27, 2013, PD-0728-12) **ROLE OF TRIAL STRATEGY**

To establish prejudice in a claim of ineffective assistance of counsel in which a defendant is not made aware of a plea-bargain offer, or rejects a plea-bargain because of bad legal advice, applicant must show a reasonable probability that: (1) he would have accepted the earlier offer if counsel had not given ineffective assistance; (2) the prosecution would not have withdrawn the offer; and (3) the trial court would not have refused to accept the plea bargain. Ex parte Argent (March 20, 2013, AP-76,891 and AP-76,892) **MISCEL-LANEOUS**

no denial of effective assistance of counsel

on failure of counsel to act

Def was not denied effective assistance of counsel on claim trial counsel failed to investigate def's mental-health history. Trial counsel was deficient when she made an unreasonable decision not to investigate def's mental-health history, but he was not prejudiced because there was not a reasonable probability that the fact-finder would have found def incompetent to stand trial [details in opinion]. Ex parte LaHood (June 26, 2013, AP-76,873 and AP-76,874) **prepa-ration for trial**

Def was not denied effective assistance of counsel for failure to preserve for appellate review challenge to validity of search warrant (counsel said "no objection" when evid was introduced), where trial record did not show def had reasonable expectation of privacy in motel room searched, so trial court did not err in denying motion to suppress and def failed to demonstrate harm resulting from trial counsel's deficient performance because he did not show that he would likely have been successful on appeal had the issue been properly preserved. Ex parte Moore (April 10, 2013, AP-76,817) **object to evidence**

Def was not denied effective assistance of counsel for failure to call additional or different expert witnesses (X and Y). After an investigation into the facts, counsel determined that expert assistance was necessary, so he retained a well-known, highly qualified, local expert with whom he had worked before and who he knew testified well in front of a jury. Trial counsel's duty does not extend to obtaining the "best" or most highly qualified (but perhaps pompous, bombastic, or incomprehensible) expert in the nation. Instead, it is to investigate the facts of the case and determine if an expert is necessary to present the defendant's case to the jury and, if so, to obtain competent expert assistance. If X had testified, state would have called counter-experts to testify that X's theories were "junk science" and would have merely escalated the "battle of the experts." Y's ultimate conclusion was no different from, and provided nothing more than, that of expert called by def. Def failed to show that had defense called X and Y, the outcome of the trial would have been reasonably likely to end in a different result. Ex parte Flores (December 5, 2012, AP-76,862) **offer evidence**

Def was not denied effective assistance of counsel for failure to request charge on defense of mistake of fact in pros for forgery of a writing. Counsel was not objectively unreasonable by failing to request the charge because that theory was inconsistent with a theory that counsel advanced at trial, and it would have misled the jury as to state's burden of proof. Under an objective standard, counsel was not unreasonable in failing to request the instruction and therefore did not render deficient performance. Okonkwo v State (May 15, 2013, PD-0207-12) **jury charge**

Def was not denied effective assistance of counsel on appeal for failure to challenge sufficiency of evidence where counsel was reasonable in his determination that a challenge to legal sufficiency was not likely to be fruitful. Ex parte Flores (December 5, 2012, AP-76,862) **post-trial matters**

for action of counsel

Def was not denied effective assistance of counsel on claim counsel's advice denied def opportunity to be placed on deferred-adjudication community supervision, where def established first Strickland prong but failed to establish second prong. While def showed deficient performance by trial counsel, he failed to prove that, had defense counsel properly informed him of his ineligibility for probation, there was a reasonable probability that his trial would have produced a different result. Trial counsel confirmed that def's strategy at trial was to claim self-defense; counsel admitted that he was unaware of any murder case in which a defendant, without a plea bargain, plead open to the trial court and received deferred-adjudication probation and that he had never advised a client to use such a strategy. Both defense counsel and prosecutor questioned the venire members regarding probation during voir dire, but the prosecutor testified during hearing on motion for new trial that this line of questioning on voir dire was necessary because the jury could have convicted def of lesser-included offense, in which case he would have been eligible for probation. On punishment, while defense team called a probation officer to introduce evidence about def's good behavior while he was released on a personal-recognizance bond, that evidence could have been viewed - and was so viewed by the trial judge - as mitigation evidence that could reduce the length of punishment assessed by the jury. Riley v State (September 19, 2012, PD-1531-11) **FOR ACTION OF COUNSEL advice of counsel**

Defense counsel's misstatement in voir dire about the concurrent-sentencing law did not deny def effective assistance of counsel where record did not indicate that there was a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. Cox v State (October 24, 2012, PD-1886-11)

FOR ACTION OF COUNSEL jury selection

denial of effective assistance of counsel

Performance of trial counsel was deficient for failure to (1) secure the presence of a critical witness at the guilt phase of the trial, (2) take his deposition in order to memorialize his testimony for presentation to the jury, or (3) alternatively, seek a continuance in order to secure that witness's testimony; cause remanded for court of appeals to address prejudice prong of Strickland. Frangias v State (February 27, 2013, PD-0728-12)

prepara-tion for trial

Chapter 11 Habeas Corpus

Art. 11.07. Procedure After Conviction Without Death Penalty

Abandoning standard stated in Ex parte Carrio, 992 S.W.2d 486 (Tex. Crim. App. 1999), in favor of a more equitable approach, doctrine of laches as it applies to bar a long-delayed habeas corpus application (1) no longer requires state to make a "particularized showing of prejudice" so that courts may more broadly consider material prejudice resulting from delay, and (2) expands the definition of prejudice under the existing laches doctrine to permit consideration of anything that places state in a less favorable position, including prejudice to state's ability to retry a defendant, so that a court may consider the totality of the circumstances in deciding whether to grant equitable relief. It may be proper to consider, among all relevant circumstances, factors such as the length of the applicant's delay in filing the application, the reasons for the delay, and the degree and type of prejudice resulting from the delay. No single factor is necessary or sufficient. Instead, courts must engage in a balancing process that takes into account the parties' overall conduct. In considering whether prejudice has been shown, a court may draw reasonable inferences from the circumstantial evidence to determine whether excessive delay has likely compromised the reliability of a retrial. If prejudice to the State is shown, a court must then weigh that prejudice against any equitable considerations that militate in favor of granting habeas relief. With respect to the degree of proof required, the extent of the prejudice the State must show bears an inverse relationship to the length of the applicant's delay. The longer an applicant delays filing his application, and particularly when an applicant delays filing for much more than five years after conclusion of direct appeals, the less evidence the State must put forth in order to demonstrate prejudice. Other equitable principles still permit a court to reject the State's reliance on laches when the record shows that (1) an applicant's delay was not unreasonable because it was due to a justifiable excuse or excusable neglect; (2) the State would not be materially prejudiced as a result of the delay; or (3) the applicant is entitled to equitable relief for other compelling reasons, such as new evidence that shows he is actually innocent of the offense or, in some cases, that he is reasonably likely to prevail on the merits. Ex parte Perez (May 8, 2013, AP-76,800)

RULES

The general rule is that an applicant must show harm to obtain habeas relief. An applicant demonstrates harm with proof by a preponderance of the evidence that the error contributed to his conviction or punishment. Proof of harm may be developed through evidence beyond the appellate record. The introduction of new evidence is a key distinguishing feature of habeas corpus. Ex parte Parrott (January 9, 2013, AP-76,647)

In general, on a claim of an illegal sentence by improper use of a prior conv for enhancement, (1) a habeas corpus applicant is harmed by an illegal sentence when the appellate and habeas records show that he has no other conviction that could support the punishment range within which he was sentenced; and (2) an applicant is not harmed by an illegal sentence when the appellate and habeas records show that there was another conviction that could properly support the punishment range within which he was sentenced. Ex parte Parrott (January 9, 2013, AP-76,647)

Mandamus conditionally granted instructing district clerk to accept relator's habeas corpus application for filing, where relator substantially complied with correct form. Although district clerk has authority to return an application when an applicant is not using the correct form [Rule 73.2] Relator in instant case appeared to have used the correct form and to have substantially complied with the instructions. It appeared relator added his own pages as extensions of the factual bases of the claims. There may have been some additional pages that were technically non-compliant, but it appeared those pages were not meant to replace the form but to give additional answers to questions on the form, and that relator was substantially complying with the instructions on the form. In re Stanley (December 12, 2012, AP-76,929)

Applicant established that his conviction in one case was barred by double jeopardy in light of his conviction in second case, and met jurisdictional requirements in art. 11.07, sec. 4(a)(2): Because he showed that no rational juror could have found him guilty of both offenses without violating the federal constitutional prohibition against double jeopardy, he had made a prima facie case that, but for a violation of the United States Constitution, no rational juror could have found him guilty beyond a reasonable doubt. [The two cases at issue were both attempted capital murder, predicated on 19.02(a)(7)(B) for two individual victims in the same scheme or course of conduct; allowable unit

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of prosecution was the attempted murders of "more than one person" in the same scheme or course of conduct.] Ex parte Milner (February 13, 2013, AP-76,481)

Even if an application does not meet the requirements of sec. 4(a)(1), a subsequent application for writ of habeas corpus may overcome the procedural bar of art. 11.07, sec. 4, if an applicant can show a constitutional violation that fulfills the requirements of sec. 4(a)(2). In order to show that the constitutional violation satisfies the requirements of subsection (a)(2), an applicant must accompany the constitutional-violation claim with a prima facie claim of actual innocence. In cases claiming double-jeopardy violations, an applicant may prove actual innocence by providing facts sufficient to establish by a preponderance of the evidence that, but for a double-jeopardy violation, no rational juror could have found the applicant guilty of the challenged offense beyond a reasonable doubt. Ex parte Milner (February 13, 2013, AP-76,481)

Subsequent habeas application under 11.07 dismissed under abuse of the writ doctrine. Art. 11.07 Sec. 4 barred court from reaching the merits of claim that trial court lacked jurisdiction to revoke deferred adjudication community supervision because the capias for def's arrest did not issue until three days after his community supervision period expired. Ex parte Sledge (January 16, 2013, AP-76,947)

On 11.07 habeas application, in which applicant intentionally provided false information in his writ application regarding his claims for relief, relief denied and clerk directed to forward a copy of court's opinion, along with the habeas application, to the prosecuting office in the county where applicant signed (or filed) the inmate declaration. Ex parte Gaither (December 12, 2012, AP-76,896)

Challenge in 11.07 habeas corpus application to trial court's order requiring repayment of attorney's fees dismissed because that order did not affect the fact or duration of applicant's confinement pursuant to her conviction. Also, because court of appeals has concurrent jurisdiction over a petition for a writ of mandamus directed against a district court judge, CCA declined to treat habeas application as a petition for mandamus. Ex parte Knight (June 26, 2013, AP-77,007) **ISSUES NOT CONSIDERED**

Claim of a double-jeopardy violation may be addressed and remedied in a habeas corpus proceeding and is not procedurally defaulted by failure to raise objection in trial court. Ex parte Denton (May 22, 2013, AP-76,801 and AP-76,802)

A claim of an illegal sentence is cognizable in a writ of habeas corpus. An illegal sentence is one that is not authorized by law; therefore, a sentence that is outside the range of punishment authorized by law is considered illegal. Ex parte Parrott (January 9, 2013, AP-76,647) **ISSUES CONSIDERED**

relief denied

Habeas corpus relief denied on claim of no evidence to support cumulation under Health & Safety Code Sec. 481.134(h) where some evidence showed that jury increased punishment due to drug-free-zone violation because it found the allegation true, trial court included that affirmative finding in its judgment, and jury sentenced applicant at the higher punishment range. Although applicant may have arguments as to why the evidence did not show that jury actually increased her sentence due to drug-free-zone finding, those arguments have little weight in a habeas proceeding, which is limited to a review for some evidence rather than for sufficient evidence. Some evidence showed that punishment for the drug-possession offense was increased due to jury's drug-free-zone affirmative finding. Ex parte Knight (June 26, 2013, AP-77,007) **RELIEF DENIED**

On habeas corpus application, relief denied on claim of illegal sentence from state's improper use of a prior conv for enhancement, where def failed to show harm. (1) Record showed def was previously convicted of other offenses that support the punishment range within which he was admonished and sentenced, and (2) because state's response to habeas application provided def notice of state's intent to support the propriety of his sentence with his other prior convictions, and he had opportunity in habeas proceedings to dispute that those prior convictions supported trial court's judgment, he could not assert a trial-error complaint premised on inadequate notice. Ex parte Parrott (January 9, 2013, AP-76,647)

Habeas corpus relief denied: A prior juvenile adjudication for conduct that would have been an ineligible felony had it been committed by an adult, renders an inmate ineligible for mandatory-supervision review when serving subsequent offenses which are mandatory release eligible on their own. Applicant's transfer from TYC to TDCJ did not alter the fact that, upon his release on parole, he was considered to have been convicted of the offense for which he had been adjudicated. Applicant's juvenile adjudication was a first-degree felony conviction for the purpose of mandatory-supervision eligibility, and applicant was not eligible for mandatory-supervision review. Ex parte Valdez (June 26, 2013, AP-76,867) **RELIEF DENIED: parole & mandatory supervis'n**

relief granted

Habeas corpus relief granted where def's due process rights were violated because a forensic scientist did not follow accepted standards when analyzing evidence used in def's drug case, and therefore results of his analyses were unreliable. DPS report showed the lab technician who was solely responsible for testing the evidence was the scientist found to have committed misconduct. While there was evidence remaining that was available to retest, that evidence was in the custody of the lab technician in question; his actions were not reliable and custody was therefore compromised, resulting in a due process violation. Ex parte Hobbs (March 6, 2013, AP-76,980)

