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Evidence Admissible during the Punishment Stage of a Criminal Trial.

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EVIDENCE ADMISSIBLE DURING THE PUNISHMENT STAGE OF A CRIMINAL TRIAL

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Most criminal proceedings in Texas are two-staged since the adoption of the Code of Criminal Procedure in 1965.[1] Under such a trial system, there is first a trial on the guilt or innocence of the defendant, and then if a conviction is returned, there is a separate hearing to assess punishment. Section 3(a) of the statute has two major impacts. The first is that it has greatly expanded the type of evidence which the state may introduce at the punishment stage, and the second is that it allow defendants to take the stand at this second stage for the purpose of mitigation of punishment without fear of self-incrimination. Section 3(a) provides that "evidence may be offered by the State and the defendant as to the prior criminal record of the defendant, his general reputation, and his character."[2] The court of criminal appeals held that the statute is not exclusive, and that evidence in mitigation of punishment or relevant to an application for probation is admissible.[3] The purpose of this article is to explain specifically what evidence can be offered by both sides at the punishment stage of a criminal trial.

Prior Criminal Record

Section 3(a) of article 37.07[4] defines the term, "prior criminal record" as "a final conviction in a court of record, or a probated or

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1. TEX. CODE CRIM. P. ANN. art. 37.07 (Supp. 1974).

2. *Id.* art. 37.07(3)(a). The article is permissive in that neither the state nor the defense is required to introduce any evidence at the punishment stage. Brumfield v. State, 445 S.W.2d 732, 740 (Tex. Crim. App. 1969); Morales v. State, 416 S.W.2d 436, 437 (Tex. Crim. App. 1967).

3. Brumfield v. State, 445 S.W.2d 732, 740 (Tex. Crim. App. 1969).

4. The original provision in the 1965 Code was article 37.07(2)(b), which provided in part, "[r]egardless of whether the punishment be assessed by the judge or the jury, evidence may be offered by the State and the defendant as to the prior criminal record of the defendant, his general reputation and his character." Tex. Laws 1965, ch. 722, at 462. The 1967 amendment only renumbered the subsection and added a sentence defining the term "prior criminal record." Tex. Laws 1967, ch. 659, § 22, at 1740.

suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged."[5] Any probated or suspended sentence assessed prior to trial, whether completed or not, is admissible.[6] A conviction in a court of record which has not resulted in a probated or suspended sentence is not "final" until the time for filing an appeal has expired, or until the court of criminal appeals has affirmed on appeal.[7] If a defendant wishes to contest a conviction as not "final," he has the burden of proof.[8]

Since the article states that such a final conviction must come from a "court of record," the general rule is that final convictions in a justice or corporation court are not admissible,[9] as these are not courts of record.[10] The exception is that such a final conviction may be introduced if it is material to the offense charged.[11]

Section 3(a) greatly expands the scope of prior final convictions which can be introduced by the state. Prior to the enactment of this article, the state was limited to prior final convictions used for enhancement of punishment under the habitual criminal statutes,[12] or for impeachment under Article 38.29 of the Texas Code of Criminal Procedure.[13]

The defendant must take the stand before he can be impeached under article 38.29, but this is not necessary under section 3(a). Additionally, article 38.29 requires that prior final convictions used for impeachment must have been for a felony or a misdemeanor involving moral turpitude,[14] but section 3(a) is not so limited.[15] In fact, section

5. This definition was held constitutional in Ramos v. State, 419 S.W.2d 359, 364 (Tex. Crim. App. 1967).

6. Glenn v. State, 442 S.W.2d 360, 362 (Tex. Crim. App. 1969).

7. Arbuckle v. State, 132 Tex. Crim. 371, 372-73, 105 S.W.2d 219, 219-20 (1937).

8. *See* Gardner v. State, 486 S.W.2d 805, 807 (Tex. Crim. App. 1972).

9. Ramos v. State, 419 S.W.2d 359, 365 (Tex. Crim. App. 1967).

10. Since court martial proceedings are courts of record within the statute, prior military convictions are admissible. Thompson v. Price, 258 F.2d 918 (3d Cir.), *cert. denied*, 358 U.S. 922 (1958); Johnson v. State, 432 S.W.2d 98, 100 (Tex. Crim. App. 1968).

11. Ramos v. State, 419 S.W.2d 359, 365 (Tex. Crim. App. 1967); *accord*, Beard v. State, 458 S.W.2d 85, 88 (Tex. Crim. App. 1970).

12. For misdemeanors see, TEX. PENAL CODE ANN. art. 61, repealed January 1, 1974, *recodified in*, TEX. PENAL CODE ANN. § 12.43 (1974); for felonies see, TEX. PENAL CODE ANN. art. 61-64, repealed January 1, 1974, *recodified in*, TEX. PENAL CODE ANN. § 12.42 (1974). These statutes require various minimum sentences far greater than those normally prescribed for repeat offenders who fall within their coverage.

13. TEX. CODE CRIM. P. ANN. art. 38.29 (1966).

14. Nichols v. State, 494 S.W.2d 830, 834 (Tex. Crim. App. 1973). The statutory definition also includes a suspended sentence given and not set aside or a probated sentence with the period for probation unexpired.

3(a) is not limited to prior final convictions which bear any relationship to the offense charged,[16] nor is it limited by any rule of remoteness, as is article 38.29.[17]

Section 3(a) does not require that prior final convictions be alleged in the indictment; the enhancement statutes require such allegation as a prerequisite to admissibility.[18] Article 37.07 puts every accused on notice that the state is entitled to show his prior criminal record:[19] probated sentences are inadmissible under the enhancement statute,[20] but they are expressly admissible under article 37.07.[21] Additionally, although a prior final conviction with a suspended sentence will be admitted under section 3(a),[22] it will not be admitted under the enhancement statutes.[23] The latter statutes require that each succeeding conviction be subsequent to the previous conviction in point of time both of the commission of the offense and of the conviction; section 3(a), however, has no such requirement.[24] Both the enhancement statutes and section 3(a) provide that an appealed conviction is not final until affirmed.[25] A prior final conviction under section 3(a) need not bear any relationship to the present charge,[26] while under articles 61 and 62 of the old penal code, it must have been for the "same offense" in the case of misdemeanors, and the "same offense or one of the same nature" in the case of felones.[27]

