TEXAS COURT OF CRIMINAL APPEALS UPDATE

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I. INTRODUCTION

In researching this article, the author reviewed all Court of Criminal Appeals published opinions covering the period from roughly May 1, 2005 through June 1, 2006. Seventy-five of those opinions appear in this paper. 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. PRETRIAL MOTIONS

A motion for new trial is not required to preserve error where the trial court denies a proper motion for continuance based on an unavailable witness.

***Harrison v. State*, ___ S.W.3d ___, No. PD-1151-04, 2005 Tex. Crim. App. LEXIS 2119 (Dec. 14, 2005).**

In this case, the defense filed a motion for continuance claiming that a material witness was unavailable at the time of trial. *Id*. at *12. That motion was denied. The court of appeals held that because the defendant did not request a hearing on his motion for new trial, he did not preserve error on the denied motion for continuance. The decision was based in part on *Benoit v. State*, 561 S.W.2d 810 (Tex. Crim. App. 1977). The CCA "expressly disavow[ed]" the language in *Benoit* requiring a motion for new trial to preserve error on a denied motion for continuance based upon an unavailable witness. *Id.* at *11. Rather, the defense, to preserve error, must timely file a sufficient motion for continuance that complies with the Code of Criminal Procedure Arts. 29.03, et seq.

A trial court does not have the general power to dismiss a prosecution without the consent of the state.

***State v. Plambeck*, 182 S.W.3d 365 (Tex. Crim. App. 2005).**

The state allowed a Texas Ranger to question witnesses in front of the grand jury and the state's first indictments were based on this testimony. Those indictments were dismissed by the state. The second indictments were based on the same testimony being read back to the grand jurors. Those indictments were dismissed by the state. The third indictments were not based on that tainted testimony, but contained tolling paragraphs that could have only been supported by those earlier flawed indictments. This time, in response to a defense motion, the trial court dismissed them as being time-barred. While the trial court dismissed the indictments "without prejudice," the effect was a dismissal with prejudice because the prosecutions were time-barred. The CCA here reiterated that the trial court has no general power to dismiss prosecutions without the state's consent. It is the court of appeals' job to determine such matters after a trial. *Id* at 370-71.

Indictment or information with tolling provision cannot be "deficient on its face." Defendant must raise limitations defense by pre-trial motion or waive it.

***Ex Parte Jason Christopher Smith*, 178 S.W.3d 797 (Tex. Crim. App. 2005).**

"When a charging instrument shows on its face that prosecution is barred by the statute of limitations and that pleading is not reparable, a defendant may seek relief from a time-barred prosecution by a pretrial petition for a writ of habeas corpus. If, on the other hand, the information or indictment does contain a tolling allegation, any errors, omissions, or defects in that tolling language must be raised in a pretrial motion to dismiss or they are waived. These reparable defects cannot be raised by a pretrial petition for writ of habeas corpus and are not subject to interlocutory appeal." *Id.* at 799. Where there is no tolling allegation, a charging instrument that shows on its face an irreparable violation of the statute of limitations presents a jurisdictional challenge to the court. Where there is a tolling allegation, no matter how flawed or weak, it must be confronted by a pre-trial motion, as are other notice defects, or that error is waived. *Id.* at 803.

III. PLEAS OF GUILTY

Waiver of a PSI at time of plea of guilty carries over to subsequent revocation.

***Griffith v. State*, 166 S.W.3d 261 (Tex. Crim. App. 2005).**

Some time after the defendant had been placed on deferred adjudication for unlawfully carrying a weapon on prohibited premises, the state filed a motion to proceed to adjudication. In connection with the original plea, the defendant had waived his right to a pre-sentence investigation report. The trial court proceeded to adjudication, but before sentencing, the defense requested a PSI and that request was denied. The CCA held that "based on the plain meaning of Art. 42.12 sec. 9, the original waiver carries forward to a subsequent punishment hearing. The reason is that the initial plea and the later adjudication and punishment hearing are really one single proceeding. *Id.* at 265.

No Anders briefs in appeals of plea bargained cases?

***Chavez v. State*, 183 S.W.3d 675 (Tex. Crim. App. 2006).**

The defendant did an open guilty plea to the court, which received his plea of guilty and then, after a PSI was prepared, sentenced him to 30 years. The defendant appealed, but did not have a certification as required by TEX. R. APP. PRO. 25.2(a)(2) that he had received permission from the trial court to appeal a plea bargained case. Counsel for the defendant filed a brief complying with *Anders v. California*, 386 U.S. 738 (1967), certifying the appeal as frivolous. The CCA held that the court of appeals does not even have the power to consider an *Anders* brief. An *Anders* review is broader than that allowed under Rule 25.2 and actually contemplates a thorough, unrestricted review with the defendant acting *pro se* if necessary. Thus, the court of appeals cannot consider such a brief to the extent that it is broader than the limited review provided for in Rule 25.2. The court of appeals initially only has jurisdiction to determine whether the appeal is allowed under Rule 25.2(a)(2). If the appeal is not allowed, then the court of appeals only has the power to dismiss without any inquiry into possibly meritorious claims, such as contemplated by an *Anders* brief.

Relationship between TEX. R. APP. PRO. 25.2 and TEX. CODE CRIM. PRO. Art. 42.12 § 5(b).

***Hargesheimer v. State*, 182 S.W.3d 906 (Tex. Crim. App. 2006).**

Both 25.2 and 42.12 § 5(b) will restrict appeals over the course of a deferred adjudicated probation. This case sets out the interplay between the two rules: "In sum, in a plea-bargain case for deferred adjudication ... the plea bargain is complete at the time the defendant enters his plea of guilty in exchange for deferred ... . Rule 25.2(a)(2) will restrict appeal only when the defendant appeals his placement on deferred adjudication ... pursuant to the original plea. Under this circumstance, the trial judge certifying the defendant's right to appeal may designate the case on the certification form as 'a plea-bargain case, and the defendant has NO right of appeal.' It is important to note, however, that if the defendant filed written motions that were ruled on before his placement on deferred adjudication community supervision pursuant to Rule 25.2(a)(2)(A), or obtained the permission of the trial court for the appeal of his placement on deferred adjudication ... pursuant to Rule 25.2(a)(2)(B), he still has the right to appeal. On the other hand, when the defendant appeals from the proceeding on the motion to adjudicate guilt, Rule 25.2(a)(2) will not restrict appeal, but Article 42.12 § 5(b) will continue to prohibit the appeal of the trial court's decision to adjudicate guilt. Under this circumstance, the trial judge must check the box on the certification form indicating the case 'is not a plea-bargain case, and the defendant has a right to appeal.'" *Id.* at 913.

In this case, the defendant filed a general notice of appeal after he was revoked on his deferred and the court of appeals denied appellant's general notice of appeal based on the trial court's certification of no right to appeal at the time of the original plea. The CCA held that the appellant has the right to file a general notice of appeal after revocation, but that the court of appeals should consider his appeal subject to Art. 42.12 § 5(b) to determine whether he is appealing the decision to proceed to adjudication.

Art. 42.12 § 5(b) does not preclude a collateral attack, and a claim that adjudication of guilt is based solely on perjured testimony is cognizable in a writ of habeas corpus.

***Ex Parte Carmona*, 185 S.W.3d 492 (Tex. Crim. App. 2006).**

The CCA essentially determines that the plain language of Art. 42.12 § 5(b), which states that no appeal may be taken from a trial court's decision to proceed to adjudicate guilt, does not prohibit a collateral attack on that decision through writ of habeas corpus. In this case, the state put on three witnesses in its successful attempt to get the defendant revoked. All three of these witnesses committed perjury. The CCA held that this was a cognizable claim and granted relief, finding that his community supervision was revoked without due process of law.

IV. TRIAL – PLEADING & PROOF

Different ranges of punishments under TEX. CODE CRIM. PRO. Art. 62.10(b)(3) (failure to register as a sex offender) are elements, not punishment enhancements.

***Juarez v. State*, ___ S.W.3d ___, No. PD-0743-05, 2006 Tex. Crim. App. LEXIS 578 (March 22, 2006).**

Defendant was charged with failing to register as a sex offender. The indictment did not specify the exact provision he had to register under that thus which range of punishment applied to him. The ranges under that statute go from a state jail felony to a second degree felony. He had to register every ninety days, so he was subject to second degree felony punishment. The jury found him guilty generally of violating the statute (without a specific finding of which reporting requirement) and the judge sentenced him to 15 years. At trial, the evidence supported the 90 day requirement, but there was no finding on this and it was not in the jury charge. The CCA found that *Apprendi v. New Jersey*,

530 U.S. 466 (2000) was not violated because this was not a sentencing enhancement, but an element of the offense. Basically, because the evidence at trial supported the 90 day requirement, the CCA just glossed over the fact that the jury never actually found that beyond a reasonable doubt.

