St. Mary's Law Journal

Volume 10 | Number 2 Article 4

6-1-1978

Particularity and Precision in Texas Indictments and Informations: What Is Fundamental Defect.

David Weiner

COMMENTS

PARTICULARITY AND PRECISION IN TEXAS INDICTMENTS AND INFORMATIONS: WHAT IS FUNDAMENTAL DEFECT?

DAVID WEINER

In a criminal proceeding the indictment and the information serve to invoke the jurisdiction of the trial court and to apprise the accused of the nature of the charges against him.[1] Pursuant to the Texas Constitution,[2] the Texas Code of Criminal Procedure sets forth the requisites of indictments; the same requisites are applicable to informations.[3] The fundamental requirement is that the indictment or the information allege every element that must be proved to constitute the offense charged.[4] Failure to allege an essential element of an offense[5] is a jurisdictional defect rendering the indictment fundamentally defective and therefore void.[6]

Many instances of fundamentally defective indictments involve a complete omission from the indictment of words capable of alleging an essential element of an offense.[7] Yet, even when an indictment contains words which arguably allege an essential element, failure to allege the element with sufficient precision[8] or particularity[9] may constitute a fundamental

1. *See* Drumm v. State, 560 S.W.2d 944, 946 (Tex. Crim. App. 1977) (en banc) (information); *Ex parte* Cannon, 546 S.W.2d 266, 270 (Tex. Crim. App. 1976) (concurring opinion) (indictment).

2. TEX. CONST. art. I, § 10.

3. *See* TEX. CODE CRIM. PRO. ANN. arts. 21.02-.24 (Vernon 1966 & Supp. 1978). The rules of indictments are made applicable to informations in art. 21.23.

4. TEX. CODE CRIM. PRO. ANN. art. 21.03 (Vernon 1966).

5. *See* TEX. PENAL CODE ANN. § 1.07(a)(13) (Vernon 1974) (meaning of "element of an offense").

6. *See, e.g.*, Zachery v. State, 552 S.W.2d 136, 137-38 (Tex. Crim. App. 1977) (indictment); Tave v. State, 546 S.W.2d 317, 318 (Tex. Crim. App. 1977) (information); Standley v. State, 517 S.W.2d 538, 540 (Tex. Crim. App. 1975) (indictment).

7. *See, e.g., Ex parte* Winton, 549 S.W.2d 751, 752 (Tex. Crim. App. 1977) (burglary indictment fundamentally defective for omission of culpable mental state); Williams v. State, 524 S.W.2d 73, 73 (Tex. Crim. App. 1975) (aggravated robbery indictment fundamentally defective for omission of injury allegation); Standley v. State, 517 S.W.2d 538, 540 (Tex. Crim. App. 1975) (indictment for conversion of property by bailee fundamentally defective for omission of property value allegation).

8. The court of criminal appeals has not used the term "precision" to describe the issue discussed under that term in this comment. The term is useful to denote the general principle, and the problems incident to it, that the exact statutory words need not be used to constitute a valid indictment or information. *See* McClane v. State, 170 Tex. Crim. 603, 605-06, 343 S.W.2d 447, 449 (1960) (authorizing substitution of equivalent words); TEX. CODE CRIM. PRO.

defect in the indictment.[10] Generally, questions of precision involve the narrow problem of whether words used in an indictment are sufficiently similar in meaning to specific statutory language.[11] In contrast, questions of particularity encompass a greater number of problems, all of which deal with the question of whether it is sufficient to allege an offense merely by following, or tracking, the language of the statute.[12]

The existence of a material distinction between cases involving insufficient particularity or precision in pleading, on the one hand, and completely omitted elements, on the other, is more apparent than real. Frequently, decisions which are ultimately framed in terms of omission of allegations from indictments actually involve questions of precision.[13]

ANN. art. 21.17 (Vernon 1966) (exact words defining offense not required in indictment). *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1784 (14th ed. 1963) ("precise" means "devoid of anything vague, equivocal, or uncertain").

9. The term "particularity" denotes the need to go beyond specific statutory language in alleging an offense. *See* Bocanegra v. State, 552 S.W.2d 130, 132-33 n.2 (Tex. Crim. App. 1977); Terry v. State, 471 S.W.2d 848, 851-52 (Tex. Crim. App. 1971). *See also* BLACK'S LAW DICTIONARY 1275 (rev. 4th ed. 1968) ("particulars" are "the details of a claim").

10. *See, e.g.*, Chance v. State, 563 S.W.2d 812, 815-16 (Tex. Crim. App. 1978) (en banc) (on motion for rehearing) (precision); Richard v. State, 563 S.W.2d 626, 626 (Tex. Crim. App. 1978) (particularity); Bocanegra v. State, 552 S.W.2d 130, 131 (Tex. Crim. App. 1977) (precision and particularity).

11. *See, e.g.*, Dovalina v. State, 564 S.W.2d 378, 380-81 (Tex. Crim. App. 1978) (en banc) ("attempt" includes "intent"); Hobbs v. State, 548 S.W.2d 884, 886 (Tex. Crim. App. 1977) ("promise" does not mean "employ"); Sims v. State, 546 S.W.2d 296, 298 (Tex. Crim. App. 1977) ("pistol" equivalent to "handgun"). The Texas Code of Criminal Procedure contains provisions for construction of words used in indictments. *See* TEX. CODE CRIM. PRO. ANN. art. 21.12 (Vernon 1966) (use of general terms for special terms); *id.* art. 21.17 (no need to use exact words defining offense).

12. Typical questions of particularity include whether an allegation of a statutory element must be accompanied by its statutory definition, whether it is necessary to allege or describe facts sufficient to aver an essential element, and whether a required property description is sufficient. *See* Richard v. State, 563 S.W.2d 626, 626 (Tex. Crim. App. 1978) (property); Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977) (facts); Baldwin v. State, 538 S.W.2d 109, 112 (Tex. Crim. App. 1976) (on motion for rehearing) (definition). The particularity category is broad enough to include the question of the need to allege a specific intent or other culpable mental state not set forth in the definition of an offense. *See* Bocanegra v. State, 552 S.W.2d 130, 131 (Tex. Crim. App. 1977) (other culpability); Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (specific intent). *See generally* TEX. PENAL CODE ANN. § 6.02 (Vernon 1974).

Perhaps the most famous example of a case where an indictment was held fundamentally defective for insufficient particularity is the "kicking and stomping" case. *See* Northern v. State, 150 Tex. Crim. 511, 513, 203 S.W.2d 206, 208 (1947). In that case the court held that a murder indictment which alleged the defendant killed the victim by "kicking and stomping" was fundamentally defective for failure to allege that the defendant kicked and stomped "with his feet with shoes on . . . ." *Id.* at 512-13, 203 S.W.2d at 207-08. Later decisions have severely criticized the *Northern* holding. *See* Alobaidi v. State, 433 S.W.2d 440, 442-43 (Tex. Crim. App.), *cert. denied*, 393 U.S. 943 (1968); Riley v. State, 379 S.W.2d 79, 81 (Tex. Crim. App. 1964) (concurring opinion).

13. *See, e.g.*, Chance v. State, 563 S.W.2d 812, 813-16 (Tex. Crim. App. 1978) (en banc)

Moreover, questions of particularity are a specialized and complicated type of omissions problem.[14] When viewed from the perspective of precision and particularity, the law pertaining to defective indictments is characterized by greater complexity than when viewed from the perspective of omission.[15]

The law dealing with particularity and precision in indictments is changing rapidly as the Texas Court of Criminal Appeals strives to coordinate established standards of indictment sufficiency with the intricate substantive provisions of the 1974 Penal Code.[16] Although the court has a framework of rules created by statute[17] and case law[18] for dealing with particularity and precision issues, application of these rules to individual cases has raised numerous questions and reveals considerable disagreement over the proper construction of indictment standards.[19] Thus, particularity and precision in indictments have become problematic areas of Texas criminal procedure.

Procedurally, the dominant problem throughout the discussion of the law relating to precision and particularity in indictments is whether or not an alleged defect should be characterized as fundamental in nature.[20] That

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(on motion for rehearing) (argument that "unlawfully" sufficiently alleged omitted culpability rejected); Bosworth v. State, 510 S.W.2d 334, 336 (Tex. Crim. App. 1974) (omission of phrase "corporeal personal property" immaterial where property otherwise accurately described); Sanders v. State, 402 S.W.2d 735, 736 (Tex. Crim. App. 1966) (use of "malice aforethought" held equivalent of omitted term "voluntarily").