Although the court of criminal appeals has stated that any prior conviction relevant under article 37.07(3)(a) is admissible, there is one limited type of "final conviction" in a court of record which is not admissible by virtue of superior statutory mandate.[28] Section 51.13 of the Family Code states that no adjudication of the status of any child made in juvenile court shall be deemed a conviction. Such

15. Thomas v. State, 477 S.W.2d 881, 884 (Tex. Crim. App. 1972).
16. Ramos v. State, 419 S.W.2d 359, 365 (Tex. Crim. App. 1967).
17. Nichols v. State, 494 S.W.2d 830, 834 (Tex. Crim. App. 1973).
18. Martinez v. State, 469 S.W.2d 185, 187 (Tex. Crim. App. 1971); Hathorne v. State, 459 S.W.2d 826, 830 (Tex. Crim. App. 1970), *cert. denied*, 402 U.S. 914 (1971); Pendleton v. State, 434 S.W.2d 694, 696 (Tex. Crim. App. 1968).
19. Ellingsworth v. State, 487 S.W.2d 108, 112 (Tex. Crim. App. 1972).
20. Perry v. State, 464 S.W.2d 660, 663 (Tex. Crim. App. 1971).
21. Glenn v. State, 442 S.W.2d 360, 362 (Tex. Crim. App. 1969).
22. Macias v. State, 451 S.W.2d 489, 491 (Tex. Crim. App. 1970).
23. Ellis v. State, 134 Tex. Crim. 346, 349, 115 S.W.2d 660, 662 (1938).
24. Burton v. State, 493 S.W.2d 837, 840 (Tex. Crim. App. 1973).
25. Arbuckle v. State, 132 Tex. Crim. 371, 376, 105 S.W.2d 219, 222 (1937).
26. Ramos v. State, 419 S.W.2d 359, 365 (Tex. Crim. App. 1967).
27. This last statutory requirement has been eliminated in the new Penal Code.
28. Slaton v. State, 418 S.W.2d 508, 511 (Tex. Crim. App. 1967).

adjudications could be admitted, however, as part of the juvenile record or in a pre-sentence report.

Article 37.07 does impose a major limitation on the state in that while it may introduce the prior final convictions, it may not describe the actual crimes.[29] Even the use of a "summary" of the prior acts,[30] or stipulations to the prior convictions reciting the details of the offenses,[31] is reversible error. It is, however, within the discretion of the trial court to allow the defendant to testify to such circumstances.[32]

In this connection the defense attorney meets a special problem when his defendant has committed a series of offenses in one criminal transaction. An example of this is the robbery-rape-murder situation. The state may choose to try the defendant separately for each crime. At each trial the problem arises that under the criminal transaction exception to the relevancy rules, the state will be able to prove all three crimes at the guilt/innocence stage of each trial. The prejudice is obvious: at the penalty stage of the robbery trial, the defendant is almost certain to receive a much greater sentence than if evidence of the rape-murder had not been admitted, especially if a jury assesses punishment. The defense counsel's tactic to combat this prejudice is to explain to the jury at the punishment stage that the defendant will be or has been tried for the other crimes as well. But the court of criminal appeals has refused to allow this admission: "There is no provision [in Article 37.07] for introduction into evidence . . . that any other charge is pending . . . and has been disposed of in another trial."[33] This is a totally unfair rule in light of the practical advantage held by the state in such a situation. Clearly, the defense should be allowed to mitigate the prejudice, and thereby, the punishment.

Proving Prior Criminal Record From Final Convictions

Proving prior convictions is a two-stage process for the state.[34]

29. "[T]he State, while authorized to prove an accused's 'prior criminal record' by virtue of Article 37.07 . . . is not authorized to prove the details of every offense resulting in a conviction which forms part of the 'prior criminal record.' " Cain v. State, 468 S.W.2d 856, 861 (Tex. Crim. App. 1971).

30. Lege v. State, 501 S.W.2d 880, 881-82 (Tex. Crim. App. 1973); Mullins v. State, 492 S.W.2d 277, 279 (Tex. Crim. App. 1973).

31. Cain v. State, 468 S.W.2d 856, 861 (Tex. Crim. App. 1971).

32. Bircher v. State, 491 S.W.2d 443, 445 (Tex. Crim. App. 1973).

33. Nash v. State, 467 S.W.2d 414, 416 (Tex. Crim. App. 1971).

34. All of these rules apply whether the prior final conviction is from Texas or another jurisdiction. *See, e.g.*, Johnson v. State, 432 S.W.2d 98 (Tex. Crim. App. 1972) where federal convictions were used.

First, the state must prove the existence of a prior final conviction; it then must prove that the defendant in the present trial was that person previously convicted. Although these present jury questions,[35] the sufficiency of this evidence is a question of law.[36]

To prove the existence of prior convictions, the state may introduce certified copies of the prior judgments,[37] sentences,[38] probation orders, and even pictures of the person convicted or documents containing his fingerprints, any of which may bear the defendant's signature. These copies will come from and be certified by the district clerk or by the custodian of records of the Texas Department of Corrections. According to statutory provisions[39] such copies will be accepted into evidence on an equal footing with the originals. Article 38.02 adopts for criminal trials all civil evidence rules which do not conflict with the provisions of the Code of Criminal Procedure or the Penal Code. The Official Records Act[40] states that certified copies from the custodian of records shall be accepted as originals.[41] The best evidence and hearsay objections, as well as the need for an in-court authentication are therefore eliminated.[42] Article 37.07 puts a defendant on notice that the state may show prior final convictions; it does not, however, apprise him of the method to be used. If article 3731a is to be used, its provisions must be followed. Section 3 states that copies of the certified record must be delivered to opposing counsel at a "reasonable time before trial, unless in the opinion of the trial court the adverse party has not been unfairly surprised by the failure to deliver such copy."[43]

35. *See* Andrews v. State, 154 Tex. Crim. 392, 393-94, 228 S.W.2d 173, 174 (1950).

36. *See* Cain v. State, 468 S.W.2d 856, 859-60 (Tex. Crim. App. 1971).