RELIEF GRANTED

Def's due process rights were violated because a forensic scientist did not follow accepted standards when analyzing evidence and therefore the results of his analyses were unreliable; DPS report showed that lab technician who was solely responsible for testing the evidence in the case was the scientist found to have committed misconduct, and the evidence had been destroyed and therefore could not be retested. Ex parte Turner (February 27, 2013, AP-76,973)

Habeas corpus relief granted for double jeopardy violations, where def was convicted in each of two causes, each charging both aggravated robbery and aggravated assault of named victim. As plead, aggravated assault was a lesser-included offense of aggravated robbery, and there was no clear legislative intent to punish the offenses separately. The aggravated-assault convictions were set aside. Ex parte Denton (May 22, 2013, AP-76,801 and AP-76,802)

JEOPARDY

Habeas relief granted by setting aside convs and remanding def to answer indictments, where def's waiver of appeal was not a binding element of his plea agreements and state breached agreement. Pre-printed language of one paragraph of plea agreements provided def must have trial court's permission to appeal, while pre-printed language of next paragraph provided that he expressly waived his right to appeal; and there was no mention of waiver of appeal in the handwritten language. Because of this ambiguity, court considered the written terms in light of the entire record, particularly the discussions at the plea hearing, and found it clear that the waiver of appeal was not intended to override the trial court's permission to appeal. Ex parte De Leon (June 5, 2013, AP-76,763 and AP-76,763)

GUILTY PLEA ISSUES

Habeas relief granted where plea agreements did not waive def's right to appeal, so def did not breach plea agreements when he appealed; state breached agreement when it reindicted def's brother, which it had agreed not to do; specific performance of agreements was not possible because def's brother had already been convicted; proper remedy was to return both parties to their original pre-plea positions; def's convictions set aside and def remanded to answer indictments. Ex parte De Leon (June 5, 2013, AP-76,763 and AP-76,763)

Habeas corpus relief granted by awarding def credit on his sentence for time he was confined after being denied bail on new offense because of a "hold" placed on him due to pending but unexecuted parole-revocation warrant. For purposes of Govt. Code Sec. 508.253, an "arrest" occurs when the blue warrant causes the defendant's confinement; thus, applicant's "arrest" occurred when the blue warrant made him ineligible for bail on the new offense, which would have otherwise been bailable. Ex parte White (June 5, 2013, AP-76,971)

TIME CREDIT ISSUES

Art. 11.071. Procedure in Death Penalty Case

Sec. 11. Review by Court of Criminal Appeals

Habeas corpus is available only for jurisdictional defects and violations of constitutional or fundamental rights; a claim alleging the violation of a rule of evidence is not cognizable on habeas corpus. Ex parte Ramey (November 7, 2012, AP-76,533)

matters not considered

Coble v State, 330 S.W.3d 253 (Tex. Crim. App. 2010), was a direct appeal case, and its holding [that testimony of Dr. Richard Coons (who also testified in petitioner's case) on whether def would pose a future danger to society was inadmissible under Rule 702] was based upon a rule of evidence. Consequently, the holding in Coble does not give rise to a claim that is cognizable on habeas corpus. Ex parte Ramey (November 7, 2012, AP-76,533)

Habeas corpus relief denied, where def claimed that holding in his prior direct appeal was overruled in a subsequent case, where that subsequent ruling did not invalidate separate rationale, stated in concurring opinion in def's direct appeal, for upholding def's conviction. Holding at issue concerned point of error on direct appeal complaining that submission of transferred intent to jury was error because law of transferred intent did not apply to capital murder in which def killed a mother and her baby; separate instances of conduct in def's offense occurred very close in time but were still sufficiently separate to involve separate intents. First, he fatally shot the child in the head, either (1) intending to kill the child or (2) intending to kill the mother but killing the child instead. Even if the latter were the case, his intent transferred to the child. Then, realizing that he had

relief denied

killed the child, he continued to shoot at the mother, thus engaging in conduct with a separate intent to kill. Norris v State (December 12, 2012, WR-72,835-02)

Habeas corpus relief granted under 11.071 where applicant presented testimony of six expert witnesses. Relying on new developments in the science of biomechanics, those experts testified that the type of injuries that victim suffered could have been caused by an accidental short fall onto concrete. Medical examiner who testified at trial that def's position that victim's injuries resulted from an accidental fall was false and impossible, testified at the evidentiary hearing that he now believes that there is no way to determine with a reasonable degree of medical certainty whether victim's injuries resulted from an intentional act of abuse or an accidental fall. State presented five expert witnesses who testified that, notwithstanding the studies cited by applicant's experts, it was very unlikely that victim's injuries were caused by an accidental short fall onto concrete. Habeas court found that all of the expert witnesses were truthful and credible; that medical examiner's re-evaluation of his 1995 opinion was based on credible, new scientific evidence and constituted a material exculpatory fact, and concluded that applicant had proven by clear and convincing evidence that no reasonable juror would have convicted her of capital murder in light of her new evidence. Court of Criminal Appeals accepted habeas court's recommendation to grant relief and remand for a new trial. Ex parte Henderson (December 5, 2012, AP-76,925)

relief granted

Art. 11.072. Procedure in Community Supervision Case

Def did not meet his burden of proving, by a preponderance of the evidence, facts that would entitle him to relief; counsel did not file a proper habeas application under 11.072; counsel's statements were not competent evidence, and even if they were, those statements did not prove, by a preponderance of the evidence, that def was improperly denied right to counsel before pleading guilty. (1) Trial judge would have been justified in dismissing def's motion, identified as a "motion to vacate," as an untimely "motion in arrest of judgment" for lack of jurisdiction, instead of treating it as a habeas application under 11.072; it was not sworn to, and it evaded the requirement of a sworn pleading for an application for habeas corpus relief. (2) The motion did not contain affidavits, associated exhibits, a memorandum of law, or anything else to establish specific facts that might entitle def to relief. (3) Even if counsel's statements were accepted as competent evidence, def still was not entitled to relief because those statements did not prove, by a preponderance of evidence, that def's waiver of counsel was unknowing, unintelligent or involuntary. State v Guerrero (June 5, 2013, PD-1258-12)

rules

An applicant's live, sworn testimony is a sufficient basis for upholding a decision to grant relief in an 11.072 habeas proceeding because the trial judge may believe any or all of a witness's testimony. Reviewing courts will defer to a trial judge's factual findings that are supported by the record even when no witnesses testify and all of the evidence is submitted through affidavits, depositions, or interrogatories. But in all habeas cases, sworn pleadings are an inadequate basis upon which to grant relief, and matters alleged in the application that are not admitted by the State are considered denied. State v Guerrero (June 5, 2013, PD-1258-12)

Extraordinary Writs (following Chapter 11)

writ of mandamus

Challenge in 11.07 habeas corpus application to trial court's order requiring repayment of attorney's fees dismissed because that order did not affect the fact or duration of applicant's confinement pursuant to her conviction. Also, because court of appeals has concurrent jurisdiction over a petition for a writ of mandamus directed against a district court judge, CCA declined to treat habeas application as a petition for mandamus. Ex parte Knight (June 26, 2013, AP-77,007)

MANDAMUS RULES

When there is no pending application for habeas corpus filed under 11.07, the court of appeals is not without jurisdiction to rule on mandamus petitions relating to a motion requesting access to material that could be used in a future habeas application. Ex rel Padieu (January 9, 2013, AP-76,727)

Challenge to assessment of bill of cost against defendant is not proper object of 11.07 habeas corpus application; challenge treated as application for writ of mandamus to compel district clerk to amend bill of cost to delete assessment of costs for attorney's fees; relief granted. Ex parte Daniel (April 17, 2013, AP-76,959)

WHICH WRIT

On mandamus action by state, contesting proposed jury charge in capital murder trial, no merit to claim state had adequate remedy at law by cross-point if def is convicted and appeals; whether he will be convicted and if so whether he will appeal, was too speculative to constitute an adequate remedy. In re State of Texas ex rel Weeks (January 16, 2013, AP-76,953 and AP-76,954)

ADEQUATE REMEDY AT LAW

Challenge to assessment of bill of cost against defendant is not proper object of 11.07 habeas corpus application; challenge treated as application for writ of mandamus to compel district clerk to amend bill of cost to delete assessment of costs for attorney's fees; relief granted. Ex parte Daniel (April 17, 2013, AP-76,959)

Mandamus conditionally granted instructing district clerk to accept relator's habeas corpus application for filing, where relator substantially complied with correct form. Although district clerk has authority to return an application when an applicant is not using the correct form [Rule 73.2] Relator in instant case appeared to have used the correct form and to have substantially complied with the instructions. It appeared relator added his own pages as extensions of the factual bases of the claims. There may have been some additional pages that were technically non-compliant, but it appeared those pages were not meant to replace the form but to give additional answers to questions on the form, and that relator was substantially complying with the instructions on the form. In re Stanley (December 12, 2012, AP-76,929)

State's application for writ of mandamus granted, requiring trial judge to submit the entire case (both guilt and punishment) to the jury after defendant pled guilty to the jury. Def never had an option to plead guilty before the jury and have the trial judge assess punishment. If def and his attorney wanted trial judge to assess punishment, his only option was to plead not guilty. If that was the option def would have chosen if he had been correctly advised about the law, then he still had the opportunity to do so after state revealed its belief that the trial had become unitary. He could have changed his plea of guilty to not guilty and caused the trial to become bifurcated. He may still have that option. In re State ex rel Tharp (November 14, 2012, AP-76,916)

MANDAMUS GRANTED

On mandamus application in CCA, challenging dismissal by court of appeals of mandamus applications in that court for lack of jurisdiction, mandamus relief granted, requiring court of appeals to consider mandamus petitions on their merits. Court of appeals did not lack jurisdiction on theory that exercising jurisdiction would interfere with CCA's exclusive jurisdiction in habeas corpus actions under 11.07, where mandamus action did not concern a pending 11.07 habeas corpus application (even though records sought in mandamus petitions in court of appeals may be intended for preparation of an eventual habeas corpus application). Ex rel Padieu (January 9, 2013, AP-76,727)

GRANTED: to rule on pending matter

Mandamus relief granted in favor of state, ordering court of appeals to grant mandamus relief directing trial judge to submit sec. 7.02(a)(2) theory of party liability in jury charge and to submit sec. 7.02(b) theory without requiring state to show that def should have anticipated the particular method by which the capital murder on trial was carried out. In re State of Texas ex rel Weeks (January 16, 2013, AP-76,953 and AP-76,954)

GRANTED: to enter specific ruling

Chapter 17 Bail

Texas Constitution, Art I

Sec 11a Multiple convictions; denial of bail

Under Art. 1, sec. 11a, the State has the burden to present evidence "substantially showing" def's guilt of the offense, which is far less than proof beyond a reasonable doubt as is necessary at a trial on the merits, but that burden must be considered in light of the general rule that favors the allowance of bail. Spell v State (March 4, 2013, AP-76,962)

BURDEN ON STATE

Order denying bail under Art. I, sec. 11a, set aside and case remanded to trial court to set reasonable bail, where state failed to present evidence "substantially showing" def was guilty of offense charged. Spell v State (March 4, 2013, AP-76,962)

DENIAL OF BAIL SET ASIDE

Chapter 21 Indictment and Information

Art. 21.15. Must Allege Acts of Recklessness or Criminal Negligence

No merit to claim that court of appeals erred in holding that a hypothetically correct jury charge for manslaughter did not require state to prove the act or acts relied upon to constitute recklessness. Variance between pleading and proof was immaterial. No merit to claim that because def was convicted of manslaughter, 21.15 applied and state was required to plead the acts relied upon to constitute recklessness. Art. 21.15 did not apply because indictment did not include manslaughter; def was convicted of that offense as a lesser included offense. Also, manslaughter is a "result of conduct" crime where the "focus" or gravamen is the "death of the individual." Because (1) the gravamen of manslaughter is the death of the victim, and the evidence showed beyond a reasonable doubt that def caused the death of the victim, (2) notice was adequately provided to def, and there was no risk of double jeopardy, and (3) the cumulative force of the evidence supported jury's verdict that, beyond a reasonable doubt, def caused the death of the victim, the variance in pleading and proof was immaterial. Ramos v State (June 26, 2013, PD-1917-11)

NO ERROR

Challenge to Indictment or Information

exception to substance of indictment

Def's motion to quash enhancement portion of indictment [under Penal Code Sec. 22.011(f)] adequately apprised the trial court of his argument that the bigamy provision was facially unconstitutional in all its applications. State v Rosseau (April 17, 2013, PD-0233-12) **ISSUE PRESERVED**

Chapter 26 Arraignment

Art. 26.05. Compensation of Counsel Appointed to Defend

Judgment modified to delete fees of def's court-appointed attorney that were included in the order for payment of court costs, where def had been determined by trial court to be indigent and there was never a finding by trial court that he was able to re-pay any amount of the costs of court-appointed legal counsel. Cates v State (June 26, 2013, PD-0861-12)

Art. 26.05(g) requires a present determination of financial resources and does not allow speculation about possible future resources. No merit to theory that there may, in the future, be funds in def's inmate trust account and that such funds could be used during his incarceration to re-pay expenses of his court-appointed counsel. Cates v State (June 26, 2013, PD-0861-12) **(g) NOTES [was (e)]**

