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Explanatory Surplusage in an Indictment Is Not Subject to Amendment.

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CASE NOTES

CRIMINAL PROCEDURE—Amendments to Indictments—Explanatory Surplusage in an Indictment is not Subject to Amendment

Burrell v. State,

526 S.W.2d 799 (Tex. Crim. App. 1975).

Richard Burrell was convicted of robbery and assault with intent to murder a police officer. The indictment returned by the grand jury charged that Burrell, "with malice aforethought," assaulted a police officer "by shooting him with a gun." After the presentation of the testimony had begun the trial court deleted these allegations on motion by the State. On appeal Burrell complained that the trial court erred in permitting the State to amend the indictment in the cause after the trial had commenced. Held—*Reversed.* Language in an indictment, although unnecessary to charge the offense but which is descriptive or explanatory of the offense charged, is a matter of substance in the indictment that must be proved as alleged, and cannot be disregarded as surplusage.[1]

The right to be charged by a grand jury indictment is guaranteed in both the United States' and Texas' Constitutions.[2] An indictment is one of two ways by which the State may commence a criminal prosecution;[3] it is a formal statement of a charge returned by a grand jury,[4] and is the only way to initiate a felony prosecution.[5] At common law the indictment of a grand jury could not be amended in any manner by the court as to form or substance.[6] The reason for the strictness of the early rule was the severity

1. Burrell v. State, 526 S.W.2d 799, 803 (Tex. Crim. App. 1975).

2. U.S. CONST. amend. V; TEX. CONST. art. I, § 10.

3. TEX. CODE CRIM. PROC. ANN. art. 27.01 (1965), which provides that "The primary pleading in a criminal action on the part of the State is the indictment or information." *See* Hewitt v. State, 25 Tex. 722, 726 (1860); *Ex parte* Cain, 86 Tex. Crim. 509, 510-11, 217 S.W. 386, 387 (1920).

4. TEX. CODE CRIM. PROC. ANN. art. 21.01 (1965) defines an indictment as "the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense." This is distinguished from an information, which is "a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted." TEX. CODE CRIM. PROC. ANN. art. 21.20 (1965).

5. Melancon v. State, 367 S.W.2d 690, 692 (Tex. Crim. App. 1963).

6. *Ex parte* Bain, 121 U.S. 1, 6 (1886). The proper practice at common law was to grant process against the grand jury to come into court and amend it, because an indictment altered by the court was not the indictment of a grand jury, and could not support a conviction. *Id.* at 6-7. *See generally* 10 B.U.L. REV. 388 (1930).

of the penalties attached to many minor crimes, and the humane tendencies of the courts to resort to any defect in the indictments to shield convicted persons from such harshness.[7]

Texas enacted a statute in 1854 that modified the common law rule,[8] and in subsequent codifications expanded that original provision to allow amendments as to form, but not as to substance.[9] The early cases gave effect to the statutory dichotomy between form and substance,[10] and that division has been retained in subsequent codifications,[11] including the present one.[12]

Shortly after the passage of the statutes creating the division between amendments as to form and those of substance, the courts encountered the problem of classifying unnecessary allegations, and adopted the approach that such surplus matters could be deleted without vitiating an indictment.[13] These precedents were soon followed, and the rule became settled in Texas

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7. Roberson v. State, 362 P.2d 1115, 1117 (Okla. Crim. App. 1961); *Ex parte* Williams, 106 P.2d 524, 525 (Okla. Crim. App. 1940). *See generally* 41 AM. JUR. 2d *Indictments and Informations* § 172 (1968). No exceptions to this strict rule were permitted, and the fact that the accused consented to the amendment, or that the words stricken from the indictment were unnecessary to charge the offense was immaterial. United States v. Norris, 281 U.S. 619, 622-23 (1930) (consent); Ford v. United States, 273 U.S. 593, 602 (1927) (surplusage). The states, however, have modified the common law rule by statute. *E.g.*, CAL. PENAL CODE § 1009 (West 1971); MICH. COMP. LAWS § 28.986 (1972); PA. R. CRIM. P., tit. 19, § 220 (Purdon's 1975). These statutes do not conflict with the United States Constitution because grand jury requirements in the fifth amendment are not binding on the states through he fourteenth amendment. *See* Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964); Beck v. Washington, 369 U.S. 541, 545 (1962).