14. See note 12 *supra* and accompanying text.

15. An example of the relative clarity and absence of controversy in indictment cases which may be viewed strictly as involving problems of omission is the decision of *Ex parte* Lewis, 544 S.W.2d 430 (Tex. Crim. App. 1976), in which the state's brief conceded fundamental error in an indictment for aggravated assault which failed to name the complaining witness and failed to allege the "harm" element. *Id.* at 431.

16. *See, e.g.*, Dovalina v. State, 564 S.W.2d 378, 380-81 (Tex. Crim. App. 1978) (en banc) ("attempt" held broad enough to include "intent" in attempt indictment); Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (indictment fundamentally defective for failure to allege specific intent embodied in separate definition of statutory element); Green v. State, 533 S.W.2d 769, 770 (Tex. Crim. App. 1976) (attempt indictment not fundamentally defective for failure to allege specific conduct).

17. *See* TEX. CODE CRIM. PRO. ANN. arts. 21.01-.24 (Vernon 1966 & Supp. 1978); *id.* arts. 27.08-.09 (Vernon 1966).

18. *See* American Plant Food Corp. v. State, 508 S.W.2d 598, 602-04 (Tex. Crim. App. 1974), *appeal dismissed,* 419 U.S. 1098 (1975).

19. In at least three recent cases strong dissents have been voiced concerning sufficiency of allegations in indictments. *See* Dovalina v. State, 564 S.W.2d 378, 380 (Tex. Crim. App. 1978) (dissenting opinion) (disagreement as to need to allege intent in attempt indictment); Victory v. State, 547 S.W.2d 1, 5 (Tex. Crim. App. 1976) (dissenting opinion on motion for rehearing) (disagreement as to need to allege specific intent embodied within separate definition of element); Green v. State, 533 S.W.2d 769, 772 (Tex. Crim. App. 1976) (dissenting opinion) (disagreement as to need to allege specific conduct in attempt indictment).

20. *Compare* Richard v. State, 563 S.W.2d 626, 626 (Tex. Crim. App. 1978) (defect in property description fundamental and properly raised for first time on appeal) *and* Bocanegra

characterization is crucial because the court will permit a convicted defendant to challenge an indictment for the first time on appeal only when a defect is of a substantive or fundamental nature.[21]

General Considerations Concerning Fundamental Defect

The minimum procedural requirements that must be met by the accused to successfully challenge the indictment for insufficient precision or particularity are determined by the degree of the alleged defect in precision[22] or particularity.[23] In connection with procedural requirements, the case of *American Plant Food Corp. v. State*[24] is important to Texas indictment law. Although *American Plant Food* did not change the law, the decision is significant because it set forth the standards for classifying indictment defects as either substantive and fundamental or as formal and waivable.[25] If a defect in an essential averment is deemed so substantial as to fail to charge an offense and thus to fail to invoke the trial court's jurisdiction, the indictment is fundamentally defective and may be challenged for the

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v. State, 552 S.W.2d 130, 132 (Tex. Crim. App. 1977) (defect in allegation of culpable mental state fundamental and properly raised for first time on appeal) *with* Rhodes v. State, 560 S.W.2d 665, 671 (Tex. Crim. App. 1978) (en banc) (defect in property description not fundamental and not properly raised for first time on appeal) *and* Dovalina v. State, 564 S.W.2d 378, 379-80 (Tex. Crim. App. 1978) (defect in allegation of culpable mental state not fundamental and not properly raised for first time on appeal). *See generally* American Plant Food Corp. v. State, 508 S.W.2d 598, 602-04 (Tex. Crim. App. 1974), *appeal dismissed,* 419 U.S. 1098 (1975) (setting out test for determining nature of defect).

21. *See* American Plant Food Corp. v. State, 508 S.W.2d 598, 602-04 (Tex. Crim. App. 1974), *appeal dismissed,* 419 U.S. 1098 (1975). *Compare* Richard v. State, 563 S.W.2d 626, 626 (Tex. Crim. App. 1978) (defect in property description fundamental and properly raised for first time on appeal) *with* Rhodes v. State, 560 S.W.2d 665, 671 (Tex. Crim. App. 1978) (en banc) (defect in property description not fundamental and not properly raised for first time on appeal). *See also* Banks v. State, 530 S.W.2d 940, 942 n.1 (Tex. Crim. App. 1975) (different question presented and different results when motion to quash filed in trial court). In this comment it is assumed that a defect was raised for the first time on appeal whenever the court does not state whether a motion to quash was filed at trial.

22. *Compare* Dovalina v. State, 564 S.W.2d 378, 379-81 (Tex. Crim. App. 1978) (defect in substitution of "attempt" for "intent" not fundamental and waived by failure to file motion to quash in trial court) *with* Carpenter v. State, 551 S.W.2d 724, 725 (Tex. Crim. App. 1977) (defect in substitution of "restrain" for "abduct" fundamental and properly raised for first time on appeal).

23. *Compare* Richard v. State, 563 S.W.2d 626, 626 (Tex. Crim. App. 1978) (defect in description of property as "merchandise" fundamental and properly raised for first time on appeal) *and* Moore v. State, 473 S.W.2d 523, 524 (Tex. Crim. App. 1971) (defect in description of property as "tires" fundamental and properly raised for first time on appeal) *with* Rhodes v. State, 560 S.W.2d 665, 671 (Tex. Crim. App. 1978) (en banc) (defect in description of property as "wall panelling" not fundamental and waived by failure to file motion to quash in trial court).

24. 508 S.W.2d 598 (Tex. Crim. App. 1974), *appeal dismissed,* 419 U.S. 1098 (1975).

25. *See id.* at 602-04.

first time on appeal or at any time thereafter.[26] In contrast, an averment that is sufficient to invoke jurisdiction and support a conviction may be defective for failure to give the accused notice of the precise charges against him.[27] A defect of this nature entitles the defendant to a new indictment, but will be waived if not raised by exception or motion to quash in the trial court.[28]

A further difference between claims asserting lack of jurisdiction and those asserting insufficient notice is that assessment of fundamental defect requires that the allegations be measured objectively against the statute, whereas claims of insufficient notice involve examination of the allegations from the perspective of the accused.[29] In both instances, however, the inquiry is to be directed to whether the offense is charged on the face of the pleading in language sufficiently plain and intelligible to enable the accused to prepare his defense.[30] Accordingly, it is improper to presume awareness of the charges on the part of the accused.[31] The court has emphasized that testing the sufficiency of the pleading by what is charged in writing complies with the intent of the Texas Constitution.[32]

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26. *Id.* at 603. An information or indictment not challenged before conviction by exception or motion to quash may be attacked as fundamentally defective by post-conviction writ of habeas corpus or on appeal from revocation of probation, as well as by direct appeal. *See Ex parte* Winton, 549 S.W.2d 751, 752 (Tex. Crim. App. 1977) (habeas corpus); Standley v. State, 517 S.W.2d 538, 539 (Tex. Crim. App. 1975) (revocation).

27. American Plant Food Corp. v. State, 508 S.W.2d 598, 604 (Tex. Crim. App. 1974), *appeal dismissed,* 419 U.S. 1098 (1975); *see* Drumm v. State, 560 S.W.2d 944, 946 (Tex. Crim. App. 1977) (en banc).

28. American Plant Food Corp. v. State, 508 S.W.2d 598, 604 (Tex. Crim. App. 1974), *appeal dismissed,* 419 U.S. 1098 (1975); *see* Hughes v. State, 561 S.W.2d 8, 10 (Tex. Crim. App. 1978) (waiver of defect in name allegation); Rhodes v. State, 560 S.W.2d 665, 671 (Tex. Crim. App. 1978) (en banc) (waiver of defect in property description).

29. *See* Drumm v. State, 560 S.W.2d 944, 946 (Tex. Crim. App. 1977) (en banc) (information); *Ex parte* Cannon, 546 S.W.2d 266, 270 (Tex. Crim. App. 1976) (concurring opinion) (indictment).

30. *See, e.g.,* Benoit v. State, 561 S.W.2d 810, 812-13 (Tex. Crim. App. 1977) (claim of fundamental defect raised for first time on appeal); Moore v. State, 473 S.W.2d 523, 523 (Tex. Crim. App. 1971) (finding fundamental defect where motion to quash filed in trial court); Terry v. State, 471 S.W.2d 848, 851-52 (Tex. Crim. App. 1971) (notice claim raised by motion to quash). *See generally* TEX. CODE CRIM. PRO. ANN. art. 21.02(7) (Vernon 1966) (plain and intelligible words); *id.* art. 21.04 (certainty required); *id.* art. 21.11 (sufficient certainty).

