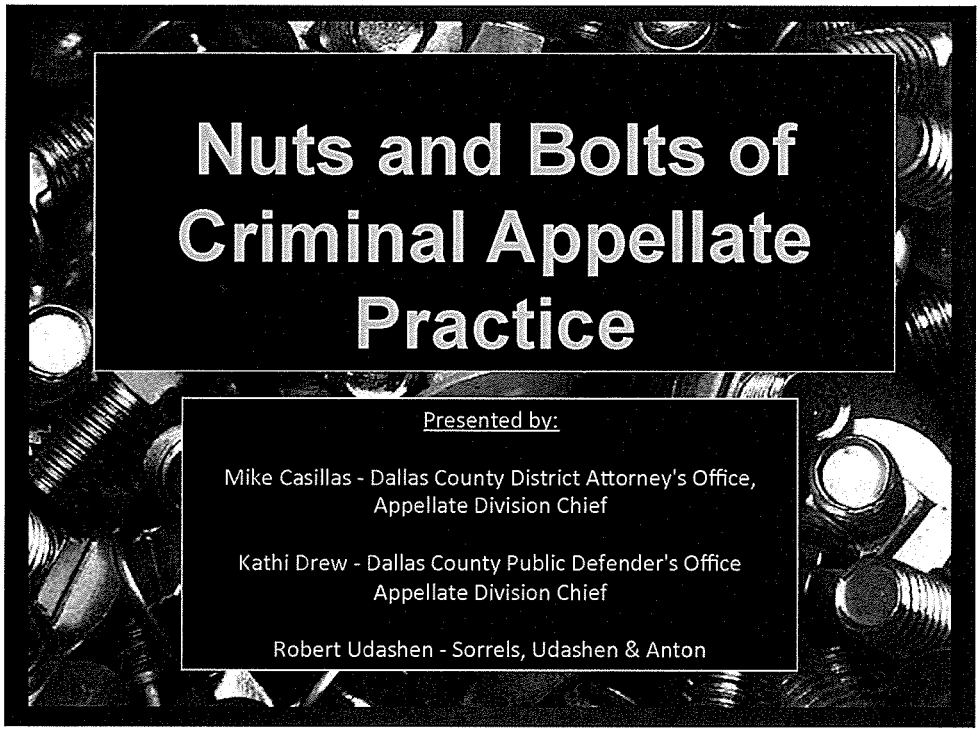
Nuts and Bolts of Criminal Appellate Practice - Mike Casillas, Kathi Drew and Robert Udashen


Nuts and Bolts of Criminal Appellate Practice
Presented by:
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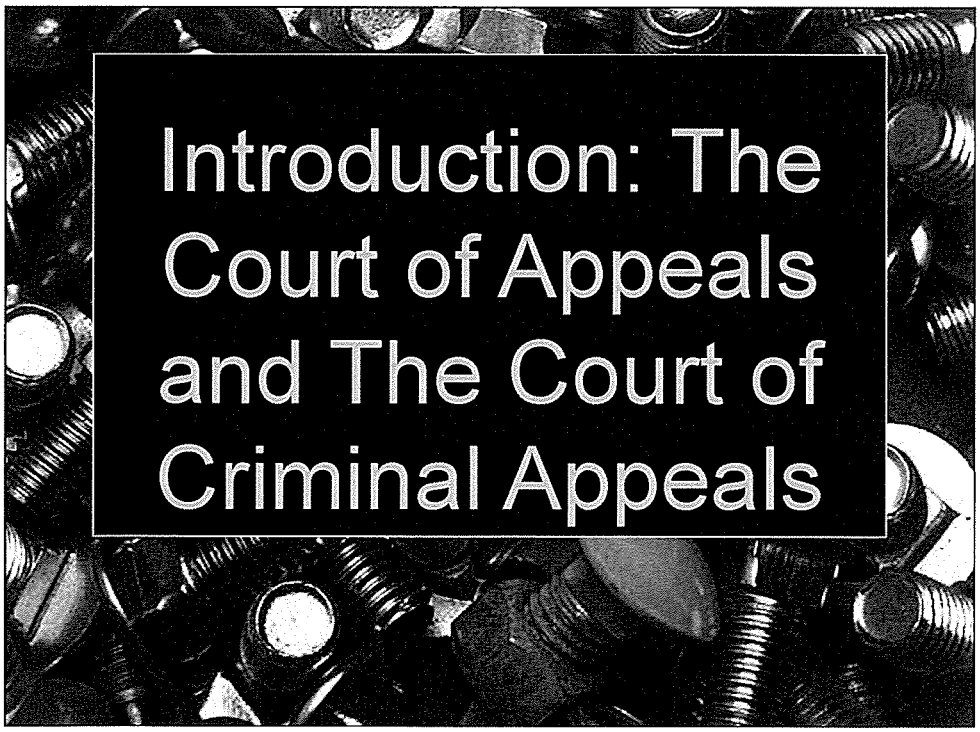
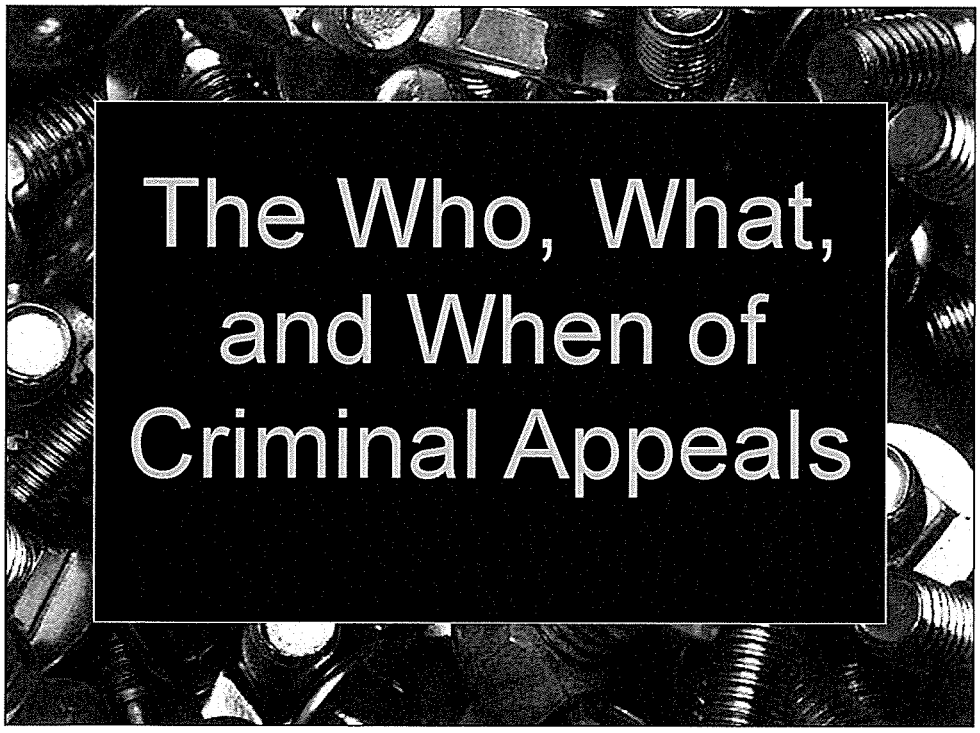

Introduction: The Court of Appeals and The Court of Criminal Appeals

I. Introduction: The Court of Appeals and The Court of Criminal Appeals

- Appeals from convictions in the county or district courts are initially filed in the Court of Appeals.
- There are 14 Court of Appeals in Texas.
- After the Court of Appeals makes it decision, the losing party may request a hearing from the Court of Criminal Appeals by filing a Petitioner for Discretionary Review.
- Whereas the Court of Appeals must take properly filed appeals, the Court of Criminal Appeals has the discretion to refuse a Petition for Discretionary Review.



II. The Who, What, and When of Criminal Appeals

Defendants:

- After a conviction, all defendants in a criminal action have the right to appeal to the Court of Appeals, *see* Tex. Crim. Proc. Code Art. 44.02. EXCEPT . . .
- Before a defendant who has entered a plea of guilty or nolo contendere pursuant to a plea agreement and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial. *See* Tex. Crim. Proc. Code Ann. § 44.02; *see also* Tex. R. App. P. 25.2(a)(2).
  - A defendant may waive his right to appeal as part of a plea bargain.

II. The Who, What, and When of Criminal Appeals

State:

- Double jeopardy issues arise when State appeals after a verdict has been entered. Accordingly, the State's right to appeal will almost always be an interlocutory appeal in which the trial is stayed pending the State's Appeal.
- Pursuant to Texas Code of Criminal Procedure Article 44.01, the State is entitled to an appeal of a trial court order which:
  - Dismisses an indictment, information, or complaint (Interlocutory)
  - Sustains a former jeopardy claim (Interlocutory)
  - Grants a motion to suppress evidence, a confession, or admission (Interlocutory)
  - Grants a Motion for DNA testing (Interlocutory)
  - Arrests or modifies a judgment
  - Grants a new trial
  - Imposes an allegedly illegal sentence

III. Preservation of Error for Appeal

- Written Motion: Typically, error is automatically "preserved" when the court grants or overrules a written motion.
- Evidentiary Rulings: Objections to the admission or exclusion of evidence are preserved by following the requirements of Texas Rule of Appellate Procedure 33.1:
  - Make a timely objection on the record;
  - State the specific grounds for the objection; and
  - Obtain a ruling from the court on the objection
  - Grounds for error on Appeal must match the grounds or the objection at trial. *See Neal v. State*, 150 S.W.3d 169 (Tex. Crim. App. 2004).
- Insufficient Evidence: It is generally assumed that no action is needed to preserve an appeal that the evidence is insufficient to support conviction.
- Fundamental Error: No action is needed to preserve fundamental errors for appeal. (E.g. jurisdictional errors in the charging instrument or jury charge errors that are so egregious that a fair trial was denied.)