8. Tex. Laws 1854, ch. 49, § 67, at 69, 3 H. GAMMEL, LAWS OF TEXAS 1513 (1854), which provides that:

> No indictment or other accusation shall be abated for any misnomer of the accused, but the court may, in case of misnomer appearing before or in the course of trial, forthwith cause the indictment or accusation to be amended accord-to fact.

9. Tex. Code Crim. P. art. 508 (1856) provided that "[w]hen the exception to an indictment or information, is sustained merely on account of form, the same shall be amended, if decided to be defective, and the cause proceed upon such amended indictment or information." Subsequently, Tex. Code Crim. P. art. 587 (1895) restated the rule as:

> Any matter of form in an indictment or information may be amended at any time before an announcement of ready for trial upon the merits by both parties, but not afterward. No matter of substance can be amended.

10. *E.g.*, Bosshard v. State, 25 Tex. 207, 210 (Supp. 1860); Prior v. State, 4 Tex. 383, 385 (1849).

11. Tex. Code Crim. P. arts. 532, 533 (1925).

12. TEX. CODE CRIM. PROC. ANN. art. 28.10 (1965), which contains the precise wording of Tex. Code Crim. P. art. 587 (1895).

13. Sublett v. State, 9 Tex. 53, 55 (1852) (allegation of the type of card game played); Wilson v. State, 5 Tex. 21, 22 (1849) (ownership of house where gambling took place); Prior v. State, 4 Tex. 383, 385 (1849) (ownership). These cases explicitly rejected the theory that where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved.

that surplus allegations in an indictment may be disregarded and need not be proved,[14] although the reason for this was never made entirely clear.[15]

The Texas courts, however, soon encountered situations in which the surplus allegations were too closely related to the offense to be disregarded, and enunciated an exception to the general rule of deletion. This exception provided that where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all of the circumstances of the description must be proved.[16] In subsequent cases, the exception frequently has been stated in combination with the general rule, to the effect that unnecessary words in an indictment may be disregarded as surplusage when not descriptive of what is legally essential to the charge.[17] This exception has remained the law in Texas.[18]

The thrust of the general rule of surplus allegations, when coupled with the exception, created a nebulous area in the law concerning the propriety of amending indictments by the trial court. The trial court must determine whether a particular surplus allegation is "descriptive" or "not descriptive" of the offense charged, in order to decide if an amendment to the indictment modifying or deleting such allegations is proper.

In dealing with this problem the Texas courts have followed a tripartite procedure in testing the validity of an indictment and its amendments. These correspond to the division of the indictment into substantive portions, formal portions, and surplus portions. In the first phase of this process, the court must determine whether or not the indictment alleges the constituent elements of the offense, and every fact or circumstance necessary to a complete description of the offense. Unless the indictment contains the substantive averments necessary to charge the offense alleged, it cannot support a conviction.[19] Once it is determined that the indictment contains the necessary elements to charge the offense, the trial court must ascertain whether

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14. Cohen v. State, 479 S.W.2d 950, 951 (Tex. Crim. App. 1972); Mayo v. State, 7 Tex. Crim. 342, 346 (1879). *See generelly* 1 BRANCH'S ANN. PENAL CODE § 517, at 497 (2d ed. 1974).

15. In Prior v. State, 4 Tex. 383, 385 (1849) the court intimated that as long as the "most material" aspects of the charge are present the purpose of the indictment would be achieved.

16. Hill v. State, 41 Tex. 253, 258 (1874); *accord*, Courtney v. State, 3 Tex. Crim. 257, 261 (1877); Warrington v. State, 1 Tex. Crim. 168, 187 (1876).

17. Moore v. State, 505 S.W.2d 842, 843 (Tex. Crim. App. 1974); Collins v. State, 500 S.W.2d 168, 169 (Tex. Crim. App. 1973); Malazzo v. State, 165 Tex. Crim. 441, 443, 308 S.W.2d 29, 31 (1957).

18. *E.g.*, Cohen v. State, 479 S.W.2d 950, 951 (Tex. Crim. App. 1972); McClure v. State, 163 Tex. Crim. 650, 653, 296 S.W.2d 263, 264 (1956); Simpson v. State, 10 Tex. Crim. 681, 683 (1881); Lancaster v. State, 9 Tex. Crim. 393, 395 (1880); McGee v. State, 4 Tex. Crim. 625, 626 (1878).