31. *See, e.g.,* Benoit v. State, 561 S.W.2d 810, 813 (Tex. Crim. App. 1977); Moore v. State, 532 S.W.2d 333, 335 (Tex. Crim. App. 1976); Moore v. State, 473 S.W.2d 523, 523 (Tex. Crim. App. 1971). *But see* Pollard v. State, 567 S.W.2d 11, 12 (Tex. Crim. App. 1978) (using "historical fact" of appellant's previous trial to satisfy "notice" requirement, although appellant claimed fundamental defect); *Ex parte* Davis, 542 S.W.2d 192, 197 (Tex. Crim. App. 1976) (using appellant's awareness of state's theory in rejecting claim of fundamental defect); Farmer v. State, 540 S.W.2d 721, 722 (Tex. Crim. App. 1976) (using appellant's stipulation to satisfy "no notice of offense" claim raised for first time on appeal and finding no fundamental defect).

32. *See, e.g.,* Benoit v. State, 561 S.W.2d 810, 813 (Tex. Crim. App. 1977); Moore v.

FUNDAMENTAL DEFECT IN PARTICULARITY

The statutory requirement that an indictment allege every element that must be proved[33] is applicable to questions concerning particularity.[34] When the standard set forth in *American Plant Food* is applied to a claim of insufficient particularity, an indictment will be fundamentally defective if the statutory terms employed to allege an essential element[35] are too general or conclusory,[36] or fail to meet a particularity requirement imposed by statute.[37] A concern for whether it is sufficient to allege the elements of

State, 532 S.W.2d 333, 335 (Tex. Crim. App. 1976); Terry v. State, 471 S.W.2d 848, 851 (Tex. Crim. App. 1971). *See generally* TEX. CONST. art. I, § 10.

33. *See* TEX. CODE CRIM. PRO. ANN. art. 21.03 (Vernon 1966).

34. *See, e.g.*, Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (question of alleging specific intent not included within definition of offense); Tave v. State, 546 S.W.2d 317, 318 (Tex. Crim. App. 1977) (question of alleging under which of two statutes license was suspended); Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977) (question of alleging facts constituting "fraud").

35. *See* TEX. PENAL CODE ANN. § 1.07(a)(13) (Vernon 1974) (meaning of "element of an offense"). Under the former and current Penal Codes, some disagreement has existed over the question of what constitutes an essential element of an offense. In Victory v. State, 547 S.W.2d 1 (Tex. Crim. App. 1976), the majority held that specific intent remains an essential element when embodied in a definitional section apart from the definition of the offense. *Id.* at 5 (on motion for rehearing). The dissent, however, held that specific intent is only a definition when embodied in a separate definitional section. *Id.* at 5 (dissenting opinion on motion for rehearing). Similarly, there was disagreement as to whether ownership was an essential element of robbery under the former Penal Code. *Compare Ex parte* Jones, 542 S.W.2d 179, 180-81 (Tex. Crim. App. 1976) (dissenting opinion) (not an essential element) *with* Lucero v. State, 502 S.W.2d 128, 128 (Tex. Crim. App. 1973) (essential element). Since the former robbery statute did not mention ownership, that element could be classified as a particularity issue as it is today. *Compare* Davis v. State, 532 S.W.2d 626, 627 (Tex. Crim. App. 1976) (robbery indictment under 1974 Penal Code not invalid upon motion to quash for failure to allege elements of intended theft, including ownership) *with* Snow v. State, 156 Tex. Crim. 49, 50, 238 S.W.2d 966, 967 (1951) (robbery indictment under former Penal Code invalid upon motion to quash for failure to allege ownership in addition to following statute).

36. *E.g.*, Tave v. State, 546 S.W.2d 317, 318 (Tex. Crim. App. 1977) (information for driving vehicle with suspended license fundamentally defective for failure to allege under which of two statutes license was suspended); Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977) (indictment fundamentally defective for failure to allege facts that would constitute "fraud" charged); Burleson v. State, 429 S.W.2d 479, 481 (Tex. Crim. App. 1968) (perjury indictment fundamentally defective for failure to set out the allegedly false and true facts); *cf.* Reynolds v. State, 547 S.W.2d 590, 591-92, 595-96 (Tex. Crim. App. 1977) (on motion for rehearing) (allegation in theft indictment that defendant "stole" property ineffective to allege essential elements of offense). *But see* Baldwin v. State, 538 S.W.2d 109, 111 (Tex. Crim. App. 1976) (on motion for rehearing) (indictment for credit card abuse which alleged defendant did "steal" not fundamentally defective for failure to allege elements of theft involved). *See also* Foreman & Jones, *Indictments Under The New Texas Penal Code*, 15 HOUS. L. REV. 1, 2 n.3 (1977) (severely criticizing *Baldwin* for failure to hold indictment fundamentally defective).

37. *See, e.g.*, Bocanegra v. State, 552 S.W.2d 130, 131 (Tex. Crim. App. 1977) (indictment fundamentally defective for failure to allege culpability under section 6.02(b) and (c)

an offense in terms of the statute defining the offense pervades the approach to particularity problems.[38] Generally, it is considered sufficient to allege an offense by tracking the language of the statute.[39] This general principle, however, is subject to the limitation that the statutory language must describe every essential element of the offense.[40] Situations exist in which particularity requirements are not met merely by following the statute.[41] One of these situations involves definitions of offenses which do not specifically include one of the four culpable mental states recognized by the Penal Code[42] but for which one is nevertheless required.[43] Thus, in *Bocanegra v. State*[44] the court held an information for welfare fraud fundamentally defective for failure to allege any of the culpable mental states technically defined in the Penal Code.[45] The requirement of alleging a

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of Penal Code); Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (indictment for indecency with a child which failed to allege specific intent embodied in separate definition of "sexual contact" fundamentally defective under article 21.05 of Code of Criminal Procedure); Moore v. State, 473 S.W.2d 523, 524 (Tex. Crim. App. 1971) (property description fundamentally defective under article 21.09 of Code of Criminal Procedure); *cf.* Jones v. State, 545 S.W.2d 771, 777-78 (Tex. Crim. App. 1977) (on motion for rehearing) (indictment for passing forged instrument alleging, according to statute, passing "with intent to defraud" not fundamentally defective for failure to allege defendant had knowledge). *But see* Pollard v. State, 567 S.W.2d 11, 13 (Tex. Crim. App. 1978) (aggravated kidnapping indictment not fundamentally defective under article 21.05 for failure to allege definition of "abduct" which included particular intent).

38. See note 12 *supra* and accompanying text.

39. *See, e.g.*, Rowl v. State, 547 S.W.2d 612, 613 (Tex. Crim. App. 1977); Johnson v. State, 547 S.W.2d 599, 601 (Tex. Crim. App. 1977); Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977).

40. See notes 35-37 *supra* and accompanying text. *See generally* Foreman & Jones, *Indictments Under The New Texas Penal Code*, 15 HOUS. L. REV. 1, 5 n.21 (1977).

41. *See, e.g.*, Bocanegra v. State, 552 S.W.2d 130, 131 (Tex. Crim. App. 1977) (information charging in language of statute fundamentally defective for failure to allege culpability required by section 6.02 of Penal Code); Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (indictment fundamentally defective for failure to allege specific intent embodied within separate definition of element); Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977) (information fundamentally defective for failure to allege facts that would constitute "fraud").

42. *See* TEX. PENAL CODE ANN. § 6.03 (Vernon 1974).

43. *See* Bocanegra v. State, 552 S.W.2d 130, 132-33 n.2 (Tex. Crim. App. 1977) (information for welfare fraud charging in language of statute that defendant acted "willfully" and in "fraudulent" manner held fundamentally defective for failure to allege culpability required by section 6.02 of Penal Code); *Ex parte* Winton, 549 S.W.2d 751, 752 (Tex. Crim. App. 1977) (indictment for type of burglary the definition of which did not specify culpable mental state fundamentally defective for failure to allege culpability under section 6.02 of Penal Code). *See generally* TEX. PENAL CODE ANN. § 6.02 (Vernon 1974).

44. 552 S.W.2d 130 (Tex. Crim. App. 1977).