III. Preservation of Error for Appeal

- Motion for a New Trial: "A motion for a new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record." Tex. R. App. P. 21.2.
  - E.g. the jurors were smoking pot and drinking whiskey during deliberations
  - Motion for a new trial must be filed before, but no later than 30 days after the date when the trial court imposes or suspends sentence in open court. Tex. R. App. P. 21.4(e). The motion may be amended within this time frame provided that the court has not already ruled on it.
  - Motion for a new trial must be presented to the court within 10 days of filing it. Tex. R. App. P. 21.6
  - Motions for a new trial that are not ruled on within 75 days after imposing or suspending sentence in open court are deemed overruled as a matter of law. Tex. R. App. P 21.8 (c).

IV. Perfecting an Appeal

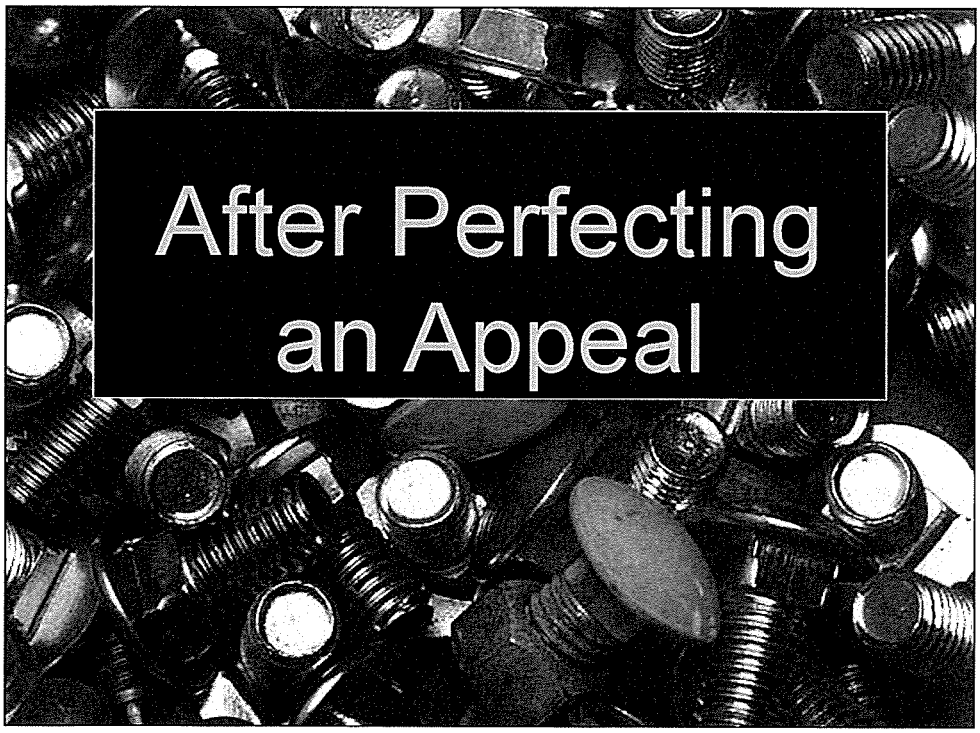
- Perfection of Appeal
  - In a non-death penalty criminal case, appeal is perfected by timely filing a sufficient notice of appeal. Tex. R. App. P. 25.2(b). In a death-penalty case, it is unnecessary to file a notice of appeal. Tex. R. App. P. 25.2(b).
- Form and Sufficiency of Notice:
  - Notice must be given in writing and filed with the *trial court clerk*. Tex. R. App. P. 25.2(c)(1).
  - Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order, and, if the State is the appellant, the notice complies with Code of Criminal Procedure article 44.01. Tex. R. App. P. 25.2(c)(2).
- Certification of Defendant's Right of Appeal:
  - If the defendant is the appellant, the record must include the trial court's certification of the defendant's right of appeal under Rule 25.2(a)(2). Tex. R. App. P. 25.2(d).

IV. Perfecting an Appeal

- Time to Perfect
  - Defendant (No Motion for a New Trial Filed): Notice of appeal must be filed within 30 days after the date when the trial court imposes or suspends sentence in open court, or after the day the trial court enters an appealable order. Tex. R. App. P. 26.2(a)(1).
  - Defendant (Motion for a New Trial Filed): Notice of appeal must be filed within 90 days after the date when the trial court imposes or suspends sentence in open court. Tex. R. App. P. 26.2(a)(2). Note that this is true regardless of whether the trial court has entered a ruling on the motion for a new trial. *See* Tex. R. App. P 21.8(a), (c) (motions for a new trial that are not ruled on within 75 days after imposing a or suspending sentence in open court are deemed denied).
  - State: Notice of appeal must be filed within 20 days after the day the trial court enters the order, ruling or sentence to be appealed. Tex. Code Crim. Proc. Ann. Art. 49.01(d), and Tex. R. App. P. 26.2(b).
  - Extension of Time: The appellate court may extend the time to the notice of appeal if, within 15 days after the deadline for filing the notice of appeal a notice of appeal is filed in the trial court and a motion complying with Texas Rule of Appellate Procedure 10.5(b) is filed in the appellate court. Tex. R. App. P. 26.3.

IV. Perfecting an Appeal

- Mailbox Rule:
  - A document is considered timely filed if it is mailed by the United States Postal Service on or before the day it is due and received by the clerk's office within 10 days of the due date. Tex. R. App. 9.2(b)(1).
  - Conclusive proof that a document was timely filed under the mailbox rule includes a legible United States Postal Service post mark, a certified or registered mail receipt endorsed by the United States Postal Service, and a certificate of mailing by the United States Postal Service. Tex. R. App. P. 9.2(b)(2).



V. After Perfecting an Appeal

- Docketing Statement
  - After perfecting the appeal in a criminal case, the appellant must file in the appellate court a docketing statement that includes the information laid out in Texas Rule of Appellate Procedure 32.2.
- Appellate Record
  - Reporter's Record is the court reporter's transcript of of testimony and proceedings before the trial court.
    - Appellant must request the reporter's record. Tex. R. App. P. 35.3(b)(2).
    - If the Reporter's Record is not filed, and the appellant is at fault the court may decide to proceed only on those issues not requiring a transcript. Tex. R. App. P. 37.3.
    - Rules relating to specific issues like costs and inaccuracies in the Reporter's Record are contained in Texas Rule of Appellate Procedure 34.6.

V. After Perfecting an Appeal

- Appellate Record (Cont.)
  - Clerk's Record essentially consists of everything else for which there is a record. (E.g. indictment, jury charge, trial court's certification of the defendant's right of appeal, and other items that parties request to be included.)
    - A specific request need not be made for the Clerk's Record provided that "(1)a notice of appeal has been filed and . . . the trial court has certified the defendant's right of appeal, as required by Rule 25.2(d); and (2) the party responsible for paying for the preparation of the clerk's record has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee." Tex. R. App. P. 35.3(a).
  - Time for Filing
    - If a motion for a new trial is not filed, then the Appellate Record must be filed within 60 days after the date the sentence is imposed or suspended in open court or the order of appeal is signed. Tex. R. App. P. 35.2(a).
    - If a motion for a new trial is filed and denied, then the Reporter's Record must be filed within 120 days after the date the sentence is imposed or suspended in open court or the order of appeal is signed. Tex. R. App. P. 35.2(b).

VI. The Briefing

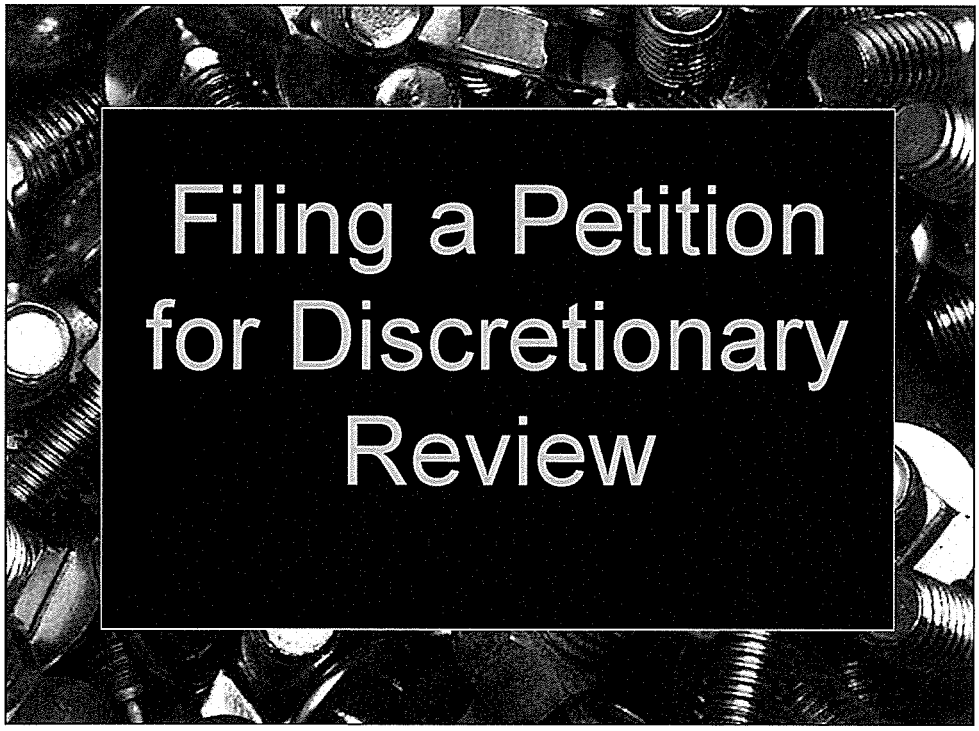
- Appellant's Brief
  - Time: Must be filed within 30 days after "the later of (1) the date the clerk's record was filed; or (2) the date the reporter's record was filed." Tex. R. App. P. 38.6(a).
    - The appellate court may grant a motion for an extension of time (complying with Rule 10.5(b)) to file a brief. A motion for an extension of time to file a brief may be filed before or after the date the brief is due. Tex. R. App. P. 38.6(d).
  - Contents: Under appropriate headings and in the order indicated by Texas Rule of Appellate Procedure 38.1 the appellant's brief must include
    - Identity of Parties and Counsel
    - Table of Contents
    - Index of Authorities
    - Statement of the Case
    - Any Statement Regarding Oral Argument
    - Issues Presented
    - Statement of Facts
    - Summary of the Argument
    - Argument
    - Prayer

VI. The Briefing

- Appellee's Brief
  - Time: Must be filed within 30 days after the date the appellant's brief was filed. Tex. R. App. P. 38.6(b)
  - Contents: The appellee's brief must conform to the same requirements as appellant's except that it need not include a list of the parties and counsel, a statement of the case, statement of the issues presented, statement of the facts, or any item already contained in the appellant's appendix.
- Reply Brief
  - Must be filed within 20 days after the date the appelle's brief was filed. Tex. R. App. P. 38.6(c).
  - Reply briefs may address any matter in the appellee's brief.
- Technical Brief Requirements
  - Requirements for font and margin size, number of copies, filing, etc. can be found in Texas Rules of Appellate Procedure 9.1 – 9.8.