19. *See* Schepps v. State, 432 S.W.2d 926 (Tex. Crim. App. 1968); Northern v. State, 150 Tex. Crim. 511, 203 S.W.2d 206 (1947).

the indictment, as returned by the grand jury, meets all formal requisites.[20] Where the indictment does not comply with these requirements, the trial court may allow an amendment prior to the announcement of ready for trial by the parties.[21] After determining that the indictment satisfies all substantive and formal requirements, the court will then consider any surplus allegations in the indictment. The mere presence of such allegations will not invalidate the indictment,[22] since these averments may be disregarded under the general rule of surplusage unless they are descriptive of the offense charged.[23] Allegations which are descriptive must be classified as part of the substantive portion of the indictment; they cannot be disregarded as surplusage, and they may not be amended.[24]

It is in this hazy area of descriptive surplusage that the principal case has application. *Burrell v. State*[25] postulates an expanded test for determining whether or not a particular allegation is descriptive. Instead of merely characterizing the words in the indictment as descriptive, the court went further and held that where the surplusage is descriptive *or explanatory* of the offense it may not be amended.[26] The court based this extension on a review of the prior cases, which indicated that the word "descriptive" had been used synonymously with "explanatory."[27] Despite this reference by the court to prior decisions, the earlier cases do not delineate any characteristics of "descriptive" surplusage. The prior decisions merely conclude that the questionable phrase in each particular case is or is not descriptive, without enumerating the identifying traits of descriptive words in general.[28]

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20. The basic requirements of an indictment are found in TEX. CODE CRIM. PROC. ANN. art. 21.02 (1965), and a sample form of an indictment is outlined in article 21.16 of the Code.

21. Roberts v. State, 489 S.W.2d 113, 114 (Tex. Crim. App. 1972); TEX. CODE CRIM. PROC. ANN. art. 28.10 (1965).

22. State v. Smith, 24 Tex. 285, 287 (1859); Agan v. State, 130 Tex. Crim. 162, 163, 93 S.W.2d 419 (1936); Sheffield v. State, 99 Tex. Crim. 95, 98, 268 S.W. 162, 164 (1924).

23. Moore v. State, 505 S.W.2d 842, 843 (Tex. Crim. App. 1974); Collins v. State, 500 S.W.2d 168, 169 (Tex. Crim. App. 1973); Malazzo v. State, 165 Tex. Crim. 441, 443, 308 S.W.2d 29, 31 (1957).

24. Cohen v. State, 479 S.W.2d 950, 951 (Tex. Crim. App. 1972); McClure v. State, 163 Tex. Crim. 650, 296 S.W.2d 263, 264 (1957); TEX. CODE CRIM. PROC. ANN. art. 28.10 (1965). *See generally* Comment, *Indictments—Texas Rule of Surplusage,* 13 TEXAS L. REV. 489 (1935).

25. 526 S.W.2d 799 (Tex. Crim. App. 1975).

26. *Id.* at 803.

27. *Id.* at 803.

28. *E.g.,* Brunson v. State, 152 Tex. Crim. 158, 211 S.W.2d 755 (1948) (allegations in prosecution for driving while intoxicated, as to make, model, and year of car); Arbetter v. State, 79 Tex. Crim. 487, 186 S.W. 769 (1916) (particularly describing the means used to commit the offense); McAllister v. State, 55 Tex. Crim. 264, 116 S.W. 582 (1909) (allegation as to where the offense occurred); Loyd v. State, 22 Tex. Crim. 646, 3 S.W. 670 (1887) (coloration of a stolen animal). All of the above held the allegations were descriptive. Other cases have held allegations not descriptive. *See*

The court in *Burrell* attempts to avoid the terseness of the prior decisions by elaborating on the meaning of "descriptive." This attempt at clarification, while laudatory, consisted of only two findings: first, that the word "descriptive" was not limited to situations in which the surplusage serves as an adjective,[29] and second, that the word "descriptive" had been previously used synonymously with "explanatory."[30] The court concluded its analysis at that point, and held that the words in *Burrell* were "descriptive and explanatory" of the offense and could not be amended.[31]

It is clear from a close reading of *Burrell*, however, that the court did not merely hold that "descriptive" could be used synonymously with "explanatory."[32] The court referred to the words "descriptive" and "explanatory" in the alternative.[33] Had the court believed that the words were synonymous, there would have been no need to conclude that the averments in the indictment in the case at bar were "descriptive and explanatory."[34] By using the words alternatively, the court suggests that each has an independent significance and are, in fact, not synonymous.

