



# ISSUES OF INTEREST BEFORE THE COURT OF CRIMINAL APPEALS

BY JEFFREY L. VAN HORN AND  
CHARLES F. "CHUCK" CAMPBELL

*The following is a list of issues the Court of Criminal Appeals will address during the 2010–11 term of court.*

## **Juries — *Trinidad v. State*, PD-1218-08**

The Court of Appeals found that Tex. Code Crim. Proc. 33.011(b) (H.B. 1086, 80th Leg., R.S., Ch. 846, §1 (2007)), when coupled with Tex. Code Crim. Proc. Art. 36.22, resulted in a defendant being entitled to a jury of 12, and only 12, jurors in a felony case. Since the trial judge had ordered an alternate juror to go to the jury room and participate in deliberations with the other 12 jurors, the defendant's rights under Tex. Const. Art. V, Section 13 were violated. So the question for the CCA is whether the statute (Art.33.011(b)) is constitutional. Assuming, *arguendo*, that this was trial error, was the error harmful in view of the fact that the extra juror did not participate in any voting that took place in the jury room?

## **Trial error; hearsay; *Crawford v. Washington and Woodall v. State*, PD-1379-09**

The Court of Appeals found that memory loss by a witness in trial did not constitute "absence" under Tex. R. Evid. 804(a)(3), such that the prosecutor could then read the witness' grand jury testimony into evidence under said exception to the hearsay rule. *Id.* The question before the CCA is whether this reading of grand jury testimony was a violation of the Confrontation Clause and of *Crawford*.

## **Corroboration of accomplice testimony, Art. 38.14 — *Smith v. State*, PD-0298-09**

The Court of Appeals held that when a witness testifies and is under indictment for the same offense or a lesser-included offense, the witness is an accomplice as a matter of law. The question before the CCA is whether, when the witness has been charged with the same offense as the defendant, but the indictment against the witness is dismissed, the witness remains an accomplice as a matter of law. Does it matter whether the indictment against the witness is dismissed pursuant to a plea bargain agreement under which the witness agrees to testify against the defendant? Should the CCA, as suggested by the state prosecuting attorney in an amicus brief, abandon the older line of cases that an indicted co-defendant who testifies for the State must be considered an accomplice witness as a matter of law, and instead let that fact of prior indictment be only one factor in determining, as a matter of fact rather than law, whether that witness is an accomplice? On its own motion, the CCA also granted review of the issue of the appropriate remedy, acquittal or reversal, if the evidence is found to be insufficient to corroborate the accomplice testimony.

**“Other commercial instrument” under Tex. Pen. Code 32.21(d); forgery; cash register or store receipt; proof of purchase; reformation of judgment by a court of appeals to reflect conviction of lesser offense — *Shipp v. State*, PD-1346-09**

The first issue before the CCA is whether a store receipt or cash register receipt can qualify as an “other commercial instrument” under the forgery statute, 32.21(d). The Court of Appeals held that it would not qualify as such. The second, and perhaps more important, issue is whether the Court of Appeals should have reformed the judgment to reflect a conviction for misdemeanor forgery under 32.21(b). The State in its PDR and brief on the merits urges the CCA to overrule *Collier v. State*, 999 S.W.2d 779 (Tex. Cr. App. 1999), and if that Court finds that the receipt was a writing but not a commercial instrument, it should reform the judgment to reflect a conviction for misdemeanor forgery, even though that option was not presented to Shipp’s jury.

**“Actual innocence” claims under Tex. Code Crim. Proc. Art. 11.072; invalid prior DWI conviction used to enhance DWI to felony; innocent of primary indictment allegation of felony DWI when evidence shows invalid prior conviction of DWI alleged for enhancement? Should *Ex parte Sparks*, 206 S.W.3d 680 (Tex. Cr. App. 2006), which holds to the contrary, be overruled? — *Wilson v. State*, PD-0008-09**

The Court of Appeals, relying on *Sparks*, affirmed the judgment of the trial court granting habeas relief under Art. 11.072. The applicant, in his brief on the merits, also relies on *Sparks*. The theme of the State’s PDR and brief is that traditional notions of actual innocence did not contemplate failure of proof in an indictment that alleged enhancement paragraphs. The State argues that “traditional hallmarks of actual innocence claims involve newly discovered evidence showing that the defendant is being wrongfully imprisoned for a crime that he did not commit.” The State urges that, to the extent it is in conflict with this holding, *Sparks* should be overruled.

**Criminal Mischief; proof of value of loss; owner’s opinion of cost of repairs in damage to property case — *Holz v. State*, PD-1786-09**

The issue presented in this case is whether, in a criminal mischief case, an owner’s opinion of the cost to repair damage to his or her property is sufficient under Tex. Pen. Code 28.03 to prove the amount of the pecuniary loss, but intertwined with this ground for review, is ground number 2, which posits the contention that the question of the owner’s expertise is a matter of admissibility and not sufficiency. The Court of Appeals held that unless the owner was an expert, an estimate of damage or an opinion on the amount of damage without further

evidence was insufficient to prove the cost of repair. The appellant argues that the State’s contention fails because the issue is strictly one of sufficiency of the evidence.