Art. 26.13. Plea of Guilty

knowing & voluntary plea

Boykin v. Alabama, 395 U.S. 238, 244 (1969), operates like a rule of default: Unless the appellate record discloses that a defendant entered his guilty plea "voluntarily and understandingly," a reviewing court must presume that he did not, and rule accordingly. The rule of Boykin is in the nature of a systemic requirement, imposing a duty on the trial court to make the record demonstrate the knowing and voluntary quality of a guilty plea. The system simply will not tolerate the entry of a guilty plea on the basis of a record devoid of any indication that the defendant possessed "a full understanding of what the plea connotes and of its consequence." Therefore, a pure Boykin claim - that is to say, a claim that the record is absolutely unrevealing with respect to whether a guilty plea was entered intelligently - is not subject to ordinary principles of procedural default. Davison v State (May 22, 2013, PD-1236-12) **KNOWING & VOLUNTARY PLEA: REVIEW**

admonish

A breach of 26.13(a) may be raised for the first time on appeal. But this does not mean that a violation is not subject to an analysis for harm. Because such a claim is predicated solely upon a statutory violation, the standard for determining harm that pertains to claims of non-constitutional error applies - Rule 44.2(b). In assaying harm under this provision, a reviewing court must look to the record as a whole to determine whether the defendant was aware of the particular information upon which he should have been admonished - notwithstanding the lack of an admonishment - prior to the time that the trial court accepted his plea. A record that is completely silent with respect to whether a defendant was actually aware of the range of punishment, notwithstanding the lack of judicial admonishment, supports the inference that he was not in fact so aware for purposes of the Rule 44.2(b) harm analysis. Davison v State (May 22, 2013, PD-1236-12) **ADMONISH: GENERAL RULES**

plea bargain

Habeas relief granted by setting aside convs and remanding def to answer indictments, where def's waiver of appeal was not a binding element of his plea agreements and state breached agreement. Pre-printed language of one paragraph of plea agreements provided def must have trial court's permission to appeal, while pre-printed language of next paragraph provided that he expressly waived his right to appeal; and there was no mention of waiver of appeal in the handwritten language. Because of this ambiguity, court considered the written terms in light of the entire record, particularly the discussions at the plea hearing, and found it clear that the waiver of appeal was not intended to override the trial court's permission to appeal. Ex parte De Leon (June 5, 2013, AP-76,763 and AP-76,763) **PLEA BARGAIN: RELIEF ON VIOLATION**

Habeas relief granted where plea agreements did not waive def's right to appeal, so def did not breach plea agreements when he appealed; state breached agreement when it reindicted def's brother, which it had agreed not to do; specific performance of agreements was not possible because def's brother had already been convicted; proper remedy was to return both parties to their original pre-plea positions; def's convictions set aside and def remanded to answer indictments. Ex parte De Leon (June 5, 2013, AP-76,763 and AP-76,763)

Art. 26.14. Jury on Plea of Guilty

State's application for writ of mandamus granted, requiring trial judge to submit the entire case (both guilt and punishment) to the jury after defendant pled guilty to the jury. Def never had an option to plead guilty before the jury and have the trial judge assess punishment. If def and his attorney wanted trial judge to assess punishment, his only option was to plead not guilty. If that was the option def would have chosen if he had been correctly advised about the law, then he still had the opportunity to do so after state revealed its belief that the trial had become unitary. He could have changed his plea of guilty to not guilty and caused the trial to become bifurcated. He may still have that option. In re State ex rel Tharp (November 14, 2012, AP-76,916)

GUILTY PLEA TO JURY: RULES

Art. 26.14 makes a jury trial on punishment the default option for a defendant who pleads guilty in a felony case. A plea of guilty causes the trial to become unitary; in such a trial there is only one finder of fact and that finder of fact determines the issue of punishment. To avoid the default option, the guilty-pleading defendant must waive his right to a jury under either Art. 1.13 or Art. 37.07. To waive a jury under Art. 1.13, the defendant must have the State's consent. In re State ex rel Tharp (November 14, 2012, AP-76,916)

Chapter 27 The Pleading in Criminal Actions

Art. 27.05. Defendant's Special Plea

rules on double jeopardy

Where def asserted double jeopardy violation by convictions for both indecency with a child by exposure for exposing his genitals to victim and indecency with a child by contact for causing same victim to touch his genitals, the proper analysis is not based on the Blockburger test and the cognate-pleadings approach (which applies only when the charged conduct involves multiple offenses in different statutory provisions that are the result of a single course of conduct); the proper analysis is to determine whether the Legislature intended for the separate statutory subsections in a single statute to constitute distinct offenses, i.e., what is the allowable unit of prosecution for indecency with a child by exposure and contact. Loving v State (June 26, 2013, PD-1334-12)

The relevant inquiry in a multiple-punishments double-jeopardy case is always whether the Legislature intended to permit multiple punishments. Loving v State (June 26, 2013, PD-1334-12)

PUNISHMENT

Absent an express statement defining the allowable unit of prosecution, the gravamen of an offense best describes the allowable unit of prosecution. The gravamen of an offense can be (1) the result of the conduct, (2) the nature of the conduct, or (3) the circumstances surrounding the conduct. Also, the unit of prosecution can be defined by the element of the offense requiring a completed act, and if each statutory provision protects a victim from a different type of harm, that is evidence that the Legislature intended for each commission of a prohibited act to be punished separately. Loving v State (June 26, 2013, PD-1334-12)

no jeopardy bar

Def's convictions for both indecency with a child by exposure for exposing his genitals to victim and indecency with a child by contact for causing same victim to touch his genitals did not violate double jeopardy clause because the Legislature intended to allow separate punishments under these circumstances. The gravamen of the indecency-with-a-child statute is the nature of the prohibited conduct, regardless of whether the accused is charged with contact or exposure; and because the commission of each prohibited act determines how many convictions may be had for a particular course of conduct, def's conduct violated the indecency-with-a-child statute two separate times. Loving v State (June 26, 2013, PD-1334-12)

NO JEOPARDY BAR: MULTIPLE PUNISHMENT

Chapter 29 Continuance

Art. 29.08. Motion Sworn to

It was error for court of appeals to reverse conviction for denial of unsworn oral motion for a continuance where the alleged error was not properly preserved. Given that the motion in question was oral and unsworn, and because there is no "due process exception" to the written-and-sworn requirement, the issue was not properly preserved for appeal. Blackshear v State (December 19, 2012, PD-0889-11)

presenting issue

Chapter 33 The Mode of Trial

Art. 33.011. Alternate Jurors

The trial court has discretion to determine whether a juror has become disabled and to seat an alternate juror under 33.011(b). Art. 36.29 requires that a disabled juror suffer from a physical illness, mental condition, or emotional state that would hinder or inhibit the juror from performing his or her duties as a juror, or that the juror was suffering from a condition that inhibited him from fully and fairly performing the functions of a juror. When dismissing a juror, the trial court must not dismiss a juror for reasons related to that juror's evaluation of the sufficiency of the evidence. Scales v State (October 10, 2012, PD-0442-11)

When reviewing the dismissal of a juror, an appellate court may not presume from a silent record that the dismissal was proper. However, neither is it the role of an appellate court to substitute its own judgment for that of the trial court, but rather, to assess whether, after viewing the evidence in the light most favorable to the trial court's ruling, the ruling was arbitrary or unreasonable. The ruling must be upheld if it is within the zone of reasonable disagreement. Scales v State (October 10, 2012, PD-0442-11)

rules

It was error for trial court to excuse juror who was not shown to be "disabled" as defined in Art. 33.011. Trial court had insufficient information from which to determine that juror was not able to perform her duties as a juror and erred when it replaced her with an alternate without ascertaining her reasons for "not deliberating," where trial court ruled based on testimony of jury foreman during hearing after note to judge from foreman requesting removal of juror. Scales v State (October 10, 2012, PD-0442-11)

Assuming that error in excusing juror under 33.011 was not constitutional error, it was reversible even under standard in Rule 44.2(b), where record showed that original jury panel was seemingly deadlocked at 11-1 for conviction; if jury had been allowed to continue deliberating, the impasse may have been resolved or the trial court may have declared a mistrial because of a hung jury. The first would have produced a verdict. The second would possibly have resulted in a retrial. Because of the error, neither possibility was allowed to occur. Given the record, the dissenting juror had found the evidence insufficient to prove def's guilt beyond a reasonable doubt and was holding to her conclusion, making a hung jury the more probable of the possible outcomes. As soon as she was replaced, the jury returned a guilty verdict, clearly demonstrating that the erroneous removal had "a substantial and injurious influence in determining the jury's verdict." Therefore, the error affected a substantial right and was reversible error. Scales v State (October 10, 2012, PD-0442-11)

error

Chapter 35 Formation of the Jury

Art. 35.16. Reasons for Challenge for Cause

no eror in ruling on challenge for cause

subsection (b) - not error to excuse

It was not error to grant state's challenge for cause where record showed panel member stated at least twice that she would not be able to answer the special issues in such a way that the death penalty would be imposed; and record also showed she stated that she could answer the special issues based on the evidence. The totality of her voir dire demonstrated that she was a vacillating or equivocating juror. Her answers as to whether she could honestly answer the special issues changed depending on which party questioned her. Also her statements regarding her personal beliefs against judging another, as well as her personal limitations on the types of cases in which she would consider the death penalty, supported trial court's determination. Hernandez v State (November 21, 2012, AP-76,275)

It was not error to grant state's challenge for cause where, depending on which party questioned her, panel member responded alternately that she could not honestly answer the special issues so that the death penalty would result or that she could answer the special issues based on the evidence. She also stated that she could not judge another person and was uncertain about her ability to follow the law, and indicated that she was uncomfortable with the decisions that had to be made in a capital case, that she did not want the responsibility of making those decisions, and that she did not think she could do it. Hernandez v State (November 21, 2012, AP-76,275)

vacillating juror in capital case

harmless error in ruling on challenge for cause

Def did not show harm from denial of challenges for cause in capital case where, although he used all of his peremptory challenges, and renewed his request for additional peremptory strikes following the use of his fifteenth strike, he did not identify to the trial court an objectionable juror who sat on the jury against whom he would have used an additional peremptory challenge. Also he did not identify such a juror in his brief on appeal. Hernandez v State (November 21, 2012, AP-76,275)

harmless error in capital cases

Art. 35.17. Voir Dire Examination

presenting issue

Comments of trial judge during jury voir dire, that he personally would want to testify if accused of a crime, did not constitute fundamental error and def failed to preserve issue by requesting mistrial without requesting instruction to disregard, which could have cured any error; and any error was in fact cured by totality of trial court's comments, which went on to tell jury that a defendant could have good reasons not to testify that were unrelated to guilt, and that the law prohibited the jurors from holding a defendant's failure to testify against him. Unkart v State (June 5, 2013, PD-0628-12)

comments by court

Where the trial court does not place an absolute limitation on the substance of an appellant's voir dire question, but merely limits a question due to its form, the appellant must attempt to rephrase the question or risk waiver of the alleged voir dire restriction. Hernandez v State (November 21, 2012, AP-76,275)

limits on questions by defense

jury voir dire rules

A commitment question is one that commits a prospective juror to resolve, or refrain from resolving, an issue a certain way after learning a particular fact. Often a commitment question requires a "yes" or "no" answer, and the answer commits a juror to resolve an issue in a particular way. Not all such questions are improper, however. Where the law requires a certain type of commitment from jurors, such as considering the full range of punishment, an attorney may ask prospective jurors to commit to following the law in that regard. Hernandez v State (November 21, 2012, AP-76,275)

limiting questions by defense

The law does not require that a juror consider any particular piece of evidence to be mitigating. The law requires only that defendants be allowed to present relevant, mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating. Whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry. Hernandez v State (November 21, 2012, AP-76,275)

jury voir dire: no error

limiting questions by defense

It was not error to sustain state's objection to question in instant case (Would you refuse to consider evidence of turbulent family history, emotional problems, defendant's upbringing, defendant's good character, mental impairment, a drug problem, child abuse, psychiatric problems, dysfunctional family history, or alcohol abuse to determine whether that evidence is a circumstance that would warrant a sentence of life without parole rather than a death penalty?); it was an improper commitment question; it sought a "yes" or "no" answer and committed the prospective juror to a determination of whether the stated circumstance was mitigating, i.e. being abused as a child. Also, the record showed that trial court did not place an absolute limitation on the underlying substance of the excluded question. Def was allowed to ask prospective jurors to expound on their questionnaire answers on the matter and was therefore able to delve into that substance. Rather, the trial court merely sustained the State's objection to the form of the question. Hernandez v State (November 21, 2012, AP-76,275)

limiting questions by defense mitigation issue

harmless error

Comments of trial judge during jury voir dire, that he personally would want to testify if accused of a crime, did not constitute fundamental error and def failed to preserve issue by requesting mistrial without requesting instruction to disregard, which could have cured any error; and any error was in fact cured by totality of trial court's comments, which went on to tell jury that a defendant could have good reasons not to testify that were unrelated to guilt, and that the law prohibited the jurors from holding a defendant's failure to testify against him. Unkart v State (June 5, 2013, PD-0628-12)

comments by court

Chapter 36 The Trial Before the Jury

Art. 36.16. Final Charge

Failure of trial court to read guilt-phase jury charge aloud before sending jury to deliberate, as required by Arts. 36.14 and 36.16, did not cause egregious harm; while reporter's record clearly showed that trial court erred by not reading the charge out loud in open court, it just as clearly showed that trial court instructed jury to read the charge aloud in the jury room. It did not appear from the record that the jury ignored that explicit instruction, nor did record provide any reason to believe that the juror selected to read the charge aloud in the jury room failed to do so "in an unbiased or clear manner." Casanova v State (November 21, 2012, PD-1521-11) **harmless**