To determine the basis for this construction one must look to the reasoning behind the rules concerning indictments. The purpose of an indictment is to inform the defendant of the charge against him so that he may adequately prepare his defense.[35] It is readily apparent that if the State were allowed to continually alter the character and particulars of the offense, the defendant could not prepare an adequate defense. The desire to prevent such prejudice to the defendant's right to defend himself accounts for the rule requiring proof of unnecessary statements in an indictment, that are descriptive of the offense. The difficulty with this rationale is not that it is incorrect, but rather that it is myopic in its assumption that an absolute prohibition is the only way to achieve the purpose of the rule. Certainly such a prohibition protects the defendant's rights, but the results of this in the area of substantive surplusage are, at times, anomalous.[36]

Hicks v. State, 493 S.W.2d 833 (Tex. Crim. App. 1973) (allegation as to date of indictment); Handley v. State, 480 S.W.2d 738 (Tex. Crim. App. 1972) (averments as to the possession of non-contraband items by the defendant); Germany v. State, 154 Tex. Crim. 454, 227 S.W.2d 815 (1950) (street address of hotel where offense occurred).

29. Burrell v. State, 526 S.W.2d 799, 803 (Tex. Crim. App. 1975).

30. *Id.* at 803.

31. *Id.* at 804.

32. *Id.* at 803, where the court stated, "[t]aking then the law governing the exception that any matter descriptive *or* explanatory of that which is legally essential to constitute the offense cannot be treated as surplusage . . . ." (emphasis added).

33. *Id.* at 803.

34. *Id.* at 804.

35. Essary v. State, 53 Tex. Crim. 596, 111 S.W. 927 (1908).

36. *See* Poston v. State, 58 Tex. Crim. 583, 126 S.W. 1148 (1910), where it was held that in an indictment charging theft of a sack of walnuts, the word "walnuts" was descriptive, and proof that the sack in fact contained mixed nuts would not support a conviction.

This rationale seems to be a result of the statutory prohibition of amendments as to substance which has been a part of Texas criminal procedure for many years.[37] The decisions in this area expressly or impliedly rely on the statutory prohibition,[38] and that prohibition rests on the implicit assumption that an absolute prohibition is the only way to protect a defendant's rights.

Before the validity of the assumption may be questioned and alternative measures suggested, however, a problem arises in those states which have constitutionally guaranteed the right to be charged by grand jury indictment.[39] In these states, which include Texas,[40] the courts must contend with the constitutionality of amendments to grand jury indictments. These state courts have been unable to obtain reliable guidance from the federal courts' construction of a similar provision in the Federal Constitution,[41] and forced to resolve the problem alone, have formulated two responses to the constitutional question. The first, and most traditional response, is exemplified by the Massachusetts approach. The Massachusetts Constitution contains a provision which guarantees the right to be charged by grand jury indictment.[42] The Massachusetts Supreme Court has construed this clause as prohibiting amendments to the substantive portions of indictments.[43]

In Oklahoma, however, a different result was reached with regard to amendments of informations.[44] The Oklahoma Legislature enacted a statute authorizing amendments of informations, as to either form or substance,

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37. Tex. Code. Crim. P. art. 587 (1895).

38. Clopton v. State, 408 S.W.2d 112 (Tex. Crim. App. 1966) (implied); McDonald v. State, 138 Tex. Crim. 610, 137 S.W.2d 1046 (1940) (express).

