TEXAS COURT OF CRIMINAL APPEALS UPDATE

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Advanced Criminal Law Course
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Greg Westfall

Westfall, Platt, Cutrer & Paschall
101 Summit Ave., Suite 910
Fort Worth, Texas 76102
817-877-1700
westfall@wpcfirm.com
www.wpcfirm.com

TABLE OF CONTENTS

I. INTRODUCTION

In researching this article, the author reviewed all Court of Criminal Appeals published opinions covering the period from roughly May 1, 2004 through May 25, 2005. What appears here are what the author believes are the 50 most important published opinions issued during that time. The opinions are generally separated topically. My hope is that by arranging the cases topically, the reader can more easily put the recent decisions into context. The recent Court of Criminal Appeals opinions are all in boldface.

II. TERRITORIAL JURISDICTION – CAPITAL MURDER w/KIDNAPPING

In ***Rodriguez v. State*, 146 S.W.3d 674 (Tex. Crim. App. 2004)**, a cooperating witness in a federal drug case was kidnapped in Texas, taken to Mexico, and murdered. The defendant was prosecuted in Texas for both kidnapping and capital murder. He was convicted and sentenced on both offenses (28 years on kidnapping and life on the capital murder) and appealed. The court of appeals affirmed the kidnapping conviction, but reversed the capital murder conviction, holding that Texas did not have territorial jurisdiction. The CCA reversed the court of appeals on the capital murder case, holding that since kidnapping was the aggravating factor in the capital murder case (what made the murder a capital murder) Texas had territorial jurisdiction. TEX. PENAL CODE ANN. § 1.04(a)(1) provides that territorial jurisdiction exists "if either the conduct or a result that is an element of the offense occurs inside this state." The CCA held that "element of the offense" applies to both "conduct" and "result." Kidnapping is a conduct offense. Therefore, the fact that the kidnapping occurred in Texas created territorial jurisdiction for the offense of capital murder where the kidnapping was the aggravator.

III. PRETRIAL MOTIONS

***Hernandez v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 268 (March 2, 2005)** addresses the proof required for "entrapment as a matter of law." In this case, the defendant had filed a pretrial motion asking the trial court to find that he had been entrapped as a matter of law. The defendant has testified during the hearing on the motion that he had been entrapped by a female confidential informant. This testimony was largely uncontradicted. The trial court denied the motion, but the court of appeals reversed, finding entrapment as a matter of law because the defendant's story was essentially uncontradicted and the state failed to disprove the defense beyond a reasonable doubt. The CCA reversed.

The CCA outlined the rules for entrapment as a matter of law, both as a trial defense and for pretrial motions:

"In some instances, the facts underlying an entrapment defense may be undisputed and the question is one solely of the application of the law to those undisputed facts. In such a case, a pretrial judicial determination of the existence of an entrapment defense may be both an effective and efficient use of scarce judicial resources. In this respect, a pretrial motion asserting 'entrapment as a matter of law' is analogous to a motion for summary judgment in a civil case which, if there is no disputed fact issue, the movant is entitled to judgment as a matter of law. [A] defendant is entitled to dismissal of the charges under section 8.06 in the pretrial hearing context only when he can establish entrapment as a matter of law with *conflict-free*, *uncontradicted, uncontested* or *undisputed* evidence. If the facts concerning entrapment are in dispute, there cannot be entrapment 'as a matter of law' determined at the pretrial stage. It is the defendant, not the state, who must 'establish beyond a reasonable doubt that he was entrapped' at the pretrial stage. At that stage, the state has no burden of proof; it need only raise a fact issue that a jury would be required to resolve. It is only at the trial stage that the state has the burden to disprove the factual defense of entrapment beyond a reasonable doubt." *Id.* at **14-16.

***Jenschke v. State*, 147 S.W.3d 398 (Tex. Crim. App. 2004)** adds a new wrinkle to TEX. CODE CRIM. PRO. Art. 38.23(a). In that case, the defendant sexually assaulted a relative of his when she was less than 17 years old. She told her parents in July, 1997. She also told them that the defendant had used a condom. The parents decided to look in defendant's truck, where they knew he hid things. They found the truck locked, located a key, and, unknown and unconsented-to by him, burglarized his truck, found the condom and seized it. More than two years later, they notified a district attorney, who notified the police. The police obtained a warrant for DNA from the defendant and matched him to the condom. In February, 2000, defendant was indicted. He moved pre-trial to suppress the evidence under Art. 38.23(a). The trial court denied the motion.

The court of appeals affirmed the denial, reasoning that the parents were not committing a burglary, because they did not have the intent to commit theft. "Theft is a taking with intent to deprive the owner of the property, and 'there is no evidence that [the

girl]'s parents had the intent to deprive Jenschke of his property. Rather, the record shows their intent was merely to obtain evidence.'" *Id*. at 400 (quoting *Jenschke v. State*, 116 S.W.3d 173, 176 (Tex. App. – San Antonio 2003)).

The CCA reversed, but nonetheless left us with a new exception to Art. 38.23(a). The CCA disagreed with the court of appeals that a person who breaks into a car to collect evidence is not taking property with the intent to deprive its owner of that property. The CCA, however, holds that this is OK, so long as that property is going to the police. "We hold that, when a person who is not an officer or an agent of an officer takes property that is evidence of crime, without the effective consent of the owner and with the intent to turn over the property to an officer, the conduct may be non-criminal [and thus not violative of Art. 38.23(a) even thought the person has intent to deprive the owner." *Id*. at 402. The problem in this case was that the parents, after sneaking into defendant's truck and stealing the condom, did not turn it over to the police for more than two years. If they had turned it over to the police in a timely fashion, this new exception would have applied to them.

***Phillips v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 701 (Apr. 27, 2005)** is another 38.23 case. In this case, TABC sent a 17 year-old informant into a bar to order a drink and she was served. The defendant ultimately pled nolo contendre to providing alcohol to a minor, but beforehand filed a motion to suppress based on TEX. CODE CRIM. PRO. art. 38.23 alleging that the minor had committed criminal trespass by coming into the bar because there was a sign posted at the bar forbidding anyone under 18 years old from entering the premises. The Texas Alcoholic Beverage Code authorizes minors to purchase alcohol, however, if they are doing it at the direction of the TABC in enforcement actions. Therefore, the CCA held that this was not a criminal trespass and therefore the 17 year-old's actions did not violate Art. 38.23. The CCA explained: "The statute does not expressly state that minors are not to be held liable for criminal trespass if they are assisting the TABC. However, we assume that because minors in this situation act at the specific request of TABC officers, and on behalf of the TABC itself, to enforce the provisions of the TABC Code through sting operations, they should not be considered trespassers even in the face of a no trespassing sign." *Id*. at *11.