Art. 36.19. Review of Charge on Appeal

Harm does not emanate from the mere failure to include the requested instruction. A reviewing court undertakes a harm analysis by following the standards as set out in Art. 36.19. If error is preserved, the record must demonstrate that def has suffered "some harm." In the harm analysis, burdens of proof or persuasion have no place. Harm must be evaluated in light of the complete jury charge, the arguments of counsel, the entirety of the evidence, including the contested issues and weight of the probative evidence, and any other relevant factors revealed by the record as a whole. Wooten v State (June 12, 2013, PD-1437-12) **NOTES**

Limiting holding in Quinn v State, 297 S.W.2d 157 (1957) (opinion on reh'g): Neither an appellant nor the State has a burden of proof or persuasion when it comes to an analysis for harm under Art. 36.19, as construed by Almanza. To the extent that Quinn might suggest that it was the def's burden to prove injury, it is no longer controlling. Also, since the opinion in Quinn, the consolidated Texas Rules of Evidence have gone into effect, including Rule 606(b), which restricts the admissibility of evidence from jurors themselves, during any post-verdict proceedings, that impugns the validity of their verdict. Thus, it is less certain today that the appellate record can be made "clear" whether the jury actually followed the trial court's instructions to have the presiding juror read the jury charge aloud in the jury room. Casanova v State (November 21, 2012, PD-1521-11)

Chapter on Jury Charge

general rules for charge

Unless statutorily permitted, a trial court may not comment on the weight of the evidence. Non-statutory instructions, even when they are neutral and relate to statutory offenses or defenses, generally have no place in the charge. Celis v State (May 15, 2013, PD-1584-11 and PD-1585-11) **COMMENT ON WEIGHT OF EVIDENCE**

The trial court may instruct on the definition of certain terms but not others. It must instruct on statutorily defined terms as the law applicable to the case. By contrast, it is generally impermissible to instruct on terms not statutorily defined, and the trial court instead must permit the jury to construe them according to the rules of grammar and common usage. However, a trial court may define a statutorily undefined term that has an established legal definition or that has acquired a technical meaning that deviates from its meaning in common parlance. Celis v State (May 15, 2013, PD-1584-11 and PD-1585-11)

Objected-to error in application paragraph of jury charge is subject to the usual Almanza harm analysis, overruling Johnson v. State, 739 S.W.2d 299 (Tex. Crim. App. 1987) (plurality op.) to the extent that it suggests a per se finding of harm. Vasquez v State (October 3, 2012, PD-0321-11) **HARMLESS ERROR TEST**

When a definition or instruction on a theory of law (such as the law of parties) is given in the abstract portion of the charge, the application paragraph must (1) specify all of the conditions to be met before a conviction under such theory is authorized; (2) authorize a conviction under conditions specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers; or (3) contain some logically consistent combination of such paragraphs. Vasquez v State (October 3, 2012, PD-0321-11) **OTHER GENERAL RULES**

If application paragraph of jury charge necessarily and unambiguously refers to another paragraph of jury charge, then a conviction is authorized, and trial judge need not sua sponte "cut and paste" that definition into the application paragraph. Vasquez v State (October 3, 2012, PD-0321-11)

It is the application paragraph of the charge, not the abstract portion, that authorizes a conviction. The abstract paragraphs serve as a glossary to help the jury understand the meaning of concepts and terms used in the application paragraphs of the charge. An abstract charge on a theory of law that is not applied to the facts does not authorize the jury to convict upon that theory. Generally, reversible error occurs in the giving of an abstract instruction only when the instruction is an incorrect or misleading statement of a law that the jury must understand in order to implement the commands of the application paragraph. Crenshaw v State (September 26, 2012, PD-1252-11)

jury charge on defense

When a definition or instruction on a defensive theory of law (such as entrapment) is given in the abstract portion of the charge, the application paragraph must list the specific conditions under which a jury is authorized to acquit. Vega v State (March 20, 2013, PD-1438-12) **DEFENSE CHARGE: GENERAL RULES**

Chapter 37 The Verdict

Art. 37.071. Procedure in Capital Case

construction

The law does not require that a juror consider any particular piece of evidence to be mitigating. The law requires only that defendants be allowed to present relevant, mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating. Whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry. Hernandez v State (November 21, 2012, AP-76,275) **construction sec 2(e)(1) mitigation issue**

Sec 2(a)(1) and (d)(1): evidence not error to exclude

It was not abuse of discretion to exclude under Rule 403 evid offered at punishment stage in capital case, of victim's drug use and promiscuous, extra-marital sexual behavior, over claim it was relevant to both circumstances of the offense and def's personal moral culpability, and that it was mitigating evidence, where def argued it was important to show that his marriage to victim was unstable and caused him emotional stress; but record showed jury was made thoroughly aware through other evidence of the emotional stress caused by def's volatile marriage: jury was aware that def and victim separated and reunited many times, and that following the final break six months prior to the offense, both had begun new relationships; witnesses also testified regarding the verbal, emotional, and physical abuse that def suffered from victim. Thus, the probative value of the evidence and the proponent's need for the evidence were not high, and the potential for the excluded evidence to impress the jury in an irrational way was high. Hernandez v State (November 21, 2012, AP-76,275) **evidence not error to exclude: mitigation evidence**

Art. 37.09. Lesser Included Offense

In determining whether def is entitled to a lesser-included-offense instruction, the instruction on the law of parties in the abstract portion of the charge should be taken into account. If it is proper to take a legal theory of liability into account for the purpose of determining the sufficiency of the evidence, and the evidence is found to be sufficient to support that theory, then it is necessarily proper to take it into account for the purpose of determining whether to submit a lesser-included offense. Yzaguirre v State (March 27, 2013, PD-0799-12)

In pros for capital murder, where def complained on appeal of failure to charge on included offense of manslaughter, and under facts of the case there were three conceivable intermediate lesser-included offenses that are greater than manslaughter but are consistent with a culpable mental state of recklessness with respect to the victim's death, a complete analysis of whether a manslaughter instruction should have been given would include consideration of whether evidence relied on by def would have established one of those intermediate offenses and whether such a circumstance would have prevented her from being entitled to the submission of manslaughter. Hudson v State (March 27, 2013, PD-0768-12) **RULES**

A harm analysis regarding the failure to submit a lesser-included offense should take into account the existence of any lesser-included offenses that were submitted and that the jury's rejection of submitted lesser-included offenses could render error with respect to the unsubmitted lesser-included offense harmless. Hudson v State (March 27, 2013, PD-0768-12) **HARMLESS**

Chapter 42 Judgment and Sentence

Art. 42.037. Restitution

Def did not forfeit review of his challenges to restitution order and to amount of restitution by failing to raise issues in trial court, where def did not have an opportunity to object in the trial court. He could not have objected during oral pronouncement because at that point, he could not have known that the sentence in the written judgment would be different from the orally pronounced sentence, or that there might be error in the amount of restitution. Also, when he filed his motion for new trial the written judgment had not yet issued, so he could not have known to include the restitution issues in the motion. The trial court ruled on the motion for new trial that same day, thus preventing def from amending the motion to include the restitution issues. Cause remanded for court of appeals to address issues on the merits. Burt v State (April 17, 2013, PD-1280-11) **PRESENTING ISSUE**

The plain language of former 42.037(h) gave a trial court discretion to revoke community supervision after the court had considered five factors related to the def's financial circumstances. It required neither that trial court render findings nor that revocations be conditioned on the quantity or quality of evidence adduced as to the enumerated factors. Although treatment of revocation for failure to pay restitution has varied historically, the Legislature plainly expressed its desire to grant the trial court increased discretion to revoke on that basis as compared to strict evidentiary requirements for revocations premised on non-payment of court costs, attorney compensation, and community-supervision fees. As long as a trial court considers the factors in its decision whether to revoke a community supervision, a court is not required to weigh the factors in any particular manner. But a trial court's discretion does have three limits: (1) the State must prove at least one violation of the terms and conditions of community supervision; (2) an appellate court will review the trial court's decision for an abuse of discretion; and (3) federal due process requires that a trial court consider alternatives to imprisonment before incarcerating an indigent defendant who is unable to pay amounts due under community supervision. Bryant v State (October 24, 2012, PD-0049-12) **RULES**

It was not abuse of discretion to revoke deferred-adjudication probation for failure to pay restitution; no merit to claim trial court failed to comply with former 42.037(h), where record showed trial court considered the statutory factors in compliance with the former restitution statute, which did not require that the court weigh the factors in any particular manner. Bryant v State (October 24, 2012, PD-0049-12) **NO ERROR**

Art. 42.08. Cumulative or Concurrent Sentence

A cumulation order in a written judgment may not substantively vary from the cumulation order contained in the trial judge's oral pronouncement of sentence. Sullivan v State (January 9, 2013, PD-1678-11 and PD-1679-11)

If a cumulation order is not sufficiently specific, a remand may be permitted to allow the trial judge to remedy the matter. Sullivan v State (January 9, 2013, PD-1678-11 and PD-1679-11)

When part of a cumulation order is illegal, the remedy is to delete the illegal portion. Sullivan v State (January 9, 2013, PD-1678-11 and PD-1679-11) **CUMULATION RULES**

Habeas corpus relief denied on claim of no evidence to support cumulation under Health & Safety Code Sec. 481.134(h) where some evidence showed that jury increased punishment due to drug-free-zone violation because it found the allegation true, trial court included that affirmative finding in its judgment, and jury sentenced applicant at the higher punishment range. Although applicant may have arguments as to why the evidence did not show that jury actually increased her sentence due to drug-free-zone finding, those arguments have little weight in a habeas proceeding, which is limited to a review for some evidence rather than for sufficient evidence. Some evidence showed that punishment for the drug-possession offense was increased due to jury's drug-free-zone affirmative finding. Ex parte Knight (June 26, 2013, AP-77,007) **CUMULATION PERMITTED**

Art. 42.12. Community Supervision

Sec. 11. Conditions of Probation

It was error to revoke community supervision for violation of condition that required def either to obtain legal status to remain in this country within twelve months or else leave the country and reside in a location where she did have a legally authorized status, even though issue was raised for first time on appeal. A condition of community supervision that effectively operates to deport a probationer violates an absolute prohibition and is therefore not subject to ordinary principles of waiver or procedural default. No merit to state's contentions that def's challenge was barred by estoppel by judgment and estoppel by contract. Gutierrez v State (October 10, 2012, PD-1658-11) **CONSTR UCTION**

Sec. 23. Revocation of Probation

Where def on motion to revoke probation pled true to allegation of failure to pay fees without raising any argument or evidence that he was unable to pay and for first time on appeal claimed state had burden to prove that his failure to pay fees was willful despite his plea of true and that, because the motion to revoke did not allege that he was able to pay the fees, his plea of true did not constitute evidence of his ability to pay, it was error for court of appeals to reverse on the merits of the claim without first determining that it was preserved for appeal. Cause remanded to court of appeals to determine whether, by pleading true to an allegation that he failed to pay and by failing to assert his inability to pay, a defendant waives or forfeits a claim that he is unable to pay. Gipson v State (November 14, 2012, PD-1470-11) **PLEA**

It would offend due process if a probationer were discharged from his therapy program for a wholly inappropriate reason - such as illegal discrimination or mere caprice - and the bare fact of that discharge were used as a basis to revoke his community supervision. Yet, by an ordinary abuse-of-discretion review, such a revocation would be sustained. In instant case trial court, through a condition of def's community supervision, made def's compliance with the terms of his community supervision subject to the discretion of a third party. In such a case, to determine whether the trial court abused its discretion court must also examine the third party's use of its discretion to ensure that it was used on a basis that was rational and connected to the purposes of community supervision. Leonard v State (November 21, 2012, PD-0551-10) **DUE PROCESS**

evidence at revocation

Where trial court revoked deferred-adjudication community supervision based on results of polygraph examinations, that evidence was inadmissible, and therefore the trial court abused its discretion. Leonard v State (November 21, 2012, PD-0551-10) Condition of probation that def "show no deception on any polygraph examination" did not justify admission of polygraph test results in evidence at hearing on motion to revoke probation. Leonard v State (November 21, 2012, PD-0551-10) **EVIDENCE: polygraph**

Before the State may take advantage of the rule that a revocation may stand on appeal so long as the evidence supports a finding that at least one of the conditions of community supervision was violated, it must demonstrate from the record that the one violation upon which it relies on appeal is supportable independent of whatever constitutional taint arguably inheres in the other. Dansby v State (May 8, 2013, PD-0613-12)

Bearden v Georgia, 461 U.S. 660, 672 (1983), does not require a showing, to revoke probation and impose imprisonment for failure to pay fees, that probationer willfully refused to pay or make sufficient bona fide efforts to do so. (1) Bearden prescribes a mandatory judicial directive, not a prosecutorial evidentiary burden. (2) Bearden does not categorically prohibit incarceration of indigent defendants; it permits incarceration when "alternative measures are not adequate to meet the State's interests in punishment and deterrence." Gipson v State (November 14, 2012, PD-1470-11) **PROOF**

Evid was insuff to prove def violated a "no contact" condition of probation (that def have no contact with his wife), when the condition allowed contact by telephone regarding issues of child custody and when def and his wife had an arrangement for def to babysit their children at his wife's home while she was at work, and evidence failed to show any contact by def with his wife that was not within the permitted telephone contact regarding child custody issues [details in opinion]. Hacker v State (January 16, 2013, PD-0438-12) **EVIDENCE INSUFFICIENT**