VII. Standards of Review

- Texas Rule of Appellate Procedure 44.2
  - (a) Constitutional Error
  - (b) Other Errors
- Structural errors not subject to harmless error review. *See Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997).
- Jury charge errors not governed by Tex. R. App. P. 44.2. *See Olivas v. State*, 202 S.W.3d 137 (Tex. Crim. App. 2006), and Tex. Code Crim. Proc. Ann. art. 36.19.



IX. Filing a Petition for Discretionary Review

- Reasons for Granting Review (Tex. R. App. P. 66.3)
  - Whether a court of appeals' decision conflicts with another court of appeals' decision on the same issue;
  - Whether a court of appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals;
  - Whether a court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States;
  - Whether a court of appeals has declared a statute, rule, regulation, or ordinance unconstitutional, or appears to have misconstrued a statute, rule, regulation, or ordinance;
  - Whether the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision; and
  - Whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

IX. Filing a Petition for Discretionary Review

- Contents of Petition (Tex. R. App. P. 68.4)
  - Table of Contents.
  - Index of Authorities
  - Statement Regarding Oral Argument
  - Statement of the Case
  - Statement of Procedural History
  - Grounds for Review
  - Argument
  - Prayer for Relief
  - Appendix *(*Must include a copy of the court of appeals opinion.)
  - Must not be longer than 15 pages , exclusive of pages containing table of contents, the index of authorities, the statement regarding oral argument, the statement, the statement of procedural history, and the appendix. Tex. R. App. P. 68.5.

IX. Filing a Petition for Discretionary Review

- Time to File
  - Petition must be filed within 30 days after either the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing was overruled. Tex. R. App. P. 68.2(a).
  - Extension of Time: The Court of Criminal Appeals may extend the time to file a petition for discretionary review if, a party files a motion complying with Texas Rule of Appellate Procedure 10.5(b) no later than 15 days after the last day for filing the petition. Tex. R. App. P. 68.2(c).
- Where to File
  - The petition and all copies of the petition must be filed with the clerk of the court of appeals. Tex. R. App. P. 68.3.
- Service on State Prosecuting Attorney
  - In addition to the service required by Rule 9.5, service of the petition, reply, or supplementation to either of these must be made on the State Prosecuting Attorney (Lisa McMinn) at P.O. Box 12405, Austin, Texas 78711. Tex. R. App. P. 68.11.

X. Miscellaneous

- Must the trial attorney pursue an appeal?
  - Tex. Code. Crim. Proc. Ann. art 26.04(j).
- Frivolous Appeal
  - Retained attorney? *See McCoy v. Court of Appeals of Wisconsin,* 486 U.S. 429 (1988).
  - Appointed attorney? *See Anders v. California*, 386 U.S. 738 (1967).
  - 5th Circuit has posted *Anders* brief guidelines and a checklist on its website. Failure to properly follow the guidelines and checklist will result in finding that the *Anders* brief is facially inadequate. *See United States v. Garland*, No. 09-50317, 2011 WL 311024, at *1-3 (5th Cir. January 31, 2011, revised February 2, 2011).

X. Miscellaneous

- Bond on Appeal governed by Tex. Code Crim. Proc. Ann. art 44.04.
- Out-of-time appeals
  - A writ of habeas corpus may be used to obtain an out-of-time appeal. *Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim. App. 1988).

Nuts and Bolts: The State's Perspective
Compiled by Mike Casillas, Assistant District Attorney
Presented March 18, 2011

The State's right to appeal is very limited and is set out in Tex. Code Crim. P. art. 44.01. In fact, "Article 44.01 does not have penumbras or 'spirits.' The statute either does or does not authorize a State's appeal." State ex rel. Lykos v. Fine, Nos. AP-76,470 & 76,471, 2011 WL 93011, 2011 Tex. Crim. App. LEXIS 1, at *25 (Tex. Crim. App. January 12, 2011)(not yet reported). The State's right to appeal does not exist at all unless authorized by statute. *See, e.g.*, Watson v. State, 924 S.W.2d 711, 713 (Tex. Crim. App. 1996). "The State does not have an unlimited right to appeal a trial court's decision in a criminal case. The State must invoke one of the specific instances in which the Legislature has granted it the right to appeal." State v. Ramirez, 62 S.W.3d 356, 357 (Tex. App. – Corpus Christi 2001, pet. ref'd). The Court of Criminal Appeals has concluded that the State may not appeal from a justice court directly to a court of appeals. *See, e.g.*, State v. Alley, 158 S.W.3d 485 (Tex. Crim. App. 2005)(decision based on interplay between different portions of the Texas Code of Criminal Procedure and the Texas Government Code).

Under the express terms of article 44.01, the State's right to appeal is limited to appealing an order in a criminal case if the order:

(a)(1) dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint;

Limited to a ruling of the trial court that: a) alters the face of the indictment as it was issued by the grand jury or the face of the information and 2) terminates the prosecution *See, e.g.*, State v. Stanley, 201 S.W.3d 754, 758-61 (Tex. Crim. App. 2006); State v. Morgan, 160 S.W.3d 1, 4-5 (Tex. Crim. App. 2004); State v. Garrett, 824 S.W.2d 181, 183-84 (Tex. Crim. App. 1992); State v. Moreno, 807 S.W.2d 327, 334 (Tex. Crim. App. 1991).

The State may even be able to appeal the dismissal of a charging instrument that occurs after jeopardy has attached so long as the trial court's decision is not one that finds the defendant not guilty or that the State's evidence in any way failed to prove all the essential elements of the offense. *See, e.g.*, Stanley, 201 S.W.3d at 758-60.

State's option of amending is of no significance in determining right of State to appeal *See, e.g.*, Moreno, 807 S.W.2d at 333.

The State's right to appeal is not dependent upon whether the indictment was a true indictment that was returned by a duly organized grand jury as the statute does not provide for any such preliminary inquiry before the State can appeal the trial court's order dismissing the indictment. *See, e.g.*, Ex Parte Young, 810 S.W.2d 221, 223-24 (Tex. Crim. App. 1991).

Actual effect of the trial court's ruling controls, not what the trial court or the parties have labeled the ruling or motion. *See, e.g.*, Garrett, 824 S.W.2d at 183-84; Moreno, 807 S.W.2d at 333; State v. Bates, 889 S.W.2d 306, 309-11 (Tex. Crim. App. 1994)("[T]he 'Order on Defendant's Motion Regarding Conduct of Trial' is quite simply an order granting a new trial.").

Caselaw exists for the proposition that the State need not object to the trial court's dismissal of the indictment in order to appeal that dismissal. *See* State v. Lohse, 881 S.W.2d 171, 172 (Tex. App. – Houston [1st Dist.] 1994, no pet.); State v. Boone, No. 05-97-01157-CR, 1998 Tex. App. LEXIS 3886, at *3-4 (Tex. App. – Dallas June 30, 1998, no pet.)(not designated for publication). However, the State needs to argue in the trial court its specific assertions or grounds of error so as to preserve those grounds for appellate review. *See, e.g.,* State v. Mercado, 972 S.W.2d 75, 76-78 (Tex. Crim. App. 1998); State v. Essien, No. 05-09-00167-CR, 2010 Tex. App. LEXIS 2039, at *3-4 (Tex. App. – Dallas April 20, 2010, no pet.)(not designated for publication). In order to have all issues addressed by the Court of Appeals, an appealing party -- whether it be the State or the defendant -- must include those issues in the initial or opening brief. *See* Tex. R. App. P. 38.1; Garrett v. State, 220 S.W.3d 926, 928-29 (Tex. Crim. App. 2007)("Rule 38.1 requires that an appellant designate all issues for review in the original brief. Indeed, Rule 38.1 allows an appellant to present whatever issues for review he or she desires, with very few limitations. [citation omitted]. Thus an appellant is the master of his or her own destiny with respect to what issues the court of appeals is required to address within its written opinion."). While the appealing party has a right to file a Reply Brief under Tex. R. App. P. 38.3, issues not raised in the appealing party's initial/opening brief nor raised in the appellee's response brief may not be raised for the first time in the Reply Brief. *See, e.g.,* Strange v. State, No. 05-00-01832-CR, 2001 Tex. App. LEXIS 8154, at *18-19 (Tex. App. – Dallas December 10, 2001, pet. ref'd)(not designated for publication), *citing* Barrios v. State, 27 S.W.3d 313, 322 (Tex. App. – Houston [1st Dist.] 2000, pet. ref'd), *cert. denied*, 534 U.S. 1024, 122 S.Ct. 555 (2001).

Example: A number of intermediate appellate courts have concluded that a trial court's ruling striking a prior conviction from a felony DWI indictment constitutes

termination of the felony prosecution such that the State may appeal the ruling of the trial court. *See, e.g.*, State v. McGuffey, 69 S.W.3d 654, 655-56 (Tex. App. – Tyler 2002, no pet.); State v. Duke, 59 S.W.3d 789, 790 (Tex. App. – Fort Worth 2001, pet. ref'd); State v. Mewbourn, 993 S.W.2d 771, 772-73 (Tex. App. – Tyler 1999, no pet.); State v. Wheeler, 790 S.W.2d 415, 416 (Tex. App. – Amarillo 1990, no pet.); *see also, e.g.*, State v. Sanders, No. 12-03-00067-CR, 2004 Tex. App. LEXIS 1957, at *2-3 (Tex. App. – Tyler February 27, 2004, no pet.)(not designated for publication). ** This issue is currently pending before the Dallas Court of Appeals.**

Example: One intermediate appellate court has reached the same conclusion in regard to the trial court's having stricken from an indictment alleging a felony-level, FV assault the allegation of the prior misdemeanor assault FV conviction. *See* State v. Cagle, 77 S.W.3d 344, 346 n. 1 (Tex. App. – Houston [14th Dist.] 2002, pet. ref'd).