37. It is not error to admit an unsigned judgment if certified. Robinson v. State, 449 S.W.2d 239, 242 (Tex. Crim. App. 1969).

38. Use of judgments and sentences will of necessity cause the defendant's prior sentence to be before the jury, as well as the fact of the prior conviction. This is permissible; in fact, the state may bring this out in testimony, and it is not error. Gilmore v. State, 493 S.W.2d 161, 163 (Tex. Crim. App. 1973).

39. TEX. CODE CRIM. P. ANN. art. 38.02 (1966); TEX. REV. CIV. STAT. ANN. art. 3731a (1961).

40. TEX. REV. CIV. STAT. ANN. art. 3731(a) (1961).

41. Johnson v. State, 432 S.W.2d 98, 100 (Tex. Crim. App. 1968).

42. Jones v. State, 470 S.W.2d 874, 876 (Tex. Crim. App. 1971); Denham v. State, 428 S.W.2d 814, 816-17 (Tex. Crim. App. 1968); Graham v. State, 422 S.W.2d 922, 926 (Tex. Crim. App. 1968).

43. Sierra v. State, 476 S.W.2d 285, 288 (Tex. Crim. App. 1971). Failure to notarize and certify these copies as required by the statute renders them inadmissible. Vessels v. State, 432 S.W.2d 108, 117 (Tex. Crim. App. 1968). These certified records need not be introduced into evidence. Simmons v. State, 457 S.W.2d 284, 286 (Tex. Crim. App. 1970); Vessels v. State, 432 S.W.2d 108, 117 (Tex. Crim. App. 1968).

The second step in proving prior convictions is to prove that the present defendant is the person who was previously convicted. Failure to do so is reversible error.[44] The court of criminal appeals has approved several methods of proving this allegation, including the testimony of a witness who identifies the accused as the person previously convicted,[45] introduction of certified copies of prison records or trial pleadings containing handwriting or fingerprints of the convicted defendant,[46] supported by expert testimony identifying them as those of the accused,[47] stipulation,[48] and admission under direct examination on the stand by the accused.[49]

In the context of providing independent testimony, the extent of the state's right to call the defendant over his objection to testify that he was the one previously convicted has been questioned. The rule is that when the defendant voluntarily takes the stand, he does so for *all* purposes, including proof of prior final convictions. When, however, the defendant voluntarily testifies at the guilt/innocence stage, but objects to being called at the punishment stage, the status of the law is unclear. There are three leading cases in the area.

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44. Cain v. State, 468 S.W.2d 856 (Tex. Crim. App. 1971) held that "it is incumbent on the state to go further [than the mere introduction of prior convictions] and show by independent testimony that the [defendant] was the identical person so previously convicted. . . . [F]ailure to comply with this requirement is reversible error." *Id.* at 858; *accord*, Smith v. State, 489 S.W.2d 920, 922 (Tex. Crim. App. 1973); Vessels v. State, 432 S.W.2d 108, 116 (Tex. Crim. App. 1968). Examples of failure to provide "independent testimony" and the resulting reversal are found in Elizalde v. State, 507 S.W.2d 749, 752 (Tex. Crim. App. 1974) (failure to connect fingerprints); Baker v. State, 505 S.W.2d 869, 870 (Tex. Crim. App. 1974) (stating name insufficient); Chaney v. State, 494 S.W.2d 813, 815 (Tex. Crim. App. 1973) (district attorney repeating vague prior statements made by defendant in another trial admitting conviction of an offense similar to that introduced by State is insufficient); Smith v. State, 489 S.W.2d 920, 921 (Tex. Crim. App. 1973) (defense counsel's unsworn statement referring to "these two convictions" is not connecting evidence).

45. Cain v. State, 468 S.W.2d 856, 859 (Tex. Crim. App. 1971).

46. *Id.* at 859. The prints used for comparison to the certified copies will usually be taken just before or during the trial. This does not violate fifth amendment rights, Burton v. State, 471 S.W.2d 817, 821 (Tex. Crim. App. 1971); Villareal v. State, 468 S.W.2d 837, 840 (Tex. Crim. App. 1971); and they need not be taken in the presence of counsel. Burton v. State, 471 S.W.2d 817, 821 (Tex. Crim. App. 1971); Rinehart v. State, 463 S.W.2d 216, 219 (Tex. Crim. App. 1971).

47. Expert testimony is required. Cain v. State, 468 S.W.2d 856, 859 (Tex. Crim. App. 1971).

48. *Id.* at 859. But defense counsel's unsworn jury argument that refers to "these two convictions" is not a stipulation, and is not connecting evidence. *See* Smith v. State, 489 S.W.2d 920, 921 (Tex. Crim. App. 1973).

49. Cain v. State, 468 S.W.2d 856, 859 (Tex. Crim. App. 1971); Beard v. State, 458 S.W.2d 85, 88 (Tex. Crim. App. 1970).

In *Stratman v. State*,[50] a bench trial, the defendant voluntarily testified at the guilt/innocence stage about previous final felony convictions alleged in the indictment for enhancement purposes. If the convictions had been used for impeachment, they would have been admissible. Defendant was recalled, over his objection, at the punishment hearing and forced to identify himself as the person previously convicted. The court of criminal appeals affirmed finding no reversible error because "had all of appellant's testimony . . . been elicited on cross-examination for impeachment purposes, there would have been no reversible error."[51]

The subsequent case of *Brumfield v. State*[52] presented the situation in which the defendant voluntarily took the stand at the guilt/innocence stage. There were no final prior convictions alleged in the indictment, none available for impeachment, and it was a jury trial. The defendant was recalled, over objection, at the punishment stage and forced to connect himself to certain prior final convictions. The court held this to be reversible error.[53] It distinguished *Stratman* on the basis that *Brumfield* was a jury trial, and that in *Stratman* the prior final convictions there were available for impeachment and used for enhancement.[54]

Three judges in *Brumfield* were of the opinion that since article 27.07 provides for two separate proceedings, a defendant's waiver of his right against self-incrimination by taking the stand at the guilt/innocence stage is limited to that particular stage and does not carry over to the punishment stage.[55]

The question arose again in *Ballard v. State*,[56] where the defendant was asked at the punishment stage to connect himself with prior final convictions. There was no majority opinion on the propriety of such act: the court held that any error had been waived by a failure to object to the testimony at trial.[57] It is apparent, then, that until the court's position is clarified the cautious defendant should object to the introduction of such evidence at either stage to preserve the point on appeal.