In a trial on evading arrest with a vehicle and prior evading in a vehicle conviction (which elevates the offense to a third degree felony), the prior conviction is an element of the offense which must be proved at the guilt stage.

***Calton v. State,* 176 S.W.3d 231 (Tex. Crim. App. 2005).**

In this case, it was the state that wanted this element to be a sentencing enhancement. CCA held otherwise. Court of appeals' opinion reversing Calton's 50 year sentence and reforming his judgment to reflect a conviction for a state jail felony was affirmed. In this case, the state did not attempt to introduce any evidence of the prior during the guilt phase, even though the prior was pled in the indictment.

V. TRIAL – PROCEDURE

Trial court may infer a dispute necessary so that testimony may be read to a deliberating jury pursuant to TEX. CODE CRIM. PRO. Art. 36.28.

***Howell v. State,* 175 S.W.3d 786 (Tex. Crim. App. 2005).**

In this DWI case, the jury twice requested certain testimony to be read back to them during deliberations. In the first response the trial court told the jury to "be more specific." In the second response, the trial court responded by asking them, "Are you in disagreement as to this testimony?" To this note, the jurors responded that one or more individuals did not clearly hear the witness. Over a defense objection, the court then sent the testimony back to the jury. The CCA held that on these facts the trial court could reasonably infer a dispute and thus Art. 36.28 was satisfied. A bare request for testimony, however, is not sufficient for a read-back.

Standifer decisions.

***Sanchez v. State,* 165 S.W.3d 707 (Tex. Crim. App. 2005).**

***Wingo v. State,* ___ S.W.3d ___, No. PD-0615-04, 2006 Tex. Crim. App. LEXIS 362 (Feb. 15, 2006).**

Lee v. State, ___ S.W.3d ___, No. PD-0181-05, 2006 Tex. Crim. App. LEXIS 1005 (May 24, 2006).

In *Sanchez*, the state asked questions to an entire jury panel, over defense objections, which were later determined to be improper commitment questions and thus violated *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001). The issue in this case was harm review. The court of appeals used the four part preservation requirement found in *Anson v. State*, 959 S.W.2d 203 (Tex. Crim. App. 2007), among others. That requirement for preserving error when the trial court denies defense questioning of a specific juror or denies defense challenges for cause dictates that the defense exhaust all peremptory challenges, request more challenges until denied and then identify an objectionable juror on the jury. The CCA held that instead, Rule 44.2(b) is the proper harm analysis where the state is erroneously allowed to ask improper commitment questions of the entire panel.

In *Wingo*, the CCA held that "Do you believe there's anything wrong with putting false information in a police report?" is not an improper commitment question.

In *Lee*, the CCA clarified the "one witness" rule. If the question asks whether a juror would need more than one witness to convict, it is an improper commitment question and violates *Standifer*. If the juror is asked "whether, assuming that there was one witness that gave testimony addressing all elements of the state's case and that you believed that testimony beyond a reasonable doubt, you would nonetheless acquit because you only heard from one witness," that is a proper question for a challenge for cause on holding the state to a higher burden than "beyond a reasonable doubt." The CCA also states that each juror does not need to be asked the entire question, so long as at least one is asked and the others understand that the same question applies to them when a subsequent shorthand version is used.

Mutually antagonistic defenses without more does not require a severance of defendants.

***Qualley v. State,* ___ S.W.3d ___, No. PD-1976-04, 2006 Tex. Crim. App. LEXIS 1007 (May 24, 2006).**

Two defendants (Qualley and Moore) were joined for trial for the death of Qualley's child. Moore was her live-in boyfriend. The charges against both defendants were capital murder by commission (both). In addition, Qualley was charged in two other counts with capital murder by omission by failing to protect the child from Moore and injury to a child by omission for the same reason. Both defendants moved for a severance. Moore contended that Qualley had an admissible conviction that would be prejudicial to him during a trial. Moore also claimed that Qualley had made statements incriminating to Moore and introduction of those would violate his right to confrontation. Moore also claimed that a joint

trial would be prejudicial because he and Qualley had antagonistic defenses. Qualley's motion for severance claimed only antagonistic defenses.

During trial, their defenses truly were antagonistic. Moore, in fact, testified and put the whole thing off on Qualley. In the end, both were convicted of capital murder. The court of appeals held that the two's defenses were mutually antagonistic and reversed both convictions.

After a fairly lengthy analysis, the CCA held: "To establish prejudice, the defendant must show a serious risk that a specific trial right would be compromised by a joint trial, or that a joint trial would prevent the jury from making a reliable judgment about guilt or innocence, and that the problem could not be adequately addressed by lesser curative measures, such as a limiting instruction." *Id.* at *32. Presumably, unless antagonistic defenses reach this level, then this fact will never be "prejudicial" for purposes of a severance.

Two other points are worth noting. First, "[t]o be timely, a motion for severance must be made before trial if the factual basis for seeking severance was known prior to trial. Otherwise, the motion must be made 'at the first opportunity or as soon as the grounds for [severance] become apparent or should have become apparent. Implicit in the requirement that the motion be timely is a requirement that the underlying grounds be alleged in a timely fashion as well. A new ground is in essence a new motion, and its timeliness should be viewed accordingly." *Id.* at *37. This is in keeping with the court's new "party responsibility" theory of error preservation. *See* Section XIV, *infra*.

Second, the proper party to be severed is the one causing the prejudice, not the one suffering the prejudice. Only the one suffering the prejudice has a complaint on appeal.

VI. TRIAL – EVIDENCE

Repeated commission of the same offense is not a "plan" for purposes of TEX. R. EVID. 404(b).

***Daggett v. State*, ___ S.W.3d ___, No. PD-0503-03, 2000 Tex. Crim. App. LEXIS 2127 (Dec. 14, 2005).**

During the defendant's trial on a sex case, the trial court allowed an extraneous sex offense as substantive evidence of the defendant's guilt on the charged offense under the theory that it was part of a "common scheme or plan." The court of appeals affirmed. The CCA reversed. "When used properly, the 'plan' exception allows admission of evidence to show steps taken by the defendant in preparation for the charged offense. For example, if the defendant steals a car on Monday, buys a machine gun on Tuesday, pastes together a robbery note on Wednesday, parks illegally in front of the Wells Fargo building on Thursday while casing out the bank, and then robs the bank on Friday using the machine gun and driving off in the stolen car, all of the extraneous acts are relevant to prove each step of the defendant's ultimate plan to rob the bank." *This is to be distinguished from repeated commission of the same offense, which is often mistaken for a "plan."* This is not generally allowed under Rule 404(b). An exception to this general prohibition is when the defendant "opens the door" to such evidence, but even then it would not be substantive evidence but only impeachment and upon request a limiting instruction must limit the evidence to this purpose.

Limiting instruction was sufficient where evidence was admitted to prove one count but inadmissible as pertains to another count.

***Thrift v. State*, 176 S.W.3d 221 (Tex. Crim. App. 2005).**

The defendant was on trial for one count of indecency with a child and one count of sexual assault of a child. To prove the "intent to arouse or gratify" element on the indecency case, the state offered some pornography. The defense objection was overruled and the evidence was admitted. The court issued a limiting instruction at the time of the evidence's admission that the jury could only consider it as pertains the indecency charge and must not consider it in relation to the sexual assault charge. The defendant was convicted on both counts and given concurrent 15 year sentences. On appeal, the court of appeals held that the porn should not have come into evidence at all and reversed the indecency conviction. The court held, however, that because of the limiting instruction, the sexual assault conviction was not tainted with the error. The CCA affirmed. While the presumption that a jury will follow instructions is rebuttable, the appellant here "failed to demonstrate that there was any spillover effect resulting from the admission of the pictures." *Id.* at 224.

In order to be a "co-conspirator statement" and thus not hearsay pursuant to TEX. R. EVID. 801(e)(2)(E), first there must be a conspiracy and then the statement must further that conspiracy.

***Byrd v. State*, ___ S.W.3d ___, No. PD-0235-04, 2005 Tex. Crim. App. LEXIS 2128 (Dec. 14, 2005).**

The analysis in this case is fairly fact-bound, but instructive. First, establish whether there is a conspiracy and if so, what the object of the purported conspiracy is. Second, determine whether the offered statement actually furthers that conspiracy. If it does not, then it is hearsay and Rule 801(e)(2)(E) does not make it admissible.

TEX. CODE CRIM. PRO. Art. 38.07 is not a rule of admissibility.