***Ford v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 399 (March 9, 2005)** is a reasonable suspicion case that stands for the proposition that mere conclusions will not be sufficient to show the specific articulable facts necessary to establish reasonable suspicion to justify a stop. In this case, the police officer pulled the defendant over for "following too close" on the highway. At the suppression hearing, the police officer testified as follows:

Q: And on September 2nd of 2001 did you notice something that caught your eye around 5:47 at night?
A: Yes, ma'am. I was patrolling and I saw a maroon utility vehicle following too close behind – I was patrolling 290 westbound. I saw a maroon GMC or Chevy utility vehicle following a white car, following too close.
Q: And where were you when you noticed this vehicle?
A: I was directly behind him.
Q: And at the time that you noticed this, what did you do?
A: I activated my emergency overheads and the vehicle pulled over.

* * *

Q: And when you were approaching the vehicle, what were your intentions before you approached the vehicle?
A: To talk to him about his violation he had committed.
Q: Which violation is that?
A: Following too close.

Id. at **3-4. The CCA reversed the judgment of the court of appeals and the trial court, holding, "[W]e adhere to the principle that specific, articulable facts are required to provide a basis for finding reasonable suspicion. Mere opinions are ineffective substitutes for specific, articulable facts in a reasonable-suspicion analysis." *Id*. at *11.

***Estrada v. State*, 154 S.W.3d 604 (Tex. Crim. App. 2005)** revisits the issue of whether a police officer has probable cause to search a house upon smelling marijuana smoke coming from within the house. In *State v. Steelman*, 93 S.W.3d 102 (Tex. Crim. App. 2002), the CCA held that the smell of burning marijuana, without more, would not justify the warrantless search of a home, because "[t]he mere odor of burning marijuana [does] not give the officers probable cause to believe that [a suspect is committing] the offense of possession of marijuana in their presence. The odor of marijuana, standing alone, does not authorize a warrantless search and seizure in a home." *Steelman*, 93 S.W.3d at 108. *Estrada* deals with the "standing alone" aspect of the *Steelman* rule.

In this case, the persons inside the house called a fake 911 call while the cop was on the doorstep, apparently in an attempt to trick him into leaving. He did leave briefly, and upon return, the occupants were

attempting to flee. In addition, there was the smell of burning marijuana. The CCA held that the trial court could have found that there were exigent circumstances present.

The CCA reasoned that there is "a distinction between what is necessary to establish probable cause, and what is required for an officer to conduct a warrantless search of an individual's residence. In Steelman, we held that the odor of marijuana alone is not enough to allow officers to conduct a warrantless search. This is because it is clear under both United States constitutional law and Texas constitutional law that a warrantless search of a residence is illegal unless probable cause exists in combination with exigent circumstances." *Id*. at 608. Thus, smell of marijuana alone is not enough – although it will provide probable cause to search, probable cause is not enough to justify a warrantless search of a home. But with the addition of exigent circumstances – which the CCA held there were in this case – the warrantless search is legal.

***Woods v. State*, 153 S.W.3d 413 (Tex. Crim. App. 2005)** stands for the proposition that a pre-trial motion to suppress is not a "mini-trial" intended to dispute an actual element of the offense that the state will have to prove at trial. This was an evading arrest case under TEX. PENAL CODE ANN. § 38.04 ("A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to detain him."). The defendant moved to suppress all evidence on the basis that the original stop was illegal. The court denied the motion to suppress and the defendant pled guilty and appealed. The CCA affirmed, noting: "By asking for the trial judge to suppress the arrest, and the details of his flight and evasion of the detention by Officer Eder, Appellant was in effect asking the trial judge to rule on whether the prosecution had proof of an element of the offense. The purpose of a pre-trial motion is to address preliminary matters, not the merits of the case itself. Preliminary matters are those issues that can be determined before there is a trial on the general issue of the case." *Id.* at 415. So, while a lawful arrest would be a preliminary matter in virtually any other type of case, in this case, it was actually an element of the offense and not therefore subject to a motion to suppress.

IV. PLEAS OF GUILTY

***Mendez v. State*, 138 S.W.3d 334 (Tex. Crim. App. 2004)** holds that where a defendant enters a plea of guilty and proceeds with a trial on punishment only, that defendant has a right to change his plea to not guilty at any time before the jury retires to deliberate its verdict, where is jury is not waived and, where a jury is waived, he may change his plea at any time prior to the court pronouncing judgment or taking the case under advisement. *See id.* at 345. However, the trial court has no duty to *sua sponte* change the defendant's plea after he has waived his right to plead not guilty and entered a plea of guilty. *See id.* at 343-44. In the framework of *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), the right to plead not guilty is a "waivable right" – on that "must be implemented by the system unless expressly waived." *Id*. For instance, if the defendant stands mute, the court must enter a plea of not guilty. Once a competent defendant waives that right, however, by entering a plea of guilty, it is up to the defendant to reassert that right in the face of evidence inconsistent with guilt.

***Mitshke v. State*, 129 S.W.3d 130 (Tex. Crim. App. 2004)** addressed the issue of "direct" versus "collateral" consequences of a plea of guilty and, in particular, sex offender registration. In this case, the court did not admonish the defendant that he would have to register as a sex offender and he therefore appealed on the basis that he plea was involuntary. Essentially, the analysis is as follows: If a consequence "is definite and largely or completely automatic, then it is a direct consequence." *Id*. at 135. Everything else is collateral. That does not stop the analysis, however, for even unwarned direct consequences will not render a plea involuntary. The next step is to determine whether the direct consequence is "remedial and civil rather than punitive." *Id.* Sex offender registration is remedial and therefore non-punitive. *See id.* at 136.

V. TRIAL – EXTRANEOUS OFFENSES

In ***Johnson v. State*, 145 S.W.3d 215 (Tex. Crim. App. 2004)**, the issue was whether a series of photographs offered into evidence by the state (and admitted by the trial court) actually proved up an extraneous offense. This was an injury to a child case where the allegation was that the defendant injured "Christopher" by burning his hand with a cigarette. The photographs, however, showed bruises on another child, Autumn, Christopher's sister. During trial, the defense called the children's mother, who acknowledged that she had previously stated she had accidently burned Christopher's hand when he ran into her lit cigarette. She then testified on cross-examination that indeed, it was the defendant who burned Christopher and he did it on purpose. The state then sought admission of the photographs to show absence of mistake or accident

under Rule 404(b). The court of appeals agreed. The CCA did not.