45. *Id.* at 131. *Bocanegra* is especially interesting because, in rejecting the state's argument that the statutory words "willfully" and "fraudulent" are sufficient to allege culpability, the court indicates that the issues of particularity and precision will at times coincide in a single challenge of an indictment or information. *See id.* at 131.

culpable mental state not found in the definition of an offense has some bearing upon the question of the need to allege specific intent, as illustrated by the case of *Slavin v. State*.[46] In *Slavin* an indictment for indecency with a child was held fundamentally defective for failure to allege the specific intent which separately defined the element of "sexual contact."[47]

The indictment must also go beyond the language of the statute when a criminal offense will not be charged unless the manner and means of doing an act are sufficiently particularized.[48] Thus, in *Posey v. State*[49] the information was held fundamentally defective for failure to allege conduct that would constitute the fraud charged.[50] The manner and means principle is especially relevant in the consideration of *Green v. State*[51] and *Williams v. State*,[52] which concern the question of alleging the offense intended in a criminal attempt.[53]

The Problem of Alleging Specific Intent

Traditionally, the court has taken the position that an indictment need not specifically allege the statutory definitions of terms used in setting out the elements of an offense.[54] Since the adoption of the 1974 Penal Code the court has reiterated its adherence to this position,[55] emphasizing that one

46. 548 S.W.2d 30, 31 (Tex. Crim. App. 1977).

47. *Id.* at 31. *But see* Pollard v. State, 567 S.W.2d 11, 13 (Tex. Crim. App. 1978) (aggravated kidnapping indictment not fundamentally defective for failure to allege particular intent defining "abduct"); *cf.* Baldwin v. State, 538 S.W.2d 109, 112 (Tex. Crim. App. 1976) (on motion for rehearing) (indictment for credit card abuse not defective for failure to allege elements, including particular intent, of theft which defined "steal" element).

48. *E.g.*, Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977) (information fundamentally defective for failure to allege facts that would constitute "fraud" charged); Jasper v. State, 403 S.W.2d 790, 791 (Tex. Crim. App. 1966) (indictment for contributing to minor's delinquency fundamentally defective for failure to particularize act which allegedly constituted offense); Northern v. State, 150 Tex. Crim. 511, 513, 203 S.W.2d 206, 207 (1947) (murder indictment alleging defendant killed victim by "kicking and stomping" fundamentally defective for failure to allege means used). *But cf.* Eanes v. State, 546 S.W.2d 312, 313 (Tex. Crim. App. 1977) (indictment for assault not fundamentally defective for failure to allege manner and means used).

49. 545 S.W.2d 162 (Tex. Crim. App. 1977).

50. *See id.* at 163.

51. 533 S.W.2d 769, 770 (Tex. Crim. App. 1976).

52. 544 S.W.2d 428, 430 (Tex. Crim. App. 1976).

53. *Compare* Williams v. State, 544 S.W.2d 428, 430 (Tex. Crim. App. 1976) (attempt indictment not fundamentally defective for failure to allege statutory terms denoting constituent elements of attempted offense) *with* Green v. State, 533 S.W.2d 769, 770 (Tex. Crim. App. 1976) (attempt indictment not fundamentally defective for failure to allege specific acts or conduct constituting alleged attempt).

54. *See, e.g.*, Townsley v. State, 538 S.W.2d 411, 412-13 (Tex. Crim. App. 1976); Austin v. State, 166 Tex. Crim. 268, 269, 312 S.W.2d 669, 669 (1958); Gray v. State, 77 Tex. Crim. 221, 225, 178 S.W. 337, 339 (1915).

55. *E.g.*, Farmer v. State, 540 S.W.2d 721, 722 (Tex. Crim. App. 1976); Townsley v.

of the purposes of the 1974 Penal Code was to dispense with any requirement of alleging statutory definitions of elements.[56]

Considerable difficulty, however, has recently emerged with regard to the test of fundamental defect in alleging elements which are separately defined in terms of a specific or particular intent.[57] The difficulty stems largely from the judicial construction of article 21.05 of the Texas Code of Criminal Procedure, which requires that an indictment state a particular intent where it is "a material fact in the description of the offense."[58] The key decisions regarding the specific intent problem are *Victory v. State*[59] and *Slavin v. State.*[60] In each of those cases an indictment for indecency with a child charging that the defendant did "knowingly and intentionally engage in sexual contact" was held defective for failure to allege the "intent to arouse or gratify the sexual desire"[61] which separately defined the essential element of "sexual contact."[62] In *Slavin,* moreover, the court held the defect to be fundamental.[63] Both decisions employed the novel reasoning that article 21.05 is applicable to an offense where an individual

State, 538 S.W.2d 411, 412-13 (Tex. Crim. App. 1976); Baldwin v. State, 538 S.W.2d 109, 112 (Tex. Crim. App. 1976) (on motion for rehearing).

56. *See* Watson v. State, 548 S.W.2d 676, 678 (Tex. Crim. App. 1977); Baldwin v. State, 538 S.W.2d 109, 112 (Tex. Crim. App. 1976) (on motion for rehearing).

57. *Compare* Pollard v. State, 567 S.W.2d 11, 13 (Tex. Crim. App. 1978) (aggravated kidnapping indictment not fundamentally defective for failure to allege particular intent defining "abduct" element) *with* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (indictment for indecency with a child held fundamentally defective for failure to allege particular intent defining "sexual contact" element) *and* Victory v. State, 547 S.W.2d 1, 5 (Tex. Crim. App. 1976) (on motion for rehearing) (indictment for indecency with a child held invalid upon motion to quash for failure to allege particular intent defining "sexual contact" element).

58. TEX. CODE CRIM. PRO. ANN. art. 21.05 (Vernon 1966). *Compare* Pollard v. State, 567 S.W.2d 11, 13 (Tex. Crim. App. 1978) (aggravated kidnapping indictment not fundamentally defective for failure to allege particular intent defining "abduct" element) *and* Moore v. State, 160 Tex. Crim. 183, 184, 268 S.W.2d 187, 188 (1954) (indictment, governed by predecessor to article 21.05, not defective although particular intent included within separate definition of element not alleged) *with* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (indictment for indecency with a child fundamentally defective for failure to allege particular intent separately defining "sexual contact" element) *and* Victory v. State, 547 S.W.2d 1, 5 (Tex. Crim. App. 1976) (on motion for rehearing) (indictment for indecency with a child invalid upon motion to quash for failure to allege particular intent separately defining "sexual contact" element) *and* Worthington v. State, 469 S.W.2d 182, 183 (Tex. Crim. App. 1971) (indictment under former theft statute fundamentally defective under article 21.05 for failure to allege element of "intent to deprive" embodied within definition of offense).

59. 547 S.W.2d 1 (Tex. Crim. App. 1976).

60. 548 S.W.2d 30 (Tex. Crim. App. 1977).

61. *See* TEX. PENAL CODE ANN. § 21.01(2) (Vernon 1974) (defining "sexual contact").

62. *See* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977); Victory v. State, 547 S.W.2d 1, 5 (Tex. Crim. App. 1976) (on motion for rehearing). *See generally* TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon 1974) (indecency with a child by sexual contact).

63. Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977).

element, rather than the offense itself, is defined in terms of a particular intent.[64] Under the provisions of the old and new Penal Codes, application of the requirement imposed by article 21.05 had previously been limited to instances where the intent was or is embodied within the definition of the offense.[65] In *Victory* the court emphasized that embodiment of the intent element in a separate definition section does not eliminate the need to allege that intent.[66]

The holding in *Slavin* with regard to characterization of the defect as fundamental is in implicit conflict with the case of *Pollard v. State*.[67] In *Pollard* the court refused to hold an indictment for aggravated kidnapping fundamentally defective for failure to allege the specific manner by which the abduction was effected.[68] The specific manner, contained in the separate definition of the essential element "abduct," includes the "intent to prevent liberation."[69] Strict adherence to the rule established in *Slavin* would have required the court in *Pollard* to hold the kidnapping indictment fundamentally defective for failure to allege the particular intent by which "abduct" is separately defined.[70]

Apparently, *Victory* and *Slavin* represent a trend toward requiring greater particularity than has previously been the case.[71] It is difficult to

64. *Compare* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (indictment fundamentally defective for failure to allege specific intent included within separate definition of element) *and* Victory v. State, 547 S.W.2d 1, 5 (Tex. Crim. App. 1976) (on motion for rehearing) (indictment invalid upon motion to quash for failure to allege specific intent included within separate definition of element) *with* Worthington v. State, 469 S.W.2d 182, 183 (Tex. Crim. App. 1971) (indictment under former theft statute fundamentally defective under article 21.05 for failure to allege element "intent to deprive" embodied within definition of offense).