***Martinez v. State,* 178 S.W.3d 806 (Tex. Crim. App. 2005).**

In this indecency with a child case the trial court, over a defense objection, allowed the complainant's mother to testify at length regarding her daughter's outcry to her. The child was too old for this to be a valid outcry statement under TEX. CODE CRIM. PRO. Art. 38.072, which was the basis for the court allowing the statement. The court of appeals held that even though the trial court committed error under Art. 38.072, the statement was admissible anyway under Art. 38.07, so the conviction was affirmed. The CCA reversed, holding that Art. 38.07 is not a rule of admissibility, but a rule designed to protect a person accused of sexual assault by requiring either that a complainant tell someone within one year of the alleged assault or that there is some other evidence of corroboration. It is not a rule of admissibility for outcry statements. In this case, the complainant fell under one of Art. 38.07's exceptions anyway, so the rule did not even apply.

Evaluation of harm in excluding defense evidence depends upon the extent to which a defendant was precluded from putting on a defense.

***Ray v. State,* 178 S.W.3d 833 (Tex. Crim. App. 2005).**

In this drug case, the defendant was allowed to testify that the drugs in the car in which she was a passenger belonged to the driver, but the court excluded the testimony of another witness who would have corroborated that fact. The appellant asserted that this was error that denied the defendant the ability to put on a defense and was thus constitutional error. The CCA held that this was error, but subject to harm review for non-constitutional error under TEX. R. APP. P. 44.2(b). The CCA did agree that in some instances, the exclusion of defense evidence may rise to a constitutional violation: "(1) when a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering relevant evidence that is vital to his defense; or (2) when a trial court erroneously excludes relevant evidence that is a vital portion of the case and the exclusion effectively precludes the defendant from presenting a defense." In those cases, Tex. R. App. P. 44.2(a) would apply, as, presumably, the exclusion of the evidence would rise to a constitutional violation. In this case, however, only because the defendant presented her defense through her own testimony, the error was judged for harm as non-constitutional error. The case was reversed anyway under that standard.

The notice requirement of TEX. R. EVID. 404(b) is a necessary condition for admissibility, but subject to harm analysis.

***Hernandez v. State,* 176 S.W.3d 821 (Tex. Crim. App. 2005).**

***McDonald v. State,* 179 S.W.3d 571 (Tex. Crim. App. 2005).**

"Since the notice requirement of Rule 404(b) is a rule of evidence admissibility, then it is error to admit Rule 404(b) evidence when the state has not complied with the notice provision of Rule 404(b)." *Hernandez*, 176 S.W.3d at 824. Harm, however, is judged under TEX. R. APP. P. 44.2(b) for non-constitutional harm. In *Hernandez*, the error was judged harmless because the defendant did not claim surprise and could not show how he was surprised. *See id.* at 825. In *McDonald*, the error was deemed harmless because the defendant did not claim surprise and the CCA held that notice "would not have affected the appellant's trial strategy." *Id.*, 179 S.W.3d at 578-79.

Fingerprint evidence per se reliable under Rule 702.

***Russeau v. State,* 171 S.W.3d 871 (Tex. Crim. App. 2005).**

"Based on our review of the record and our own well-established history, we conclude that fingerprint-comparison testimony is admissible under Texas Rule of Evidence 702 because it is reliable and it assists the trier of fact in its task of determining whether a latent fingerprint is that of a particular person." *Id.* at 883. Note that the CCA cites *Kelly*, so it appears fingerprint comparison is considered "hard" science.

VII. TRIAL – JURY CHARGE

"Act" or "omission" language in the injury to a child statute are not separate elements of the offense, but different manners or means of committing the offense.

***Jefferson v. State,* ___ S.W.3d ___, No. PD-0363-05, 2006 Tex. Crim. App. LEXIS 769 (April 12, 2006).**

Different paragraphs alleging different acts or omissions can therefore be charged to the jury disjunctively and the jury does not have to unanimously agree on a particular allegation to return a general verdict of guilty to the indictment.

Lesser-included offenses.

***Hampton v. State*, 165 S.W.3d 691 (Tex. Crim. App. 2005).**

***Stadt v. State*, 182 S.W.3d 360 (Tex. Crim. App. 2005).**

***Irving v. State*, 176 S.W.3d 842 (Tex. Crim. App. 2005).**

Hampton v. State discusses the remedy where the trial court erroneously submits, at the state's request, a lesser-included offense and the jury convicts on that lesser-included offense. At first blush, one might think that since there was no evidence in the record from which a reasonable juror would conclude that if the defendant is guilty at all, he is guilty only of the lesser offense, that the evidence might be legally insufficient to support a conviction on that offense. *See Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). The CCA holds that while the submission of this lesser-included offense did indeed fail the second prong of the *Rousseau* test, the evidence was, nonetheless, legally sufficient to support a conviction on the lesser-included offense that was submitted to the jury. Thus, case is reversed because of the lesser-included offense error, but case is remanded for new trial on the lesser-included offense.

In *Stadt v. State* the defendant was charged with manslaughter alleged to have been committed several different ways. These several manners and means were charged to the jury. At the state's request, the lesser-included offense of criminally negligent homicide was also submitted over the defendant's objection. The jury convicted on criminally negligent homicide. On appeal, the defendant argued that the state did not satisfy the second prong of the *Rousseau* test, citing *Arevalo v. State*, 970 S.W.2d 547 (Tex. Crim. App. 1998) for the proposition that "if sufficient evidence of more than one theory of the greater offense is presented to allow the jury to be charged on alternate theories [of the greater offense], the second prong of the [*Rousseau*] test is satisfied only if there is evidence which, if believed, refutes or negates every theory which elevates the offense from the lesser to the greater." The CCA holds that the defendant's reliance on this language is "misplaced" because criminally negligent homicide differs from manslaughter only in that it has a lesser culpable mental state. *See id.* at 363-65; *see also* TEX. CODE CRIM. PRO. Art. 37.09 (defining the four types of lesser-included offenses). In *Arevalo*, the greater offense was aggravated sexual assault and the lesser was sexual assault. Thus, the lesser was not a "lesser culpable mental state" offense. The CCA creates a distinction for this and explains: "The question before us is not whether there was some evidence presented at appellant's trial that would permit a rational jury to find that he was not guilty of each and every alternate theory of manslaughter alleged in the indictment but whether there was some evidence presented at appellant's trial that would permit a rational jury to find that he possessed the culpable mental state of criminal negligence rather than recklessness." *Id.* at 364. Seems like a distinction without much of a difference.

***Almanza* issues.**

***Pickens v. State*, 165 S.W.3d 675 (Tex. Crim. App. 2005).**

***Ex Parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006).**

***Marshall v. State*, ___ S.W.3d ___, No. PD-2016-04, 2006 Tex. Crim. App. LEXIS 360 (Feb. 15, 2006).**

Pickens v. State holds that failing to request an instruction under TEX. CODE CRIM. PRO. Art. 38.23 does not waive error in not submitting one. The court of appeals faced with such a situation must first determine whether there is a factual dispute that would qualify for an Art. 38.23 charge and then determine harm under the egregious harm standard of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985).

Ex Parte Smith holds that *Almanza* harm review applies to error in the special issues in a death penalty case. This is a position enunciated in *Penry v. State*, 178 S.W.3d 782, 788 (Tex. Crim. App. 2005) and carried forward here. In this case as well as *Penry*, the error was in the scope of the mitigation question. The CCA held that both were harmless because the defendant could not show egregious harm caused by this un-objected-to error. *See id.* at *46.

In *Marshall v. State*, the state gave notice of an habitual enhancement in a letter to counsel for the defense. The enhancements were not in the indictment. At the beginning of the punishment stage, the defendant was not arraigned on the enhancements or otherwise requested to enter a plea. The enhancements were proved up during the hearing and a fingerprint expert connected them to the defendant. The habitual enhancements were submitted to the jury in the jury charge. The defense failed to object to the jury charge. The CCA saw this as charging error – the enhancements should not have been included since the defendant was never called upon to enter a plea to them. As jury charge error, harm is determined under *Almanza* and, as there was no objection, egregious harm would have to be shown for reversal. The CCA remanded to the court of appeals to determine whether there was egregious harm.

VIII. TRIAL – DEADLY WEAPON FINDINGS

Finding supported in an evading with a vehicle case.

***Drichas v. State*, 175 S.W.3d 795 (Tex. Crim. App. 2005).**

Drichas was charged with evading with a vehicle and had enough priors to qualify as a habitual offender, which was also pled. He got 99 years and an affirmative finding of a deadly weapon. He appealed the deadly weapon finding on legal sufficiency. The CCA observed, "Appellant ultimately led law enforcement officers from three agencies on a fifteen-mile high-speed chase into Texas, during which he drove at speeds, 50 to 70 miles per hour, that caused his truck to fishtail on turns and reduced appellant's ability to control it. Appellant disregarded traffic signs and signals, drove erratically, wove between lanes and within lanes, turned abruptly into a construction zone, knocking down barricades as he did so, and drove on the wrong side of the highway." *Id.* at 787. He bailed out of his still moving truck and it hit a van and a trailer. The CCA found these facts supported the deadly weapon finding.

Defendant not entitled to oral pronouncement of a deadly weapon finding.