The CCA outlined an analytical framework for admission of extraneous offenses, which takes into account both relevancy and Rule 403 concerns: "For extraneous-offense evidence to be admissible under both Rule 404(b) and Rule 403, that evidence must satisfy the following two prong test: (1) Is the extraneous offense evidence relevant to a fact of consequence in the case apart from its tendency to prove conduct in conformity with character? and (2) Is the probative value of the evidence sufficiently strong so that it is not substantially outweighed by unfair prejudice? If the answer to both of these questions is "Yes," then the extraneous-offense evidence is admissible under both Rules 404(b) and 403. If the opponent invokes only Rule 404, then only the first prong must be satisfied. If both Rules 404 and 403 are invoked, then both prongs must be satisfied." *Id*. at 220.

The CCA then simply held that the photographs of the bruises on Autumn did nothing to prove the issue of whether the burn on Christopher happened accidentally or not or whether defendant or his wife did it. The CCA did, however, hold that to admit the photographs was harmless error.

VI. TRIAL – DEFENSES

***Hayes v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 652 (Apr. 27, 2005)** held that, for purposes of the self-defense issue of "first aggressor," the defendant need not have been implicated in a Rule 404(b) prior of the deceased for it to be admissible on that issue. In this case, the defendant wanted to have two witnesses testify that the decedent had threatened them with a gun on a prior occasion to the incident giving rise to the case. The trial court excluded this testimony. The defendant was, nonetheless, acquitted on the murder charge to which the defense applied. On appeal the court of appeals affirmed, also holding that this evidence was not admissible under Rule 404(b). The CCA disagreed. Citing *Tate v. State*, 981 S.W.2d 189, 193 (Tex. Crim. App. 1998), the court held that "where a defendant claims self-defense, the deceased's prior threats may be admitted, even though those threats were not directed at the defendant, 'as long as the proferred [threats] explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only." *Id*. at *6 (quoting *Torres v. State*, 71 S.W.3d 758, 761-62 (Tex. Crim. App. 2002)).

In ***Bowen v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 705 (May 4, 2005)**, the CCA held that the necessity defense is not unavailable to a person charged with resisting arrest. TEX. PENAL CODE ANN. § 9.22 provides for the necessity defense and states that the defense will be available unless specifically excluded by the legislature. There is nothing in TEX. PENAL CODE ANN. § 38.03 (Resisting Arrest) that evidences a legislative purpose to specifically exclude the defense of necessity. Therefore, it is available. There is language there and in TEX. PENAL CODE ANN. § 9.31 that appears to limit the defense of self-defense in resisting arrest cases, but, the CCA held, self-defense and necessity are separate defenses. Exclusion or limitation of one does not affect the availability of the other.

VII. TRIAL – EVIDENCE

***Carrasco v. State*, 154 S.W.3d 127 (Tex. Crim. App. 2005)** concerned the admissibility in a subsequent re-trial of a trial evidence stipulation from a previous trial resulting in a mistrial. In this murder case, the defense and state entered a stipulation admitting that the defendant stabbed and killed his wife and agreeing to the admissibility of certain items of evidence. The jury hung. At the re-trial, the state then re-offered the stipulation and the defense objected. The court re-admitted the stipulation. The court of appeals and the CCA affirmed, holding that whether such a stipulation is admitted at a subsequent trial is a matter within the court's discretion. To remedy this situation, ensure that stipulations expressly state that the stipulation applies to THIS trial only, regardless of whether a verdict is reached.

In ***Mauricio v. State*, 153 S.W.3d 389 (Tex. Crim. App. 2005)**, a drug case, a "jury view" was considered and approved. A police officer testified that he had done a search of his car before and after he transported the defendant and in his second search, he found some cocaine. At the end of his testimony, over a defense objection, the court allowed the state to take everyone outside so the police officer could give a demonstration of how he searches his car. The CCA did give the following rules for a "jury view": "A trial court, in exercising its discretion to grant or deny a request for a jury view, must consider the totality of the circumstances of the case, including, but not limited to, the timing of the request for the jury view, the difficulty and expense of arranging it, the importance of the information to be gained by it, the extent to which that information has been or could be secured from more convenient sources (e.g., photographs, videotapes,

maps, or diagrams), and the extent to which the place or object to be viewed may have changed in appearance since the controversy began. In addition, the trial court, in exercising its discretion to grant or deny a request for a jury view, must give opposing counsel an opportunity to be heard on the question. Once a trial court grants a request for a jury view, the court must implement appropriate procedural safeguards to ensure fundamental fairness to the accused as well as to protect the trial's truth-finding function. What procedural safeguards are appropriate in any given case will depend on the particular circumstances of that case." *Id.* at 393 & 393 n.3.

The trial court in this case "(1) attended and supervised the jury view; (2) instructed the jury before the view began that it was to remain quiet at the view, not conversing or asking questions; (3) gave the defendant and both counsel the opportunity to be present at the view; and (4) enlisted the attendance of a court reporter to record what transpired at the view," which the CCA held was sufficient. *Id*. at 393 n.3.

***Apolinar v. State*, 155 S.W.3d 184 (Tex. Crim. App. 2005)** addresses excited utterances. In this case the declarant, who was stabbed in the abdomen during a robbery, was either unconscious, under sedation, or generally incoherent for four days. When he snapped out of if, his daughter asked him what happened and he said "they robbed me again." *Id*. at 185. He was also excited because he got to stab them both during the incident, which matched the stab wounds that both assailants had. *See id.* The defense objected to the admissibility of the statements of the complainant's daughter as hearsay because they were made four days after the startling event. The CCA affirmed the COA, which affirmed the trial court's decision to admit the statements.

The CCA held that unconsciousness, while not a substitute for the continuity of stress of an event, is a factor to be considered in whether the declarant was still under the stress of the event. The declarant in this case was not unconscious the entire time, but was sedated or incoherent during the intervals during which he was not unconscious. The CCA observed that what matters is whether the declarant had an "opportunity to reflect." *Id.* at 189-190. In this case, due to the sedation and incoherence, the CCA held that he did not. The CCA then set out the factors to be considered: "(A) Length of the Delay and Circumstances; (B) Demeanor of the Declarant; (C) Whether the Statement Was Made in Response to a Question; and (D) Whether the Statement Is Self-Serving." *Id.* at 190-91.