On appeal from revocation of deferred adjudication probation, in which def claimed revocation was based on his invocation of privilege against self-incrimination by refusing to answer questions during a court-imposed sexual history polygraph examination about past sexual assault offenses, court of appeals incorrectly failed to address that issue by affirming revocation on violation by def's discharge from treatment program, where he was discharged because he refused to answer **FINDINGS RULES**

incriminating questions during the sexual history polygraph. Failure to successfully complete sex offender treatment program was not independent basis for revocation where record failed to show that, even without refusing to answer what he took to be incriminating questions, def actually would have been discharged from the sex offender treatment program. Dansby v State (May 8, 2013, PD-0613-12)

Before the State may take advantage of the rule that a revocation may stand on appeal so long as the evidence supports a finding that at least one of the conditions of community supervision was violated, it must demonstrate from the record that the one violation upon which it relies on appeal is supportable independent of whatever constitutional taint arguably inheres in the other. Dansby v State (May 8, 2013, PD-0613-12)

Sec. 24 Due Diligence

The common-law requirement that the state exercise due diligence in prosecuting a motion to revoke community supervision has been replaced by Art. 42.12, Sec. 24 (the "due-diligence statute"). Furthermore, the due-diligence statute applies to only two alleged community-supervision violations: failure to report to a supervision officer as directed or to remain within a specified place. Garcia v State (December 12, 2012, PD-1846-11)

Sec. 24, which expressly created a due-diligence affirmative defense to revocation, is more favorable to the state than was the common-law defense in three ways. First, it makes due diligence an affirmative defense, thereby shifting the burden of proof to the defendant. Second, it limits the state's due-diligence duty to contacting or attempting to contact the defendant at his last-known residential or employment addresses, whereas common law required reasonable investigative efforts to apprehend the defendant. Third, it applies to only two revocation allegations: failure to report to an officer as directed, and failure to remain within a specified place. By contrast, the common-law due-diligence requirement applied to all revocation allegations. Garcia v State (December 12, 2012, PD-1846-11)

Where probation revocation was based in part on failure to complete required substance-abuse treatment, even assuming that state did not exercise due diligence in executing the capias, trial court did not abuse its discretion def's on claim of no due-diligence by state because no due-diligence defense is available with respect to failure to complete substance-abuse treatment, and proof of a single violation will support revocation. Garcia v State (December 12, 2012, PD-1846-11)

Chapter 44 Appeal and Writ of error

Art. 44.01. Appeal by state

(a)(1) - dismissal of indictment

STATE MAY APPEAL

A court of appeals has jurisdiction to address the State's challenge to a trial court's order dismissing a portion of an indictment, even when that portion is the punishment-enhancement paragraph, as opposed to elements of the offense. Under 44.01(a)(1) there is no meaningful distinction between elements of the offense and enhancement allegations contained within an indictment; both constitute "portion[s] of the indictment" under 44.01(a)(1). State v Rosseau (April 17, 2013, PD-0233-12)

On appeal by state from trial court's refusal to let it use Iowa convictions to enhance the punishment range of the charged offense, it was error for court of appeals to dismiss state's appeal for lack of jurisdiction. Court of appeals had jurisdiction under the plain language of 44.01(a)(1). Because the quashed enhancement paragraphs were alleged in the indictment, and thus are quite literally a "portion of an indictment," 44.01(a)(1) may be invoked to permit the state's appeal. State v Richardson (November 21, 2012, PD-1867-11)

Art. 44.29. Effect of Reversal

CONSTRUCTION

Where def's 1977 conviction and death penalty judgment were reversed [in 1983 for error affecting punishment, at time when 44.29 required complete new trial, not just new punishment hearing] and mandate issued before Governor signed order to commute def's sentence from death to life, the commutation was a nullity because there was no punishment in existence at that time to commute. Hartfield v Thaler (June 12, 2013, AP-76,926)

Where trial judge erred by recalling discharged jury and having it re-deliberate after def had been formally sentenced, it was error for court of appeals to remand case for new punishment hearing: def was entitled to reinstatement of original, probated sentence. Under Rule 43.3 court of appeals was required to render judgment that trial court should have rendered. No merit to state's contention that cause should be remanded under 44.29 for new punishment hearing; that provision provides for a punishment retrial when reversible error occurs during or in the punishment stage, but error in instant case occurred after the punishment hearing and after the jury decided the punishment issue. Def's sentence was probated, and he did not ask for a new trial; the trial had ended. Cook v State (January 30, 2013, PD-0344-12)

Chapter 48 Pardon and Parole

Case Notes for Chapter 48

Where def's 1977 conviction and death penalty judgment were reversed [in 1983 for error affecting punishment, at time when 44.29 required complete new trial, not just new punishment hearing] and mandate issued before Governor signed order to commute def's sentence from death to life, the commutation was a nullity because there was no punishment in existence at that time to commute. Hartfield v Thaler (June 12, 2013, AP-76,926)

Chapter 62. Sex Offender Registration Program

Although the Texas sex offender registration program is generally complex, the plain language of articles 62.001 and 62.003 clearly demonstrates the Legislature's intent that whether an extra-jurisdictional conviction or adjudication triggers a person's duty to register is controlled by a DPS determination pursuant to article 62.003. Crabtree v State (October 31, 2012, PD-0645-11)

Establishing that def had a reportable conviction or adjudication under the definition of Art. 62.001(5)(H) is a condition precedent to proving he had a duty to register and failed to comply with that burden. Without proving that his conviction satisfied this definition, he could not have committed the charged offense because he would not labor under an obligation to register. Based on the plain language of articles 62.001(5)(H) and 62.003, court held that a DPS substantial-similarity determination is an essential element of the offense of failure to comply with registration requirements. Crabtree v State (October 31, 2012, PD-0645-11) **who must register**

Whether a particular extra-jurisdictional conviction or adjudication is a "reportable conviction or adjudication" under article 62.001(5)(H) is a matter of law. While a jury must find that def has a reportable conviction or adjudication that requires him to register, it is not the jury's role to determine whether a particular conviction or adjudication legally satisfies article 62.001(5)(H). In a case in which a duty to register is imposed by virtue of an extra-jurisdictional conviction or adjudication, this distinction between issues of fact and law is appropriately addressed by a jury charge that instructs the jury in the abstract and correctly sets out the law of the case. Crabtree v State (October 31, 2012, PD-0645-11)

In pros for failure to comply with sex offender registration requirements, evid was insuff where it failed to show that DPS determined def's extra-jurisdictional conviction was substantially similar to a Texas offense requiring registration; therefore the State did not prove that he was required to register as a sex offender in Texas. The record was silent as to whether DPS previously determined that the Washington offense of rape of a child in the first degree was substantially similar to a Texas offense statutorily defined as a "reportable conviction or adjudication." Crabtree v State (October 31, 2012, PD-0645-11) **OFFENSE: EVIDENCE INSUFF**

Texas Rules of Appellate Procedure

Section Two. Appeals from Trial Court Judgments and Orders

Rule 21. New Trials in Criminal Cases.

Rule 21.3 Grounds

An essential element of a motion for new trial is that the matter of error relied upon for a new trial must be specifically set forth therein. The purpose of this requirement is to allow the court enough notice to prepare for the hearing and make informed rulings and to allow the State enough information to prepare a rebutting argument. State v Zalman (June 5, 2013, PD-1424-12) **RULES**

It was error for trial court to grant def's motion for new trial over state's objection when def argued only unpled (or untimely pled) grounds at the hearing. Where motion for new trial claimed def was entitled to a new trial "in the interest of justice" because the verdict was "contrary to the law and the evidence," it raised a valid legal claim of insufficient evid to support verdict, but did not raise any other claim. State v Zalman (June 5, 2013, PD-1424-12) **NEW TRIAL ERROR TO GRANT**

Rule 33. Preservation of Appellate Complaints.

Rule 33.1 Preservation; How Shown

Procedural-default rules are the same regardless of whether the trial court has made findings of fact and conclusions of law. Whether reviewing court infers the fact findings or considers express findings, it upholds the trial court's ruling under any applicable theory of law supported by the facts of the case. Similarly, regardless of whether the trial court has made express conclusions of law, appeals court upholds trial court's ruling under any theory supported by the facts because an appellate court reviews conclusions of law de novo. Even if trial court limits its conclusion of law to a particular legal theory, an appellate court would not be required to defer to that theory under its de novo review. Alford v State (June 26, 2013, PD-0009-12) **NOTES**

Although state failed to argue before court of appeals that the issue on which court of appeals reversed was not preserved, review of state's claim on PDR was not foreclosed; preservation of error is a systemic requirement which a court of appeals should review on its own motion, but if it does not do so expressly, court of criminal appeals can and should do so when confronted with a preservation question. Blackshear v State (December 19, 2012, PD-0889-11)

Overruling any last vestiges of the De Garmo doctrine [De Garmo v. State, 691 S.W.2d 657 (Tex. Crim. App. 1985)]: Reasoning in Leday v. State, 983 S.W.2d 713 (Tex. Crim. App. 1998), applies to all guilt-stage claims of error, not merely "fundamental" claims; therefore, a defendant who testifies at the punishment stage of trial and admits his guilt does not forfeit his right to complain on appeal about errors occurring during the guilt stage. Jacobson v State (February 6, 2013, PD-1466-11) **DeGarmo**

Def did not forfeit review of his challenges to restitution order and to amount of restitution by failing to raise issues in trial court, where def did not have an opportunity to object in the trial court. He could not have objected during oral pronouncement because at that point, he could not have known that the sentence in the written judgment would be different from the orally pronounced sentence, or that there might be error in the amount of restitution. Also, when he filed his motion for new trial the written judgment had not yet issued, so he could not have known to include the restitution issues in the motion. The trial court ruled on the motion for new trial that same day, thus preventing def from amending the motion to include the restitution issues. Cause remanded for court of appeals to address issues on the merits. Burt v State (April 17, 2013, PD-1280-11) **ISSUE PRESERVED**

Def properly preserved for review his challenge to admission of expert evidence where he let the trial court know what he wanted by filing a motion to suppress and following up with objections to admission; he made it clear why he thought he was entitled to suppression by repeatedly citing relevant cases; and he did all of this clearly enough for the trial court to understand the objection at the appropriate time in the trial, evidenced by the trial court also referring repeatedly to the cited cases and holding a Rule 702 hearing to vet the state's expert. Everitt v State (February 6, 2013, PD-1693-11)

Where trial judge erred by recalling discharged jury and having it re-deliberate after def had been formally sentenced, def's "mistrial" motion preserved error for appellate review because it was timely and specific, and he obtained an adverse ruling. It was timely because counsel moved for a mistrial as soon as the trial judge told the former jurors to return to the jury room for a second deliberation. No merit to claim by state that, to be timely, def should have objected as soon as trial judge said "Bring them in." Trial judge's actions were not objectionable until she sent the discharged jurors back to deliberate again. Counsel had no reason to think def's previously imposed sentence would "disappear" until trial judge sent discharged jurors back into the jury room. As soon as that occurred, he moved for a

mistrial. Also, the "mistrial" motion informed the trial judge and opposing counsel of def's complaint: Everyone understood that defense counsel was saying "Stop this proceeding - whatever it is." The basis for the motion was obvious from the post-sentencing context. Cook v State (January 30, 2013, PD-0344-12)

No merit to state's contention def failed to preserve for review challenge to revocation of deferred-adjudication probation for failure to make restitution, where trial judge and prosecutor knew that def's inability to pay restitution was the sole basis of defense counsel's argument against revocation; they were well aware that def was urging consideration of his financial circumstances as described in the former restitution statute; although def did not specifically cite the former restitution statute, he presented evidence and maintained throughout the proceedings that revocation was improper because he was unable to make the restitution payments. Bryant v State (October 24, 2012, PD-0049-12)

Application of rule 33.1(a) to state by court of appeals in instant case was erroneous because state, as appellee, was not subject to normal procedural-default rules. Ordinary notions of procedural default do not apply equally to appellants and appellees; in general, appellants are subject to procedural default and appellees are not. The rationale for this rule is that an appellee, satisfied with the trial court's ruling in his favor, generally does not make a "complaint on appeal." Alford v State (June 26, 2013, PD-0009-12)

STATE PRESERVING ISSUES

Rule 43. Judgment of the Court of Appeals.

Where trial judge erred by recalling discharged jury and having it re-deliberate after def had been formally sentenced, it was error for court of appeals to remand case for new punishment hearing: def was entitled to reinstatement of original, probated sentence. Under Rule 43.3 court of appeals was required to render judgment that trial court should have rendered. No merit to state's contention that cause should be remanded under 44.29 for new punishment hearing; that provision provides for a punishment retrial when reversible error occurs during or in the punishment stage, but error in instant case occurred after the punishment hearing and after the jury decided the punishment issue. Def's sentence was probated, and he did not ask for a new trial; the trial had ended. Cook v State (January 30, 2013, PD-0344-12)

NOTES

Rule 44. Reversible Error.

Rule 44.2 Reversible Error in Criminal Cases

Rule 44.2(b): non-constitutional error

A harm analysis regarding the failure to submit a lesser-included offense should take into account the existence of any lesser-included offenses that were submitted and that the jury's rejection of submitted lesser-included offenses could render error with respect to the unsubmitted lesser-included offense harmless. Hudson v State (March 27, 2013, PD-0768-12)

RULES: jury charge issues

Rule 50 Reconsideration on Petition for Discretionary Review

Second opinion of court of appeals ordered withdrawn, and original judgment and opinion of court of appeals reinstated. Withdrawal of first opinion by court of appeals and issuance of another opinion, after state had filed PDR, was not permitted because Rule 50 had been previously abolished, after which, when a petition for discretionary review is filed, the appellate court loses authority to issue an opinion. Ex parte Shaw (March 20, 2013, PD-0042-13)

NOTES

Section Five. Proceedings in the Court of Criminal Appeals

Rule 73. Postconviction Applications for Writs of Habeas Corpus.