***Ex Parte Huskins*, 176 S.W.3d 818 (Tex. Crim. App. 2005).**

In *Huskins*, the trial court, after revoking his deferred adjudication, orally pronounced his 8 year sentence but did not orally pronounce the affirmative deadly weapon finding that later turned up in his judgment. He argued that the oral pronouncement of the sentence controls. The CCA states, "Applicant correctly cites these legal propositions, but he overlooks the fact that the expectation of having the oral pronouncement match the written judgment applies only to sentencing issues, such as the term of confinement assessed and whether multiple sentences will be served concurrently or consecutively. A deadly-weapon finding, however, is not part of the sentence." *Id.* at 820-21. "Thus," the CCA later continues, "a trial court is not required to orally announce a deadly-weapon finding at sentencing *if the allegation of use of a deadly weapon is clear from the face of the indictment.*" *Id.* at 821 (emphasis added).

IX. TRIAL – FAMILY VIOLENCE FINDINGS

Family violence finding does not need to be submitted to the jury – the trial court must make an affirmative finding if the evidence supports it.

***Butler v. State*, ___ S.W.3d ___, No. PD-0838-05, 2006 Tex. Crim. App. LEXIS 760 (Apr. 12, 2006).**

In this assault case, family violence was not charged in the information and no finding was submitted to the jury. Nonetheless, an affirmative finding of family violence appeared in the judgment. The defendant appealed that he received no notice. The CCA, through reading the plain language of TEX. CODE CRIM. PRO. Art. 42.013, determined that it is the court that determines whether an affirmative finding of family violence should be entered and in fact if the court determines that the offense involved family violence, the trial court must enter such a finding. Therefore, no notice to the defendant is required.

X. TRIAL – PUNISHMENT ISSUES

Extraneous offense victim impact evidence not admissible in trial on offense where there is not a named victim.

***Haley v. State*, 173 S.W.3d 510 (2005).**

In the punishment case of the defendant's possession of cocaine 4-200 grams case, the state put on victim impact testimony from a family member connected to an extraneous murder case. The jury gave her 65 years. The defendant argued that the victim impact evidence should not have been admitted. The CCA agreed, holding that because there was no named victim in the possession case being tried, the victim impact evidence on the extraneous murder charge was not relevant under TEX. R. EVID. 401 for determining the appropriate sentence on her drug case.

The trial court may adjust a court-imposed sentence downward during the time of its plenary power.

***State v. Aguilera*, 165 S.W.3d 695 (Tex. Crim. App. 2005).**

Defendant entered an open plea to the trial court and was sentenced to 25 years and that sentence was pronounced. Then there was a victim-impact allocution that caused the trial court to reduce the sentence, over the state's objection, to 15 years. The state appealed. The CCA held that "a trial court ... retains the plenary power to modify its sentence if, as in this case, the modification is made on the same day as the assessment of the initial sentence and before the court adjourns for the day. The re-sentencing must be done in the presence of the defendant, his attorney, and counsel for the state." *Id.* at 698. This sentencing was done in the absence of a motion for new trial or a motion in arrest of judgment. With either of those motions within 30 days, the CCA says that the trial court may "modify a sentence" any time while it still retains plenary power. *See id.* at 697-98, n.7. Note that this really can only apply to downward

adjustments. It would violate double jeopardy to adjust a sentence upward after that sentence begins.

Sufficient notice of enhancements is a right of constitutional dimension, but there is no set time for giving this notice other than it must be "sufficient."

***Villescas v. State,* ___ S.W.3d ___, No. PD-0531-05, 2006 Tex. Crim. App. LEXIS 682 (Apr. 5, 2006).**

Defendant was given notice of enhancements six days before trial. He objected that the notice was untimely and his objection was overruled. Court of appeals reversed punishment phase. CCA reversed court of appeals. CCA held that notice requirement is of constitutional dimension. Also, there is no set time for giving notice of the enhancements. In fact, they could be given at the beginning of the punishment phase and still possibly be constitutional – if there is no defense to them and if the defense does not request a continuance. "The ultimate question is whether constitutionally adequate notice was given." *Id.* at *11.

After remand for new punishment hearing because of an untimely enhancement, the state is free to use the enhancement, assuming timely notice.

***McNatt v. State,* ___ S.W.3d ___, No. PD-0133-05, 2006 Tex. Crim. App. LEXIS 588 (Mar. 29, 2006).**

After his conviction and 99 year sentence, the defendant successfully appealed on the issue of untimely notice of an enhancement. The court of appeals reversed and remanded for a new punishment hearing, but also gave specific instructions that the enhancement that had been noticed untimely cannot be used in the retrial. The state appealed to the CCA. The CCA holds that the previous untimeliness of an enhancement allegation does not carry forward to any retrial on punishment, barring some other consideration such as prosecutorial vindictiveness.

The assertion that the enhancements were mistakenly omitted from the indictment is sufficient to rebut the presumption of prosecutorial vindictiveness after an appellate reversal of a trial where the enhancements were not used.

***Hood v. State,* 185 S.W.3d 445 (Tex. Crim. App. 2006).**

Defendant was tried and received 65 years. His indictment did not contain enhancements. He got his case reversed and before trial he was notified that the state would proceed on a habitual enhancement. The defendant filed a motion to quash, claiming prosecutorial vindictiveness. The trial court held a hearing where the prosecutor told the judge that not alleging the enhancements last time was "an omission from the very first indictment and should have been charged from the beginning." *Id.* at *3. Basically, they forgot. The trial court found that this was sufficient to rebut the presumption of vindictiveness. Defendant got life in his retrial. The CCA affirmed.

The CCA set out the rules as follows: "When a defendant proves that he was convicted, he appealed and obtained a new trial, and that the state thereafter filed ... additional enhancements, the burden shifts to the prosecution to provide an explanation of the additional enhancements that is unrelated to the defendant's exercise of his legal right to appeal." *Id.* at *6 (internal quotes removed). "The trial court decides the issue based upon all of the evidence, pro and con, and the credibility of the prosecutor's explanation." *Id.* "This is entirely consistent with United States Supreme Court precedent." *Id.* at **6-7. "In the instant case, there is a presumption of prosecutorial vindictiveness because the defendant was convicted, he successfully appealed, and the state thereafter filed additional enhancements. However, the trial court was entitled to believe the prosecutor's explanation that the enhancement paragraphs were added to the re-indictment because they were an omission from the very first indictment and should have been charged from the beginning, meaning that their absence from the original indictment was an oversight or mistake. This objective explanation is unrelated to appellant's exercise of his legal right to appeal, and is, therefore, sufficient to rebut a presumption of vindictiveness." *Id.* at *7 (internal quotes removed).

The CCA went on to say, "We also note that appellant procedurally defaulted any claim that the prosecution's 'mistake or oversight' explanation is factually insufficient to rebut a presumption of prosecutorial vindictiveness because appellant did not make that specific claim in the trial court or in this Court." *Id.* at *10 (citing *Reyna v. State*, 168 S.W.3d 173 (Tex. Crim. App. 2005)(discussing and applying "party responsibility" concept of error preservation, which is discussed at Section XIV in this paper). The CCA went on, "We further note that some jurisdictions would decide that a 'mistake or oversight' explanation is factually sufficient ... while other jurisdictions would not so decide ..." and went on to say that the former would consider this an objective reason while the latter treat it as subjective. *Id.* at *11. "This is an important distinction," the court notes, "because an objective explanation is required." *Id.*

The CCA then immediately pronounces "mistake or oversight" to be an objective explanation that may be sufficient to rebut the presumption of vindictiveness.

XI. POST-TRIAL MOTIONS

You still must present a motion for new trial and request a hearing in order to preserve any error in the trial court not conducting a hearing on the motion.

***Rozell v. State*, 176 S.W.3d 228 (Tex. Crim. App. 2005).**

"We have held that to present a motion in the context of a motion for new trial, the defendant must give the trial court *actual notice* that he timely filed a motion for new trial and requests a hearing on the motion for new trial. ... [A] reviewing court does not reach the question of whether a trial court abused its discretion in failing to hold a hearing if no request for a hearing was presented to it." *Id.* at 230 (emphasis in original). In this case, the defendant filed a motion for new trial, which was overruled by operation of law, and never requested a hearing. No error preserved for not getting a hearing.

XII. PROBATIONS

There is no minimum time to be served on deferred adjudication before the trial court can terminate early.

***State v. Juvrud*, ___ S.W.3d ___, No. PD-0006-03, 2006 Tex. Crim. App. LEXIS 575 (Mar. 22, 2006).**

Defendant pled guilty to felony misapplication of fiduciary property and was placed on deferred adjudication for 10 years. Four months later, he filed a motion for early termination, which the trial court granted over the state's objection. State appealed, arguing that TEX. CODE CRIM. PRO. Art. 42.12 § 20, which requires that one third of a "straight" probation be served before the probationer can be released early, also applies to deferred adjudicated probations. CCA disagreed, holding that Art. 42.12 § 5(c) applies to deferred adjudications and prescribes no minimum time period before early termination is available.