VIII. TRIAL – MISCELLANEOUS ISSUES

***Flenteroy v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 519 (Apr. 6, 2005)** is a variance case. The offense was car-jacking (aggravated robbery). In this case, the indictment alleged a deadly weapon – a screwdriver. The state presented evidence that the defendant used either a knife, a screwdriver, or a hard metal-like object. The jury acquitted on the aggravated robbery charge, but convicted on the lesser-included offense of robbery. When the court submitted the punishment charge to the jury, it submitted, over defendant's objection of lack of notice, a deadly weapon issue allowing the jury to fill in a blank stating what the deadly weapon was that the defendant used. The jury found a deadly weapon and filled in the blank, identifying the deadly weapon as "a hard metal-like object." The court of appeals reversed, citing error in both submitting a second deadly weapon charge where the jury had already determined that no deadly weapon was used by acquitting on aggravated robbery and in allowing the jury to decide for itself what deadly weapon was used.

The CCA began its analysis with this language: "A couple of things in this case are clear. The state proved beyond a reasonable doubt that appellant used some type of a deadly weapon. And, the state timely informed appellant that it would seek a deadly weapon finding at trial. The issue, therefore, comes down to whether the variance between the named instrument in the indictment (a screwdriver) and the proof at trial (a hard metal-like object) was material." *Id.* at *14. The CCA simply held that it was not.

In ***Gray v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 456 (March 16, 2005)**, the trial court excused, over the defendant's objection, a prospective juror for purely economic reasons in violation of TEX. GOV'T CODE ANN. § 62.110(c). The court of appeals reversed the conviction, holding that this statutory error was constitutional in nature and because this statute had the purpose of ensuring a defendant's Sixth Amendment right to a fair cross-section of jurors, the error was "structural" and therefore not subject to harm analysis. The CCA disagreed, holding that even if this statute is meant to give effect to constitutional protections, it is still just a statute and violation of a statute can never be structural error.

In ***Nelson v. State*, 129 S.W.3d 108 (Tex. Crim. App. 2004)**, the CCA held that a defendant had waived any error in seating an absolutely disqualified juror by affirmatively stating that he had no objection to

the juror being seated once everyone learned of the absolute disqualification during voir dire. The key statute is TEX. CODE CRIM. PRO. art. 44.46, which requires a defendant to raise the disqualification issue before the verdict is entered where he knows about it at that time. The CCA held that were the defendant agrees to seat the disqualified juror, he has not "raised" the disqualification issue.

***Sanchez v. State,* 138 S.W.3d 324 (Tex. Crim. App. 2004)** addresses – in the context of motions to quash – the meaning of "before the date on which the trial on the merits commences" for purposes of TEX. CODE CRIM. PRO. art. 45.019(f). The CCA held, "Article 45.019(f) means what it says, that a party can move to quash a charging instrument at any time prior to the day on which the trial on the merits commences." *Id*. at 330. This does not mean on the day that the case is *set* for trial, but on the day that the trial actually begins. Thus, *the day before the actual trial* is timely, *the day of the actual trial* is not.

***Harris v. State,* 153 S.W.3d 394 (Tex. Crim. App. 2005)** deals with enhancements and punishment judgments. In this case, the trial court, on a drug case, initially pronounced sentence at 10 years ID-TDCJ. The next day, the court brought the defendant back and, after explaining that he had mistakenly overlooked the evidence of prior convictions, re-sentenced the defendant to 25 years. The CCA found that this was a violation of the defendant's Double Jeopardy rights and reversed. Importantly, the trial court in pronouncing the first sentence did not find that the enhancements were true and then pronounce the 10 year sentence. If it had done so, then 10 years would have been an illegal sentence. Therefore, 10 years was in the proper pronounced range of punishment and this was a valid sentence. Once a sentence is pronounced, it can only be corrected if it is unauthorized or revised via *nunc pro tunc* if the written judgment varies from the sentence pronounced. The 25 year sentence, however, was a brand new sentence and thus violated Double Jeopardy.

In ***Dang v. State,* 154 S.W.3d 616 (Tex. Crim. App. 2005)**, a non-death penalty capital murder case, the trial court limited closing arguments to 20 minutes per side and the defendant objected. The issues were complex and included voluntariness of a confession, two lesser-included offenses, and the law of parties and conspiracy. When the defendant's time ran, he again objected and requested three more minutes, which the judge denied. The court of appeals affirmed, holding that the trial court did not abuse its discretion. The CCA reversed.

The CCA first established that a defendant has a right to make a closing argument. *See* TEX. CODE CRIM. PRO. arts 36.07 & 36.08. Then the CCA observed that any restrictions on this right must be reasonable. The CCA then set out a framework for the appellate courts to use in determining whether time restrictions on closing argument are reasonable and thus not an abuse of discretion: "We conclude that reviewing courts should consider, but are not limited to considering, the following non-exclusive list of factors on a case-by-case basis: (1) the quantity of evidence; (2) the duration of the trial; (3) conflicts in the testimony; (4) the seriousness of the offense; (5) the complexity of the case; (6) whether counsel used the time allotted efficiently; and (7) whether counsel set out what issues were not discussed because of the time limitation." *Id.* at 621.

IX. JURY CHARGE – UNANIMITY

In ***Ngo v. State,* ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 457 (March 16, 2005)**, the defendant went into a bar and ordered a couple beers. He then attempted to pay for the beers with a credit card reflecting the name Hong Truong. The manager of the bar, who took the card, immediately knew there was a problem for two reasons: (1) "Hong" is a woman's name in Viet Nam; and (2) "Hong Trong" was the manager's ex-wife. The manager called his ex-wife, who told him her credit cards had been stolen. He then got the police. The defendant was arrested and indicted for thee separate offenses: stealing the credit cards (TEX. PENAL CODE ANN. § 32.31(b)(4)); knowingly receiving the stolen credit card (TEX. PENAL CODE ANN. § 32.31(b)(4)); and presenting the credit card with intent to defraud without the effective consent of its owner. TEX. PENAL CODE ANN. § 32.31(b)(1)(A). These three offenses were charged in three paragraphs of the same count in the indictment.

The jury charge charged these three offenses – in the disjunctive – in three different application paragraphs and requested a general verdict. The prosecutor then told the jury that not all 12 needed to agree on any one method of credit card abuse. On appeal, the state continued to contend that each of the paragraphs was merely a manner or means of committing credit card abuse. The court of appeals and the CCA disagreed. Each of these was a different statutory offense, not a manner or means of committing the general offense of credit card abuse. Thus, the jury had to unanimously agree on at least one of the paragraphs. There was no instruction to that effect,

thus, there was error.