65. *Compare* Worthington v. State, 469 S.W.2d 182, 183 (Tex. Crim. App. 1971) (indictment under former theft statute fundamentally defective under article 21.05 for failure to allege element "intent to deprive" embodied within definition of offense) *with* Moore v. State, 160 Tex. Crim. 183, 184, 268 S.W.2d 187, 188 (1954) (indictment, governed by predecessor to article 21.05, not defective although particular intent included within separate definition of "carrying away" element not alleged). *See generally* Tex. Code Crim. Pro. art. 399 (1954) (predecessor to article 21.05).

66. *See* Victory v. State, 547 S.W.2d 1, 4 (Tex. Crim. App. 1976) (on motion for rehearing). In one instance governed by the former Penal Code and the predecessor to article 21.05, the reasoning used in *Victory* was not recognized and, as a consequence, the court did not hold the indictment fundamentally defective for failure to allege the intent embodied within a separate definition. *See* Moore v. State, 160 Tex. Crim. 183, 184, 268 S.W.2d 187, 188 (1954) (element of "carrying away" in article 1379 of former Penal Code separately defined by particular intent); Tex. Code Crim. Pro. art. 399 (1954) (predecessor to article 21.05).

67. 567 S.W.2d 11 (Tex. Crim. App. 1978).

68. *Id.* at 11, 13.

69. TEX. PENAL CODE ANN. § 20.01(2) (Vernon 1974).

70. *See* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977).

71. *Compare* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (indictment held fundamentally defective under article 21.05 for failure to allege particular intent included within separate definition of element) *with* Worthington v. State, 469 S.W.2d 182, 183

determine whether the wording of article 21.05 is more consistent with limiting the statute's application to cases in which a particular intent is embodied in the definition of an offense[72] or with the expanded application established by *Victory* and *Slavin*.[73] The court has not yet been confronted with other instances of indictments or informations concerning offenses having an element separately defined in terms of a particular intent. Such offenses include incest,[74] theft of services by deception,[75] forgery by possession,[76] solicitation of a child,[77] and possibly prostitution.[78] Historically, some of these offenses have predecessors which included an element of particular intent within the definition of the offense.[79] Some of the elements, however, which are now separately defined in terms of particular intent, had no counterpart in the former Penal Code.[80] The element of

(Tex. Crim. App. 1971) (indictment under former theft statute fundamentally defective under article 21.05 for failure to allege intent element embodied within definition of offense) *and* Moore v. State, 160 Tex. Crim. 183, 184, 268 S.W.2d 187, 188 (1954) (indictment, governed by predecessor to article 21.05, not defective although particular intent embodied within separate definition of "carrying away" element not alleged).

72. *Compare* Pollard v. State, 567 S.W.2d 11, 13 (Tex. Crim. App. 1978) (article 21.05 of Code of Criminal Procedure not applied to require pleading of particular intent embodied in separate definition of essential element) *and* Moore v. State, 160 Tex. Crim. 183, 184, 268 S.W.2d 187, 188 (1954) (predecessor to article 21.05 not applied, although particular intent embodied in separate definition of essential element) *with* Worthington v. State, 469 S.W.2d 182, 183 (Tex. Crim. App. 1971) (indictment under former theft statute fundamentally defective under article 21.05 for failure to allege particular intent embodied within definition of offense).

73. *See* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977) (article 21.05 applied to render fundamentally defective indictment which failed to allege particular intent embodied within separate definition of essential element); Victory v. State, 547 S.W.2d 1, 5 (Tex. Crim. App. 1976) (on motion for rehearing) (article 21.05 applied to render invalid upon motion to quash indictment which failed to allege particular intent embodied within separate definition of essential element).

74. *See* TEX. PENAL CODE ANN. § 25.02(a) (Vernon 1974) (incest); *id.* § 25.02(b)(1) (deviate sexual intercourse defined for purposes of incest).

75. *See id.* § 21.01(2) (sexual contact defined for purposes of solicitation of a child); *id.* § 25.06(a), (b) (Vernon Supp. 1978) (solicitation of a child).

76. *See id.* § 31.01(2)(E) (Vernon 1974) (deception defined for purposes of theft by deception); *id.* § 31.04(a)(1) (Vernon Supp. 1978) (theft by deception).

77. *See id.* § 32.21(a)(1)(C) (Vernon 1974) (forging by possession defined for purposes of forgery); *id.* § 32.21(b) (forgery).

78. *See id.* § 43.01(3) (sexual contact defined for purposes of prostitution); *id.* § 43.01 (4) (sexual conduct defined for purposes of prostitution); *id.* § 43.02(a)(1), (2) (Vernon Supp. 1978) (prostitution).

79. One such offense is indecency with a child. *Compare id.* § 21.11(a)(1) (Vernon 1974) (indecency with a child) *with* Tex. Penal Code art. 535d, § 1 (1952) (fondling). Another example is forgery by possession. *Compare* TEX. PENAL CODE ANN. § 32.21(a)(1)(C) (Vernon 1974) *with* Tex. Penal Code art. 998 (1961).

80. *Compare* TEX. PENAL CODE ANN. § 25.02(b)(1) (Vernon 1974) (definition of deviate sexual intercourse for purposes of incest) *and id.* § 43.01(3) (definition of sexual contact for purposes of prostitution) *with* Tex. Penal Code arts. 496, 497 (1952) (incest) *and id.* art.

"abduct" that was involved in the *Pollard* aggravated kidnapping indictment is one of these new elements.[81] In contrast, the definition of "sexual contact" involved in the *Victory* and *Slavin* cases is derived from the "lascivious intent" element of the fondling statute contained in the former Penal Code.[82] Whether this historical difference contributed to the different results reached in *Slavin* and *Pollard* on the question of fundamental defect is purely a matter of conjecture. In any case, how strictly and consistently the rule laid down in *Slavin* will be applied remains to be seen.

One solution to the questions surrounding the sufficient pleading of specific intent that defines an essential element would be a legislative revision of article 21.05 to clarify the scope of its application to offenses under the 1974 Penal Code. Until such a revision is made, it is imperative that a uniform policy be followed with regard to the pleading of elements separately defined by a particular intent. An alternative to the strict standard of fundamental defect established by *Slavin* would be holding an indictment which fails to allege a separately defined intent invalid upon motion to quash[83] but not fundamentally defective. Two arguments can be advanced in support of this compromise alternative. The first of these involves reference to the conclusion by the court in *Victory* that allegation of the general culpable mental state "knowingly and intentionally" does not dispense with the requirement of alleging a particular intent.[84] The Penal Code, however, allows intent, knowledge, or recklessness to establish criminal responsibility where the culpability is not prescribed in the "definition of the offense."[85] The *definition* of indecency with a child which specifically involves sexual contact does not prescribe a culpable mental state.[86] Thus, the *Slavin* indictment, which alleged that the defendant did "knowingly and intentionally engage in sexual contact"[87] meets the minimum substantive requirements imposed by the Penal Code and should not be fundamentally defective. A second, more far-reaching, conclusion

607(20). *See also* TEX. PENAL CODE ANN. § 31.01(2)(E) (Vernon 1974) (definition of deception for purposes of theft by deception).

81. *Compare* TEX. PENAL CODE ANN. § 20.01(2) (Vernon 1974) (definition of abduct for purposes of kidnapping and aggravated kidnapping) *with* Tex. Penal Code art. 1177 (1961) (kidnapping). The use of a particular intent in the definition of kidnapping for extortion in the former Penal Code has been carried forward into the definition of aggravated kidnapping for ransom or reward in the 1974 Penal Code. *Compare* TEX. PENAL CODE ANN. § 20.04(a)(1) (Vernon 1974) *with* Tex. Penal Code art. 1177a (1961).

82. *Compare* TEX. PENAL CODE ANN. § 21.01(2) (Vernon 1974) (sexual contact defined for purposes of indecency with a child) *with* Tex. Penal Code art. 535d, § 1 (1952) (fondling).

83. *See* Victory v. State, 547 S.W.2d 1, 5 (Tex. Crim. App. 1976) (on motion for rehearing).

84. *See id.* at 4.

85. *See* TEX. PENAL CODE ANN. § 6.02(b), (c) (Vernon 1974).

86. *Compare id.* § 21.11(a)(1) (indecency with a child by sexual contact) *with id.* § 21.11(a)(2) (indecency with a child "knowing the child is present, with intent to arouse").