Example: Setting aside of information based on conclusion of unconstitutionality of the criminal statute under which the defendant had been charged was appealable by the State as was dismissal with prejudice for pre-indictment delay. *See, e.g.*, State v. Horner, 936 S.W.2d 668, 670 (Tex. App. – Dallas 1996, pet. ref'd)(pre-indictment delay); State v. Eaves, 786 S.W.2d 396 (Tex. App. – Amarillo 1990)(unconstitutionality of statute), *aff'd*, 800 S.W.2d 220 (Tex. Crim. App. 1990).

Example: Since Tex. Code Crim. P. art. 28.01, §(9) requires that the entrapment defense be determined pretrial, the State may not appeal if a trial court dismisses an indictment based on a finding of entrapment as a matter of law. *See* State v. Taylor, 886 S.W.2d 262, 266 (Tex. Crim. App. 1994yler 1999, no pet.).

Example: This provision does not permit the State to invoke the appellate court's jurisdiction relative to an order of the trial court that dismisses a motion to revoke probation. *See, e.g.*, State v. Lopez, No. 05-96-01757-CR, 1997 Tex. App. LEXIS 572, at *5 (Tex. App. – Dallas February 11, 1997, no pet.), *citing* State v. Cuellar, 815 S.W.2d 295, 297 (Tex. App. – Austin 1991, no pet.).

(a)(2) arrests or modifies a judgment [*See* Tex. R. App. P. 22];

> "The 'plain' language of Article 44.01(a)(2), is unambiguous, and it authorizes the State to appeal the trial court's order that modified its previous judgment regardless of the legal grounds for the appeal (the trial court's 'jurisdiction to act') and regardless of how the Court of Appeals characterized this appeal. State v. Gutierrez, 129 S.W.3d 113,

115 (Tex. Crim. App. 2004)(9 months after having imposed sentence of confinement for 2 years, same trial court – but different visiting judge – signed order on Gutierrez's motion for reconsideration of punishment).

Example: The Court of Criminal Appeals has concluded that the State had the right to appeal under this provision in regard to what the trial court characterized as a judgment nunc pro tunc when the record showed that there had been no clerical error in regard to the original judgment. *See* Collins v. State, 240 S.W.3d 925, 927-28 (Tex. Crim. App. 2007).

Example: A number of intermediate appellate courts have concluded that a trial court's ruling placing a defendant on "shock" probation under Tex. Code Crim. P. art. 42.12, §6 may be appealed by the State under Tex. Code Crim. P. art. 44.01(a)(2). *See, e.g.*, State v. Posey, 300 S.W.3d 23, 26 (Tex. App. – Texarkana 2009), *aff'd*, Nos. PD-0034-10 & PD-0035-10, 2011 Tex. Crim. App. LEXIS 343 (Tex. Crim. App. January 12, 2011)(not yet reported); State v. Dunbar, 269 S.W.3d 693, 695 (Tex. App. – Beaumont 2008), *aff'd*, 297 S.W.3d 777 (Tex. Crim. App. 2009); In re State ex rel. Deleon, 89 S.W.3d 195, 196-97 (Tex. App. – Corpus Christi 2002, no pet.). Additionally, the Court of Criminal Appeals has concluded that the State's right to appeal the "truly jurisdictional" question of whether the trial court had jurisdiction to place the defendant on "shock" probation is not subject to procedural default in the trial court for failure to comply with Tex. R. App. P. 33.1. *See* State v. Dunbar, 297 S.W.3d 777, 780 (Tex. Crim. App. 2009).

Example: One intermediate appellate court has concluded that a trial court's order releasing the defendant from non-deferred probation at a point earlier than that called for in the original judgment may be appealed by the State under Tex. Code Crim. P. art. 44.01(a)(2). *See* Cuellar, 815 S.W.2d at 298. [since an order of deferred adjudication is not a judgment, an order modifying the original order of deferred adjudication seems not to be appealable by the State under Tex. Code Crim. P. art. 44.01(a)(2). *See* Tex. Code Crim. P. art. 42.01, §1 defining "judgment" as "the written declaration of the trial court signed by the trial judge and entered or record showing the conviction or acquittal of the defendant."]

Example: The Court of Criminal Appeals has held that the State may not appeal from a judgment that modifies a previously entered judgment nisi. *See* State v. Sellers, 790 S.W.2d 316, 320-28 (Tex. Crim. App. 1990).

(a)(3) grants a new trial

See Tex. R. App. P. 21; State v. Herndon, 215 S.W.3d 901, 906 (Tex. Crim. App. 2007)(explaining limits to the discretion of the trial court relative to granting a motion for new trial); State v. Choice, 319 S.W.3d 22 (Tex. App. – Dallas 2008, no pet.)(reversal of motion for new trial granted on grounds on ineffective assistance when there was no evidence of ineffective assistance); State v. Saylor, 319 S.W.3d 704 (Tex. App. – Dallas 2009, pet. ref'd)(reversal of motion for new trial granted on grounds of violation of witness rule when record failed to show violation of witness rule or how any testimony had been impacted by purported violation of witness rule).

If order of trial court is labeled something other than order that grants a new trial, but is "functionally indistinguishable" from or the "functional equivalent" of an order granting a new trial, appellate court "can look past the label assigned to the order by the trial court and treat the order as one granting a new trial." State v. Boyd, 202 S.W.3d 393, 400 (Tex. App. – Dallas 2006, pet. ref'd)(citations omitted)(State invoked appellate court's jurisdiction because even though motion was oral, labeled motion for mistrial, and lodged before jury returned its verdict, trial court "carried" the motion and ruled on it when it was re-urged by defendant at the punishment hearing). *See, e.g.*, State v. Bates, 889 S.W.2d 306, 309-11 (Tex. Crim. App. 1994)("[T]he 'Order on Defendant's Motion Regarding Conduct of Trial' is quite simply an order granting a new trial."). One intermediate appellate court has acknowledged that a post-verdict grant of a mistrial may be functionally indistinguishable from an order granting a motion for new trial. *See, e.g.*, State v. Garza, 774 S.W.2d 724, 726 (Tex. App. – Corpus Christi 1989, pet. ref'd).

Example: The Court of Criminal Appeals has held that granting a JNOV was the same as granting a motion for new trial (at least where the trial court did not grant the JNOV on evidentiary sufficiency). *See* State v. Savage, 905 S.W.2d 268, 269 (Tex. Crim. App. 1996).

Example: The Court of Criminal Appeals has held that granting a motion to withdraw a nolo plea that was filed the day after sentencing was the same as granting a motion for new trial. *See* State v. Evans, 843 S.W.2d 576, 577-78 (Tex. Crim. App. 1992).

(a)(4) sustains a claim of former jeopardy;

"Because the prosecutor's statement concerning appellee's prearrest, pre-Miranda silence was not clearly erroneous, it cannot be said that there was any intent to induce a mistrial or reckless disregard that a mistrial would be

reasonably certain to occur. The Court of Appeals erred in hold a retrial is jeopardy barred. The judgment of the Court of Appeals is reversed and the trial court's order dismissing the indictment in this cause is set aside." State v. Lee, 15 S.W.3d 921, 926 (Tex. Crim. App. 2000)(reversing State v. Lee, 971 S.W.2d 553 (Tex. App. – Dallas 1997) in which the State had appealed the trial court's dismissal of the indictment and barring retrial based on double jeopardy).

(a)(5) grants a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case and if the prosecuting attorney certifies to the trial court that the appeal is not taken for purpose of delay and that the evidence, confession, or admission is of substantial importance to the case;

"We therefore, overrule [State v.] Roberts[, 940 S.W.2d 655 (Tex. Crim. App. 1996)] because article 44.01(a)(5) is not limited solely to pretrial rulings that suppress 'illegally obtained' evidence. The State may appeal an adverse ruling on **any** pretrial motion to suppress evidence as long as the other requirements of the statute are met." State v. Medrano, 67 S.W. 3d 892, 903 (Tex. Crim. App. 2002)(emphasis in original).

Rules of procedural default apply to the State's appeal of a motion to suppress with the exception of the issue of standing, which can be raised and addressed for the first time on appeal. *See, e.g.,* Mercado, 972 S.W.2d at 76-78 (procedural default rules apply to State when State is party who lost below and is appealing); State v. Klima, 934 S.W.2d 109, 110 (Tex. Crim. App. 1996)(State may challenge standing for first time on appeal); State v. Jenkins, No. 05-09-00028-CR, 2009 Tex. App. LEXIS 8297, at *2 -3 (Tex. App. – Dallas October 29, 2009, pet. ref'd)(not designated for publication).

Example: This provision does not permit the State to file a motion to reconsider and then timely file a notice of appeal after the deadline for filing the notice of appeal has passed relative to the trial court's original suppression ruling. *See* State v. Cowsert, 207 S.W.3d 347, 351-52 (Tex. Crim. App. 2006).

(a)(6) is issued under Chapter 64 [DNA testing];

Under this category, the State's appeal is directed to contentions involving how the person seeking DNA testing failed to meet his or her burden relative to demonstrating his or her entitlement to DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. *See, e.g.,* State v. Young, 242 S.W.3d 926, 929 (Tex. App. – Dallas 2008, no pet.)(no entitlement to DNA testing because defendant, by virtue of his having been

granted deferred adjudication, had not been convicted and Chapter 64 by its very terms concerned a "convicted person"); State v. Cooper, No. 05-08-01642-CR, 2009 Tex. App. LEXIS 5773, at *4-6 (Tex. App. – Dallas July 28, 2009, pet. ref'd)(not designated for publication).