Rule 73.2 Action on Application

Mandamus conditionally granted instructing district clerk to accept relator's habeas corpus application for filing, where relator substantially complied with correct form. Although district clerk has authority to return an application when an applicant is not using the correct form [Rule 73.2] Relator in instant case appeared to have used the correct form and to have substantially complied with the instructions. It appeared relator added his own pages as extensions of the factual bases of the claims. There may have been some additional pages that were technically non-compliant, but it appeared those pages were not meant to replace the form but to give additional answers to questions on the form, and that relator was substantially complying with the instructions on the form. In re Stanley (December 12, 2012, AP-76,929)

NOTES

Rule 77. Opinions.

Rule 77.1 Generally

An "opinion of the Court" or "majority opinion" is one that is joined by a majority of the judges participating in the case. A "fractured decision" is a judgment by an appellate court that has no majority opinion. A "plurality opinion" is that opinion in a fractured decision that was joined by the highest number of judges or justices. Plurality opinions do not constitute binding authority. But a fractured decision may constitute binding authority if, and to the extent that, a majority holding can be ascertained from the various opinions in the case. Even if the rationales seem disparate, if a majority of the judges agree on a particular narrow ground for or rule of decision, then that ground or rule may be viewed as the holding of the court. Unkart v State (June 5, 2013, PD-0628-12)

plurality decisions

Case Note Updates for Baker's Texas Criminal Evidence Handbook

Chapter on Non-Statutory Arrest without Warrant Issues

An appellate court must defer to a trial judge's factual findings which, when viewed piecemeal and in isolation, may be ambiguous, but, when read in their totality, reasonably support his legal conclusion. A reviewing court must apply the same non-technical, common-sense deference that it uses to assess a magistrate's determination of probable cause, not only to the trial judge's individual factual findings, but also to the totality of those findings. State v Duran (April 17, 2013, PD-0771-12)

It was error for court of appeals to reverse order granting motion to suppress, where it did not give required deference to trial court's conclusion that officer did not observe traffic violation. Even though there was "indisputable visual evidence" (from patrol car DVD recording) that the traffic violation occurred before officer stopped def, there was no indisputable visual evidence that officer saw that violation. State v Duran (April 17, 2013, PD-0771-12)

ROLE OF APPEALS COURT

Cases on Stop and Detention

The question of whether an officer has reasonable suspicion to detain an individual for further investigation is determined from the facts and circumstances actually known to the officer at the time of the detention - what he saw, heard, smelled, tasted, touched, or felt - not what that officer could have or should have known. The standard is not what an omniscient officer would have seen, but rather what a reasonable officer would have done with what he actually did see. State v Duran (April 17, 2013, PD-0771-12)

Although nervousness alone is not sufficient to establish reasonable suspicion for an investigative detention, it can do so in combination with other factors. Likewise, a prior criminal record does not by itself establish reasonable suspicion but is a factor that may be considered. Deception regarding one's own criminal record has also been recognized as a factor that can contribute to reasonable suspicion. Hamal v State (September 12, 2012, PD-1791-11)

BASIS FOR STOP

An officer's mistake about the legal significance of facts, even if made in good faith, cannot provide probable cause or reasonable suspicion. Abney v State (March 27, 2013, PD-1231-11)

TRAFFIC STOP

cases on lawful stop

Officer had reasonable suspicion to detain def for canine sniff following traffic stop, where def was traveling late at night; she was speeding; she was nervous, with hands shaking; she had a prior criminal record; her record included arrests for drug offenses; one of the drug arrests was recent, approximately seven months before the stop; and she responded, "No," when asked whether she had ever been in trouble before. Hamal v State (September 12, 2012, PD-1791-11)

SCOPE AND DURATION OF STOP

It was error to grant motion to suppress where officer had reasonable suspicion to conduct investigatory detention, were reasonable suspicion was based on officer's knowledge at time he initiated detention that: (1) shortly after midnight, someone called the police to report several people fighting in front of PR's Bar; (2) upon arrival at PR's Bar, officer saw several people standing outside; (3) officer spoke to someone who was the owner of a damaged vehicle which was at the location; (4) this person, who identified him or herself to officer, pointed at a vehicle parked on the roadway directly across the street from the bar and stated, "There they are right there. There they are, there they are;" and (5) as officer approached def's vehicle, it began to move and he ordered def to stop. State v Kerwick (February 27, 2013, PD-1837-11)

LAWFUL STOP: INVESTIGATION OF REPORTED CRIME: VEHICLE

cases on unlawful stop

On appeal by state, it was not error to grant def's motion to suppress, where officer did not provide specific, articulable facts that would lead him to reasonably suspect that def committed traffic offense under Transp. Code sec. 544.004. Officer's belief that a "left lane for passing only" sign located fifteen miles away was applicable to def did not provide probable cause or reasonable suspicion that would lead one to reasonably conclude that def committed a traffic violation. Record indicated that officer did not know at what point def entered the highway; he explained that he followed def for a one-mile stretch that did not contain a "left lane for passing only" sign and that he pulled def over as he was turning left onto a crossover, assuming def had passed a sign located fifteen to twenty miles behind him. No evidence supported an assumption that def had driven past the sign, and other evidence introduced indicated that the sign officer relied upon was actually located twenty-seven miles away from the stop. The facts supported conclusion that def was driving in the left lane to make a left turn, which would be an appropriate action to take as it is clearly illegal to make a left turn from the right lane. The evidence indicated only that, in officer's opinion, def may have passed a "left lane for passing only" sign located at least fifteen miles away. Other testimony

TRAFFIC STOP

indicated that the sign was twenty-seven miles from where the traffic stop was conducted. Neither one of these scenarios places the sign at or near where the alleged violation took place. Abney v State (March 27, 2013, PD-1231-11)

Cases on Arrest

An officer's mistake about the legal significance of facts, even if made in good faith, cannot provide probable cause or reasonable suspicion. Abney v State (March 27, 2013, PD-1231-11) **RULES ON PROBABLE CAUSE FOR ARREST**

Community Caretaking Function

On appeal and PDR by state from order granting motion to suppress, because the community caretaking function was not a theory argued by the State at trial or to the court of appeals, it could not rely on that theory on PDR in CCA to prove that the trial court's ruling should be reversed. State v Betts (April 17, 2013, PD-1221-12) **COMMUNITY CARETAKING FUNCTION: PRESENTING ISSUE**

Chapter 18 Search Warrants

Art. 18.01. Search Warrant

The statutory requirement of a "sworn affidavit" serves two important functions: to solemnize and to memorialize. That the affidavit must be sworn to fulfills the constitutional requirement that it be executed under oath or affirmation so as "to impress upon the swearing individual an appropriate sense of obligation to tell the truth." That it must be in writing serves the additional objective that the sum total of the information actually provided to the issuing magistrate in support of his probable cause determination be memorialized in some enduring way to facilitate later judicial review. Clay v State (January 9, 2013, PD-0579-12) **RULES**

Under facts of instant case, warrant affidavit for extraction of blood for forensic testing under 18.01(b) was properly sworn out, even though affiant and judge were not in face-to-face meeting, but were talking on telephone, at time when affiant swore out his warrant affidavit. Because affiant and judge recognized one another's voices on the telephone at the time affiant swore out his warrant affidavit, it was properly solemnized. And because affiant reduced the affidavit to writing and faxed it to the judge for filing, the basis for probable cause was properly memorialized. Under these circumstances, Article 18.01(b)'s requirement of a "sworn affidavit" was satisfied. Clay v State (January 9, 2013, PD-0579-12) **SEARCH LAWFUL**

Chapter on Non-Statutory Search and Seizure Issues

presenting issue

On appeal and PDR by state from order granting motion to suppress, because the community caretaking function was not a theory argued by the State at trial or to the court of appeals, it could not rely on that theory on PDR in CCA to prove that the trial court's ruling should be reversed. State v Betts (April 17, 2013, PD-1221-12) **ISSUE NOT PRESERVED**

standing and expectation of privacy

RECORD SHOWED STANDING OR REASONABLE EXPECTATION OF PRIVACY

On appeal by state from order granting motion to suppress (in pros for cruelty to animals, def's dogs), record supported trial court's conclusion that def had a reasonable expectation of privacy, where property where the search and seizure occurred was owned by def's aunt (X); while def no longer lived at the residence, he had permission from X to keep his dogs in the backyard and to enter the premises in order to water and feed his dogs, which he did on a daily basis; the backyard was fenced on three sides with two-wire fencing, and the fourth side was enclosed by the neighbor's wood privacy fence; the dogs were kept approximately 70 yards from the road, behind the house, in a central part of the back yard; some of the dogs were chained to the ground near doghouse structures, and others were in pens surrounded by chainlink. Certainly the housing and shelter of animals is a common private use for one's backyard. The record supported conclusion that def had a reasonable expectation of privacy in X's backyard. State v Betts (April 17, 2013, PD-1221-12)

consent to search

RULES ON THIRD PARTY CONSENT

The Georgia v. Randolph, 547 U.S. 103 (2006), rule on co-occupant third-party consent does not apply to searches of vehicles. Unlike homes occupied by general co-tenants, society does generally recognize a hierarchy with respect to the occupants of a vehicle. The driver is the person who has the superior right. As the person with the exclusive control over the operation of the vehicle, a driver necessarily is placed in a superior role with respect to the society within the vehicle. The passengers of the vehicle become subservient to his control. Social expectations about vehicles include the recognition that a driver's control may quickly and unexpectedly be relegated to another as circumstances change. The mobility of the vehicle, fluidity of circumstances, and rapidity with which decisions must be made make it unreasonable to expect a police officer to assess the social expectations for each of the case-by-case determinations about who may override a driver's control. State v Copeland (May 8, 2013, PD-1340-12)

SEARCH NOT AUTHORIZED BY CONSENT

It was error to deny motion to suppress evidence obtained by police when they remained in def's residence without a warrant under the guise of conducting a "warrant check" after def unequivocally told then to leave the residence. Record did not support conclusion that officers' presence was justified under emergency doctrine or that evid was obtained under plain view doctrine. Trial court's factual finding that presence of police in def's apartment was part of a reasonable domestic-violence investigation was accurate as to their initial entry, but did not support a legal conclusion that they were still completing their investigation of domestic violence at the time they remained in her apartment while waiting for a return on the warrant check and at the time the evid was found. At that point def had told them four times to leave, and the officers, by their own admission, were planning to leave after results of the warrant check came back because their domestic-violence investigation had been completed. Def had revoked her consent to enter, the officers had no probable cause to arrest her until after the fourth time she revoked consent; by remaining in her apartment, they were not at a vantage point where they had the right to be. Miller v State (November 21, 2012, PD-0705-11)

plain view doctrine

PLAIN VIEW DOCTRINE NOT SATISFIED

On appeal and PDR by state from order granting motion to suppress (in pros for cruelty to animals, def's dogs), no merit to state's claim that court of appeals improperly ignored trial court's dispositive fact finding in ruling that the search and seizure was not justified under the plain view doctrine. Trial judge found that officer (X) "witnessed from the street dogs that appeared to be chained and malnourished in the backyard," and this was supported by the record: X testified that he could see the dogs from the roadway, before he entered the property and that he observed that all of the dogs were skinny and appeared to be malnourished and in poor overall health. Because trial court's finding was supported by the record, court of appeals failed to properly defer to that finding when it concluded that "it is not clear that [X] could observe the condition of the dogs from the street." However, even giving proper deference, claim that the seizure was justified by the plain-view doctrine was without merit: although record supported fact that officers could plainly view the dogs from the street, fact that they could see the dogs from afar did not mean that they were entitled to go onto the property and seize the dogs without a warrant, at least in the absence of some other exigency. The officers did not have a lawful right to go into the yard and seize the dogs. Def's dogs were kept in the backyard of his aunt's home, that is, within the residence's curtilage. The curtilage of a house is protected by the Fourth Amendment. The officers did not have a warrant to enter the yard, and the State did not argue that an exception to the warrant requirement existed. Therefore, the police were not authorized by the plain view doctrine to make a warrantless entry into the yard to seize the dogs. State v Betts (April 17, 2013, PD-1221-12)

It was error to deny motion to suppress evidence obtained by police when they remained in def's residence without a warrant under the guise of conducting a "warrant check" after def unequivocally told then to leave the residence. Record did not support conclusion that officers' presence was justified under emergency doctrine or that evid was obtained under plain view doctrine. Trial court's factual finding that presence of police in def's apartment was part of a reasonable domestic-violence investigation was accurate as to their initial entry, but did not support a legal conclusion that they were still completing their investigation of domestic violence at the time they remained in her apartment while waiting for a return on the warrant check and at the time the evid was found. At that point def had told them four times to leave, and the officers, by their own admission, were planning to leave after results of the warrant check came back because their domestic-violence investigation had been completed. Def had revoked her consent to enter, the officers had no probable cause to arrest her until after the fourth time she revoked consent; by remaining in her apartment, they were not at a vantage point where they had the right to be. Miller v State (November 21, 2012, PD-0705-11)

searches with and without warrants

rules on affidavit for search warrant

The citizen-informer is presumed to speak with the voice of honesty and accuracy. The criminal snitch who is making a quid pro quo trade does not enjoy any such presumption; his motive is entirely self-serving. Citizen informants are considered inherently reliable; confidential informants are not.