A trial court is free to "stack" conditions where there are two or more concurrent probations.

***Kesaria v. State*, ___ S.W.3d ___, No. PD-1802-04, 2006 Tex. Crim. App. LEXIS 680 (Apr. 5, 2006).**

The defendant was tried on two burglary cases and the jury found him guilty and probated him on both cases. The trial judge ordered him to serve 180 days as a condition of probation in each case and ordered that the two 180 day periods be served consecutively. Defendant appealed. The CCA, through strict statutory construction, determined that this is not prohibited. "If [TEX. CODE CRIM. PRO. Art. 42.12] Section 12(a) authorizes a condition of confinement of jail for up to 180 days for a probationer who has been convicted in a felony case, as it clearly does, we cannot say that the authority of the statute is exceeded by another such condition of probation for a probationer who has been convicted in another felony case. A decision that more convictions result in more confinement is consonant with the policy of the criminal law. ... Finding no limitation on the judge's authority in the statutes, and not having been presented with any questions of constitutionality, we uphold the trial judge's decision." *Id.* at *16.

Apprendi v. New Jersey does not apply to conditions of probation.

***Butler v. State*, ___ S.W.3d ___, No. PD-0838-05, 2006 Tex. Crim. App. LEXIS 760 (Apr. 12, 2006).**

Because of a finding of family violence which was not submitted to the jury, but found by the judge, defendant argued that the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) that any finding that increases punishment, aside from a prior conviction, must be submitted to the jury and proven beyond a reasonable doubt was violated. His argument was not that the finding caused an increased range of punishment, but that it resulted in more onerous conditions of probation. The CCA held that it could find no authority for the proposition that *Apprendi* applies to conditions of probation.

XIII. LEGAL SUFFICIENCY – PARTICULAR OFFENSES

Petition for expunction is a government record.

***State v. Vasilas*, ___ S.W.3d ___, No. PD-0351-05, 2006 Tex. Crim. App. LEXIS 577 (Mar. 22, 2006).**

The issue was whether a pleading "filed with" a court but not "issued by" a court falls within the definition of "court record" and is therefore a "government record" for purposes of TEX. PENAL CODE § 37.01(2)(A). The CCA held that it does. *See id.* at *14. Thus, this attorney may be prosecuted for tampering with a government record for filing a petition for expunction containing incorrect information.

Defendant still evading with a vehicle after abandoning his vehicle (for at least six hours).

***Hobbs v. State*, 175 S.W.3d 777 (Tex. Crim. App. 2005).**

Defendant ran from the police in his car around 10:00pm. He drove into a field and the cops chose not to follow him, for fear of damaging their patrol cars. The cops later found defendant's car in a different field, abandoned. They searched for him without luck and broke off the search at 2:30am. At 8:30am, the cops

started searching again and found defendant hiding in a woodshed attached to a home eight miles from where the car was abandoned. State tried him for burglary of a habitation with intent to commit the felony offense of evading with a vehicle. He got a conviction and 40 years.

The CCA held that the police never gave up the pursuit and thus the felony evading arrest was a continuing offense. Affirmed.

Blood in syringe was "adulterant or dilutant" for purposes of weight of meth.

***Seals v. State*, ___ S.W.3d ___, No. PD-0678-04, 2005 Tex. Crim. App. LEXIS 1966 (Nov. 16, 2005).**

Plain meaning analysis. CCA held that blood is included within the plain meaning of "adulterant or dilutant."

Unexplained possession of recently stolen property will sustain a burglary conviction.

***Poncio v. State*, ___ S.W.3d ___, No. PD-0386-05, 2006 Tex. Crim. App. LEXIS 364 (Feb. 15, 2006).**

On appeal from a burglary conviction, the CCA held that unexplained possession of recently stolen property (and the presumed jury inference based on same) will support a conviction for burglary in the face of a legal sufficiency challenge.

A party to a burglary of a habitation does not have to enter the habitation.

***Powell v. State*, ___ S.W.3d ___, No. PD-0726-05, 2006 Tex. Crim. App. 758 (Apr. 12, 2006).**

"[A]n individual may be guilty of burglary of a habitation even though he does not personally enter the burglarized premises if he is acting together with another [who actually does] in the commission of the offense." *Id.* at *8.

XIV. PRESERVATION OF ERROR

The "party responsibility" theory of error preservation.

***Reyna v. State*, 168 S.W.3d 173 (Tex. Crim. App. 2005).**

At defendant's trial for indecency with a child, his counsel attempted to cross examine the complainant on a prior allegation against another man that turned out to be false. The court excluded the testimony and a bill was made. In stating the reasons for admissibility, counsel stated, "credibility issue at this point in time, Your Honor. She's making similar allegations later on against another gentleman. And I'm not offering it to prove the truth of the matter asserted. I'm not offering it to go into her sexuality. I'm offering it to demonstrate that as to prior sexual activities, that she made allegations that there were prior sexual allegations, and recanted." The trial court sustained the state's objection.

On appeal, the court of appeals reversed. While the court of appeals did not mention the Confrontation Clause, opinions it cited supporting its decision were confrontation cases. CCA reversed. The CCA now officially institutes what it calls the "party responsibility" theory of error preservation: "the complaining party [must have] brought to the trial court's attention the very complaint that party is now making on appeal." *Id.* at 177. Basically, now, if you want to make an *argument* on appeal, you must have made that argument at the trial court level. This rule supposedly applies equally to the state and the defense. *See id.*

In the final analysis, the CCA held that Reyna did not preserve error: "Reyna did not cite to any rules of evidence, cases, or constitutional provisions. ... [His] arguments are ... based on the Rules of Evidence. Reyna's reference to 'credibility' could be a reference to either the Rules of Evidence or the Confrontation Clause. ... As the losing party, Reyna must 'suffer on appeal the consequences of his insufficiently specific offer.' Reyna did not do 'everything necessary to bring to the judge's attention the evidence rule or statute in question and its precise and proper application to the evidence in question.'" *Id.* at 179.

Uncontroverted statements by counsel may preserve error regarding an event in the courtroom.

***Thieleman v. State*, ___ S.W.3d ___, No. PD-1743-04, 2005 Tex. Crim. App. LEXIS 2110 (Dec. 14, 2005).**

A juror slept through defendant's trial. Defense counsel requested a mistrial, stating for the record that the juror slept through the trial. The state did not deny the fact. The trial court overruled the request. On appeal, the state argued that error had not been preserved. The court of appeals held that mere statements of counsel are not evidence so there was no evidence there really was a sleeping juror. The CCA reversed. "We find that such statements may be some evidence that the event occurred and may, under some circumstances, establish that the event occurred." *Id.* at *4. "The assertion does not, however, conclusively prove that the event occurred. The weight of the assertion is increased if the assertion about the alleged event is made contemporaneously to the event, thus giving opposing counsel and the trial court the opportunity to observe the event." *Id.* at *7. An uncontroverted assertion by counsel about an event, particularly a non-contemporaneous assertion, may be taken as true only if: (1) the event could not have

happened without being noticed; and (2) the assertion is of the sort that would provoke a denial by opposing counsel if it were not true. If these two conditions are met, the opposing party may be held to have adoptively admitted the assertion, and the assertion will be accepted as both true and sufficient to preserve an issue for appellate review." *Id*. at **7-8.

Complaint that the state violated a plea agreement preserved if brought in a motion for new trial.

***Bitterman v. State*, 180 S.W.3d 139 (Tex. Crim. App. 2005).**

Defendant pled guilty to agg. sexual assault and went open to the judge. The state agreed beforehand that it would neither recommend nor argue against deferred adjudication. During the hearing, however, the prosecutor just couldn't help himself. Thanks in part not only to argument, but to evidence from the state, the court sentenced the defendant to the penitentiary. Defendant did not object at the time that the state violated its plea agreement, but the objection was raised in a timely filed motion for new trial. The court of appeals held that error was not preserved. CCA reversed. Motion for new trial was sufficient in this case because it put the trial court on notice of the error at a time when the court could still do something about it.

Motion to strike testimony sufficient in this case to preserve all objections to qualifications of expert.

***Rodgers v. State*, ___ S.W.3d ___, No. PD-0645-05, 2006 Tex. Crim. App. LEXIS 852 (May 3, 2006).**

A fingerprint expert was presented to testify about tire tread and shoe-print matching and defendant objected to his qualifications after a Rule 705(b) hearing. Trial judge overruled the objections. During the expert's testimony and the defense' cross-examination, the defendant presented new challenges to his qualifications. At the end of the testimony, the defense moved to strike all his testimony. The motion was overruled. The defendant then appealed asserting arguments made not only at the end of the Rule 705 hearing but challenges developed during the expert's testimony in front of the jury. The court of appeals would only consider arguments from the 705(b) hearing. CCA holds that in this case, because the defense never really stopped challenging the expert's qualifications, the objection was continuous and the motion to strike preserved error for all the challenges made.