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50. 436 S.W.2d 144 (Tex. Crim. App. 1968).
51. *Id.* at 146.
52. 445 S.W.2d 732 (Tex. Crim. App. 1969).
53. *Id.* at 733-34; *accord*, Ballard v. State, 450 S.W.2d 83 (Tex. Crim. App. 1969).
54. Brumfield v. State, 445 S.W.2d 732, 732-33 (Tex. Crim. App. 1969).
55. *Id.* at 741. The concurring judges stated that the rule in *Stratman* was applicable. *Id.* at 742.
56. 450 S.W.2d 83 (Tex. Crim. App. 1970).
57. *Id.* at 85.

Problems of Joint Trial

The problems of admissibility of previous convictions increase in a joint trial. While prior final convictions of co-defendants may not be admitted at the guilt stage, they will be admitted at the penalty stage. Every attorney knows that instructing the jury not to consider the prior convictions of co-defendants in determining punishment is no more effective to erase the prejudice of "punishment by association" at this stage of trial than it would be to erase "guilt by association" prejudice at the guilt/innocence stage. The defense attorney's only alternative to protect his client from the prejudice of a co-defendant's prior convictions is to move for a severance under Article 36.09 of the Code of Criminal Procedure which provides,

> in cases in which, upon timely motion to sever, and evidence introduced thereon, it is made known to the court that there is a previous admissible conviction against one defendant or that a joint trial would be prejudicial to any defendant, the court shall order a severance as to the defendant whose joint trial would prejudice the other defendant or defendants.[58]

The court of criminal appeals has given this statute a relatively restricted reading. Severance is mandatory only if at either stage of the bifurcated trial, one defendant has had admissible prior final convictions and a co-defendant has not.[59] In a case where all defendants have had admissible prior final convictions, the movant must show that a "joint trial would be prejudicial" because, for example, of the nature of the co-defendants' crime or the large number of his admissible convictions as compared with the movant's.[60] This ground for severance is within the sound discretion of the court.

The purpose of this statute is to provide judicial economy through the use of joint trials.[61] This purpose, coupled with the reluctance of the court of criminal appeals to find abuse of discretion in any criminal case, indicates that failure to grant a severance results in reversal only if severance was mandatory. The problem that remains is that everyone—judge, prosecutor, defendant, and defense attorney—knows that the jury never follows the instructions not to consider the prior final convictions of co-defendants in assessing punishment any more than they would do so in determining guilt at the guilt/innocence stage of

58. TEX. CODE CRIM. P. ANN. art. 36.09 (Supp. 1974).
59. Robinson v. State, 449 S.W.2d 239, 240-41 (Tex. Crim. App. 1969).
60. *Id.* at 241.
61. Before this article was passed, severance was a matter of right.

the trial. But the court of criminal appeals has apparently decided that such judicial fictions are worth the increased judicial efficiency.

Prior Void Criminal Convictions

The holding of the United States Supreme Court in *Loper v. Beto*,[62] that an invalid conviction cannot be used to prove guilt, enhance punishment, or impeach,[63] applies to section 3(a).[64] The effect of this ruling on section 3(a) is demonstrated by a defendant's claim that he was denied his right to counsel at a prior trial, and that, therefore, the prior final conviction is inadmissible. Characteristically, the court of criminal appeals has placed the burden on the defendant claiming that a prior criminal conviction was void to prove that he was indigent at the time of that trial, that he was not apprised of his right to counsel, and that he did not waive his right to counsel. The absence of a recitation on the face of the judgment or sentence is not determinative,[65] and such a recitation is binding in the absence of evidence to the contrary.[66] Even when there is such a showing, however, the court may find such error harmless.[67]

General Reputation and Character

The general reputation contemplated by the statute is that maintained prior to trial, and it is not error to exclude evidence of the defendant's general reputation prior to the time of his arrest.[68] In *James v. State*[69] the court of criminal appeals held that the only proper way to show reputation and character is through testimony regarding the defendant's reputation as a peaceable and law-abiding citizen. Questioning pursuant to this section of the statute, therefore, should follow this particular form:[70]

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62. 405 U.S. 473 (1973).
63. *Id.* at 482-84.
64. Cherry v. State, 488 S.W.2d 744, 755 (Tex. Crim. App. 1972), *cert. denied*, 411 U.S. 909 (1973).
65. *Ex parte* Scott, 485 S.W.2d 921, 922 (Tex. Crim. App. 1972).
66. Gutierrez v. State, 456 S.W.2d 84, 85-86 (Tex. Crim. App. 1970).
67. As it did in Marks v. State, 454 S.W.2d 749 (Tex. Crim. App. 1970).
68. Simmons v. State, 504 S.W.2d 465, 475 (Tex. Crim. App. 1974).
69. 479 S.W.2d 307 (Tex. Crim. App. 1972), *noted in* 51 TEXAS L. REV. 148 (1972).
70. Form sustained in Lovett v. State, 479 S.W.2d 286, 287 (Tex. Crim. App. 1972); Witt v. State, 475 S.W.2d 259, 261 (Tex. Crim. App. 1971); Pogue v. State, 474 S.W.2d 492, 496 (Tex. Crim. App. 1971); Smith v. State, 414 S.W.2d 659, 661 (Tex. Crim. App. 1967).

Q Are you familiar with the reputation of the defendant as a peaceable and law-abiding citizen in the community in which he resides?
A Yes, sir.

or

Q Are you familiar with the reputation of the defendant as a peaceable and law-abiding citizen in the community in which he resides and among those with whom he associates?
A Yes, sir.
Q And, what is that reputation?
A It is bad (or good).[71]

When the testimony is given by a defense witness, it is usually by a teacher, co-worker, or neighbor. When given by a state's witness, the testimony generally comes from the arresting or investigating officers,[72] but it can come from anyone, even the prosecuting attorney.[73]

Such reputation testimony, is of course, an exception to the hearsay rule.[74] Notwithstanding the fact that the witness states he has never heard the accused's reputation discussed in the community, the witness is permitted to testify that he knows the general reputation of the accused as peaceable and law-abiding, and that his reputation is good. If, however, the witness testifies that accused's reputation is bad, he must have actually heard someone say so, or he may not testify.[75]

The state may not introduce testimony of bad reputation which is based solely on the arrest for the present charges.[76] But the reputation

71. In Reeves v. State, 491 S.W.2d 157, 161 (Tex. Crim. App. 1973), the witness had no opinion. There the state called a character witness who was asked if he knew the defendant and had an opinion as to his reputation as a peaceable and law abiding citizen. When he stated that he had no opinion, the state passed the witness. Since no objection was made, the court held no error to be presented.