87. *See* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977).

emerges from this argument as well as from decisions involving the particular intent problem: when a particular intent is separated from the definition of an offense it is a "material fact in the description of the offense,"[88] which must be alleged upon timely objection in the trial court, but it is not an essential element of the offense.[89]

The Problem of Alleging Criminal Attempt

Another source of uncertainty in the area of particularity stems from the different positions taken by the court with regard to the necessity of alleging the specific conduct or acts constituting criminal attempt.[90] The court held in *Williams v. State*[91] that an indictment for criminal attempt is not fundamentally defective for failure to allege the statutory terms denoting the constituent elements of the attempted or intended offense.[92] In *Williams* the attempted burglary was sufficiently charged by alleging that the defendant attempted to commit burglary by "prying a door latch with a steel meathook."[93] That allegation, therefore, set out the specific act done in the attempt to commit the intended offense. *Williams* should be compared with the case of *Green v. State,*[94] decided earlier the same year. In *Green* it was held that an indictment for criminal attempt is not fundamentally defective for failure to allege the specific acts or conduct furnishing the basis for a criminal attempt prosecution.[95] The indictment in *Green* for attempted burglary tracked the burglary statute.[96] No specific act,

88. TEX. CODE CRIM. PRO. ANN. art. 21.05 (Vernon 1966).

89. *See* Pollard v. State, 567 S.W.2d 11, 13 (Tex. Crim. App. 1978) (indictment not fundamentally defective for failure to allege particular intent embodied in separate definition of essential element); Moore v. State, 160 Tex. Crim. 183, 184, 268 S.W.2d 187, 188 (1954) (indictment, governed by predecessor to article 21.05, not defective although particular intent embodied in separate definition of essential element not alleged).

90. *Compare* Williams v. State, 544 S.W.2d 428, 430 (Tex. Crim. App. 1976) (attempt indictment not fundamentally defective for failure to allege statutory terms denoting constituent elements of attempted offense) *with* Green v. State, 533 S.W.2d 769, 770 (Tex. Crim. App. 1976) (attempt indictment not fundamentally defective for failure to allege specific acts or conduct constituting alleged attempt).

91. 544 S.W.2d 428 (Tex. Crim. App. 1976).

92. *Id.* at 430.

93. *Id.* at 429. *Williams* adopted the same reasoning previously applied to other offenses committed with intent to commit some other offense or committed in the course of committing some offense. *See id.* at 429-30; Gonzales v. State, 517 S.W.2d 785, 788 (Tex. Crim. App. 1975) (burglary); Earl v. State, 514 S.W.2d 273, 274 (Tex. Crim. App. 1974) (robbery); Small v. State, 466 S.W.2d 281, 281 (Tex. Crim. App. 1971) (assault with intent to commit rape). *See also* Colman v. State, 542 S.W.2d 144, 146 (Tex. Crim. App. 1976) (attempt indictment not fundamentally defective for omission of phrase "amounting to more than mere preparation that tends but fails to effect the commission of the offense intended").

94. 533 S.W.2d 769 (Tex. Crim. App. 1976).

95. *Id.* at 770.

96. *See id.* at 770.

however, comparable to the "prying" allegation present in the *Williams* indictment was alleged.[97] To reach its conclusion, the court in *Green* found it necessary to overrule the earlier case of *Fonville v. State*,[98] which had established the requirement of alleging specific acts constituting the attempt.[99] The result of the *Williams* and *Green* decisions is to allow alternative means for alleging the offense intended in a criminal attempt.[100] Thus, an attempt indictment will not be fundamentally defective if it alleges either the constituent statutory elements of the intended offense[101] or the specific conduct underlying the attempt.[102]

Clearly, the result in *Williams* is more satisfactory than that of *Green*, as it adheres more closely to the statutory definition of criminal attempt.[103] An essential element of that offense is that the accused "does an act amounting to more than mere preparation."[104] In a prosecution for criminal attempt, the attempt is the primary offense, or legal conclusion, and should be supported by allegations describing the specific conduct with a certain degree of factual particularity.[105] Criminal attempt is similar to situations in which the specific manner and means of doing the proscribed

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97. *See id.* at 770.

98. 62 S.W. 573 (Tex. Crim. App. 1901).

99. *Id.* at 573.

100. *Compare* Williams v. State, 544 S.W.2d 428, 429-30 (Tex. Crim. App. 1976) (attempt indictment which alleges specific conduct not fundamentally defective for failure to allege constituent elements of attempted offense) *with* Green v. State, 533 S.W.2d 769, 770 (Tex. Crim. App. 1976) (attempt indictment which alleges constituent elements of attempted offense not fundamentally defective for failure to allege specific conduct). *See also Ex parte* Cannon, 546 S.W.2d 266, 272 (Tex. Crim. App. 1976) (on motion for rehearing) (dictum) (burglary indictment may allege entry with intent to commit theft or named felony, or may allege elements of felony or theft intended); Williams v. State, 505 S.W.2d 838, 841 (Tex. Crim. App. 1974) (burglary indictment charging act done with intent to commit "felony" fundamentally defective for failure to allege elements of "felony" intended).

101. *See* Green v. State, 533 S.W.2d 769, 770 (Tex. Crim. App. 1976).

102. *See* Williams v. State, 544 S.W.2d 428, 429-30 (Tex. Crim. App. 1976).

103. *See id.* at 429-30. TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1978) provides: "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."

104. TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1978). *See generally* Baldwin v. State, 538 S.W.2d 615, 616 (Tex. Crim. App. 1976) (considering "an act amounting to more than mere preparation" as distinct element of attempt).

105. *See* Green v. State, 533 S.W.2d 769, 772 (Tex. Crim. App. 1976) (dissenting opinion); *cf.* Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977) (indictment fundamentally defective for failure to allege facts that would constitute "fraud" charged); Jasper v. State, 403 S.W.2d 790, 791 (Tex. Crim. App. 1966) (indictment for contributing to minor's delinquency fundamentally defective for failure to particularize act alleged to constitute offense). *See generally* Dovalina v. State, 564 S.W.2d 378, 384-85 (Tex. Crim. App. 1978) (en banc) (concurring opinion) (prohibition against alleging mere conclusions); Foreman & Jones, *Indictments Under The New Texas Penal Code*, 15 HOUS. L. REV. 1, 6 (1977) (prohibition against alleging mere conclusions).

conduct must be particularized in order to allege an offense.[106] Tracking the elements of the attempted offense without any description of specific acts or conduct, as was the case in *Green,* should render the indictment fundamentally defective.[107] Conversely, the *Williams* decision is in accord with other cases involving acts done with the intent to commit a named offense;[108] the court held that a criminal attempt indictment which alleges the constituent elements of the primary offense, attempt, is not fundamentally defective for failure to track the constituent elements of the offense attempted.[109]

FUNDAMENTAL DEFECT IN PRECISION

When the issue of precision in indictments or informations is before the court, the state benefits from case law[110] and numerous statutes[111] that manifest a policy of liberal construction of the words used to allege the terms representing the elements of offenses. The Code of Criminal Procedure allows the substitution of synonyms and equivalents in place of the exact statutory words[112] and also allows the use of general terms for special or particular terms.[113] Significantly, however, the liberal policy is limited by the principle that it is not permissible to make substitutions for words which have acquired a technical meaning.[114] In addition, it must be noted

106. *Compare* Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977) (indictment fundamentally defective for failure to allege facts that would constitute "fraud" charged) *and* Jasper v. State, 403 S.W.2d 790, 791 (Tex. Crim. App. 1966) (indictment for contributing to minor's delinquency fundamentally defective for failure to particularize act alleged to constitute offense) *with* TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1978) ("an act amounting to more than mere preparation" is element of attempt).

107. See cases and materials cited note 105 *supra.*

108. *See* Williams v. State, 544 S.W.2d 428, 429-30 (Tex. Crim. App. 1976) (attempt); Gonzales v. State, 517 S.W.2d 785, 788 (Tex. Crim. App. 1975) (burglary); Earl v. State, 514 S.W.2d 273, 274 (Tex. Crim. App. 1974) (robbery); Small v. State, 466 S.W.2d 281, 281 (Tex. Crim. App. 1971) (assault with intent to commit rape).

109. *See* Williams v. State, 544 S.W.2d 428, 429-30 (Tex. Crim. App. 1976). The question whether an indictment for an offense committed with intent to commit some other offense is voidable upon motion to quash was answered in the negative in the case of Davis v. State, 532 S.W.2d 626, 627 (Tex. Crim. App. 1976) (aggravated robbery).