XV. APPELLATE PROCEDURE

The proper procedure for court of appeals in face of an Anders brief.

***Bledsoe v. State*, 178 S.W.3d 824 (Tex. Crim. App. 2005).**

After a jury trial, counsel for defendant filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) certifying that the appeal was wholly frivolous. In response, defendant filed a *pro se* brief raising his own points of error. The court of appeals held that no reversible error existed and affirmed the conviction. Defendant appealed, complaining that the court of appeals did not respond to his brief. He further argued that he is denied the ability to file a PDR if the court of appeals does not address the merits of his arguments. CCA affirms. In this case, the CCA clarifies the court of appeals' job in the face of an *Anders* brief: "When faced with an *Anders* brief and if a later *pro se* brief is filed, the court of appeals has two choices. It may determine that the appeal is wholly frivolous and issue an opinion explaining that it has reviewed the record and finds no reversible error. Or, it may determine that arguable grounds for appeal exist and remand the cause to the trial court so that new counsel may be appointed to brief the issues. Only after the issues have been briefed by new counsel may the court of appeals address the merits of the issues raised." The CCA cited effective assistance of counsel for the second choice. *Id.* at 826-27. A defendant's right to file a PDR is not impaired, because he can petition on the issue of his appeal being declared wholly frivolous.

Limited showing of prejudice required to get out of time PDR.

***Ex Parte Crow*, 180 S.W.3d 135 (Tex. Crim. App. 2005).**

In this case, defendant had counsel on his appeal who failed to let him know that his case had been affirmed and that he had 30 days to file a PDR. A year later, he filed a writ of habeas corpus alleging ineffective assistance of counsel and requesting an out of time PDR. The state argued that defendant could not show prejudice because he could not show that any of his claims had merit.

The CCA held that a showing of meritorious claims is not required. Rather, a showing that there was a proceeding that the defendant could not avail himself of and that he would have availed himself of that proceeding is all that is required to show prejudice. Thus, it must be shown that he had a right to file a PDR and that he would have availed himself of that right. *See id.* at 137-38.

Appellant has burden to show ineffective assistance of counsel on appeal which prevented him from filing a PDR before he can get an out of time PDR.

***Ex Parte Scott,* ___ S.W.3d ___, No. WR-62,896-02, 2006 Tex. Crim. App. LEXIS 767 (Apr. 12, 2006).**

In this case, the defendant was affirmed on appeal and never filed a PDR. *Twelve years* later, he filed a writ claiming his attorney never told him his convictions were affirmed or what he needed to do to file a PDR. The attorney, in an affidavit, could only say that it was the practice of his firm to give clients such notice, but he no longer had applicant's file and could not say for sure it was done in applicant's case. The trial court held that the attorney rendered ineffective assistance.

The CCA disagreed. The court noted that proving ineffective assistance by a preponderance of the evidence is the applicant's job and he did not get it done in this case.

Pro se appellant not entitled to a free record for filing a PDR.

***Ex Parte Trainer,* 181 S.W.3d 358 (Tex. Crim. App. 2005).**

We already know that an appellant does not have the right to appointed counsel on PDR or writ. This case holds that an appellant does not have a right to a free record for purposes of PDR or writ. Presumably, the appellant in this case was affirmed on appeal and his attorney notified him that he had to file his own PDR. He tried to get the trial record, but could not do so, again, presumably because he could not afford to have it sent to him or to purchase a copy. He wanted a free copy so he could do his own PDR. The time for filing a PDR expired while he fought over the record and so he filed a writ for an out of time PDR.

When "unassigned error" must be briefed before court of appeals may rule on it.

***Pena v. State,* ___ S.W.3d ___, No. PD-0966-05, 2006 Tex. Crim. App. LEXIS 832 (Apr. 26, 2006).**

The court of appeals decided this appeal on an issue not contained in the briefs below and the state sought PDR. CCA reversed. "We have previously held, and reaffirm today, that appellate courts are free to review 'unassigned error' – a claim that was preserved in the trial below but was not raised on appeal. In conducting such a review, however, the question becomes whether certain circumstances obligate a court to *assign* such error by ordering briefing from the parties. We recognize that many, if not most, of the types of error that would prompt *sua sponte* appellate attention need not be assigned because the error involved constitutes an obvious violation of established rules. Novel constitutional issues are a different matter." *Id.* at *8. The issue decided in this destruction of evidence case was whether the Texas Constitution's Due Course of Law provision offered more protection than the United States Constitution's Due Process provision. CCA held that the court of appeals should have allowed briefing, as this was a novel issue.

Court of appeals must address every issue that is raised and necessary to a final disposition.

***Kombudo v. State,* 171 S.W.3d 888 (Tex. Crim. App. 2005)**

The State argued that D should be estopped from asserting a constitutional challenge to his conviction in the court of appeals because he misled the trial court. The court of appeals reversed without addressing the State's estoppel argument.

The CCA noted that the court of appeals must address every issue raised and necessary to the final disposition of an appeal, including an alternative argument in the appellee's reply. The CCA vacated the judgment and remanded the case to the court of appeals to address the State's argument.

Court of appeals must apply deferential standard to review of a motion to suppress even when the burden of proof is clear and convincing evidence and the record contains a videotape of the search.

***Montanez v. State,* ___ S.W.3d ___, No. PD-0894-04, 2006 Tex. Crim. App. LEXIS 830 (Apr. 26, 2006)**

The defendant filed a motion to suppress claiming that his consent to search a vehicle was not voluntary. The trial court denied the motion.

The court of appeals reversed, stating, "Giving proper deference to the trial court's determination, we nevertheless conclude that the record of the suppression hearing does not contain clear and convincing evidence to support the trial court's finding that Appellant freely and voluntarily consented to the search."

The CCA held that the court of appeals erred because it did not follow the standard of review set out in *Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997). The issue was whether, after affording almost total deference to the trial court's determination of historical facts that were supported by the record, the trial court abused its discretion by finding that the State proved by clear and convincing evidence that the defendant voluntarily consented to the search of the vehicle. The CCA added that, although a videotape of the traffic stop was admitted into evidence at the suppression hearing, and was therefore available for appellate review, the deferential standard of review of Guzman still applied to the trial court's determination of historical facts. The CCA remanded to the court of appeals.

XVI. CONSTITUTIONAL LAW – SEARCHES

"Smell of burning marijuana" doctrine further clarified.

***Parker v. State*, ___ S.W.3d ___, NO. PD-0250-05, 2006 Tex. Crim. App. LEXIS 759 (Apr. 12, 2006).**

A known informant approached a police officer and told him that alcohol was being served to minors at a house around the block. Cops went to the house and it looked like a party was going on and the cops recognized one of the kids inside. Cops knocked and appellant opened the door. Cops smelled burning marijuana and forced their way in.

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 entry into 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. Last year, *Estrada v. State*, 154 S.W.3d 604 (Tex. Crim. App. 2005) revisited the issue of whether a police officer has probable cause to search a house upon smelling marijuana smoke coming from within the house. *Estrada* dealt with the "standing alone" aspect of the *Steelman* rule. In that 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, the 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 *Estrada* – the warrantless search is legal.

In *Parker*, the appellant argued that the police did not have probable cause to enter the house based upon the smell of burning marijuana, relying on *Steelman*. Rather than simply restating what the court had said last year in *Estrada*, the CCA attempts to "dispel[ ] any lingering confusion concerning the existence of probable cause to cross the threshold of a home when officers smell the odor of contraband emanating from the residence." *Id.* at **4-5. First, the CCA points out, the standard for a warrantless arrest and the standard for a warrantless entry into a home are different. Both require probable cause, but differ depending upon whether the probable cause "points to a person (arrest) or a location (search)." *Id.* at *5. That, according to the CCA, is the first of two "hurdles." *Id.* Probable cause to arrest a person "must point like a beacon" to a particular person (rather than "someone") and show that he has either committed or is committing an offense. Probable cause to search a location must, again, "point like a beacon" at a location and show that the instrumentality of a crime or evidence of a crime is at that location.

The second "hurdle," the CCA continues, depends upon whether it is a warrantless search or a warrantless arrest. For a warrantless arrest, you have to have probable cause and the statutory authority to arrest without a warrant. For a warrantless search of a residence, you have to have probable cause and exigent circumstances. The CCA sets out three categories of exigent circumstances: "(1) rendering aid or assistance to persons whom the officers reasonably believe are in need of assistance; (2) preventing the destruction of evidence or contraband; and (3) protecting the officers from persons whom they reasonably believe to be present and armed and dangerous." *Id.* at *9 n.16.