72. Nichols v. State, 494 S.W.2d 830, 835 (Tex. Crim. App. 1973); Frison v. State, 473 S.W.2d 479, 485 (Tex. Crim. App. 1971); Walker v. State, 454 S.W.2d 415, 420 (Tex. Crim. App. 1970) (juvenile parole officer); Sprinkle v. State, 452 S.W.2d 456, 457 (Tex. Crim. App. 1970) (adult probation officer).

73. Gonzales v. State, 466 S.W.2d 772, 774 (Tex. Crim. App. 1971). Allowing proof of reputation and character does not deprive the accused of a fair and impartial trial. Davis v. State, 429 S.W.2d 895, 897 (Tex. Crim. App. 1968), *cert. denied*, 393 U.S. 1096 (1969).

74. Maldonado v. State, 467 S.W.2d 468, 469 (Tex. Crim. App. 1971).

75. Weatherall v. State, 159 Tex. Crim. 415, 417, 264 S.W.2d 429, 430 (1954); Gilson v. State, 140 Tex. Crim. 345, 346, 145 S.W.2d 182, 183 (1940); Ewing v. State, 120 Tex. Crim. 137, 141, 49 S.W.2d 450, 452 (1931).

It does not matter to whom the state's witness has spoken, and if it was a confidential informant, the prosecution may not be forced to divulge that person's identity. Durham v. State, 466 S.W.2d 758, 759 (Tex. Crim. App. 1971).

76. Frison v. State, 473 S.W.2d 479, 485 (Tex. Crim. App. 1971).

witness may testify even if he does not know the defendant,[77] or has known him only since the date of his arrest,[78] and the reputation need not have been discussed prior to the arrest[79] or offense.[80] As a practical matter, then, if such reputation is based solely on the arrest, it will be almost impossible to prove.

Although Section 51.13 of the Family Code[81] makes certain portions of the record of prior juvenile proceedings inadmissible, it does not prevent a witness from testifying to the general reputation of a defendant when such reputation has been gained as a result of such proceedings. The article "concerns only testimony regarding the disposition of matters having been adjudicated in juvenile court and in no way affects the qualification of one having personal knowledge of appellant's general reputation in the community."[82] The admissibility of such testimony is not affected because the defendant was a juvenile at the time his reputation was acquired.[83]

Truth and Veracity

In *Logan v. State*[84] the defense attempted to elicit testimony from the defendant's homeroom teacher that, "[A]s I knew Mr. Logan in the classroom, his reputation for truth and veracity was good."[85] The defense argued that such testimony should be admissible to show character as distinguished from reputation. The court of criminal appeals disagreed, stating that the rule was well established that if the state had attacked his general reputation for truth and veracity through any witness, or had attempted to impeach the defendant through Article 38.29 of the Code of Criminal Procedure, then he would have been permitted to have introduced such proof; but until such contingency arose, the fact that he gave testimony disputing that offered by the state would not make his testimony admissible.[86]

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77. *Id.* at 485.
78. Lovett v. State, 479 S.W.2d 286, 287 (Tex. Crim. App. 1972); Witt v. State, 475 S.W.2d 259, 261-62 (Tex. Crim. App. 1971).
79. Frison v. State, 473 S.W.2d 479, 485 (Tex. Crim. App. 1971).
80. Glenn v. State, 442 S.W.2d 360, 362-63 (Tex. Crim. App. 1969).
81. TEX. FAMILY CODE ANN. § 51.13(b) (1975).
82. Fortson v. State, 474 S.W.2d 234, 235-36 (Tex. Crim. App. 1971); Walker v. State, 454 S.W.2d 415, 420 (Tex. Crim. App. 1970).
83. Garcia v. State, 502 S.W.2d 718, 719 (Tex. Crim. App. 1973).
84. 455 S.W.2d 267 (Tex. Crim. App. 1970).
85. *Id.* at 269.
86. *Id.* at 269; *accord*, Wallace v. State, 501 S.W.2d 883, 886 (Tex. Crim. App. 1973).

Evidence Relevant to an Application for Probation or to Mitigate Punishment

This is the judicially created catch-all category under which the court of criminal appeals allows evidence to come before the court or jury which does not fall into the statutory classifications of "prior criminal record" or "reputation and character." This includes evidence of the defendant's juvenile record, pre-sentence reports, proof of facts of the offense charged, probation-related testimony, specific acts of misconduct, and various other matters. Since the test is "relevancy," hard and fast rules in this area are difficult to establish from the decisions. The factor of whether the jury or the court will sentence seems to be a dominant consideration in determining admissibility.

Juvenile Record

Walker v. State[87] involved a question which "appear[ed] to be one of first impression; that is, whether, in a punishment hearing before the court, testimony may be elicited from the accused concerning his juvenile record."[88] The court held that under the circumstances such an inquiry "makes a great deal of sense." It was carefully noted, however, that the hearing was before the court and that the same information could have been contained in a pre-sentencing report.[89] A different result would possibly be reached if a jury were to assess punishment, but the court of criminal appeals has not yet had an opportunity to decide the issue.

The court in *Walker* did not consider the application of article 2338-1(13)(d), which stated that "the disposition of a child or any evidence given in the court shall not be admissible into evidence against the child in any case or proceeding in any court other than the juvenile court . . . ."[90] Presumably, since this information, along with the rest of the defendant's juvenile record, is often contained in a pre-sentence report, it would probably be admissible before the court, but not before a jury.