The state argued that because the defense did not force the state to elect, the verdict did not have to be unanimous. The court held that the failure to request an election does not eliminate the defendant's right to a unanimous verdict. The court did point out that the issue was not charging the offenses in the disjunctive. The issue, rather, was failing to instruct the jury that it had to unanimously agree on at least one of the paragraphs. If the trial court had simply said, "If you unanimously find beyond a reasonable doubt ..." rather than "If you find beyond a reasonable doubt ..." then there would have been no error.

X. JURY CHARGE – TEX. CODE CRIM. PRO. Art. 38.23

In ***Hanks v. State*, 137 S.W.3d 668 (Tex. Crim. App. 2004)** the issue was whether a defendant is entitled to a factual sufficiency review of a jury's implied rejection of an Article 38.23 issue. Noting that an Art. 38.23 directs the jury not to consider evidence it finds was illegally seized, the CCA held that there is not factual sufficiency review available for such a determination. Factual sufficiency review is only available for state's proof as to elements of the offense, affirmative defenses and deadly weapon findings. What about a justification defense?

XI. JURY CHARGE – LESSER INCLUDED OFFENSES

***Campbell v. State*, 149 S.W.3d 149 (Tex. Crim. App. 2004)**, ***Irving v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 654 (Apr. 27, 2005)** and ***Hayward v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 266 (March 2, 2005)** all teach us that the question of whether a lesser-included offense instruction is required depends upon the indictment and proof at trial rather than the simple elements of the offense.

In *Campbell*, a drug case, the defendant was arrested on a warrant and a subsequent inventory search revealed 8.64 grams of meth in his backpack and was indicted for possession w/intent 4-200. At trial, the defendant testified and admitted to a small baggie of speed that the cops never found that was less than one gram. He then requested a lesser-included offense instruction for that baggie that the cops never found. The CCA held that this was a separate and distinct criminal act, and therefore not a lesser-included offense.

Irving was an aggravated assault case where it was alleged that the defendant beat the complainant with a baseball bat. The defendant, who testified in this case as well, denied striking the complainant with the bat, but did struggle with her. He then requested the lesser-included offense of simple assault. The CCA held that he was not entitled to the lesser-included offense because the conduct to which he admitted was not a lesser-included offense of the conduct alleged in the indictment – assault by striking with fists is not a lesser-included offense of assault by striking with a baseball bat.

Hayward was a murder case where the indictment alleged murder by stabbing. The defendant sought a lesser-included offense of assault by using fists. The CCA held she was not entitled, stating, "Because the conduct that the appellant alleged was not included within the conduct charged in the indictment, the trial court did not err in failing to give the lesser-included offense instruction." *Id.* at *9.

XII. JURY CHARGE – INSTRUCTING ON PROOF OF PRIOR CONVICTIONS

In ***Bluitt v. State*, 137 S.W.3d 51 (Tex. Crim. App. 2004)**, the state, during punishment, proved up actual criminal record evidence on the defendant – probations, convictions, and judgments deferring adjudication on several offenses. The jury charge on punishment contained no instruction requiring the jury to find that these were true beyond a reasonable doubt before considering them. The CCA held that this instruction does not apply to actual criminal record evidence. "The criminal record of the defendant is not grouped with extraneous offenses [which the jury cannot consider unless it first finds that they are true beyond a reasonable doubt]. ... If an offense has been subject to [prior court or jury scrutiny] and the burden of proof has been met, regardless of whether the judicial proceeding concluded with a final conviction, it is part of a defendant's criminal record, and Art. 37.03 § 3 does not require further proof of guilt beyond a reasonable doubt." *Id*. at **8.

Bluitt also held, once again, that where a defendant states affirmatively that he has no objection to the charge, this does not waive charging error, but will be treated the same as failing to object to the charge and thus triggering "egregious harm" review under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985).

***Guevara v. State*, 152 S.W.3d 45 (Tex. Crim. App. 2004)** made clear that jury charge error is examined in accordance with TEX. CODE CRIM. PRO. art. 36.19 and *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985), not TEX. R. APP. P. 44.2(b). There had apparently been some confusion on this after the CCA handed down Bagheri v. State, 119 S.W.3d 755 (Tex. Crim. App. 2003). However, the CCA pointed out in this case that Rule 44.2(b) was used in *Bagheri* because that was an issue of erroneous admission of evidence, not jury charge error. In this case, the issue was an erroneous theory in the jury charge, but the issue was jury charge error nonetheless. Therefore, Art. 36.19 and *Almanza* apply.

XIII. PRESERVING ERROR/SHOWING HARM

In ***Rich v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 566 (Apr. 13, 2005)**, an attempted capital murder case, the trial court denied a proper question the defense proposed to ask of the entire venire. The defendant appealed and the court of appeals held that defense had failed to show harm. The court of appeals observed that to show harm in this case, the defendant would have had to (1) exhaust all peremptory challenges; (2) request additional peremptory challenges; (3) have that request denied; and (4) identify an objectionable person on the jury that the defendant would have struck if he had an additional peremptory challenge. Since the defendant did not request additional peremptory challenges, he could not show harm.

The CCA disagreed with this analysis. The CCA held that when the voir dire is a panel voir dire and the denied question is one for the entire panel, then the harm analysis is simply the rule for non-constitutional errors under TEX. R. APP. PRO. 44.2(b): whether the error had a substantial and injurious effect or influence in determining the jury's verdict.

***Young v. State*, 137 S.W.3d 65 (Tex. Crim. App. 2004)** dealt with preserving error/showing harm through objections at trial. Traditionally, the defense has had to (1) object; (2) request an instruction to disregard; and (3) request a mistrial. In this case, the defense just asked for a mistrial. The issue was whether that preserves error. The CCA held that this will preserve error, however, "when a party's first action is to move for mistrial, ... the scope of appellate review is limited to the question whether the trial court erred in not taking the most serious action of ending the trial; in other words, an even that could have been prevented by timely objection or cured by instruction to the jury will not lead an appellate court to reverse a judgment on an appeal by the party who did not request these lesser remedies in the trial court. Limited as this scope of appellate review may be, such an appellate review is available to such a party." *Id.* at 70.