The CCA sums it up as follows: "In *Steelman*, police officers entered the defendant's home and arrested everyone in the room after smelling the odor of marihuana when the defendant opened the door. We concluded that the odor of marihuana emanating from a home cannot, by itself, justify a reasonable belief that any particular individual present had committed or was committing any particular offense. In *Steelman* we noted that 'odors alone do not authorize a search without a warrant.' But we did not, as appellant argues, find that the odor of marihuana alone was insufficient to establish probable cause to believe that someone had committed or was then committing the offense of possession of marihuana. With respect to a warrantless entry and arrest, *Steelman* simply reinterated what previously had been well established: the odor of marihuana emanating from a residence, by itself, is insufficient to establish both probable cause and statutory authority required for a warrantless arrest of a particular person inside." *Id.* at *11.

Driver of his girlfriend's rent car has an expectation of privacy in the vehicle even though he is not an authorized driver under the rental contract.

***Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006).**

Straight analysis of expectation of privacy: "We conclude that, given the evidence in this particular case, society would recognize as reasonable Appellee's expectation of privacy in the use of his girlfriend's rental car with her permission even though he was not listed as an authorized driver on the rental agreement." *Id.* at 927. The state had argued otherwise.

XVII. CONSTITUTIONAL ISSUES – CONFRONTATION

In this case, allowing a witness to testify in disguise violated the defendant's right to confrontation.

***Romero v. State*, 173 S.W.3d 502 (Tex. Crim. App. 2005).**

Aggravated assault case. An eyewitness to the shooting (a cab driver) was a very reluctant witness and was ultimately allowed to testify wearing a disguise. Defendant objected. CCA held that his right to confrontation was violated in this case. "An encroachment upon face-to-face confrontation is permitted only when necessary to further an important public interest and when the reliability of the testimony is otherwise assured." *Id.* at 505. In this case, there was no evidence that the defendant was threatening to retaliate against the witness and, besides, the defense knew the witness' name anyway. The disguise was allowed merely to allay the witness' subjective fear and that was insufficient.

Incident reports and disciplinary reports considered "testimonial."

***Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005).**

In this death penalty case, the state sought and received admission into evidence of incident reports from the Smith County Jail and disciplinary reports from TDC. They were admitted as business records. The reports were very damaging. The CCA held that they contained testimonial statements and the state did not show that the witnesses were unavailable or that they had been subject to cross-examination when the statements were made. Thus, there was a constitutional violation. The CCA held that constitutional harm was shown.

XVIII. CONSTITUTIONAL ISSUES – CONFESSIONS

Burden on juvenile to prove causation where he seeks to suppress a statement taken in violation of Texas Family Code 52.02(b).

***Pham v. State*, 175 S.W.3d 767 (Tex. Crim. App. 2005).**

This was a consolidated case with two defendants, both of whom had statements taken from them as juveniles and whose parents were not promptly notified that they were in custody as required under TEX. FAMILY CODE § 52.02(b). The CCA holds that statements may be suppressed on this ground, but that the defendant bears the burden of showing that there was a causal connection between the statutory violation and the statement. If the defendant shows a causal connection, then the statement is deemed inadmissable and the state may make an argument that any taint was attenuated under TEX. CODE CRIM. PRO. Art. 38.23. The causal connection analysis, however, is not the same as the attenuation of taint analysis. The *defendant* has the burden to show a causal connection before the statement will be rendered presumptively inadmissible. The state then has the burden to show attenuation if it can.

48 hours is "without delay" to notify a consulate pursuant to the Vienna Convention and defendant failed to show causal connection between any delay and his statements.

***Sorto v. State*, 173 S.W.3d 469 (Tex. Crim. App. 2005).**

Death penalty case. The defendant is El Salvadoran. He gave videotaped statements. The El Salvadoran consulate was not notified of his arrest until 48 hours after his arrest and after he had given videotaped statements which were later used against him at trial. The Vienna Convention requires such notice "without delay." The CCA held that this was "without delay" and that there is nothing that requires such notice prior to the defendant giving a statement. The CCA held also that even assuming a violation of the Vienna Convention, the defendant failed to show any causal connection between the violation of the Vienna Convention and the taking of his videotaped statement. Note that before his gave his statements, he was given his *Miranda* warnings both by a magistrate and by the police prior to the videotaped statement.

CPS worker not required to administer Miranda warnings unless she is "working in tandem" with law enforcement.

***Wilkerson v. State*, 173 S.W.3d 521 (Tex. Crim. App. 2005).**

In this injury to a child case, the defendant was interviewed by a CPS worker while he was in jail. The CPS worker then appeared at his trial to testify about what the defendant said to her during this interview.

Defendant objected, overruled, etc. The court of appeals reversed, but the CCA reinstated the conviction, holding that "there was no evidence that the CPS worker was acting in tandem with police officers when she interviewed appellant." *Id.* at 523-24.

The CCA first analyzed the statutory mission of CPS and compared it to law enforcement and determined that CPS and law enforcement are on "parallel" but not necessarily "converging" paths. As long as those paths remain parallel, then the CPS worker does not need to *mirandize* the defendant. The CCA set out an analytical framework for determining whether the paths have converged: "First, courts should look for information about the relationship between the police and the potential police agent. Did the police know the interviewer was going to speak with the defendant? Did the police arrange the meeting? Were the police present during the interview? Did they provide the interviewer with the questions to ask? ... And finally, does the record show that the police were using the agent's interview to accomplish what they could not lawfully accomplish themselves? In sum, was law enforcement attempting to use the interviewer as its anointed agent?" *Id.* at 530.

"Second, courts should examine the record concerning the interviewer's actions and perceptions: What was the interviewer's primary reason for questioning the person? Were the questions aimed at gaining information and evidence for a criminal prosecution, or were they related to some other goal? ... In sum, did the interviewer believe that he was acting as an agent of law enforcement?" *Id.*

Finally, courts should examine the record for evidence of the defendant's perceptions of the encounter. ... [W]ould a reasonable person in defendant's position believe that the interviewer was an agent of law enforcement?" *Id.* at 530-31.

XIX. CONSTITUTIONAL ISSUES – DOUBLE JEOPARDY

Resisting arrest is not a lesser-included of assault on a public servant.

***Ortega v. State*, 171 S.W.3d 895 (Tex. Crim. App. 2005).**

In this case, the defendant basically resisted arrest. He was charged with the misdemeanor offense of resisting arrest but was subsequently also charged with the felony offense of assault on a public servant for the same incident and same conduct. He pled to resisting. His double jeopardy objection was overruled and he got 75 years at his trial for assault of a public servant after the state proved a habitual allegation. The CCA embarked on a strict *Blockburger* analysis. *See Blockburger v. United States*, 284 U.S. 299 (1932). The CCA held, "The offense of assault required proof of at least one fact that the offense of resisting arrest did not: that the appellant caused bodily injury. The offense of resisting arrest required proof of a fact that the offense of assault did not: that the appellant prevented or obstructed a peace officer from effecting an arrest." *Id.* at 900.

"Multiple victims" capital murder can only result in one prosecution.

***Saenz v. State*, 166 S.W.3d 270 (Tex. Crim. App. 2005).**

Appellant and two others killed three people during the same criminal transaction (a drug deal gone bad). He was charged with capital murder in a three count indictment, each count naming one of the three dead and using the other two as aggravating circumstances. He got three life sentences. The court of appeals acquitted defendant of two of the convictions for double jeopardy. CCA affirmed. The CCA noted that it must determine what is the allowable "unit of prosecution" under the capital murder statute. The CCA held that the multiple victim capital murder statute contemplates one prosecution for an unlimited number of people killed in the same criminal transaction as one "unit" of prosecution. Thus, the situation here involved multiple convictions for the same offense and it violated double jeopardy.

A complaint about double jeopardy in the jury charge must be made at the time charge is submitted or it is waived.

***Langs v. State*, 183 S.W.3d 680 (Tex. Crim. App. 2006).**

In this case, the defendant was charged with burglary in two different ways: entry with intent to commit retaliation and (2) entry and then the commission of retaliation. He was also charged with the retaliation. The burglary case was submitted with both theories in the disjunctive for one general verdict. He was convicted of both the burglary and the retaliation. On appeal, he complained that the two convictions could not both stand, for one was barred by double jeopardy/multiple punishments. The CCA held that his double jeopardy claim was waived because he did not object to the disjunctive submission of the two counts before the charge was read to the jury. The reason is that one of the burglary theories would be double jeopardy (entry and then retaliation) but one would not (entry with intent to retaliate). Thus, it was not clear from the record which theory of burglary the jury relied upon. The CCA held, "When offenses, one of which could give rise to a multiple-punishment double-jeopardy violation, are listed

disjunctively in a jury charge, the burden is upon the defendant to 'preserve, in some fashion a double jeopardy objection at or before the time the charge is submitted to the jury.'" *Id.* at 687. Because appellant failed to object, he waived the error.