(k) The State is entitled to appeal an order granting relief to an applicant for a writ of habeas corpus under Article 11.072.

(l) The State is entitled to appeal an order entered under:
(1) Subchapter G or H, Chapter 62, that exempts a person from complying with the requirements of Chapter 62; and
(2) Subchapter I, Chapter 62, that terminates a person's obligation to register under Chapter 62.

In all the aforementioned situations involving orders that the State wishes to appeal, there must be a signed, written order and a docket sheet entry is insufficient. *see* State v. Rosenbaum, 818 S.W.2d 398, 402-03 (Tex. Crim. App. 1991); State v. Shaw, 4 S.W.3d 875, 877-78 (Tex. App. – Dallas 1999, no pet.); State v. Kibler, 874 S.W.2d 330, 332 (Tex. App. – Fort Worth 1994, no pet.); State v. Acosta, 948 S.W.2d 555, 556 (Tex. App. – Waco 1997, no pet.).

(b) The State is entitled to appeal a sentence in a case on the ground that the sentence is illegal.

The State's appeal must be about the actual sentence itself, as opposed to the process that led to the imposition of the sentence. *See* State v. Baize, 981 S.W.2d 204, 206 (Tex. Crim. App. 1998). The State's right to appeal a sentence on the ground that it was illegal did not permit the State to invoke the appellate court's jurisdiction relative to the issue of the trial court's failure to enter a deadly weapon finding in the judgment. *See* State v. Ross, 953 S.W.2d 748, 751-52 (Tex. Crim. App. 1997). However, enhancement findings are a part of the sentence, such that the State may appeal the trial court's failure to consider such findings when assessing punishment. *See* Wooldridge v. State, 158 S.W.3d 484, 485 (Tex. Crim. App. 2005); State v. Kersh, 127 S.W.3d 775, 778 (Tex. Crim. App. 2004). The right to appeal does not turn on whether such findings were previously found true or not. *See* Wooldridge, 158 S.W.3d at 485.

If the defendant is convicted and appealed, the State does not have to file a notice of appeal in order to appeal on the illegality of the defendant's sentence. *See* Mizell v. State, 119 S.W.3d 804, 806-07 (Tex. Crim. App. 2003).

Example: The Court of Criminal Appeals has in effect held that an illegal sentence does not result when the trial court, in an open plea scenario, imposes one sentence, but then within the same day reconsiders the sentence and imposes a lesser sentence that is still within the applicable range of punishment. *See* State v. Aguilera, 165 S.W.3d 695, 698-99 (Tex. Crim. App. 2005).

Example: One court of appeals has held that the trial court's unauthorized granting of "shock" probation cannot be appealed by the State under the illegal sentence provision because probation is not a sentence such that even a legally-unauthorized probation cannot constitute an illegal sentence. *See* Ramirez, 62 S.W.3d at 358.

(c) The State is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment.

> In the Fifth Court of Appeals District, "the State must file a notice of appeal pursuant to appellate rule 25.2(a), ..." Strong v. State, 87 S.W. 3d 206, 212 (Tex. App. -- Dallas 2002, pet. ref'd). Strong court noted that, "The San Antonio, Houston (Fourteenth District), and El Paso Courts of Appeals have concluded that the State is not required to file a notice of appeal in order to appeal a ruling on a question of law pursuant to article 44.01(c)." Strong, 87 S.W.3d at 212 (citations omitted). However, Strong court opted to "agree with the Austin and Beaumont courts [of appeals]." Strong, 87 S.W.3d at 212.
>
> Since Strong was issued, the Texarkana court of appeals has indicated that "the State is required to file a notice of appeal to perfect a cross-appeal under Article 44.01(b)." Baines v. State, No. 06-10-00069-CR, 2010 Tex. App. LEXIS 8777, at *22 (Tex. App. – Texarkana November 3, 2010, pet. filed)(not designated for publication). Baines court noted that, "The Austin, Dallas, Beaumont, and Fort Worth Courts of Appeals have each held that the State must file a notice of appeal in order to perfect a cross-appeal." Baines, No. 06-10-00069-CR, 2010 Tex. App. LEXIS 8777, at *20-21. (citations omitted).

Example: The Court of Criminal Appeals has held that the State was entitled to appeal the question of law regarding whether a prior conviction used for enhancement had been secured in accord with the requirements of the Dallas County Magistrate's Act. However, since the Court of Appeals had affirmed the conviction, the State was not entitled to a decision on the merits because doing so would violate the prohibition of issuing advisory opinions. *See, e.g.,* Armstrong v. State, 805 S.W.2d 791, 793-94 (Tex. Crim. App. 1991).

THE STATE'S NOTICE OF APPEAL
[Tex. R. App. P. 25.2 and Tex. R. App. P. 26.2]

"In conclusion, we hold that Article 44.01 requires the elected 'prosecuting attorney' (and not his assistant) to 'make' the State's notice of appeal, within the prescribed fifteen-day [now 20] time period, either through the physical act of signing the notice or by personally and expressly authorizing an assistant to file a specific notice of appeal on his behalf. Because John B. Holmes, Jr, the 'prosecuting attorney' with the primary responsibility of prosecuting cases in Harris County did not personally authorize the filing of the original notice of appeal in this case within the statutorily required fifteen day period, we hold that the original notice of appeal was defective." State v. Muller, 852 S.W.2d 525, 527-28 (Tex. Crim. App. 1992). "Prosecuting attorney" may not make a general delegation of authority to an assistant. *See* State v. Muller, 829 S.W.2d 805, 810 n. 6 (Tex. Crim. App. 1992). Failure of the elected prosecuting attorney to make the appeal is a jurisdictional defect. *See* State v. Riewe, 13 S.W.3d 408, 411 (Tex. Crim. App. 2000).

Assistant City Prosecutor does not constitute the "prosecuting attorney" under Tex. Code Crim. P. art. 44.01 for purposes of signing a notice of appeal even if prosecution is for an offense prosecuted by the Office of the City Attorney. *See* State v. Boseman, 830 S.W.2d 588, 591 (Tex. Crim. App. 1992).

Signature stamp of the elected county attorney, even when accompanied by the actual signature of an assistant county attorney, is insufficient to show that the appeal "was personally, expressly, and specifically authorized by **the** prosecuting attorney." State v. Shelton, 830 S.W.2d 605, 606 (Tex. Crim. App. 1992)(emphasis in original).

An assertion in a timely-filed, amended notice of appeal that "the County Attorney has consented to the City Attorney prosecuting this appeal" was more than a signature stamp, was not a general delegation of authority to an assistant (as prohibited by Muller, 829 S.W.2d at 810 n. 6), and was in some fashion a written express personal authorization by the County Attorney "of this specific notice of appeal in this particular case." State v. Blankenship, 146 S.W.3d 218, 220 (Tex. Crim. App. 2004).

Attorney *pro tem* who takes the place of the elected prosecuting attorney is permitted to sign the State's notice of appeal because the attorney *pro tem* takes on all the powers and duties of the elected prosecuting attorney. *See* State v. Rosenbaum, 852 S.W.2d 525, 528 (Tex. Crim. App. 1993).

When the State appeals a trial court's suppression of evidence, the State's notice of appeal or some other timely-filed document must contain the certifications that the appeal is not taken for purposes of delay and that the evidence suppressed was of substantial importance in the case in order to invoke the appellate court's jurisdiction. *See, e.g.,* State v. Johnson, 175 S.W.3d 766, 767 (Tex. Crim. App. 2005); Riewe, 13 S.W.3d at 411. Under Tex. R. App. P. 25.2(f), an amended notice of appeal may be filed in the appellate court in accordance with Tex. R. App. P. 37.1, or at any time before the appealing party's brief is filed if the court of appeals has not used Tex. R. App. P. 37.1.

The Court of Criminal Appeals has concluded that the verity of the State's certifications may not be attacked by the defendant. *See, e.g.,* State v. Johnson, 871 S.W.2d 744, 749 (Tex. Crim. App. 1994)("Appellee simply seeks to challenge the verity of the State's certification. Art. 44.01 does not include a provision for making such a challenge.").

One court of appeals has concluded that the defendant waived any complaint about the lack of the certifications by failing to offer any argument on appeal about the omitted certifications. *See, e.g.,* State v. Brown, 929 S.W.2d 588, 589-90 (Tex. App. – Corpus Christi 1996, no pet.)[this conclusion seems at least debatable in light of the holding of the later conclusion by the Riewe court that the failure of the elected prosecutor to make the appeal is a jurisdictional defect]

The Dallas Court of Appeals has found that it had jurisdiction relative to a State's appeal that was actually from a writ of habeas corpus and found such even though the notice of appeal had stated that the appeal was from the granting of a motion for new trial. *See, e.g.,* State v. Nkwocha, 31 S.W.3d 817, 818 n. 1588, 589-90 (Tex. App. – Dallas 2000, no pet.)("The State's notice of appeal recites the trial judge granted Nkwocha's 'Motion for New Trial' when in fact the judge granted Nkwocha relief on his application for writ of habeas corpus. Nevertheless, we have jurisdiction to consider the State's appeal. *See* TEX. CRIM. PRO. CODE ANN. art. 44.01(a)(3)(Vernon Supp. 2000); State v. Kanapa, 778 S.W.2d 592, 593-94 (Tex. App. – Houston [1st Dist.] 1989, no pet.)").

The notice of appeal must be filed within the time frame set out in Tex. R. App. P. 26.2, which is normally measured from the date the trial court judge signs the order to be appealed. *See, e.g.,* State ex rel. Sutton v. Bage, 822 S.W.2d 55, 57 (Tex. Crim. App. 1992). However, actions of the trial court, such as filing a signed letter indicating that the order to be appealed is not of legal effect until a number of days pass may change the deadline

relative to what it would have been based purely on the date the judge signed the order. State v. Rosenbaum, 818 S.W.2d 398, 401-03 (Tex. Crim. App. 1991).