***Heidelberg v. State*, 144 S.W.3d 535 (Tex. Crim. App. 2004)** is a preservation of error case dealing with post-arrest silence. The defendant testified at trial. During the trial, the following series of colloquies unfolded:

[STATE (to appellant)]: Mr. Heidelberg, you certainly knew that Detective Fitzgerald was trying to get a hold of you [to] talk to you, didn't you?
[DEFENSE COUNSEL]: Objection, Your Honor. This goes to the Fifth Amendment right, my client's Fifth Amendment. He doesn't have to talk to anybody.
[COURT]: Be overruled.

* * *

[STATE]: Did you ever ask to talk to the detective about this case once you knew that the charges were there?
[APPELLANT]: I didn't know about any charges until July of this year.
[STATE]: And in July of this year did you ask to talk to the detective in the case?
[APPELLANT]: Well, I was already incarcerated. So --
[STATE]: Well, did you ever ask anyone --
[DEFENSE COUNSEL]: Objection, Your Honor. This goes to the Fifth Amendment.
[COURT]: Overruled. Answer the question.

* * *

[STATE (to Appellant)]: You certainly could have talked with the investigating officer on this case and explained to him, in your opinion, why [the complainant] made this up, right?
[DEFENSE COUNSEL]: Objection, your Honor. My client -- all of this line of questioning goes to the Fifth Amendment. My client does not have to speak with anyone about it.
[COURT]: Be overruled.

* * *

[STATE]: Were you able to make contact with the defendant?
[OFFICER FITZGERALD]: In a way.
[DEFENSE COUNSEL]: Objection, Your Honor. I would like to renew my objection as to my client's Fifth Amendment right.
[COURT]: Be Overruled.
[DEFENSE COUNSEL]: May I have a standing objection throughout so I'm not have to-

[COURT]: You may.

* * *

[STATE]: Once the defendant was placed under arrest, had he wanted to talk to you, would you have sat down and spoken with him?
[FITZGERALD]: Oh, definitely; yes, ma'am.

* * *

[STATE (during closing argument)]: Do you really believe he wanted to wait five months from the date of arrest, he saved all that information to come and tell you? Of course not, that's garbage.
[DEFENSE COUNSEL]: Your Honor, I object again. And may I have a standing objection to any reference to the Fifth Amendment?
[COURT]: That will be overruled.

The defendant appealed, asserting that the court erred in allowing the prosecutor to cross-examine on the defendant's post arrest silence. The state argued that error had not been preserved because his objections were directed only at the Fifth Amendment to the United States Constitution and "[t]he Fifth Amendment of the federal constitution protects post-arrest silence made only after *Miranda* warnings have been given." *Id.* at 537. "Article I, section 10 of the Texas Constitution, however, protects a defendant's post-arrest silence even before such warnings have been administered." *Id.* (citing *Sanchez v. State*, 707 S.W.2d 575, 582 (Tex. Crim. App. 1986).

Citing the general proposition that "presenting a claim based solely on federal grounds will not suffice to put the court on notice to claims based on state grounds, unless the state ground is apparent from the context," the CCA held that this objection did not put the trial court on notice that appellant was complaining about a comment on post-*arrest* silence versus post-*Miranda* silence. Therefore, the error was not preserved on state constitution grounds. But, as the court pointed out, "An objection referring specifically to the Texas Constitution or the *Sanchez* case, however, pointing out that this Court has barred the use of post-arrest, pre-*Miranda* statements to impeach a testifying defendant, would be an entirely different matter." *Id.* at 537. Indeed.

In ***Keeter v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 521 (Apr. 6, 2005)**, the issue was whether the defendant preserved a *Brady* claim for review. This was an indecency with a child case. The defense found out after trial that the complainant's father and step-mother had told the prosecutor that they did not believe the complainant and that the prosecutor did not disclose this to the defense. The complainant ultimately recanted her testimony.

The defense filed a motion for new trial which contained as one of it's claims: "Evidence establishing the defendant's innocence was withheld by a material prosecution witness." *Id*. at *2. The motion, however, did not cite to *Brady v. Maryland*, 373 U.S. 83 (1963), nor did the order from the trial court denying the motion for new trial, nor did the submissions from either side during the hearing or after the hearing. The defendant appealed the denial of the motion for new trial, however, on the ground that his *Brady* claim had been erroneously denied. The CCA held that the Brady claim was not preserved for review.

The CCA had this to say: "We have said that we should avoid splitting hairs when determining whether a claim has been procedurally defaulted. 'All a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.' We should consider the context when we determine whether a party has preserved a complaint on appeal." *Id.* at *10.

In ***Franklin v. State*, 138 S.W.3d 351 (Tex. Crim. App. 2004)** the issue was whether a constitutional harm analysis should apply to the trial court's denial of a mistrial after it was revealed that a juror knew the complainant in a sexual abuse case. The legal grounds were the Sixth Amendment's right to a fair trial and an impartial jury. The juror had not disclosed to anyone that she knew any of the participants in the trial, but when the complainant was called to the stand, the juror let the judge know that she did know the complainant. In fact, the juror was the assistant leader of the complainant's Girl Scout troop and her daughter was a friend of the complainant. The trial court asked the juror if she could be fair and impartial and she replied that she could. The court then denied the defense's request to question the juror and also denied a defense motion for mistrial. The court of appeals held that defendant had been denied his right to a fair trial and impartial jury and applied the standard for constitutional harm found at TEX. R. APP. P. 44.2(a) and reversed the conviction. The CCA affirmed the court of appeals' use of the constitutional harm standard.

***Andrews v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 500 (March 23, 2005)** is one of the rare cases where an ineffective assistance of counsel claim is found on appeal because "there could be no legitimate trial strategy" for the defense lawyer failing to do something – in this case, failing to object to an

improper argument. This was another child sexual abuse case. There were four counts in the indictment – three sexual assaults and one indecency with a child. The prosecutor had filed a motion to stack any sentences even before the trial began. The defense lawyer had been served with the motion. The jury found the defendant guilty of all four counts. At punishment, the defense attorney did not request an instruction to the jury explaining that the counts could be stacked. During arguments, the same prosecutor who just six days before had filed the prospective motion to stack sentences got up and made the following argument: "So you have to come up with an amount. You've got four charges. They don't add up, by the way. You give him 20 years in each case, it's still just 20 years. It's still not 80. You can give different amounts if you want. You can give 20, 10, 10, five, it's still just 20. And you can forget about the fine. We're talking about keeping him off the streets, keeping him away from other people, for other victims, for the future and for what he did here." Id. at *3.