110. *See* Butler v. State, 551 S.W.2d 412, 413 (Tex. Crim. App. 1977) (subject matter and context in which words used should be considered); Watson v. State, 548 S.W.2d 676, 678 (Tex. Crim. App. 1977) (relying on articles 21.12 and 21.17 of Code of Criminal Procedure to uphold indictment); McClane v. State, 170 Tex. Crim. 603, 606, 343 S.W.2d 447, 449 (1960) (allowing substitution of equivalent words).

111. *See* Code Construction Act, TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 2.01 (Vernon Supp. 1978); TEX. CODE CRIM. PRO. ANN. arts. 21.12, .17 (Vernon 1966).

112. *See* TEX. CODE CRIM. PRO. ANN. art. 21.17 (Vernon 1966).

113. *See id.* art. 21.12.

114. *See* Chance v. State, 563 S.W.2d 812, 815-16 (Tex. Crim. App. 1978) (en banc) (on motion for rehearing); Code Construction Act, TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 2.01 (Vernon Supp. 1978) ("words and phrases" having "technical or particular meaning . . . shall

that the court does not automatically approve the use of non-statutory words simply because the statutory words do not have a technical meaning.[115] Thus, in the case of *Hobbs v. State*[116] an indictment for attempted capital murder for remuneration was held fundamentally defective on the ground that the words "promise to pay" could not be equated with the statutory term "employs."[117]

Another aspect of the precision issue involves situations where use of the statutory terms to allege an essential element nevertheless leaves what may be described as ambiguity in the indictment.[118] Often, the ambiguity is created by grammatical or syntactical errors in alleging an element.[119] The court's willingness to consider the subject matter and context in which words are used[120] will often prevent such errors from causing an indictment to be fundamentally defective.[121] At times, however, an ambiguity will be considered sufficiently serious to constitute fundamental defect.[122]

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be construed accordingly"); *cf.* Bocanegra v. State, 552 S.W.2d 130, 131 (Tex. Crim. App. 1977) ("willfully" and "fraudulent" not equivalent to any culpable mental state recognized in Penal Code); Carpenter v. State, 551 S.W.2d 724, 725-26 (Tex. Crim. App. 1977) (kidnapping indictment substituting "restrain" for "abduct" held fundamentally defective). *But see* Dovalina v. State, 564 S.W.2d 378, 380 (Tex. Crim. App. 1978) (en banc) ("attempt" held broad enough to include "intent" in indictment for attempted murder despite technical definitions given to each term); *cf.* Watson v. State, 548 S.W.2d 676, 679 (Tex. Crim. App. 1977) (rape indictment not fundamentally defective for using general terms "force" and "threats" in place of special statutory definitions of those terms).

115. *See, e.g.*, Hobbs v. State, 548 S.W.2d 884, 886 (Tex. Crim. App. 1977) (allegation of "promise to pay" not equivalent to "employ"); Carter v. State, 115 Tex. Crim. 614, 615, 27 S.W.2d 821, 822 (1930) (allegation of "unlawfully and *willingly*" not equivalent to "willfully"); Barthelow v. State, 26 Tex. 175, 178 (1862) (allegation of "unlawfully, voluntarily, and unjustly" not the equivalent of "willfully").

116. 548 S.W.2d 884 (Tex. Crim. App. 1977).

117. *Id.* at 886.

118. *See, e.g.*, Terry v. State, 517 S.W.2d 554,, 556 (Tex. Crim. App. 1975) (omission of "did" not fundamental defect where "made" could be read for "make"); Linton v. State, 452 S.W.2d 494, 495 (Tex. Crim. App. 1970) (omission of "to" following "intent" not fundamental defect); McCann v. State, 168 Tex. Crim. 383, 383-84, 328 S.W.2d 298, 298 (1959) (alleging "without the consent . . . *and the intent* . . . to deprive" could be construed only as allegation that defendant took without intent to deprive) (court's emphasis).

119. *See* cases cited note 118 *supra.*

120. Butler v. State, 551 S.W.2d 412, 413 (Tex. Crim. App. 1977); *see* Linton v. State, 452 S.W.2d 494, 495 (Tex. Crim. App. 1970) (omission of a word not fatal if certainty and meaning not affected); Dawson v. State, 33 Tex. 492, 504 (1870) ("awkward use of words . . . and clumsy construction of . . . sentences" does not render indictment "bad").

121. *See, e.g.*, Butler v. State, 551 S.W.2d 412, 413 (Tex. Crim. App. 1977); Terry v. State, 517 S.W.2d 554, 556 (Tex. Crim. App. 1975); Linton v. State, 452 S.W.2d 494, 495 (Tex. Crim. App. 1970).

122. *See* Agnew v. State, 474 S.W.2d 218, 219 (Tex. Crim. App. 1971) (allegation of "intent" present but misplaced in indictment); McCann v. State, 168 Tex. Crim. 383, 383-84, 328 S.W.2d 298, 298 (1959) (information alleging "without the consent . . . *and the intent* . . . to deprive" could be construed only as allegation that defendant took without intent to deprive) (court's emphasis).

The Problem of Alleging Specific Intent

A significant controversy involving a question of precision has arisen regarding the apparent trend to relax the standard of jurisdictional sufficiency in the pleading of the "intent" element.[123] The trend is exemplified by the recent case of *Dovalina v. State*.[124] In *Dovalina* a plurality of the court held that an indictment for attempted murder was not fundamentally defective for failure to specifically allege that the attempt was made with "intent" to commit murder.[125] This result was reached even though the language, "with specific intent to commit an offense," is part of the statutory definition of criminal attempt.[126]

The plurality in *Dovalina* relied heavily on *Lucero v. State*[127] in concluding that the word "attempt" is broad enough to include "intent."[128] It appears, however, that reliance on *Lucero* was misplaced because that case is distinguishable from *Dovalina* on two closely related grounds. First, the *Lucero* case was not governed by the 1974 Penal Code, which now defines "attempt" and "intent" in technical terms.[129] The court has recently reaffirmed the well established rule prohibiting substitutions for words which have acquired a technical meaning.[130] Thus, the meaning of "attempt" now seems to diverge too significantly from that of "intent" to be considered a permissible substitute for the latter.[131]

Similarly, article 21.12 of the Code of Criminal Procedure, which allows the use in indictments of general terms which embrace "special or particular terms,"[132] is now inapplicable to the use of "attempt" in place of

123. *See* Dovalina v. State, 564 S.W.2d 378, 380 (Tex. Crim. App. 1978) (en banc); Hobbs v. State, 548 S.W.2d 884, 887 (Tex. Crim. App. 1977) (on motion for rehearing).

124. 564 S.W.2d 378 (Tex. Crim. App. 1978) (en banc).

125. *Id.* at 380-81; *accord,* Telfair v. State, 565 S.W.2d 522, 524 (Tex. Crim. App. 1978) (en banc) (on motion for rehearing).

126. *See* TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1978); *cf.* Colman v. State, 542 S.W.2d 144, 146 (Tex. Crim. App. 1976) (attempt indictment which omitted phrase "amounting to more than mere preparation that tends but fails to effect" not fundamentally defective where specific conduct was sufficiently alleged).

127. 502 S.W.2d 750, 754 (Tex. Crim. App. 1973) (indictment under former Penal Code for assault with intent to commit robbery not fundamentally defective when "attempt" substituted for "intent").

128. *See* Dovalina v. State, 564 S.W.2d 378, 380 (Tex. Crim. App. 1978) (en banc). *But cf. Ex parte* Winton, 549 S.W.2d 751, 752 (Tex. Crim. App. 1977) (burglary indictment alleging defendant "therein *attempted* to commit . . . theft" fundamentally defective for omission of culpable mental state) (emphasis added).

129. *See* TEX. PENAL CODE ANN. § 6.03(a) (Vernon 1974) (intent); *id.* § 15.01(a) (attempt) (Vernon Supp. 1978).

130. *See* Chance v. State, 563 S.W.2d 812, 815-16 (Tex. Crim. App. 1978) (en banc) (on motion for rehearing).

131. See notes 126-130 *supra* and accompanying text. *But see* Dovalina v. State, 564 S.W.2d 378, 381 (Tex. Crim. App. 1978) (en banc) (meaning of "attempt" and "intent" have not changed with adoption of new Penal Code).