MOTIONS FOR REHEARING AND EN BANC RECONDSIDERATION
[Tex. R. App. P. 49.1 and Tex. R. App. P. 49.7]

See Franks v. State, 97 S.W.3d 584, 584-86 (Tex. Crim. App. 2003)(Cochran, J. dissenting to the denial of appellant's motion for reh'g, joined by Price, Johnson, & Holcomb, JJ.)(Four members of the Court of Criminal Appeals have recognized the potentially problematic interplay (relative to tolling the deadline for the filing of a petition for discretionary review) between rules 49.1, 49.7, and 68.2 of the Texas Rules of Appellate Procedure. Only the Motion For Rehearing from the panel under Tex. R. App. P. 49.1. invokes the tolling provision relative to any petition for discretionary review that might potentially be filed.

PETITIONS FOR DISCRETIONARY REVIEW
[Tex. R. App. P. 68.4]

--The Appendix must contain a copy of the opinion under 68.4(i).
--May be helpful to urge the Court of Criminal Appeals that PDR should be granted despite unpublished nature of the opinion because the former prohibition of citing unpublished opinions under Tex. R. App. P. 47.7(a) is no longer as stringent as it used to be.

NUTS AND BOLTS OF CRIMINAL APPELLATE PRACTICE

A Practical Approach to Appeals for Indigents

By Katherine A. Drew

March 18, 2011

I. Preserving Error for Appeal

All error for purposes of appeal is preserved in the trial court by way of written motion, objection or specific request. TEX. R. APP. P. 33.

A. Purpose:

The primary purpose of any request made to a trial judge is to call attention to an issue or a perceived error and allow the trial judge an opportunity to correct it. The denial of any request or objection may form the base for a point of error on appeal.

B. "Raise It or Waive It"

No matter how egregious[1] the error, failing to call it to the trial court's attention and permitting the judge an opportunity to rule waives the error. Even constitutional error can be waived.

C. Guideline to Preserving Error

1. Be specific: What do you want? Why do you want it? Does the law support it?

    a. Example: Motion to suppress evidence in a drug prosecution
        (1) What? To keep the drugs from being admitted.
        (2) Why? Because the police lacked reasonable suspicion.
        (3) Law? U.S. CONST. IV & XIV, TEX. CONST. Art. I §9. TEX. CODE CRIM. PROC. ART. 38.23, and any case law.

    b. Example: Objection to Jury Argument
        (1) What? To prevent the prosecutor from making certain remarks.
        (2) Why? The prosecutor commented on the defendant's right to silence.
        (3) Law: 5th Amendment.

        1) If sustained, request an instruction to disregard and ask for a mistrial.

        2) If overruled, nothing further is needed.

2. Get a ruling:

    a. Any objection, motion or request must be called to the trial court's attention and ruled on adversely in order to preserve error.

        1) Simply filing a motion is not enough to call it to the trial court's attention.

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[1] The exception is egregious error in a jury charge. *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985).

2) "Omnibus" pre-trial motion is dangerous in this regard.

3) The ruling can be on the record, on the motion, on a docket sheet, or all three.

b. Responses to objections such as "let's move along," "wrap it up," "the jury will remember the testimony," etc. are *not rulings* on the objection.

1) If a trial court fails or refuses to rule, an objection must be made to that failure or refusal.

c. Make sure the ruling is on the record!

1) Bench conference: Is the court reporter taking it down?

2) In chambers or off the record: memorialize what is said when you go back on the record. If the trial court will not permit it at that time, make a "proffer of proof" at the end of the trial on the record.

3) This is a particular danger with charge conferences and dealing with juror notes.

d. If any matter does not appear in the written record of the trial, an appellate court will presume that it simply did not happen!

4. Re-Raise the objection, motion or request, if necessary.

a. Example: A denied motion to suppress can be re-urged during trial.

b. A motion for new trial can be made on grounds that it was error for the trial court to deny a pre-trial motion, overrule an objection, or refuse a requested jury charge.

D. Challenges to sufficiency of evidence require no specific action

1. Denial of a motion for a directed verdict is considered a challenge to the sufficiency of the evidence. *Madden v. State*, 799 S.W.2d 683 (Tex. Crim. App. 1990).

2. Factual sufficiency is no longer a viable point of error. *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010). All sufficiency challenges are under a legal sufficiency standard.

II. Initiating an Appeal

A. Right of Appeal: Texas affords a broad right of appeal to most defendants. TEX. CODE CRIM. PROC. art. 44.02.

1. The right of appeal is invoked by filing written notice of appeal with the trial court clerk. TEX. R. APP. P. 25.2 (b) & (c).

a. Generally, 30 days from the judgment. TEX. R. APP. P. 26.2 (a) (1).

b. 90 days if a motion for new trial is filed. TEX. R. APP. P. 26.2 (a) (2).

c. May be extended if a motion for an extension of time in which to file notice of appeal is filed with the court of appeals within 15 days of the deadline for giving notice of appeal. TEX. R. APP. P. 26.3 (b).

d. "Mail box rule" can apply to either the notice of appeal or the extension motion or both. TEX. R. APP. P. 9.2.

1) To be considered timely filed, a mailed document must be received within 10 days after the filing deadline. TEX. R. APP. P. 9.2 (b).

2) The postmark is presumptive evidence.

3) Some law supports the proposition that a document is timely filed by a prison inmate when the inmate timely places the document in the prison mail system. *Villarreal v. State*, 199 S.W.3d 30 (Tex. App. – San Antonio 2006, no pet.). The Texas prison system can track mail but the Dallas County jail cannot.

2. It is the trial attorney's obligation to give notice of appeal if the client wishes to appeal.

a. A defendant will probably be entitled to an out-of-time appeal based on ineffective assistance of counsel if counsel fails to file timely notice of appeal. *Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim. App. 1988).

b. If a client says he does not wish to appeal, make a note of that in the file, or have the defendant state it on the record. Any defendant can also waive the right to appeal as part of a plea agreement.

B. Certificate of a Defendant's Right of Appeal

1. This is required in *every* case. TEX. R. APP. P. 25.2 (a) & (d).

2. An appeal *will not* proceed without a proper certificate.

a. Failure to have one on file may result in an appeal being dismissed.

b. At least 30% of the time, the certificate is missing, contains inaccurate information, or lacks essential information.

1) Insure that the certificate is in order before walking out of the courtroom.

2) The certificate provides some protection as to whether the defendant has been informed of his appellate rights.

C. Insuring Representation on Appeal

1. Unless trial counsel is replaced with appellate counsel of record, the appellate court will consider the trial attorney to be the appellate attorney.

2. Being relieved of responsibility for the appeal:

a. Move to withdraw and/or substitute counsel and have the trial court release you from the case.

b. For an indigent defendant, have the trial court appoint appellate counsel.

c. State's Appeals: A State's appeal is interlocutory. Sometimes the trial court judge is unaware that the State has filed notice of appeal. Other times, the trial attorney does not move for the appointment of appellate counsel. The appellate courts *will* rule on a State's appeal without a defendant's brief if no one takes responsibility to insure representation.

D. Exceptions:

1. Plea Bargains:

a. A defendant sentenced in accordance with a plea bargain needs written permission of the trial court to appeal except for pre-trial motions. TEX. R. APP. P. 25.2(a) (2).

b. An "open plea" is *not* a plea bargain.

2. A defendant may waive the right of appeal, usually as part of a plea bargain.

E. Motion for New Trial

1. A motion for new trial must be filed within 30 days of the date of judgment. TEX. R. APP. P. 21.4 (a).

a. Amendments must also be made within 30 days and before the trial court overrules the motion. TEX. R. APP. P. 21.4 (b).

b. Once overruled, even if within the 30 day period, a motion for new trial cannot be amended.

1) However, a trial court may have the authority to rule on an untimely amendment during a hearing if the State does not object. *See State v. Moore*, 225 S.W.3d 556 (Tex. Crim. App. 2007).

2. A motion for new trial must be presented to the trial court within 10 days. TEX. R. APP. P. 21.6. The trial court has discretion to permit a motion for new trial to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court. *Id.*

3. A motion for new trial must be acted on within 75 days *from the date of judgment* or it is overruled by operation of law. TEX. R. APP. P. 21.8 (a).

4. If a hearing a desired, a trial court must grant that request if the motion presents a question of fact upon which evidence must be heard.

5. The filing of a motion for new trial has the effect of extending the time in which to file notice of appeal to 90 days from date of judgment. It also extends the court reporter's time to file the record from 60 to 120 days.

6. A motion for new trial can be used to preserve error for appeal.

a. A motion for new trial can be used to bring in new evidence, challenge performance of counsel at trial, and raise an objection to the sentence assessed.

b. The motion must be specific. A generic motion for new trial, *i.e.,* "the verdict is contrary to the law and the evidence," may not be sufficient in all cases.

III. Record on Appeal

A. Appellate Counsel's Duties:

1. Appellate counsel has a duty to timely request a record from clerk and reporter. Be sure to request all the record, including exhibits, plea hearings, etc.

a. If there are multiple court reporters, it is best to provide notice to all of them, even though the official court reporter remains responsible.

b. The Dallas Court of Appeals abates cases where records are overdue. One of the findings asked to be made is whether a request for the record was made. Another is if the record has not been prepared due to ineffective assistance.

2. Supplementing a Record: Once the appellate court believes it has a complete record, that court will set a briefing due date.

a. Records are often incomplete. An appellate attorney may not realize that until the briefing process is underway.

b. If the record is incomplete, file a motion to supplement the reporter's record and hold the briefing schedule in abeyance.

3. Most common omissions:

a. The original plea in an adjudication or revocation appeal.

b. Exhibits, particularly videos.

c. Juror questionnaires when a *Batson* challenge was premised on a juror's answers to the questionnaire.

IV. The Brief

A. Time to File: 30 days after the record is filed with the court of appeals. TEX. R. APP. P. 38.6.

1. Extensions may be requested. TEX. R. APP. P. 10.5, 38.6.

2. A reply brief must be filed within 20 days of the State's brief. TEX. R. APP. P. 38.6 (c).

B. Contents and Form of the Brief

1. TEX. R. APP. P. 38 sets out the necessary contents and order of the Brief.

a. All briefs must contain the following: Identity of Parties and Counsel, Table of Contents, Index of Authorities, Statement of the Case, Any Statement Regarding Oral Argument, Issues Presented, Statement of Facts, Summary of the Argument, Argument, and Prayer.

b. Technical requirements (font, page size, etc.) are set out in TEX. R. APP. P. 9.1-9.8.

c. A brief is limited to 50 pages unless the appellate court permits a longer brief. TEX. R. APP. P. 38.4.