RULES ON INFORMANTS

Confidential informants - even though culled from the "criminal milieu" - may be considered reliable tipsters if they have a successful "track record." State v Duarte (September 12, 2012, PD-1511-11)

RULES ON SEARCH WITHOUT WARRANT

On appeal and PDR by state from order granting motion to suppress (in pros for cruelty to animals, def's dogs), no merit to state's claim that court of appeals improperly ignored trial court's dispositive fact finding in ruling that the search and seizure was not justified under the plain view doctrine. Trial judge found that officer (X) "witnessed from the street dogs that appeared to be chained and malnourished in the backyard," and this was supported by the record: X testified that he could see the dogs from the roadway, before he entered the property and that he observed that all of the dogs were skinny and appeared to be malnourished and in poor overall health. Because trial court's finding was supported by the record, court of appeals failed to properly defer to that finding when it concluded that "it is not clear that [X] could observe the condition of the dogs from the street." However, even giving proper deference, claim that the seizure was justified by the plain-view doctrine was without merit: although record supported fact that officers could plainly view the dogs from the street, fact that they could see the dogs from afar did not mean that they were entitled to go onto the property and seize the dogs without a warrant, at least in the absence of some other exigency. The officers did not have a lawful right to go into the yard and seize the dogs. Def's dogs were kept in the backyard of his aunt's home, that is, within the residence's curtilage. The curtilage of a house is protected by the Fourth Amendment. The officers did not have a warrant to enter the yard, and the State did not argue that an exception to the warrant requirement existed. Therefore, the police were not authorized by the plain view doctrine to make a warrantless entry into the yard to seize the dogs. State v Betts (April 17, 2013, PD-1221-12)

In light of Kentucky v. King, 131 S. Ct. 1849 (2011), the five McNairy factors [McNairy v. State, 835 S.W.2d 101 (Tex. Crim. App. 1991)] no longer adequately assist a court in determining whether the record shows an exigent circumstance. The first circumstance (the degree of urgency involved and the amount of time necessary to obtain a warrant) and the third circumstance (the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought) are now immaterial to the exigent-circumstances evaluation. The second circumstance (which permits consideration of whether there is a reasonable belief that the contraband is about to be removed) essentially allows the court to consider the ultimate question at issue, which asks whether there is proof that the officer reasonably believed that removal or destruction of evidence was imminent. Although it remains appropriate for a court to consider McNairy's fourth and fifth circumstances regarding whether occupants know the police are "on their trail" and whether the evidence is readily destructible, these factors are merely aids in a court's assessment of the entire record in determining whether the officer reasonably believed that the removal or destruction of evidence was imminent. Turrubiate v State (April 10, 2013, PD-0388-12)

probable cause

Affidavit for search warrant provided probable cause where from face of affidavit magistrate had a substantial basis to find: (1) in Nov 2007, a confidential informant (CI), who had provided affiant truthful information in the past and knew what methamphetamine looks like, saw a man CI knew as "Mike Bonds" in possession of methamphetamine, a penalty-group 1 controlled substance; (2) CI saw Mike Bonds possess methamphetamine in his house, known to CI to be located at specified location; (3) affiant transported CI to the residence which the magistrate could reasonably infer was the location where CI observed Bonds possess methamphetamine and was identified by CI as Bonds's residence; (4) CI identified Bonds from a photo lineup as the person he saw possess methamphetamine; (5) according to DPS records, Bonds himself identified his address on his driver's license as specified address; (6) from these records, magistrate could reasonably infer that affiant identified Bonds's residence as 401 Barker Street; (7) on May 27, July 15, and Aug 5, 2008, affiant searched trash left for collection at that address - which could be reasonably understood as the house CI identified as Mike Bonds's residence - and discovered drug paraphernalia containing methamphetamine and cocaine residue and a MasterCard application addressed to Michael Bonds, 401 Barker Street, Bowie, Texas 76230; and (8) Bonds had a number of prior arrests for drug possession and a previous conviction for possession of a penalty-group 1 controlled substance. Bonds v State (March 20, 2013, PD-0039-12)

PROBABLE CAUSE: DRUGS

search under warrant - no error

Search warrant's description of location to be searched was sufficiently particular and described the location actually searched to a sufficient degree that enabled officers to locate and distinguish the property intended to be searched from another in the community. Trial judge found warrant's description of location to be searched was erroneous in only two respects: the color of the roof and the address. The remaining descriptive factors accurately described the house that was searched [details in opinion]. The location searched was a south-facing, white, wood-framed residence that had two windows facing Barker Street. In contrast, the residence to the east of the searched property had six windows facing Barker Street, and according to affiant's testimony was a "premanufactured" home, not a wood-framed house. Further, the manufactured residence's large ramp leading to a wooden deck was a prominent feature that distinguished the two locations and was not included in the warrant's description. Despite listing an incorrect address and roof color, the balance of the description was sufficient to enable an officer to distinguish which property was intended to be searched. Affiant's familiarity with the location to be searched and that he was both the affiant and participated in the warrant's execution were circumstances which resolved any ambiguity created by description's errors and rendered the warrant sufficiently particular. Affiant was quite familiar with the location searched; he had been to that location a minimum of four times before the warrant's execution; he first identified the location searched when informant identified where he observed def in possession of methamphetamine; through his additional investigation, he had been to the location searched three additional times over the course of four months to search the trash in front of the location, the last time being the day of the warrant's issuance and execution; most significantly, he testified that the location intended to be searched was the actual location searched. Affiant's significant familiarity with the location to be searched (and actually searched) left little chance that the officers would mistakenly search the wrong location and the property of an innocent property owner. There was also little potential under facts of instant case that looking to officer's knowledge would allow limitless officer discretion in executing a warrant. Assuming ambiguity existed, the warrant's description on its face limited the authority to search one of two houses: either the residence searched or the manufactured home labeled 401. Because the warrant's authorization to search was substantially narrow, officer's discretion to choose which residence to search based on his familiarity with the location intended to be searched was appropriately limited. Bonds v State (March 20, 2013, PD-0039-12)

PLACE SEARCHED

search under warrant error

deficient affidavit

Affidavit failed to provide magistrate with a substantial basis for concluding that probable cause existed to search def's home where it was based almost entirely on hearsay information supplied by a first-time confidential informant. There was no substantial basis for crediting the first-time informant's hearsay statement. Officers failed to corroborate the tip except to confirm def's address. The tip was not a statement against interest, nor repeated by other informants. There was no accurate prediction of future behavior. The tip was a first-hand observation, but it contained no particular level of detail regarding def's premises or his criminal activity. State v Duarte (September 12, 2012, PD-1511-11)

DEFICIENT AFFIDAVIT: INFORMANT

search without warrant error

Probable cause to believe that illegal drugs are in a home coupled with an odor of marijuana from the home and a police officer making his presence known to the occupants do not justify a warrantless entry. The existence of probable cause combined with the deputy making his presence known to the occupants and the strong odor of marijuana emanating from the home did not justify deputy's inference that the destruction of evidence was imminent so as to permit the warrantless entry. Turrubiate v State (April 10, 2013, PD-0388-12)

SEARCH OF PREMISES

search under emergency circumstances

It was error to deny motion to suppress evidence obtained by police when they remained in def's residence without a warrant under the guise of conducting a "warrant check" after def unequivocally told then to leave the residence. Record did not support conclusion that officers' presence was justified under emergency doctrine or that evid was obtained under plain view doctrine. Trial court's factual finding that presence of police in def's apartment was part of a reasonable domestic-violence investigation was accurate as to their initial entry, but did not support a legal conclusion that they were still completing their investigation of domestic violence at the time they remained in her apartment while waiting for a return on the warrant check and at the time the evid was found. At that point def had told them four times to leave, and the officers, by their own admission, were planning to leave after results of the warrant check came back because their domestic-violence investigation had been completed. Def had revoked her consent to enter, the officers had no probable cause to arrest her until after the fourth time she revoked consent; by

ERROR

remaining in her apartment, they were not at a vantage point where they had the right to be. Miller v State (November 21, 2012, PD-0705-11)

Chapter 38 Evidence In Criminal Actions

Art. 38.072. Hearsay Statement of Child Abuse Victim

The outcry statute does not permit admission of video-recorded statements of a complainant. Bays v State (April 17, 2013, PD-1909-11) **CONSTRUCTION**

Article 38.072, the outcry statute, is a hearsay exception statutorily limited to live testimony of the outcry witness. The child-complainant's own videotaped statement did not meet the requirements for being admitted under that statute. It was error for trial court to admit the child's videotaped statement under the outcry statute. Bays v State (April 17, 2013, PD-1909-11) **ERROR**

Art. 38.14. Testimony of Accomplice

charge

The corroborating evidence, though legally sufficient, may yet prove in a given case to be so insubstantial or "unconvincing" as to render the lack of an accomplice-witness corroboration instruction egregiously harmful. Casanova v State (November 21, 2012, PD-1521-11)

Whether error in failing to submit an accomplice-witness instruction will be deemed harmful is a function of the strength of the corroborating evidence. The strength of that evidence is, in turn, a function of (1) its reliability or believability and (2) how compellingly it tends to connect the accused to the charged offense. Corroborating evidence that is exceedingly weak - that is to say, evidence that, while it is legally sufficient to tend to connect, is nevertheless inherently unreliable, unbelievable, or dependent upon inferences from evidentiary fact to ultimate fact that a jury might readily reject - may call for a conclusion that the failure to give the accomplice-witness instruction resulted in harm regardless of whether the deficiency was objected to. Corroborating evidence this weak may thus result in both egregious harm and some harm. As the strength of the corroborating evidence increases, however, a reviewing court may no longer be able to declare that the lack of an accomplice-witness instruction resulted in egregious harm, but it may still conclude that the deficiency resulted in some harm and reverse the conviction if there was a trial objection. And as the corroborating evidence gains in strength to the point that it becomes implausible that a jury would fail to find that it tends to connect the accused to the commission of the charged offense, then a reviewing court may safely conclude that the only resultant harm is purely theoretical and that there is no occasion to reverse the conviction, even in the face of an objection, since the jury would almost certainly have found that the accomplice witness's testimony was corroborated had it been properly instructed that it must do so in order to convict. Casanova v State (November 21, 2012, PD-1521-11) **CHARGE: RULES**

In pros for possession of cocaine, failure to give accomplice witness charge did not cause egregious harm where other evid showed that the cocaine was found in the hotel room that def was sharing with his wife (X); def appeared to officer (Y) to be under the influence of "some kind of drug or alcohol" and according to Y, def admitted to having smoked crack cocaine earlier that day; def's paranoia appeared to be escalating over the course of the evening, suggesting that he may have "been smoking crack" at a point in time relatively close to Y's first encounter with him; def himself conceded that he was aware that X was ingesting drugs earlier in the day and may have been smoking crack cocaine in the bathroom of the hotel. Casanova v State (November 21, 2012, PD-1521-11) **CHARGE: ERROR HARMLESS**

Art. 38.23. Evidence Not to be Used

An appellate court must defer to a trial judge's factual findings which, when viewed piecemeal and in isolation, may be ambiguous, but, when read in their totality, reasonably support his legal conclusion. A reviewing court must apply the same non-technical, common-sense deference that it uses to assess a magistrate's determination of probable cause, not only to the trial judge's individual factual findings, but also to the totality of those findings. State v Duran (April 17, 2013, PD-0771-12) **REVIEW ON APPEAL BY STATE**

not error to deny motion to suppress

It was not error to deny motion to suppress under 38.23 on claim person (X) hired by def to stay in his home and care for his dog while def was on vacation discovered child pornography on def's computer in def's bedroom illegally. Record supported finding that X did not commit trespass or breach of computer security by entering def's bedroom and using his computer, and that def gave X his apparent consent: he invited X to help herself to "anything" and "everything," and this invitation was not limited to the refrigerator and pantry, but was repeated during the course of the tour of the house, which included his bedroom. Whatever he may have intended, he told X only that he required her to keep the bedroom door closed in order to keep the dog out. He did not expressly banish her from the bedroom, nor did he forbid her to use his computer. He showed her how to operate the television and stereo. He did not power the computer down or password-protect it, and he admitted that he allowed his roommate to use it regularly. Under these facts, trial court was justified in concluding that X had def's apparent consent - that is, it was clear and manifest to the understanding that she had his assent in fact - to enter his bedroom and use his computer. Baird v State (May 8, 2013, PD-0159-12)

NOT ERROR TO DENY MOTION: CONDUCT OF PRIVATE PERSON

Jury Charge on Exclusionary Rule

Where the issue raised by the evidence at trial does not involve controverted historical facts, but only the proper application of the law to undisputed facts, that issue is properly left to the determination of the trial court. Robinson v State (September 19, 2012, PD-0238-11)

RULES

jury charge

absence of charge not error

It was not error to deny jury instruction under 38.23 on lawfulness of traffic stop, where only disagreement was not about the character of the roadway, but about the legal significance of the character of the roadway. The question of whether def was required to use his turn signal was a question of law, not fact, and the admissibility of any evidence officer obtained as result of traffic stop did not depend on reasonableness of his belief that def was legally required to signal. The only dispute was about the legal significance of those undisputed historical facts. Robinson v State (September 19, 2012, PD-0238-11)

It was not error to deny jury instruction on claim of fact issue of whether officer was reasonable in believing def had correctly heard his question and understood it, following traffic stop, where there was no dispute in the testimony about what video of events during detention depicted, was no conflict in evidence regarding what def and officer said and did, and it was uncontroverted that def was nervous. There was no dispute in what officer did, said, saw, or heard. (Def was detained for canine sniff following traffic stop, based on combination of factors: Def was traveling late at night; she was speeding; she was nervous, with hands shaking; she had a prior criminal record; her record included arrests for drug offenses; one of the drug arrests was recent, approximately seven months before the stop; and she responded, "No," when asked whether she had ever been in trouble before.) Hamal v State (September 12, 2012, PD-1791-11)