39. MASS. CONST. art. XII; OKLA. CONST. art. II, §§ 17, 18, 20.

40. TEX. CONST. art. I, § 10.

41. The United States Supreme Court adopted the strict common law approach in *Ex parte* Bain, 121 U.S. 1 (1886), which has never been overruled. *See* Stirone v. United States, 361 U.S. 212, 217 (1960); United States v. Cirami, 510 F.2d 69, 72 (2d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 1952, 44 L. Ed. 2d 451 (1975); Overstreet v. United States, 321 F.2d 459, 461 (5th Cir. 1963), *cert. denied*, 376 U.S. 919 (1964); Dodge v. United States, 258 F. 300, 305 (2d Cir.), *cert. denied*, 250 U.S. 660 (1919). The "no amendment" rule has been weakened by several cases allowing amendments. Russell v. United States, 369 U.S. 749 (1962) (amendments allowed as to form); United States v. Colasurdo, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972) (amendment as to form); Thomas v. United States, 398 F.2d 531 (5th Cir. 1967) (form); Dye v. Sacks, 279 F.2d 834 (6th Cir. 1960) (misnomer); Stillman v. United States, 177 F.2d 607 (9th Cir. 1949) (typographical error). Surplus allegations, descriptive of the offense, were held to be substantive and not subject to amendment in United States v. Root, 366 F.2d 377 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967). *See generally* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL § 127, at 271 (1969).

42. MASS. CONST. art. XII.

43. Commonwealth v. Snow, 169 N.E. 542 (Mass. 1930).

44. An information is a formal accusation of a crime, differing from an indictment only in that it is proferred by a prosecuting officer instead of a grand jury. People v. Gahagan, 14 N.E.2d 838, 839 (Ill. 1938).

prior to pleading without leave of court, and after pleading with leave of court.[45] This statute was declared unconstitutional in an early case[46] because of a conflict with the Oklahoma Constitution.[47] Later cases, however, reasoned that an amendment of substance does not necessarily conflict with the constitutional guarantee, since the original information could have been sufficient to inform the defendant of the nature of the act with which he is charged.[48]

The Texas Court of Criminal Appeals in *Burrell*, however, was faced with an amended *indictment*, not an amended *information*. This distinction does not render the analogy to the Oklahoma approach inapposite. The difference between the offenses charged by an indictment and an information in Texas and Oklahoma is more illusory than real. In Texas a felony may not be prosecuted by an information.[49] Oklahoma, however, allows felonies to be prosecuted by either an indictment or information.[50] It seems clear that Oklahoma would sanction amendments to informations charging offenses that would require a grand jury indictment in Texas. In such cases, Oklahoma would allow an amendment to the substance of an information if it could be done without materially prejudicing the rights of the defendant,[51] whereas the current Texas approach would prohibit any amendment to the substance of an indictment charging the defendant with an identical felony. The blurring of the distinction between indictments and informations in Oklahoma at least indicates that the rights of the defendant may be secured by a constitutional and statutory scheme, allowing amendments to the substantive portions of indictments. Unfortunately, matters of substance in an indictment or information cannot be amended in Texas by reason of a statutory prohibition.[52]

The reasoning behind such a prohibition, and cases like *Burrell* that must classify surplus allegations as either descriptive or not descriptive, is at least open to question. The underlying rationale for the necessity of such a classification is the traditional view that only an absolute prohibition against amendments to the substantive portions of indictments will secure the

45. 22 OKLA. STAT. tit. 22, § 304 (1969).
46. Webb v. State, 224 P. 991, 992 (Okla. Crim. App. 1924).
47. OKLA. CONST. art. II, §§ 17, 18, 20.
48. Herren v. State, 115 P.2d 258, 264 (Okla. Crim. App. 1941); Hill v. State, 287 P. 1080, 1082 (Okla. Crim. App. 1930). *See generally* 13 OKLA. L. REV. 438 (1960).
49. Melancon v. State, 367 S.W.2d 690, 692 (Tex. Crim. App. 1963); *see* King v. State, 473 S.W.2d 43, 47-48 (Tex. Crim. App. 1971). *See generally* 42 C.J.S. *Indictments and Informations* § 9 (1944).
50. OKLA. CONST. art. 2, § 17; 22 OKLA. STAT. tit. 22, § 301 (1969). In Hampton v. Oklahoma, 368 F.2d 9, 10 (10th Cir. 1966) it was held that the defendant's constitutional rights were not violated because he was proceeded against by the use of an information rather than by an indictment.
51. 22 OKLA. STAT. tit. 22, § 304 (1969).
52. TEX. CODE CRIM. PROC. ANN. art. 28.10 (1965).

defendant's right to know the charge and prepare a defense. As the Oklahoma approach has made clear, the controlling issue is avoiding prejudice to the defendant, which may be achieved by allowing the defendant ample time, after an amendment, to prepare his defense.