**“Mailbox rule,” Tex. R. Civ. 5 and Tex. R. App. P. 9.2; so-called grace period for filing documents; applicability to pro se inmates — *Campbell v. State*, PD 1081-09**

The Court of Appeals dismissed the appellant’s appeal for want of jurisdiction because the motion for new trial and notice of appeal were received several days late. Appellant argues that pro se inmates should be exempted from enforcement of the 10-day filing proviso contained within Tex. R. Civ. P. 5 and Tex. R. App. P. 9.2(b)(1), citing *Houston v. Lack*, 487 U.S. 266 (1988), from the U.S. Supreme Court, and *Warner v. Glass*, 135 S.W.3d 681 (Tex. 2004), from our Texas Supreme Court. The State argues that the rules should be applied uniformly and to engraft an exception on them would help promote fraud on the part of the pro se inmates. The State contends that late-filing inmates have a remedy in any event (i.e., habeas corpus).

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**Fourth Amendment; search & seizure; plain view doctrine; items or property immediately apparent to police; *Horton v. California*, 496 U.S. 128 (1990), *White v. State*, 729 S.W.2d 737 (Tex. Cr. App. 1987) — *Dobbs v. State*, PD-0873-09**

During the execution of a search warrant for narcotics, officers observed two new bags of golf clubs with sales tags still attached and shirts with the logo of a local country club. In order to ascertain whether or not the golf equipment could have been stolen merchandise, the officers called the country club. Once they were informed that the property had been recently stolen, the officers seized the property. The issue in the case is whether the necessity of the phone call to determine whether the property was stolen defeated the requirement that, in order to seize property in plain view, it must be “immediately apparent” that the property is evidence of crime.

**Double Jeopardy; false statements to obtain credit; allowable units of prosecution — *Jones v. State*, PD-0499-09**

The Court of Appeals held that pursuant to Tex. Pen. Code 32.32, the gravamen of the offense was the obtaining of credit, and that, *ergo*, the State could not get a conviction for each of the six false statements (the appellant was convicted six times under the statute) that the appellant made in order to obtain that credit. The issue before the CCA is whether each false statement that related to a separate matter could have caused the granting of credit in the amount of \$200,000, was an allowable unit of prosecution. If the gravamen of the statute is the obtaining of credit, the Court of Appeals was probably correct, but if the gravamen is the false statement, then a separate offense occurs for every false statement made. If the latter is true, then no double jeopardy violation occurred in this case.

**Factual sufficiency of evidence; continued viability of the concept; factual sufficiency measured against legal sufficiency — *Brooks v. State*, PD-0210-09**

The issue presented verbatim from the State’s PDR:

Is there any meaningful distinction between legal sufficiency review under *Jackson v. Virginia* and factual sufficiency review when that review is limited to the weakness of the evidence in the abstract and, if so, does it escape review in this Court (CCA)? Weighing in on this ubiquitous issue is the State Prosecuting Attorney in a post-submission amicus curiae brief, framing the issue differently, and yet in harmony with the DA’s petition;

and

[W]hat can be the only practical difference between a court’s view of the evidence in the light most favorable to the jury’s verdict [and] its view of the evidence in a neutral light ... except that a “neutral” view of the evidence authorizes the appellate court to substitute its judgment for that of the jury on issues of credibility of witnesses and weight to be given to testimony.

The appellant, interestingly, in his own PDR, and not really in conflict with the State’s premise, avers that the Court of Appeals erred in finding the evidence was legally sufficient, where that Court found that same evidence factually insufficient. “A rose, by any other name...” *Romeo & Juliet*, Act II, Scenes 1–2. Shakespeare, William.

**First Amendment; void for vagueness; constitutionality of Tex. Pen. Code 42.07(a)(4) and (7) (Harassment statute) — *Scott v. State*, PD-1069-09**

Issues before the CCA on the State’s petition include whether the term “repeated” and the phrase “in a manner reasonably likely to harass, annoy, alarm, abuse, torment or offend another” are unconstitutionally vague and whether those sections implicate the First Amendment. Additionally, the question is posed whether the lower court erred in failing to apply a narrowing construction to the statute, so as to lessen the consequences of an overbreadth finding.

**Eighth Amendment; juvenile defendants; life sentence without possibility of parole; cruel and unusual punishment; four-year window — *Meadoux v. State*, PD-0123-10**

The issue presented to the CCA is whether the assessment of a sentence of life without parole to a juvenile for the crime of capital murder constitutes cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. This case, and perhaps others in the appellate pipeline, may be remanded to the various lower courts to consider the issue in light of *Graham v. Florida*, 2010 Lexis 3881, May 17, 2010, U.S. Supreme Court, No. 08-7412, wherein the Supreme Court declared unconstitutional a Florida statute that provided life without parole to some non-homicide cases. The question left unanswered is whether homicide cases will also be affected. Texas cases that are in the window between the life without parole provision in §12.31(a) and the 2009 amendment, S.B. 839, 81st Leg. (TX. 2009), effectuating a change, will be the primary cases affected by *Graham*. The CCA may decide this question itself, or it may remand for further consideration.

### JEFFREY L. VAN HORN

was appointed state prosecuting attorney on May 23, 2007. He had been an assistant state prosecuting attorney since 1991 and first assistant state prosecuting attorney since 1996.

### CHARLES F. “CHUCK” CAMPBELL

served for two years in Harris County and one year in Tarrant County as an assistant district attorney from 1969 until 1972 prior to his employment as special assistant state attorney in 2007. He was elected to the Court of Criminal Appeals in 1982, and re-elected in 1988. Since 1995, he sat both as a district judge and as an intermediate appellate court judge in a visiting capacity.