ABSENCE OF CHARGE NOT ERROR: ARREST STOP OR DETENTION

Erroneous jury charge in pros for DWI (on issue of color of light illuminating license plate, which formed basis for traffic stop) did not cause egregious harm. Third and fourth factors weighing in favor of finding no egregious harm outweighed first and second factors weighing in favor of finding egregious harm. Conclusion supported by fact that jury was unlikely to have been misled given the fact that common sense, the correct abstract paragraph, and correct jury arguments most likely alerted the jury to the error and allowed them to recognize the mistake and properly apply the law as correctly stated in the preceding sentence. Gelinas v State (May 15, 2013, PD-1522-11)

CHARGE ERROR HARMLESS

Art. 38.36. Evidence in Prosecutions for Murder

evidence

It was not abuse of discretion to exclude under Rule 403 evid offered at punishment stage in capital case, of victim's drug use and promiscuous, extra-marital sexual behavior, over claim it was relevant to both circumstances of the offense and def's personal moral culpability, and that it was mitigating evidence, where def argued it was important to show that his marriage to victim was unstable and caused him emotional stress; but record showed jury was made thoroughly aware through other evidence of the emotional stress caused by def's volatile marriage: jury was aware that def and victim separated and reunited many times, and that following the final break six months prior to the offense, both had begun new relationships; witnesses also testified regarding the verbal, emotional, and physical abuse that def suffered from victim. Thus, the probative value of the evidence and the proponent's need for the evidence were not high, and the potential for the excluded evidence to impress the jury in an irrational way was high. Hernandez v State (November 21, 2012, AP-76,275) **EVIDENCE EXCLUSION PROPER**

Chapter 39 Depositions and Discovery

Art. 39.02. Depositions for Defendant

Chapter 39 imposes no hard and fast deadline for the filing of an application for deposition. Frangias v State (February 27, 2013, PD-0728-12) **RULES**

Other Case Notes on Discovery (following Chapter 39)

various discovery matters

When a defendant intends to present mental-health expert testimony, state is entitled to compel the defendant to undergo examination by state's expert for rebuttal purposes ("LaGrone examination" [LaGrone v. State, 942 S.W.2d 602 (Tex. Crim. App. 1997)]). To be entitled to appellate review of trial court's ruling that a LaGrone examination would not be limited to the same areas examined by the defense expert, appellant is required to submit to the LaGrone examination and suffer any actual use by the State of the results of this examination. (Defense expert testified that he had assessed def for intellect and school achievement and had evaluated def to ascertain whether he could have understood the consequences of waiving his rights and giving a statement to police.) Hernandez v State (November 21, 2012, AP-76,275) **PRESENTING ISSUE**

Chapter on Confession of Defendant (Art. 38.22)

rules on confession

To determine if store's loss-prevention officer (X) who obtained confession from def was working as an agent of law enforcement, court applied three factors to facts of the case: (1) relationship between police and the potential police agent (X); (2) interviewer's (X) actions and perceptions; and (3) def's perceptions of the encounter. Elizondo v State (November 7, 2012, PD-0882-11)

Generally, a routine traffic stop does not place a person in custody for Miranda purposes. But a traffic stop may escalate from a non-custodial detention into a custodial detention when formal arrest ensues or a detainee's freedom of movement is restrained "to the degree associated with a formal arrest." Courts evaluate whether a person has been detained to the degree associated with arrest on an ad hoc, or case-by-case, basis. In making the custody determination, the primary question is whether a reasonable person would perceive the detention to be a restraint on his movement "comparable to . . . formal arrest," given all the objective circumstances. State v Ortiz (October 31, 2012, PD-1181-11) **RULES: WARNINGS**

In evaluating whether a reasonable person would believe his freedom has been restrained to the degree of formal arrest, court looks only to the objective factors surrounding the detention. The subjective beliefs of the detaining officer are not included in the calculation of whether a suspect is in custody. But if the officer manifests his belief to the detainee that he is a suspect, then that officer's subjective belief becomes relevant to the determination of whether a reasonable person in the detainee's position would believe he is in custody. Conversely, any undisclosed subjective belief of the suspect that he is guilty of an offense should not be taken into consideration - the reasonable person standard presupposes an "innocent person." State v Ortiz (October 31, 2012, PD-1181-11)

not error to admit confession

It was not error to deny motion to suppress written confession obtained by store's loss-prevention officer (X) where no agency relationship existed between law enforcement and the loss-prevention officer. X was not acting in tandem with the police; fact that he eventually gave DA's office a copy of def's written confession did not transform him into an agent of law enforcement. Because he was working on a path parallel to, yet separate from, the police, Miranda warnings were not required. Applying factors: (1) while officers may have been aware that store had a policy of obtaining a civil demand notice, there was no indication that this knowledge led to a calculated practice between the police and the store's loss-prevention staff; (2) X's reason for obtaining the civil demand notice was to adhere to the policies in the store's loss-prevention manual; while he did help build a case that led to def's arrest, and his testimony indicated that the purpose of obtaining a written confession went beyond merely civil reasons, his primary duty was to document the incident for company records; record indicated he believed he was following store policy and acting on the store's behalf, not acting as a police agent; and (3) nothing in the record indicated that he appeared to def to be cloaked with the actual or apparent authority of the police Elizondo v State (November 7, 2012, PD-0882-11)

WARNINGS

error to admit confession

It was not abuse of discretion to grant motion to suppress statements made by def during course of traffic stop, on finding that def was in custody when statements were made and had not been properly Mirandized. At the moment that officer elicited the cocaine statements from def, a reasonable person in his position would have believed, given the accretion of objective circumstances, that he was in custody. The objective facts showed that, by that time: (1) officer had expressed his suspicion to def "point blank" that he had drugs in his possession; (2) two additional law enforcement officers had arrived on the scene; (3) def and his wife had both been patted down and handcuffed; and (4) the officers had manifested their belief to def that he was connected to some sort of (albeit, as-yet undisclosed) illegal or dangerous activity on his wife's part. These circumstances combine to lead a reasonable person to believe that his liberty was compromised to a degree associated with formal arrest. State v Ortiz (October 31, 2012, PD-1181-11)

NO WARNINGS

Chapter on Right of Confrontation

denial of right of confrontation, error

Confrontation clause was violated by admission of a drug analysis when only reviewing analyst (not testing analyst) testified. State attempted to submit testimonial evidence that def possessed cocaine without giving def opportunity to cross-examine analyst who tested the cocaine and made affirmation of its contents. Although state did call reviewing analyst at trial, that witness did not have personal knowledge that the tests were done correctly or that the tester did not fabricate the results. She could say only that original analyst wrote a report claiming to have conformed with required safeguards. Consequently, she was not an appropriate surrogate witness for cross-examination. Burch v State (June 26, 2013, PD-0943-12)

ERROR: ADMISSION OF EVID

Chapter on Sufficiency of Evidence Rules

general rules

Juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation. Speculation is the mere theorizing or guessing about the possible meaning of the facts and evidence presented. On the other hand, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. A conclusion that is reached by speculation may not seem completely unreasonable, but it is not sufficiently based upon facts or evidence to support a conviction beyond a reasonable doubt. Gross v State (October 10, 2012, PD-1688-11)

JURY TRIAL

Texas Rules of Evidence

Article IV. Relevancy and Its Limits

Rule 403. Exclusion of Relevant Evidence on Special Grounds

It was not abuse of discretion to exclude under Rule 403 evid offered at punishment stage in capital case, of victim's drug use and promiscuous, extra-marital sexual behavior, over claim it was relevant to both circumstances of the offense and def's personal moral culpability, and that it was mitigating evidence, where def argued it was important to show that his marriage to victim was unstable and caused him emotional stress; but record showed jury was made thoroughly aware through other evidence of the emotional stress caused by def's volatile marriage: jury was aware that def and victim separated and reunited many times, and that following the final break six months prior to the offense, both had begun new relationships; witnesses also testified regarding the verbal, emotional, and physical abuse that def suffered from victim. Thus, the probative value of the evidence and the proponent's need for the evidence were not high, and the potential for the excluded evidence to impress the jury in an irrational way was high. Hernandez v State (November 21, 2012, AP-76,275) **NOT ERROR TO EXCLUDE**

Article VI. Witnesses

Rule 606. Competency of Juror as a Witness

Rule 606(b) prevents a juror from testifying that the jury discussed improper matters during deliberation; it was not intended to eliminate post-trial questioning altogether. McQuarrie v State (October 10, 2012, PD-0803-11)

Jury deliberations must be kept private to encourage jurors to candidly discuss the law and facts, and during an inquiry pursuant to Rule 606(b), such privacy will be maintained because the court may not "delve into deliberations." The court may not inquire as to the subjective thought processes and reactions of the jury, so jurors should continue to feel free to raise and discuss differing viewpoints without the fear of later public scrutiny. Similarly, the jury should be protected from post-trial harassment or tampering, and an inquiry under Rule 606(b) will not result in such undue interference; a Rule 606(b) inquiry is limited to that which occurs outside of the jury room and outside of the juror's personal knowledge and experience. Also, the risk of harassment can be minimized through other well-established safeguards such as pretrial examination of juror's prejudices and experiences and specific jury instructions informing the jury of prohibited conduct. McQuarrie v State (October 10, 2012, PD-0803-11) **RULES**

Court adopted plain-meaning interpretation of outside influence in Rule 606(b): something originating from a source outside of the jury room and other than from the jurors themselves. McQuarrie v State (October 10, 2012, PD-0803-11)

Trial court abused its discretion in excluding, pursuant to Rule 606(b), jurors' testimony and affidavits offered by def at hearing on motion for new trial, where internet research conducted by a juror (in pros for sexual assault) about the effects of date rape drugs constituted an "outside influence." McQuarrie v State (October 10, 2012, PD-0803-11) **ERROR**

Article VII. Opinions and Expert Testimony

Rule 702. Testimony by Experts

Def properly preserved for review his challenge to admission of expert evidence where he let the trial court know what he wanted by filing a motion to suppress and following up with objections to admission; he made it clear why he thought he was entitled to suppression by repeatedly citing relevant cases; and he did all of this clearly enough for the trial court to understand the objection at the appropriate time in the trial, evidenced by the trial court also referring repeatedly to the cited cases and holding a Rule 702 hearing to vet the state's expert. Everitt v State (February 6, 2013, PD-1693-11) **PRESENTING ISSUE**

In concluding def failed to preserve for review challenge to admission of expert testimony, court of appeals erred in distinguishing between admissibility based on relevance and admissibility based on reliability. Under Rule 702 both relevance and reliability of the expert testimony are components of a trial court's Daubert/Kelly ruling on admissibility. Everitt v State (February 6, 2013, PD-1693-11)

rules

For the testimony of an eyewitness identification expert to be relevant for purposes of Rule 702, it is enough that he is able to say that a particular identification procedure, or the facts or circumstances attending a particular eyewitness event, has been empirically demonstrated to be fraught with the potential to cause a mistaken identification. Blasdell v State (December 5, 2012, PD-1892-11)

Not all expert testimony that is logically "relevant" will invariably serve to "assist" a jury for purposes of Rule 702. As the quantity and quality of evidence establishing a defendant's identity as the perpetrator of the charged offense increases, the possibility that expert testimony will facilitate the jury's resolution of that issue will decrease concomitantly. At some point, a trial court may decide that the expert testimony is, on balance, insufficiently helpful to the jury's resolution of the issue to justify the time and resources it would take to present it at trial. Blasdell v State (December 5, 2012, PD-1892-11)

RULES: SPECIFIC EXPERTS

error

It was abuse of discretion to exclude expert witness testimony of forensic psychologist intended to educate the jury about the so-called "weapon focus effect" where only evidence against def was was eye-witness identification testimony of the aggravated robbery victim. Given the content of the expert testimony, the context in which it was offered, and, most pertinently, the paucity of other evidence to establish def's identity as victim's assailant, it was error to conclude that expert's weapon focus effect testimony was not relevant to the issues in this case. Blasdell v State (December 5, 2012, PD-1892-11)

ERROR TO EXCLUDE

Rule 703. Bases of Opinion Testimony by Experts

Rule 703 allows opinions based only upon inadmissible evidence if the inadmissible evidence is of a sort "reasonably relied upon." The use of the word "reasonably" rather than "customarily" or "regularly" implies that judicial oversight was intended. While witness in instant case did make the conclusory statement that those in his field reasonably rely on polygraph results, the sole basis of his opinion (that def was not complying with terms of therapy program that was condition of probation) was the results of a test that has been held inadmissible because it is not reliable. Total reliance on inadmissible and untrustworthy facts cannot be reasonable. Nor would such an opinion achieve the minimum level of reliability necessary for admission under Rule 702. Rule 703 is not a conduit for admitting opinions based on "scientific, technical, or other specialized knowledge" that would not meet Rule 702's reliability requirement. If the methodology or data underlying an expert's opinion would not survive the scrutiny of a Rule 702 reliability analysis, Rule 703 does not render the opinion admissible. Thus Rule 703 did not provide a basis for trial court to admit testimony of witness that he relied on polygraph test results. Leonard v State (November 21, 2012, PD-0551-10)

rules

Case Note Updates for
Baker's Texas Family Code Handbook

TItle 3 - Juvenile Justice Code

Chapter 51 General Provisions

51.095. Admissibility of a Statement of a Child

Sec. 51.095(a)(1)(A), unlike 51.095(a)(1)(B)(i) and 51.095(a)(1)(D), does not prohibit the presence of law-enforcement officers (when juvenile is given Miranda warnings by magistrate). Herring v State **rules** (April 10, 2013, PD-0285-12)