XX. CONSTITUTIONAL ISSUES – INEFFECTIVE ASSISTANCE

Wiggins does not compel an attorney to present bad evidence he found during the mitigation investigation.

***Ex Parte Woods*, 176 S.W.3d 224 (Tex. Crim. App. 2005).**

Woods' lawyers did an investigation of defendant's background (including retaining three separate mitigation specialists) and found mostly really bad stuff. At trial, they did not present much of it. Counsel chose not to call several of the persons giving the evidence, but to present the bulk of it through an expert. Counsel also chose not to personally interview several of these witnesses. Applicant now claims ineffective assistance of counsel via *Wiggins v. Smith*, 539 U.S. 510 (2003). The CCA noted that other attorneys may have interviewed all of the witnesses, and that these attorneys did not conduct "the most thorough investigation possible," but in this case it appears that not to have done so was a reasonable professional judgment. "When an attorney opens Pandora's box, he is not constitutionally required to examine each and every disease, sorrow, vice, and crime contained therein before quietly and firmly closing the cover." *Id.* at 228.

Counsel ineffective for not hiring experts or investigating his client's case because client did not give him the money to do so.

***Ex Parte Briggs*, ___ S.W.3d ___, No. AP-75,199, 2005 Tex. Crim. App. LEXIS 2174 (Dec. 16, 2005).**

This was an injury to a child case where the defendant was charged with killing her daughter. She pled guilty. She subsequently filed a writ of habeas corpus claiming she was actually innocent and that her attorney (and the state) failed to adequately investigate the case. The CCA grants relief under *Wiggins v. Smith*, 539 U.S. 510 (2003). The attorney had quoted a fee of $15,000 and she had paid him $10,400. The attorney threatened to withdraw. He also told her that it would take between $2,500 and $7,500 to retain an expert. The lawyer did subpoena all the medical records and reviewed them pretty extensively, but no doctor ever reviewed them pretrial. The defendant pled open and the court gave her 17 years.

Once a doctor did review the medical records (in connection with the writ proceeding), it was fairly apparent that the defendant did not, in fact, kill her baby, but rather he died of natural causes and through the gross negligence of the hospital. Counsel denied that he coerced the defendant to plead because of the money issue.

The CCA states that this was not a strategic choice on the part of counsel, but an economic one. Once it was apparent that the defendant was not going to pay, counsel had three choices: subpoena all the doctors to testify, withdraw from the case or seek to have experts appointed. Relief granted.

Counsel ineffective for eliciting prior convictions during defendant's testimony under mistaken belief they were admissible anyway.

***Robertson v. State*, ___ S.W.3d ___, No. PD-0325-05, 2006 Tex. Crim. App. LEXIS 576 (March 22, 2006).**

In this aggravated assault case, the defendant chose to testify. On direct examination in front of a jury, defendant's counsel asked him about two convictions that were currently on appeal and therefore not admissible. The defendant's self defense claim was rejected and he was convicted. During a later hearing on a motion for new trial, the same counsel admitted that he did not know the convictions were inadmissible. Counsel testified that he did it on purpose and it was a strategic decision. The court of appeals affirmed, holding that having the defendant admit to the inadmissible convictions was trial strategy. The CCA reversed, holding that this was indeed deficient performance. Essentially, even though it was a strategic choice, it was a strategic choice based on a mistaken belief about the law and the injury was compounded because of the self defense claim: "In cases like this where appellant's self-defense claim rested almost entirely on his credibility, the weight of authority supports a holding that appellant's trial lawyer performed deficiently under the first prong of *Strickland* by allowing the jury to hear prejudicial and clearly inadmissible evidence because this evidence could serve no strategic value including demonstrating that appellant is not a liar." *Id.* at **24-25. The CCA reversed and remanded for consideration of prejudice.

Prejudice not shown for filing an unsworn motion for probation.

***Ex Parte Cash*, 178 S.W.3d 816 (Tex. Crim. App. 2005).**

Appellant stood trial for murder. His counsel filed a motion for probation, but forgot to get it sworn. He

requested a charge on probation, but the trial court denied it, not because of the defective motion for probation, but because the judge thought (incorrectly, apparently) that appellant had a prior that precluded eligibility for probation. The court of appeals would not review the merits of the charge error claim, holding that appellant had waived error because of the defective motion for probation.

The CCA was silent on whether filing the defective motion for probation is deficient performance. Instead, the CCA went directly to the prejudice prong of the *Strickland* analysis and held that because the appellant got 40 years, he could not show prejudice even if his counsel's performance were deficient.

XXI. DNA TESTING

Motion for DNA testing does not violate "two forum rule."

***Thacker v. State*, 177 S.W.3d 926 (Tex. Crim. App. 2005).**

Death penalty case. Defendant moved for DNA testing and a stay of execution. He claimed the failure to file a motion earlier was because he thought that while his federal writ was pending, he could not file the motion without violating the "two forum rule" which requires litigation to be either in the federal system or state system but not both. The CCA observed that unlike a writ, a motion for DNA testing cannot, in and of itself, result in relief from a conviction. Thus, it does not violate the two forum rule and therefore delay is not excused on that ground.

Appeal from a denied motion must be within 30 days.

***Swearingen v. State*, ___ S.W.3d ___, No. AP-75,203, 2006 Tex. Crim. App. LEXIS 186 (Feb. 1, 2006).**

Appellant moved for DNA testing, which was denied in an order dated April 7, 2005. After that date, there were intervening events. Between April 7 and June 9, there was a motion to extend time to respond to the state's response, and ex parte application and motion for discovery and application for writ of mandamus, all of which ended on May 10, 2005. On June 9, 2005, he filed his notice of appeal. The CCA holds that the appellate timetable ran from the date of the original order denying DNA testing. And that this is an appealable order (and *the* appealable order) from which the 30 day time limit for appeal runs.

Not entitled to a writ of habeas corpus or effective assistance of counsel in connection with a DNA motion.

***Ex Parte Baker*, 185 S.W.3d 894 (Tex. Crim. App. 2006).**

***Ex Parte Suhre*, 185 S.W.3d 898 (Tex. Crim. App. 2006).**

Both of these cases involved complaints of ineffective assistance of counsel in connection with a DNA motion. Both cases hold that no such right to effective assistance exists with DNA motions, even though the applicant has a right to counsel by statute (same as with 11.071 writs). However, Baker goes even further and holds that a defendant does not even have a right to a writ of habeas corpus in connection with a DNA motion (there is complaint associated with a DNA motion that is "cognizable" by writ). The reason is that a DNA motion, regardless of how it is decided, cannot result in an independent confinement – nobody is confined because of a DNA motion. Thus, the first requirement for a writ of habeas corpus – illegal confinement – does not exist. Thus, you really don't even get to the issue of ineffective assistance – there is no way to present it even if it exists. In Suhre, the CCA points out that a defendant is not limited to just one DNA motion and if ineffective assistance prevented a full and fair review, then the interests of justice may require a court to consider a second DNA proceeding.

XXII. WRIT OF HABEAS CORPUS ISSUES

Subsequent acquittal of co-defendant is not "newly available evidence" of actual innocence in appealing defendant's case.

***Ex Parte Thompson*, 179 S.W.3d 549 (Tex. Crim. App. 2005).**

Applicant was convicted of capital murder as a party and given the death penalty. The shooter then went to trial and was acquitted of capital murder and convicted of felony murder. Applicant then argued in a writ that because applicant was guilty only as a party, the principal's acquittal of capital murder means that applicant cannot be guilty of capital murder. The CCA held that the verdict in a different trial does not affect the verdict in applicant's trial.

A district clerk cannot just refuse to accept mail from the penitentiary even if he has an irrational fear of anthrax.

***DeLeon v. District Clerk of Lynn County*, ___ S.W.3d ___, No. AP-75,353, 2006 Tex. Crim. App. LEXIS 502 (March 8, 2006).**

Applicant tried twice to file a writ of habeas corpus from the penitentiary and each time it was returned to him, unopened and marked "refused." As it turns out, for

three or four years ago the district clerk's office quit accepting inmate correspondence that had not been inspected for the presence of anthrax. Of course, mandamus relief granted, as the applicant has an obvious constitutional right to file a writ of habeas corpus.

The question here is why just inmate correspondence?

The court will not consider allegations that are not contained on the proper form.

***Ex parte Blacklock*, ___ S.W.3d ___, No. AP-75,324, 2006 Tex. Crim. App. LEXIS 926 (May 10, 2006)**

The defendant filed a pro se application for writ of habeas corpus using a pre-printed writ-application form, but he failed to satisfy the requirements of Rule 73.1, requiring that he specify any grounds for relief and factual allegations. He included a two-page handwritten letter.

The CCA noted that the rules do not permit the defendant's letter/memorandum to substitute for the required specification and dismissed defendant's application as non-compliant.