C. Points of Error

1. A point of error must be premised on the law and the trial record.

2. Common Points of Error

a. Insufficient evidence
   1) Evidence can be insufficient on a deadly weapon finding
   2) Evidence can be insufficient on an aggravating element
   3) Evidence can be insufficient as to loss or value

4) Evidence can be insufficient as to quantity or quality of a drug

b. Jury charge error
c. Improper jury argument
d. Failure to grant a motion (suppress, quash, new trial)
e. Admitting inadmissible evidence
f. Excessive sentencing

3. Points of error need to be specific and separately briefed to avoid a claim of waiver or multifarious briefing.

D. *Anders* Briefs: *Anders v. California,* 386 U.S. 738 (1966)

1. When is an *Anders* brief appropriate?

a. When there is truly nothing to raise!

b. All parts of the record must be analyzed.

1) Are there any objections that were denied?
2) Were any pretrial motions overruled?
3) Is the judgment correct in all particulars?

2. If an *Anders* brief is filed, then appellate counsel must do the following:

a. File a brief certifying that counsel has made a diligent search and no points of error exist to support the appeal.

1) Go over every part of the case and analyze why error is not reflected.

2) Often this analysis will reveal an error.

b. File a motion to withdraw as counsel in the appellate court. *Jeffery v. State,* 903 S.W.2d 776 (Tex. App.—Dallas 1995, no pet). You remain counsel of record until the motion is granted.

c. Send the client a copy of the record and instructions on how to file a pro se brief along with a copy of the *Anders* brief and motion to withdraw.

3. Note: The Dallas Court of Appeals has been known to disagree with an *Anders* brief, remand the case to the trial court, order new counsel appointed and the case re-briefed.

E. Ineffective Assistance of Counsel on Appeal

1. A defendant has a constitutional right to effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985).

a. Test: *Strickland v. Washington*, 466 U.S. 668 (1984).

1) Was appellate counsel's performance deficient?

2) Was the appellant prejudiced by counsel's errors?

b. Ultimate question: whether a defendant was afforded a meaningful appeal. *Olivo v. State*, 918 S.W.2d 511, 526 (Tex. Crim. App. 1996).

2. Appellate counsel need not raise all possible claims of error in order to be effective *See Jones v. Barnes*, 463 U.S. 745, 751 (1983).

3. Remedy: a new appeal.

4. Since there are no time limits in which to bring a writ of habeas corpus under TEX. CODE CRIM PROC. art. 11.07 for ineffective assistance of appellate counsel, it is a good idea to keep a defendant's file in order and handy in case the need arises to prepare an affidavit defending legal performance on the appeal.

V. Petition for Discretionary Review (PDR): To File or Not to File?

A. Duty to Inform

Under TEX. R. APP. P. 48.4, an attorney must inform a client within 5 days of the date of the opinion affirming the conviction if the attorney will file a PDR or not.

1. Considerations:

a. Does the case meets the guidelines as promulgated in the Rules of Appellate Procedure? TEX. R. APP. P. 66.3

b. Will the client would be well served by a PDR?

c. Note: It is often possible to have a good idea at the time a case is originally briefed and/or argued in the court of appeals whether a PDR will be seriously considered. If the case is a State's appeal, a PDR will almost always be in order, regardless of which party prevails on direct appeal.

2. There is no right to appointed counsel on a PDR. If appointed, and you want to be paid, you may need to go back to the trial court and ask for an additional appointment, or at least insure that the trial court will honor the pay voucher.

B. Practical Matters

1. A PDR must be filed in the court of appeals within 30 days of the date of the opinion or the day a motion for rehearing was overruled. TEX. R. APP. P. 68.2.

a. The Court of Criminal Appeals is fairly generous about giving one 30 day extension. TEX. R. APP. P. 68.3.

b. Extension motion must be filed in Court of Criminal Appeals.

2. Maximum length: 15 pages. TEX. R. APP. P. 68.5.

3. Contents: TEX. R. APP. P. 68.4.

a. Table of Contents, Index of Authorities, Statement Regarding Oral Argument, Statement of the Case, Statement of Procedural History, Grounds for Review, Argument, Prayer for Relief, Appendix.

b. Must attach a copy of the court of appeals opinion as an Appendix to the PDR.

4. Must serve not only opposing counsel but also the State Prosecuting Attorney
Lisa McMinn
P.O. Box 13046
Capitol Station
Austin, Texas 78711

C. Writing a Successful PDR

A PDR is not a brief on the merits. It is a petition which, if successful, will allow you to write a brief on the merits.

1. Concentrate on *why* the Court of Criminal Appeals should agree to hear the case.
a. Is there a conflict among the various intermediate courts of appeals?
b. Is there a conflict with federal law?
c. Is this a case of first impression?
d. Is a new statute or rule of law involved?
e. Should the court change a prior ruling?

2. It is more important to explain how the jurisprudence of the state suffers from the opinion than how the client is harmed.

D. When a PDR is granted

1. Briefs will be ordered filed.

a. Court of Criminal Appeals will set a briefing schedule.

b. An extension of time may or may not be possible.

2. Court of Criminal Appeals may or may not permitted oral argument.

a. If not permitted, the case is submitted on petition and briefs.

b. If permitted, a set time is announced for argument on a Wednesday morning.

1) Significantly fewer cases are permitted oral argument than in years past, so make the most of it!

VI. Harmless Error

A. TEX. R. APP. P. 44.2

1. Constitutional Error: TEX. R. APP. P. 44.2 (a): "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment."

2. Non-Constitutional Error: TEX. R. APP. P. 44.2 (b): "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

B. Should harm be briefed?

1. Judgment call. May depend on just how harmful the error is.

EXAMPLES OF FORMS

Forms Attached

1. Designation of Record on Appeal

2. Notice to the Court Reporter

3. Docketing Statement

4. Motion to Supplement the Record

5. Motion to Withdraw/*Anders* Case

No. F12-00001-Z

JOE SHILBOTNIK	§	**IN THE CRIMINAL DISTRICT**
V.	§	**COURT NO. 8**
THE STATE OF TEXAS	§	**OF DALLAS COUNTY, TEXAS**

DESIGNATION OF RECORD ON APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant in the above styled and number cause, and submits this Designation of Record on Appeal, and requests that the following items be contained in the record of this appeal:

1. A complete Reporter's Record of the trial of this case, including any testimony at any stage of the trial, any bench conferences, any arguments on motions, the *voir dire* examinations of the jury, the final arguments of counsel, any pre-trial or post-trial hearings, or any other matters connected with this case where the court reporter was present and transcribing the proceeding.
2. The indictment or information.
3. Any special pleas and motions of the Defendant and of the State.
4. Any written waivers.
5. The trial court's docket sheet.
6. The charge of the Court on both guilt-innocence and punishment.
7. Any special requested charges submitted by the Defendant.
8. The verdict of the jury.
9. Any Findings of Fact and Conclusions of Law.
10. The judgment and sentence.
11. Any Motions for New Trial.
12. The Notice of Appeal.

13. Any notes from the jury and the Court's response thereto.

14. All exhibits introduced at trial.

15. All juror information sheets and information on peremptory strikes, including any substantive juror questionnaires.

16. Any other matter contained within the Court's files.

17. Any order appointing a visiting or retired Judge to preside on this case.

18. Any subpoenas or requests for subpoenas.

19. Any notes written by the Judge in the Court's file.

20. Any letters written by the Defendant to the Court.

21. The Defendant's application for probation, if any.

22. The certification of the Defendant's right to appeal under Rule 25.2.

WHEREFORE, PREMISE CONSIDERED, the Defendant/Appellant respectfully requests that these matters be contained within the record of this appeal.

Lynn Richardson
Chief Public Defender, Dallas County

Katherine A. Drew
Assistant Public Defender
Dallas County Public Defender's Office
State Bar Number: XXXXXXXX
133 N. Riverfront Blvd., LB 2
Dallas, Texas 75207
(214) 653-3550 *(phone)*
(214) 653-3539 *(fax)*

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing document has been hand-delivered to the Dallas County Criminal District Attorney's Office (Appellate Section), 133 N. Riverfront Blvd., 10th Floor, Dallas, TX 75207 on March 18, 2012.

_____
Katherine A. Drew

March 18, 2012

Jessica Rabbit
Official Court Reporter
Criminal District Court No. 8 of Dallas County
133 N. Riverfront Blvd.
Dallas, Texas 75207

RE: *Joe Shilbotnik v. The State of Texas*
Trial Court No: F12-00001-Z

TO THE OFFICIAL COURT REPORTER:

The Dallas County Public Defender's Appellate Section has been appointed to represent the defendant in the above-styled and numbered cause. Pursuant to Rule 34.6(b), Texas Rules of Appellate Procedure, I am making this written request that a reporter's record be prepared to include the following:

1. The jury voir dire examination, including any juror questionnaires;

2. All the testimony of all the witnesses who testified during the hearings on guilt-innocence and punishment;

3. If a plea hearing, all of the admonishments and testimony of the witnesses;

4. All hearings, held outside the presence of the jury, as well as all communications between the Court and the jury, and the Court and the parties;

5. All pre-trial hearings and conferences;

6. All jury arguments during the hearings on guilt-innocence and punishment;

7. All testimony presented during any hearings concerning any motion for new trial or bill of exception; and

8. All testimony presented during any hearings, including revocation hearings and any hearings to proceed with adjudication of guilt.

I would further request that the reporter's record include copies of the exhibits admitted during the proceedings, including but not limited to juror information cards, photographs, written reports and documents, penitentiary packets, and transcripts of voice recordings, if any.

The judgment in this case was entered on March 1, 2012. A Motion for New Trial has not been filed.

I would be grateful if the record is **not** prepared in condensed format.