87. 493 S.W.2d 239 (Tex. Crim. App. 1973).
88. *Id.* at 240.
89. TEX. CODE CRIM. P. ANN. arts. 42.12(4), 42.13(4) (1966).
90. TEX. REV. CIV. STAT. ANN. art. 2338-1(13)(d), *recodified in*, TEX. FAMILY CODE ANN. § 51.13(a) (1975).

Pre-Sentence Report

The trial judge may order a probation officer to report to the court "the circumstances of the offense, criminal record, social history and present condition of the defendant."[91] The judicially stated purpose of this procedure is "to provide the trial court with succinct and precise information upon which to base a rational decision on the motion for probation."[92]

Although a pre-sentence report containing the defendant's "social history" helps a trial judge reach "rational" decisions regarding probation, the same is not true for juries. In *Tezeno v. State*[93] the defendant asserted that the trial court committed error "in not allowing him to offer evidence concerning the sociological, economic, political, and overall conditions of his neighborhood at the punishment phase of the trial."[94] Certainly these criteria constitute social history. "We fail to perceive," the court of criminal appeals responded, "how the evidence which the defendant sought to offer would be relevant."[95]

The court of criminal appeals has held that while it is "desirable" that the trial court turn a copy of the report over to the defense, it is not required to do so.[96] This decision is deemed to rest within the sound discretion of the court.[97] Although the report may contain hearsay statements, the court is not bound, as a jury would be, to disregard them.[98]

Proof of Facts of Offense After Guilty Plea or Verdict

After the adoption of the Code of Criminal Procedure in 1965, defense attorneys tried to preclude the introduction of evidence concerning the offense charged in the indictment by entering a plea of guilty and arguing that on such a plea, this evidence was irrelevant. The court of criminal appeals rejected this argument in *Darden v. State*,[99] where it stated,

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91. TEX. CODE CRIM. P. ANN. art. 42.12(4) (1966).
92. Rodriguez v. State, 502 S.W.2d 13, 14 (Tex. Crim. App. 1973).
93. 484 S.W.2d 374 (Tex. Crim. App. 1972).
94. *Id.* at 379.
95. *Id.* at 380.
96. Rodriguez v. State, 502 S.W.2d 13, 14 (Tex. Crim. App. 1973).
97. *Id.* at 14-15.
98. Lee v. State, 505 S.W.2d 816, 818 (Tex. Crim. App. 1974). *See also* Brown v. State, 478 S.W.2d 550, 551 (Tex. Crim. App. 1972).
99. 430 S.W.2d 494 (Tex. Crim. App. 1968).

> It is well established that a plea of guilty to a felony charge before a jury admits the existence of all facts necessary to establish guilt and, in such cases, the introduction of testimony by the State is to enable the jury to intelligently exercise the discretion which the law vests in them touching the penalty to be assessed.[100]

In *Brazile v. State*,[101] a murder conviction, the court of criminal appeals took the first step in granting the same right to a defendant. There, the defendant called no witnesses at the guilt/innocence stage of the trial. At the punishment stage he attempted to testify to his version of the facts and circumstances surrounding the homicide. The court pointed out that in *Foster v. State*[102] it had held that the presence or absence of malice in murder cases relates only to punishment, since there are no degrees of murder in Texas. It would thus appear proper to submit the issue of malice only during the punishment stage.[103] The court then concluded that since defendant's testimony would not have raised any affirmative defense, but would have related only to mitigation of punishment, it should have been allowed.[104]

Four months later, in *Marrero v. State*,[105] the court held that the presence or absence of malice is determinative of punishment in cases of assault with intent to murder. The defendant, who had offered no witnesses at the guilt/innocence stage, should have been allowed to testify about the circumstances surrounding the assault, and the case was reversed for a new punishment hearing.

In *Kelly v. State*[106] the court held that although the voluntary use of narcotics or drugs will not justify or excuse one from being held accountable for any criminal offense, it may be considered for the purpose of mitigation of punishment.[107]

The developing rule seems to permit the defendant to remain silent until the punishment stage of the trial, and at that time to testify to

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100. *Id.* at 495.

101. 497 S.W.2d 302 (Tex. Crim. App. 1973). *See* Crampton, *Changes in the Punishment Hearing at the Bifurcated Criminal Trial*, 37 TEX. B.J. 153 (1974), cited in several opinions by the court of criminal appeals, which considers the effect of this case.

102. 493 S.W.2d 812 (Tex. Crim. App. 1973).

103. Brazile v. State, 497 S.W.2d 302, 304 (Tex. Crim. App. 1973).

104. In *Brazile*, the court discussed White v. State, 444 S.W.2d 921 (Tex. Crim. App. 1969), a statutory rape case, and said that testimony regarding the defendant's relationship with the prosecutrix on and before the night of the alleged rape, since not in the nature of an affirmative defense, should have been admitted in mitigation of punishment. Brazile v. State, 497 S.W.2d 302, 304 (Tex. Crim. App. 1973).

105. 500 S.W.2d 818, 819-20 (Tex. Crim. App. 1973).

106. 442 S.W.2d 726 (Tex. Crim. App. 1969).

107. *Id.* at 727-28.

any facts surrounding the offense that may apply to mitigation of punishment. The defendant will not, however, be allowed to testify to facts which will tend to exonerate him or to raise affirmative defenses.[108]

Testimony Specifically Regarding Application for Probation

In *Allaben v. State*,[109] a sodomy prosecution, the defendant was not permitted to show the jury that since the offense he had been seeing a psychiatrist twice a week in connection with his problem, and that he hoped to continue treatment if granted probation. On appeal this was held error, but not reversible error. The later case of *Schulz v. State*[110] held it was not error to admit psychiatric testimony that it would be better for the defendant to be placed on probation rather than sentenced to the Department of Corrections. A subsequent case, *Logan v. State*,[111] held that the defendant had no right to have a probation officer testify to the purposes of probation or the requirements necessary for probation.[112] This holding reaffirmed the earlier *Allaben* case, in which the jury, after retiring to determine punishment, requested from the judge information on the statutory requirements not contained in the charge. The trial court refused, and this was upheld on appeal.[113]

Other Admissible Testimony

With regard to miscellaneous matters, a defendant may testify to his remorse for having participated in the offense,[114] his prior good conduct,[115] and that he has never been arrested[116] or convicted of a

108. Dixon v. State, 506 S.W.2d 585, 588 (Tex. Crim. App. 1974). The state apparently may allow the victim to exhibit his scars resulting from the attack to the jury during the punishment stage. The defendant has the burden of showing prejudice. Jones v. State, 481 S.W.2d 833, 835 (Tex. Crim. App. 1972).