The jury sentenced the defendant to 20 years on each of the sexual assaults and 18 years on the indecency with a child case. In front of defense counsel, the prosecutor then immediately asked the judge to stack and the judge did – giving a total of 78 years. The defendant appealed on the basis of ineffective assistance of counsel for his trial attorney not objecting to the prosecutor's misstatement of the law. The court of appeals affirmed.

The CCA, in an admittedly rare turn, determined that there could be no reasonable strategy decision behind this omission and reversed on the appellate record.

***Goodspeed v. State,* ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 520 (Apr. 6, 2005)**, on the other hand, presents the now-familiar manner in which the appellate courts for the last few years have been dealing with ineffective assistance of counsel claims brought on direct appeal. In *Goodspeed*, the defense lawyer failed to ask any questions during voir dire and then, when exercising his peremptory challenges, struck two jurors who had already been excused by the trial court. The court of appeals held that there could be no reasonable trial strategy behind these omissions. The CCA disagreed, reversed the court of appeals, and reinstated the conviction. Relying on cases from Montana, Tennessee, Pennsylvania, California and the Sixth Circuit, Chief Judge Keller, writing for the majority, determined that there could have been any number of sound legal strategies for essentially doing nothing during voir dire. Thus, the record was insufficient under *Strickland v. Washington*, 466 U.S. 668 (1984) to show that counsel's performance was deficient.

XIV. APPELLATE REVIEW ON PLEAS OF GUILTY – JURISDICTIONAL ERRORS

***Griffin v. State,* 145 S.W.3d 645 (Tex. Crim. App. 2004)** puts to rest the issue of appealing a jurisdictional issue under Tex. R. App. Pro. 25.2(a)(2). *Flowers v. State*, 935 S.W.2d 131, 133-34 (Tex. Crim. App. 1996) had stated that voluntariness of the plea and jurisdictional issues could be appealed after a plea of guilty. That was before Rule 25.2. After Rule 25.2, the CCA ruled in *Cooper v. State*, 45 S.W.3d 77, 81-83 (Tex. Crim. App. 2001) that voluntariness of the plea could no longer be appealed via direct appeal. The CCA in this case held that a jurisdictional defect may still be appealed, but not in a manner outside the statutory authority to do so, which is found at Rule 25.2(a) and which only allows a defendant to appeal after an agreed plea where the punishment does not exceed the recommendation either (1) motions ruled upon or (2) with the court's permission. As the defendant in this case had neither, his appeal was dismissed. Both voluntariness and jurisdictional defects may be litigated via writ of habeas corpus.

XV. CONSTITUTIONAL ISSUES – DOUBLE JEOPARDY (MULTIPLE PUNISHMENTS)

In ***Patterson v. State,* 152 S.W.3d 88 (Tex. Crim. App. 2004)**, the defendant committed two aggravated sexual assaults by penetrating the complainant's anus in two incidents on the same evening separated by a short period of time. The defendant was indicted on two counts of aggravated sexual assault, one count of indecency by contact (also of the anus) and one count of exposure. The indecency by contact and exposure allegations, however, were not separate incidents but were a part of the aggravated sexual assault offenses (e.g., the defendant contacted his genitals to the complainant's anus in the process of penetrating the complainant's anus and exposed himself in the process of committing the offense of aggravated sexual assault. This was not the indictment allegation, but how the proof developed at trial). The court of appeals had already held that the contact count was barred by the Double Jeopardy Clause's prohibition against multiple punishments. The CCA held that the exposure count was as well: "The court of appeals affirmed the two convictions for aggravated sexual

assault, then correctly found that penetration required contact and reversed that conviction. ... The record in this case does not show an occasion during the assaults when the exposure was a separate offense. Under the facts in these incidents, exposure was incident to and subsumed by the aggravated sexual assault." *Id.* at 92.

XVI. CONSTITUTIONAL ISSUES – WAIVER OF 5TH AMENDMENT

***Cross v. State*, 144 S.W.3d 521 (Tex. Crim. App. 2004)** is the CCA's latest pronouncement on *Edwards v. Arizona*, 451 U.S. 477 (1981) waiver of counsel. *Edwards* holds that once a person invokes his right to counsel, all interrogation must cease unless he initiates further communication. In this case, during his initial interrogation, defendant invoked his right to counsel and interrogation ceased. He later initiated communications with a different police officer and made a written statement. Subsequent to that, the same police officer came to him and initiated communication, which resulted in yet another statement. Defendant attempted to suppress the second statement. The CCA held that once a defendant voluntarily initiates communication with the police after he has asserted his rights under *Edwards*, his rights under *Edwards* are waived for all purposes and the police may then approach him even if he does not initiate the subsequent communications.

XVII. CONSTITUTIONAL ISSUES – 6TH AMENDMENT RIGHT TO EFFECTIVE COUNSEL

***Ex Parte McFarland*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 740 (May 18, 2005)** is another sleeping-lawyer case. Habeas relief denied because co-counsel was present and shouldered the load. Lesson: if you are inclined to sleep during a death penalty trial, make sure your co-counsel drinks plenty of coffee.

***Johnson v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 818 (May 25, 2005)** is an ineffective assistance of counsel case where the allegation was that the defense attorney forced the defendant to not testify. The CCA held that the proper standard for assessing counsel's performance and assessing any harm in a "preventing the defendant from testifying" claim is the basic analytical framework of *Strickland v. Washington*, 466 U.S. 668 (1984). When deficient conduct is found, that error is not structural. Prejudice must be shown.

XVIII. CONSTITUTIONAL ISSUES – FAIR TRIAL (TESTIFYING LAWYERS)

In ***Flores v. State*, 155 S.W.3d 144 (Tex. Crim. App. 2004)**, the defense attorney cross-examined a witness in a manner that the prosecutor believed created a false impression with the jury. The prosecutor's remedy: call the defense lawyer to the stand (in front of the jury) and clear it up. Defense counsel objected, but the trial court ordered him to testify. Defendant appealed, claiming denial of fair trial and the court of appeals affirmed his conviction. The CCA reversed. While the CCA did not outright prohibit calling the defense attorney to the stand, the court did fashion some pretty tough rules: "We hold that, when there is a compelling need to call a defense attorney as a witness in the case, the trial court must take all appropriate ameliorative measures to prevent harm.