If another court reporter took the testimony, or any part thereof, please contact me immediately so that I can contact that court reporter to make appropriate arrangements.

Thank you again and, if any issues arise, please do not hesitate to call me.

Sincerely,

Lynn Richardson
Chief Public Defender, Dallas County

_____

Katherine A. Drew
Assistant Public Defender
Dallas County Public Defender's Office
State Bar Number: XXXXXXXX
133 N. Riverfront Blvd., LB 2
Dallas, Texas 75207
(214) 653-3550 *(phone)*
(214) 653-3539 *(fax)*

Attorney for Defendant on Appeal Only

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing document has been hand-delivered to the Dallas County Criminal District Attorney's Office (Appellate Section), 133 N. Riverfront Blvd., 10th Floor, Dallas, Texas, 75207 on March 18, 2012.

_____

Katherine A. Drew

Appellate Docket No.: _____
Appellate Case Style: _____

FIFTH DISTRICT COURT OF APPEALS
CRIMINAL APPEAL - DOCKETING STATEMENT

PARTIES (TRAP 32.2(a)):

Appellant: Joe Shilbotnik	Appellee: The State of Texas
Attorney (Lead Counsel): Katherine A. Drew (assigned appellate attorney) Appointed [X] Retained [ ]	Attorney (Lead Counsel): Craig Watkins
Address (Lead Counsel): Dallas County Public Defender's Office Appellate Division 133 N. Riverfront Blvd. LB 2 Dallas, Texas 75207- 4313	Address (Lead Counsel): Dallas County District Attorney's Office Appellate Division 133 N. Riverfront Blvd. LB 19 Dallas, Texas 75207- 4313
Telephone: 214-653-3550	Telephone: 214-653-3625
Fax: 214-653-3539	Fax: 214-653-3643
Email: Kathi.Drew@dallascounty.org	Email: mcasillas@dallascounty.org (for Michael Casillas, District Attorney's Appellate Section)
SBN (Lead Counsel): 24050279	SBN (Lead Counsel): 00791886
If not represented by counsel, provide appellant's/appellee's address, telephone number, and fax number. N/A	

PERFECTION OF APPEAL (TRAP 32.2(b),(d),(f)-(k)):

Date Sentence Imposed or Suspended in Open Court or Appealable Order Signed: March 1, 2012	Date Notice of Appeal Filed: March 12, 2012 If Mailed, Date Mailed: Attach File-Stamped Copy of Notice

ACTIONS EXTENDING TIME TO PERFECT APPEAL (TRAP 32.2(e)):

Mt. for New Trial: Yes [] No [x] Mt.in Arrest of Judgment: Yes [ ] No [x] Other (Specify):	Date Filed: N/A Date Filed:

TRIAL AND APPEAL (TRAP 32.2(f)-(k)):

Offense Charged: Misuse of the internet Date of Offense: March 18, 2011 Defendant's Plea: Not Guilty If guilty or nolo contendere, was plea result of negotiated plea bargain agreement? Was the trial jury or nonjury? Guilt/Innocence Phase: Jury Punishment Phase: Non-Jury Punishment Assessed: 7 years, TDCJ	Is the appeal from a pretrial order? Yes [ ] No [X] Does the appeal involve the validity of a statute, rule, or ordinance? Yes [ ] No [] If yes, specify.

TRIAL COURT AND RECORD (TRAP 32.2(c), (*l*), (m)):

Court: Criminal District Court No. Eight	T.Ct. Cause No. F12-00001-Z
Trial Judge (Who Tried or Disposed of Case): Hon. Pontius Pilate Telephone No.: 214-653-XXXX Fax: Address: 133 N. Riverfront Blvd. Frank Crowley Criminal Courts Building 133 N. Riverfront Blvd. Dallas, Texas 75207	Court Clerk (District or County Clerk): Gary Fitzsimmons Telephone No.: 214-653-5950 Fax: Address: District Clerk Frank Crowley Criminal Courts Building 133 N. Riverfront Blvd. Dallas, Texas 75207
Clerk's Record	Fee Paid: Yes [ ] No [X] Arrangements Made to Pay Fee: Yes [ ] No [ ]

Court Reporter(s) or Court Recorder(s): Jessica Rabbit
Telephone Number(s): 214-653-XXXX
Fax Number(s):
Address(es):

Official Court Reporter
Criminal District Court No. Eight
Frank Crowley Criminal Courts Building

133 N. Riverfront Blvd. Dallas, Texas 75207	
Reporter's/Recorder's Record (Check If Electronic Recording [ ]) Number and Date(s) of Hearing(s):	Date Requested: March 18, 2012 Fee Paid: Yes: [ ] No: [x] Arrangements Made to Pay Fee: Yes [ ] No [ ]

INDIGENCY OF PARTY (TRAP 32.1(k)):

Event	Filed Check as Appropriate	Date
Motion and Affidavit Filed	Yes [x] No [ ]	
Date of Hearing: March 12, 2012		
Ruling on Motion: Granted [x] Denied [ ]		

OTHER INFORMATION (TRAP 32.2(m)):

List any other pending related appeals before this or any other Texas appellate court by Court, Docket Number, and Style:

NOTE: If inadequate space has been provided for the information requested, please provide the additional information on an attachment.

I CERTIFY THAT, TO THE BEST OF MY KNOWLEDGE, ALL OF THE ABOVE INFORMATION IS TRUE AND CORRECT.

Katherine A. Drew

Date

Representing: Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Docketing Statement was served this 18th day of March, 2012, on all parties/attorneys of record listed below by: (circle one) personal service, mail, commercial delivery service, fax. *See* TRAP 9.5(b).

Mr. Craig Watkins
Dallas County District Attorney's Office
Attn: Appellate Section
133 N. Riverfront Blvd. LB 19
Dallas, Texas 75207- 4313

Katherine A. Drew

No. 05-12-01000-CR

JOE SHILBOTNIK	§	**IN THE FIFTH DISTRICT**
V.	§	**COURT OF APPEALS**
THE STATE OF TEXAS	§	**AT DALLAS, TEXAS**

MOTION TO SUPPLEMENT THE RECORD ON APPEAL AND TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW Appellant in this cause, by and through his duly appointed attorney on appeal, and requests that this Court order the appellate record to be supplemented with omitted material and to hold the briefing schedule in abeyance until such time as a complete record is filed with this Court.

I.

Appellant was convicted of misuse of the internet and sentenced to seven years imprisonment.

II.

The reporter's record was filed in this case on September 11, 2012. The current due date for Appellant's Brief is October 11, 2012. The case is not yet set for submission.

III.

Counsel for Appellant is in the process of reading and reviewing the record in this cause. Counsel is aware that an extensive motion to quash the indictment was filed by trial counsel. (CR1: 6-11). Trial counsel has informed the undersigned counsel that a hearing was, indeed, held on the motion to quash. However, counsel has not yet found a reporter's record concerning the presentment of the motion to quash.

Counsel telephoned the court reporter, Jessica Rabbit, on September 29, 2012, to discuss this omission in the record. Ms. Rabbit has agreed to supplement the record at her earliest convenience.

IV.

This Motion is not brought for purposes of delay but so that a complete appellate record can be filed with this Court, read and evaluated for potential error.

WHEREFORE, Appellant requests this Court order the court reporter to supplement the appellate record with the omitted material. Appellant further prays that this Court hold the briefing schedule in abeyance until such time as a complete record is filed with this Court.

Respectfully submitted,

Lynn Richardson
Chief Public Defender
Dallas County, Texas

Katherine A. Drew
Assistant Public Defender
State Bar No. XXXXXXXX
Frank Crowley Courts Building
133 N. Riverfront Blvd., LB-2
Dallas, Texas 75207-4399
(214) 653-3550 *(phone)*
(214) 653-3539 *(fax)*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion was served on the Dallas County Criminal District Attorney's Office (Appellate Section), 133 N. Riverfront Blvd., B-19, 10th Floor, Dallas, Texas, 75207, by hand delivery on September 30, 2012.

Katherine A. Drew

No. 05-12-01000-CR

JOE SHILBOTNIK	§	**IN THE FIFTH DISTRICT**
V.	§	**COURT OF APPEALS**
THE STATE OF TEXAS	§	**AT DALLAS, TEXAS**

ON APPEAL FROM
CRIMINAL DISTRICT COURT No. 8
OF DALLAS COUNTY, TEXAS
IN CAUSE NO. F12-00001-Z

MOTION TO WITHDRAW AS COUNSEL ON APPEAL

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW the undersigned attorney, and respectfully requests that she be discharged as the attorney of record for the Appellant. In support of this motion the undersigned attorney would show the Court the following:

I.

The Appellate Division of the Dallas County Public Defender's Office was appointed by the trial court to represent Appellant in the appeal of this conviction. The undersigned attorney is the attorney assigned to the case.

II.

After a full review of the record in this cause, the undersigned attorney is of the opinion that there are no arguable points of error or issues upon which an appeal can be predicated. The undersigned attorney has filed an *Anders* brief with this Court.

III.

The undersigned attorney has informed Appellant that in her professional opinion, this appeal is without merit. The undersigned attorney has also explained that Appellant has the right to review the record and file a pro se brief if he so desires and has sent Appellant a copy of the record. Appellant has also been informed by the undersigned attorney that he may request an extension of time from this Honorable Court to file a pro se brief if he so desires.

WHEREFORE, PREMISES CONSIDERED, the undersigned attorney prays that this Court will grant this Motion to Withdraw as Counsel on Appeal in the above entitled and numbered cause.

Respectfully submitted
Lynn Richardson
Chief Public Defender

Katherine A. Drew
Assistant Public Defender
State Bar No.XXXXXXX
Frank Crowley Courts Building
133 N. Riverfront Blvd., LB-2
Dallas, TX. 75207-4399
(214) 653-3550 (telephone)
(214) 653-3539 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion was served on the Dallas County Criminal District Attorney's Office (Appellate Section), 133 N. Riverfront Blvd., LB-19, 10th Floor, Dallas, Texas, 75207, by hand delivery on October 31, 2012.

_____
Katherine A. Drew