109. 418 S.W.2d 517, 519 (Tex. Crim. App. 1967).

110. 446 S.W.2d 872, 874 (Tex. Crim. App. 1969).

111. 455 S.W.2d 267 (Tex. Crim. App. 1970).

112. *Id.* at 270.

113. Allaben v. State, 418 S.W.2d 517, 519 (Tex. Crim. App. 1967); *accord,* Logan v. State, 455 S.W.2d 267, 270 (Tex. Crim. App. 1970).

In the recent case of Wallace v. State, 501 S.W.2d 883 (Tex. Crim. App. 1973), the prosecutor asked the defendant, "Would you tell the Jury whether [defense counsel] told you that there were in excess of five hundred probationers here in Smith County, and there are only two probation supervision officers to look after them?" *Id.* at 886. The question was held irrelevant and its asking error, but not such error as to require reversal of the conviction.

114. Santiago v. State, 444 S.W.2d 758, 759 (Tex. Crim. App. 1969).

115. Allaben v. State, 418 S.W.2d 517, 519 (Tex. Crim. App. 1967).

felony[117] or any criminal offense.[118] He may tell the jury of his past and present employment,[119] his grades in high school or college,[120] degrees earned,[121] or the fact that he holds an honorable discharge.[122] The defendant may promise to abide by the terms of probation,[123] and promise that he will live at home with his parents,[124] and he may ask for mercy.[125] He may also explain his motives for the crime.[126] Parents and siblings may testify that the defendant can be rehabilitated, although the state may refute such testimony through an expert.[127] Defendant may show a history of alcoholism and hospitalization therefor.[128] The state may read article 37.07(3)(a) to the jury.[129] All these matters have been held relevant to mitigation of punishment or to an application for probation.

Specific Acts of Misconduct

The general rule is that the state may not prove prior acts of misconduct which have not resulted in final convictions. Hence, in *Jones v. State*[130] the court held it to be reversible error to bolster a state witness for defendant's bad reputation by the introduction of photographs of the defendant, in the nude, leading a parade through downtown Dallas. The court rejected the argument that the photos were evidence of bad character, and held instead that reputation testimony was the proper method to show bad character.

There is, however, another rule which may admit into evidence specific actions which have not resulted in final convictions. Such proof may be adduced when it "is relevant to a fair determination of

116. Cleveland v. State, 502 S.W.2d 24, 25 (Tex. Crim. App. 1973); Allaben v. State, 418 S.W.2d 517, 519 (Tex. Crim. App. 1967).
117. *Id.* at 519; Smith v. State, 414 S.W.2d 659, 662 (Tex. Crim. App. 1967).
118. McCrea v. State, 494 S.W.2d 821, 823 (Tex. Crim. App. 1973).
119. Cleveland v. State, 502 S.W.2d 24, 25 (Tex. Crim. App. 1973); Allaben v. State, 418 S.W.2d 517, 519 (Tex. Crim. App. 1967).
120. Allaben v. State, 418 S.W.2d 517, 519 (Tex. Crim. App. 1967).
121. *Id.* at 519.
122. Cleveland v. State, 502 S.W.2d 24, 25 (Tex. Crim. App. 1973).
123. McCrea v. State, 494 S.W.2d 821, 823 (Tex. Crim. App. 1973).
124. *Id.* at 823; Childs v. State, 491 S.W.2d 907, 908 (Tex. Crim. App. 1973).
125. Richardson v. State, 458 S.W.2d 665, 666 (Tex. Crim. App. 1970).
126. Nichols v. State, 500 S.W.2d 158, 160 (Tex. Crim. App. 1973).
127. Armstrong v. State, 502 S.W.2d 731, 735 (Tex. Crim. App. 1973).
128. Hendrix v. State, 459 S.W.2d 634, 635-36 (Tex. Crim. App. 1970); Ingram v. State, 426 S.W.2d 877, 879 (Tex. Crim. App. 1968).
129. Harden v. State, 417 S.W.2d 170, 173 (Tex. Crim. App. 1967).
130. 479 S.W.2d 307 (Tex. Crim. App. 1972).

an accused's application for probation,"[131] just as is evidence of specific prior good acts.[132] Thus, the court has allowed inquiry into whether the defendant is addicted to any drug[133] or has ever been hospitalized for addiction,[134] has ever shot "speed" and how often,[135] and if he uses or purchases marijuana.[136] Although proof of prior acts of misconduct which have not resulted in prior convictions may follow a good reputation witness through a state rebuttal witness,[137] or even be elicited from the defendant himself[138] or one of his reputation witnesses, the purpose for their introduction is not impeachment but rather their relevancy toward an application for probation.[139]

"Opening the Door" to Otherwise Inadmissible Testimony

While the provisions of article 37.07 are very broad, there is still a limit to what the state may offer. For example, evidence of pending trials, prior indictments that resulted in acquittals, arrests, and the facts of a particular conviction are all inadmissible.[140] Any of these may, however, be admitted under the auspices of impeachment under Article 38.29 of the Code of Criminal Procedure. Under the provisions of that article the fact that a witness has been charged with an offense is inadmissible for the purpose of impeachment, unless the proffered charge has resulted in a final conviction of a felony or crime involving moral turpitude and is not too remote. But if the defendant "opens the door" and makes blanket statements concerning his exemplary conduct, the state may refute such testimony despite the nature of the conviction or its remoteness.[141]

131. Cleveland v. State, 502 S.W.2d 24, 26 (Tex. Crim. App. 1973); McCrea v. State, 494 S.W.2d 821, 825 (Tex. Crim. App. 1973); Davis v. State, 478 S.W.2d 958, 959 (Tex. Crim. App. 1972); Santiago v. State, 444 S.W.2d 758, 759 (Tex. Crim. App. 1969).