Appropriate ameliorative measures include, but are not limited to: (1) substitution of another attorney to replace defense counsel once it becomes apparent that the testimony is required; and (2) appointment of an additional attorney to represent the defendant during the questioning of defense counsel if there is a compelling need for counsel to testify. ... The trial court must also be confident that defense counsel's credibility before the jury will not be impugned, tarnished, or discredited in any way; the jury will not be confused by the testimony, the subsequent argument relating to the testimony, or the break in the proceedings; and the testimony will not involve, relate to or touch upon any privileged communication." *Id.* at 150. Under the "compelling need" test, "the state must show that: (1) there is no feasible alternative for obtaining and presenting the information to the jury except through defense counsel's testimony; and (2) the testimony is essential, not merely relevant, to the state's case." *Id.* at 148. If these requirements are not met, essentially, both error and harm are shown.

The CCA notes near the end of the opinion, "in accordance with our holding today, the state may indeed call defense counsel to the stand, and the court may require the lawyer to testify, but the state will do so at its own peril." *Id.* at 151.

In ***Ramon v. State*, ___ S.W.3d ___, 2004 Tex. Crim. App. LEXIS 2144 (Dec. 15, 2004)**, the same prosecutor who had called the defense lawyer to the stand in *Flores v. State*, 155 S.W.3d 144 (Tex. Crim. App. 2004) for creating a "false impression" called

herself to the stand because, again, the defense lawyer had created a "false impression." The defense was not allowed to cross-examine the prosecutor, and the court ultimately decided that the testimony should not have come before the jury and struck the testimony and instructed the jury to disregard it. The court denied the defense request for a mistrial, however. The defendant appealed, asserting denial of a fair trial. In contrast to *Flores*, however, not only did the CCA affirm the conviction, but the standard for harm when the prosecutor calls herself (as opposed to the defense lawyer) to the stand will be the standard prosecutorial misconduct analysis from *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998), which is generally used for improper jury arguments. Under *Mosley*, three factors are considered: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *See id.* at *3.

Note that while this case was designated for publication last December, it has not yet been released for publication.

XIX. SEARCH WARRANTS – STANDARD OF REVIEW

***Swearingen v. State*, 143 S.W.3d 808 (Tex. Crim. App. 2004)** addressed the appropriate standard for an appellate court's reviewing a magistrate's determination that probable cause existed to issue a search warrant. The court held that the review of searches is keyed to whether a warrant was obtained. If it is a warrantless search, then the standard of review is *de novo*. *See id.* at 811. If a warrant was obtained, then a deferential standard of review is to be applied. *See id.*

XX. DRIVING WHILE INTOXICATED CASES

***Getts v. State*, 155 S.W.3d 153 (Tex. Crim. App. 2005)** addressed the time limitations between enhancements for DWI cases. Getts had three DWIs: the charged offense was 2002, and the enhancements were from 1997 and 1984. The court held that based on the 2001 amendments to the DWI statutes, these enhancements could not elevate his 2002 DWI to a third degree felony. The court set out the analytical framework for DWI enhancements under TEX. PENAL CODE ANN. § 49.09(e). *See id.* at 155-57. The court held the following as pertained to Getts:

"Under the statute, all three conditions must be met for the conviction to be unavailable for enhancement. Otherwise, the conviction is available for enhancement. In this case, all three conditions are met: (1) The 1984 conviction is a final conviction. (2) The 2002 offense was committed more than 10 years after April 29, 1984 [the date of the 1984 conviction]. (3) Getts was not convicted of another alcohol-related offense within 10 years of April 29, 1984." *Id.* at 156-57. Thus, the 1984 conviction could not be used and Getts' 2002 DWI could not be enhanced to a felony.

In ***State v. Mechler*, 153 S.W.3d 435 (Tex. Crim. App. 2005)**, on the basis that the breath test was administered 1.5 hours after arrest, the trial court had suppressed not only evidence of retrograde extrapolation but the entire breath test under *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001) and TEX. R. EVID. 403. The CCA held that it was error to suppress the breath test itself under *Mata* (as opposed to extrapolation evidence) and, going through a routine Rule 403 analysis, that it was error to suppress the breath test under Rule 403 as well. *See id.* at 438-42.

***Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004)** decided the issue of fundamental TEX. R. EVID. 401 relevancy of a breath test where extrapolation testimony has been suppressed. The CCA held that absent retrograde extrapolation, a failed breath test still meets Rule 401's requirement that the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*. at 96 (quoting TEX. R. EVID. 401).

In ***Bryant v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 517 (April 6, 2005)**, another felony DWI case, the defendant had made a stipulation to his two priors pursuant to *Tamez v. State*, 11 S.W.3d 198 (Tex. Crim. App. 2000). The state then neglected to get the stipulation admitted into evidence. Defendant appealed on legal sufficiency grounds. The CCA held that the stipulation was a judicial admission that relieved the state from the requirement of proving the enhancements. *See id.* at **12-13.

XXI. DEADLY WEAPONS

***Robertson v. State*, ___ S.W.3d ___, 2005 Tex. Crim. App. LEXIS 739 (May 18, 2005)**, a drug case, addressed the issue of whether a switchblade knife was a deadly weapon "by design." The definition of "deadly weapon" found at TEX. PENAL CODE ANN. § 1.07 speaks of two different types of deadly weapons: (1) weapons

which are deadly by design (e.g., a firearm) and (2) weapons which are deadly because of the manner of their use or intended use. There was no evidence in this case that the switchblade was used at all, let alone in a manner making it a deadly weapon, so the only thing that could have sustained the jury's deadly weapon finding would be to find that this switchblade was a deadly weapon by design. While the CCA stopped short of determining that in all cases a switchblade is a deadly weapon "by design," the court held that in this case, this particular switchblade, was.

***Coleman v. State*, 145 S.W.3d 649 (Tex. Crim. App. 2004)**, another drug case, explored the distinction between "use" and "exhibit" a deadly weapon. In this case, the deadly weapons were guns and they were located near the drugs, which were in the defendant's home. The defendant was not in the home when the drugs and weapons were found. He had been stopped in his driveway and detained and handcuffed and placed in a police car prior to the search. The issue was whether, even though the defendant was not around the drugs or weapons, did he nonetheless "use" the deadly weapons for purposes of an affirmative finding. The CCA held that he did. "Although [he] was handcuffed rather than present in the house ... we do not find the defendant's presence to be necessary. ... The real question is whether the weapons are found to have facilitated [the defendant's] possession and intended distribution of the drugs." *Id.* at 654-55. The CCA held that it is the proximity of the weapon to the drugs, rather than the proximity of the defendant to the weapon, that is important.