Even if the decision in *Burrell* had been compelled by reasons other than the statutory provisions and prior cases based on the unsound assumption underlying those decisions, the conclusion of the court does not dispose of the problem presented by unnecessarily descriptive indictments. The court in *Burrell* has merely concluded that words "descriptive or explanatory" of the offense are not subject to amendment.[53]

The crux of the problem, unresolved in *Burrell*, is to define what is "explanatory" and what is "descriptive." Decisions in this area would be more predictable with a clear delineation of the characteristics of "descriptive" and "explanatory" surplusage. Since it is apparent that the court used the words alternatively,[54] each word must have a significance independent of the other; yet the particular words in *Burrell* were both descriptive *and* explanatory, which suggests a certain similarity in meaning. The only conclusion which may be drawn is that the terms "descriptive" and "explanatory" are not mutually exclusive concepts but instead, are closely related and overlapping. Thus it appears from *Burrell* that a surplus allegation may be descriptive but not explanatory, explanatory but not descriptive, or simultaneously descriptive and explanatory.[55]

By viewing the surplusage in this manner, a certain order can be found in prior decisions. By determining the relation of the surplus allegation to the charge, the character of that phrase as descriptive, explanatory, or both, is established. Clearly, words used as adjectives to modify the offense are descriptive. This is equivalent to saying that words are descriptive if they refer to the "what" or the "where" of the offense,[56] or if they refer to the physical characteristics of the items involved in the offense.[57] In such cases, the surplusage bears the same relation to the offense as an adjective does to a noun. *Burrell* concludes, however, that substantive surplusage is not limited to situations where the averments as adjectives modify the offense.[58] The prior cases, therefore, must encompass situations in which the averments are explanatory. Thus explanatory surplusage refers to situations in which

53. Burrell v. State, 526 S.W.2d 799, 803 (Tex. Crim. App. 1975).
54. *Id.* at 803.
55. *Id.* at 804.
56. Snelling v. State, 57 Tex. Crim. 416, 417, 123 S.W. 610, 611 (1909) (what); Withers v. State, 21 Tex. Crim. 210, 212, 17 S.W. 725, 726 (1886) (where).
57. *E.g.*, Holloway v. State, 168 Tex. Crim. 264, 265, 324 S.W.2d 886 (1959) (means used); Arbetter v. State, 79 Tex. Crim. 487, 488, 186 S.W. 769 (1916) (means used); Maxwell v. State, 66 Tex. Crim. 258, 145 S.W. 1190 (1912) (means used); Loyd v. State, 22 Tex. Crim. 646, 3 S.W. 670 (1887) (physical characteristics).
58. Burrell v. State, 526 S.W.2d 799, 803 (Tex. Crim. App. 1975).

the surplusage is not used adjectively, but is still held to be substantive. A review of the cases suggests that this situation occurs where the indictment contains surplusage referring to the method or manner of the offense.[59] Where a particular phrase contains both elements of description and explanation, as in *Burrell*, the two concepts overlap.

By its decision in *Burrell* the court does not clearly develop the distinction between descriptive and explanatory surplus. Indeed, the major difficulty with this case is its lack of guidelines for future cases. Broadly stated, the court should define substantive surplusage as any allegation so closely connected or intimately related to the elements of the offense that when they are placed in an indictment with those elements they become, by logical inference, a part of the offense charged. This would encompass both descriptive and explanatory averments. The court could then distinguish these two types of substantive surplusage within the generic classification, if that is deemed desirable.

A clear definition of what is descriptive is a first step to an unobstructed view of the problems of amending indictments. A second step would be to focus attention on the reason for the classification of surplusage as descriptive or not descriptive. It is suggested that by doing so, it will become apparent that an absolute prohibition against amendments to the substance of the indictment is not required to secure the rights of a defendant. A statute allowing such amendments where they do not prejudice a defendant's right to be made aware of the charge against him would serve equally as well, and would avoid the anomalous results of the present rule. The reasoning of the Oklahoma Court of Criminal Appeals regarding informations suggests that such a statute could be construed in harmony with the Texas Constitution.

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59. *Id.* at 801 (manner of offense); Johnson v. State, 384 S.W.2d 885, 886 (Tex. Crim. App. 1964) (means and manner of offense).