132. The rule in Jones v. State, 418 S.W.2d 833 (Tex. Crim. App. 1972), coupled with the "relevancy toward an application for probation rule," presents an interesting problem. What can the state do to get specific acts of misconduct before the jury if no application for probation is filed? There was none in *Jones*, the prosecution was forced to use the character theory, and it was refused. This writer has not seen an answer in the cases.

133. McCrea v. State, 494 S.W.2d 821, 823 (Tex. Crim. App. 1973).

134. Holmes v. State, 502 S.W.2d 728 (Tex. Crim. App. 1973).

135. McCrea v. State, 494 S.W.2d 821, 823-24 (Tex. Crim. App. 1973).

136. *Id.* at 824.

137. Davis v. State, 478 S.W.2d 958, 959 (Tex. Crim. App. 1970).

138. McCrea v. State, 494 S.W.2d 821, 825 (Tex. Crim. App. 1973); Santiago v. State, 444 S.W.2d 758, 759 (Tex. Crim. App. 1969).

139. Holmes v. State, 502 S.W.2d 728, 729 (Tex. Crim. App. 1973); McCrea v. State, 494 S.W.2d 821, 825 (Tex. Crim. App. 1973).

140. Bermudez v. State, 504 S.W.2d 868, 872 (Tex. Crim. App. 1974).

141. Thomas v. State, 477 S.W.2d 881, 884 (Tex. Crim. App. 1972). On the other

Therefore, if the defendant says in response to questioning either by his lawyer[142] or by the prosecutor[143] that he has never been in trouble before, he has thrown the door wide open to impeaching evidence. The state may then introduce arrests,[144] criminal indictments,[145] outstanding or unexecuted arrest warrants,[146] prior inconsistent statements,[147] and prior final convictions from courts not of record, even if not material to the offense charged.[148] A motion in limine against the introduction of these matters cannot prevent such impeachment.[149]

Good reputation testimony also "opens the door" to the extent of proper cross-examination of the witness. The general rule is that the state is allowed to ask such witnesses if they have heard of specific acts of misconduct of the defendant. It may not, however, ask whether the witness had personal knowledge of the act, nor may the questions be framed so as to imply that the act was actually committed. As a prerequisite to such cross-examination, the state must have a good faith belief that the act actually occurred. Any act of misconduct may be discussed, so long as it is not inconsistent with the character trait about which the witness testifies.

The rationale behind the rule is that reputation is an opinion based on hearsay: the witness is testifying to his opinion of the defendant's reputation, based on what he has heard others say. In order to test the witness' opinion, the state is permitted to ask whether the witness has heard—not whether he knows—of facts or reports inconsistent with a good reputation. The theory is that if the witness is truly familiar with the defendant's reputation, he will also have heard of adverse reports which are circulating in the community, the inquiry being not what the defendant is, but rather what he is thought to be.

Hence, the question "have you heard" of a specific act of misconduct tests the grounds upon which the witness bases his opinion, and

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hand, the general statement by the defendant that he has lived a clean life for 22 years does not open the door to evidence of specific arrests and bad acts. Smith v. State, 506 S.W.2d 602 (Tex. Crim. App. 1974).

142. Thomas v. State, 477 S.W.2d 881, 883-85 (Tex. Crim. App. 1972).

143. Ames v. State, 499 S.W.2d 110, 118-19 (Tex. Crim. App. 1973).

144. Thomas v. State, 477 S.W.2d 881, 885 (Tex. Crim. App. 1972); Barnett v. State, 445 S.W.2d 205, 210 (Tex. Crim. App. 1969).

145. Thomas v. State, 477 S.W.2d 881, 885 (Tex. Crim. App. 1972).

146. *Id.* at 885.

147. Sierra v. State, 476 S.W.2d 285, 287 (Tex. Crim. App. 1971).

148. Ames v. State, 499 S.W.2d 110, 118-19 (Tex. Crim. App. 1973).

149. Thomas v. State, 477 S.W.2d 881, 884 (Tex. Crim. App. 1972).

goes to the weight of the testimony. The inquiry is not to test the truth and veracity of the witness (as it is in the case of impeachment under article 38.29), but rather whether what he says is supported by fact.[150]

CONCLUSION

As the rules have developed, the test of "evidence in mitigation of punishment or relevant to an application for probation" has been the most important. Its liberal application by the Texas Court of Criminal Appeals has the salutory effect of "taking the blinders off of the jury." In this respect, I suggest the following changes in the law, which run counter to the philosophy and intent of article 37.07, the "mitigation" and the "relevancy" tests.

First, in any situation where a defendant is tried for one criminal offense which is part of a criminal transaction consisting of other different criminal offenses, for which he has been charged and is to be or has been tried, and which are admissible for any purpose at the present trial, the defendant should be allowed to show that charges for the other criminal acts are pending or have been tried. This would minimize the inclination of jurors to assess punishment for all criminal acts in the belief that if they do not, the defendant will escape punishment for the other acts. *Nash v. State*[151] should be overruled.

Second, to the extent that *Tezeno v. State*[152] holds that evidence of sociological, economic, political, and other similar conditions are not "social history" of the defendant, it should be overruled. It should also be overruled to the extent that it requires that "social history" is admissible in a pre-sentence report to the court but not to a jury. Juries, too, wish to make "rational" sentencing decisions based on all relevant evidence.

Third, there is no good reason that the emerging rule allowing the defendant to remain silent at the guilt/innocence stage and then permits him to testify at the punishment stage about facts surrounding the offense should be limited so as to prohibit him from alleging facts which might constitute affirmative or avoidance defenses. After all, the conviction cannot be rescinded, and such evidence should probably be allowed for whatever worth.

150. Brown v. State, 477 S.W.2d 617, 619-20 (Tex. Crim. App. 1972).
151. 467 S.W.2d 414 (Tex. Crim. App. 1971).
152. 484 S.W.2d 374 (Tex. Crim. App. 1972).

Last, a rule which permits a defense witness to give favorable reputation testimony, even with no knowledge of that reputation, should not be allowed to stand. Although the court has allowed it "for whatever it is worth," it is worth nothing and such a rationale borders on suborning perjury. Logically, a witness should have heard a reputation before he is permitted to express an opinion about it. *Weatherall v. State*[153] and the cases it rests on should, therefore, also be overruled.

153. 159 Tex. Crim. 415, 264 S.W.2d 429 (1954).