132. TEX. CODE CRIM. PRO. ANN. art. 21.12 (Vernon 1966) provides: "When a statute

"intent," since "attempt" is no longer a general term, but rather a "special or particular term."[133] Moreover, in contrast to the liberal practice that prevailed under the former Penal Code,[134] the exclusive and technical definitions of culpable mental states, including intent, set out in the 1974 Penal Code[135] appear to preclude the use of alternative terms to allege the required culpability.[136] In addition, article 21.17, which allows the use of words similar in meaning to statutory words,[137] should not support the allegation of "intent" by the use of "attempt." This conclusion is required because the separate statutory definitions of "intent" and "attempt" do not suggest any similarity of meaning between the two terms.[138]

The second factor which indicates misplaced reliance upon *Lucero* by the court in *Dovalina* is that the offense in *Lucero* was not criminal attempt, but rather assault with intent to commit robbery.[139] Under the 1974 Penal Code "attempt" is the legal conclusion that must be reached to support a conviction.[140] "Attempt," therefore, should not be confused with "intent," which, as a strong dissent in *Dovalina* emphasized, is one of the essential elements to be proved in reaching that conclusion.[141] The *Dovalina* decision appears even more questionable in view of the provision in the Code of Criminal Procedure addressed to indictments for acts done

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defining an offense uses special or particular terms, indictment on it may use the general term which, in common language, embraces the special term."

133. *See* TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1978) (attempt).

134. Cases decided under the former Penal Code varied in the latitude with which terms of culpability could be alleged. *Compare* Huggins v. State, 544 S.W.2d 147, 148 (Tex. Crim. App. 1976) (indictment charging "unlawfully" fundamentally defective for failure to allege "willfully") *with* Sanders v. State, 402 S.W.2d 735, 736 (Tex. Crim. App. 1966) (use of "malice aforethought" held equivalent of "voluntarily" in murder indictment).

135. TEX. PENAL CODE ANN. § 6.03 (Vernon 1974).

136. *See* Chance v. State, 563 S.W.2d 812, 815-16 (Tex. Crim. App. 1978) (en banc) (on motion for rehearing) ("unlawfully" not equivalent to "knowingly," partly because impermissible to substitute for technical words); Bocanegra v. State, 552 S.W.2d 130, 131 (Tex. Crim. App. 1977) (information for welfare fraud charging in language of statute that defendant acted "willfully" and in "fraudulent" manner held fundamentally defective for failure to allege required culpability). *See generally* Foreman & Jones, *Indictments Under The New Texas Penal Code*, 15 HOUS. L. REV. 1, 10-11 (1977).

137. TEX. CODE CRIM. PRO. ANN. art. 21.17 (Vernon 1966) states: "Words used in a statute to define an offense need not be strictly pursued in the indictment; it is sufficient to use other words conveying the same meaning, or which include the sense of the statutory words."

138. *Compare* TEX. PENAL CODE ANN. § 6.03(a) (Vernon 1974) (intent) *with id.* § 15.01(a) (Vernon Supp. 1978) (attempt).

139. *See* Lucero v. State, 502 S.W.2d 750, 754 (Tex. Crim. App. 1973).

140. *See* Dovalina v. State, 564 S.W.2d 378, 385 (Tex. Crim. App. 1978) (en banc) (concurring opinion); *id.* at 387 (dissenting opinion); TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1978).

141. *See* Dovalina v. State, 564 S.W.2d 378, 387 (Tex. Crim. App. 1978) (en banc) (dissenting opinion); TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1978).

with intent to commit some other offense,[142] and the provision requiring indictments to state a particular intent where it is "a material fact in the description of the offense."[143]

The reasoning in the foregoing discussion of *Dovalina* is equally applicable to *Hobbs v. State.*[144] In *Hobbs* an indictment for attempted capital murder for remuneration was held fundamentally defective on the ground that the allegation of a "promise to pay" was not equivalent to an averment that the defendant "employed" another to commit murder, as specifically required by the capital murder statute.[145] On rehearing, however, the court concluded that the indictment was sufficient to allege the offense of criminal solicitation.[146] Criminal solicitation is similar to criminal attempt because it requires that the solicitation be made "*with intent* that a capital felony or felony of the first degree be committed."[147] The court in *Hobbs* held that the "intent" essential to a solicitation was sufficiently alleged by the averment that the defendant did "attempt knowingly" to cause the victim's death.[148] Insofar as "attempt" is now a separate, general offense,[149] the approval by *Hobbs* of an "attempt" allegation in a solicitation indictment allows the name and legal conclusion of one kind of offense to be substituted in the pleading of a wholly independent offense. In addition, since the 1974 Penal Code assigns dissimilar technical definitions to "knowingly" and to "intent,"[150] the use of "knowingly" in a solicitation indictment is not the equivalent of an "intent" allegation.[151] Furthermore, the holding in *Hobbs,* like *Dovalina,* ignores the strict requirements imposed by statute on the pleading of specific intent.[152]

The resolution of the problems raised in *Dovalina* and *Hobbs* lies in a

142. TEX. CODE CRIM. PRO. ANN. art. 21.13 (Vernon 1966) provides: "An indictment for an act done with intent to commit some other offense may charge in general terms the commission of such act with intent to commit such other offense."

143. *Id.* art. 21.05.

144. 548 S.W.2d 884 (Tex. Crim. App. 1977).

145. *Id.* at 886.

146. *Id.* at 887 (on motion for rehearing). The conviction was nevertheless reversed because the state did not specify its reliance on the solicitation theory in the indictment itself. *See id.* at 887-88.

147. TEX. PENAL CODE ANN. § 15.03(a) (Vernon 1974) (solicitation) (emphasis added). *Compare id.* § 15.01(a) (Vernon Supp. 1978) (attempt) *with id.* § 15.03(a) (Vernon 1974) (solicitation).

148. Hobbs v. State, 548 S.W.2d 884, 887 (Tex. Crim. App. 1977) (on motion for rehearing). Although this apparent error in the *Hobbs* indictment was not raised by the appellant, the court considered it in a cursory way on its own motion. *See id.* at 887; TEX. CODE CRIM. PRO. ANN. art. 40.09(13) (Vernon 1966) (unassigned error considered in the interest of justice).

149. *See* TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1978).

150. *Compare id.* § 6.03(a) (Vernon 1974) (intent) *with id.* § 6.03(b) (knowingly).

151. *Cf.* Victory v. State, 547 S.W.2d 1, 4 (Tex. Crim. App. 1976) (on motion for rehearing) (allegation of general culpable mental state "knowingly and intentionally" does not dispense with need to allege particular intent).

152. *See* TEX. CODE CRIM. PRO. ANN. arts. 21.05, .13 (Vernon 1966).

more careful scrutiny of the meanings that the 1974 Penal Code now assigns to individual terms such as "attempt," "intent," and "knowingly."[153] The recognition of the independence of such terms from one another should result in a more orderly determination of sufficient precision in indictments and informations.

CONCLUSION

The Texas Court of Criminal Appeals has the framework of statutory and court-made rules within which to achieve uniformity in determining when an indictment should be held fundamentally defective for lack of particularity or precision.[154] Presently, considerable dissatisfaction may be felt as a result of the court's tendencies to miscontrue the standards provided by the Texas Code of Criminal Procedure and by the court itself. With regard to the issue of precision, decisions such as *Dovalina* and *Hobbs* indicate a failure to grasp the limitations now imposed upon a policy of liberal construction by the articulation of technical definitions in the 1974 Penal Code. In the area of particularity, no one would suggest that the court should revert to a standard so strict that an indictment would be fundamentally defective for failure to specifically allege that the "kicking and stomping" were done with one's "feet with shoes on."[155] The elimination in *Green,* however, of the need to allege the specific acts or conduct underlying an alleged criminal attempt stands as another example of the court's difficulties with certain procedural requirements implied by the substantive definitions embodied in the 1974 Penal Code.[156]

153. *See generally* TEX. PENAL CODE ANN. § 6.03(a) (Vernon 1974) (intent); *id.* § 6.03(b) (knowingly); *id.* § 15.01(a) (Vernon Supp. 1978) (attempt).

154. *See* American Plant Food Corp. v. State, 508 S.W.2d 598, 602-04 (Tex. Crim. App. 1974), *appeal dismissed,* 419 U.S. 1098 (1975); Code Construction Act, TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 2.01 (Vernon Supp. 1978); TEX. CODE CRIM. PRO. ANN. arts. 21.01-.24 (Vernon 1966 & Supp. 1978); *id.* arts. 27.08-.09 (Vernon 1966).

155. *See* Northern v. State, 150 Tex. Crim. 511, 512-13, 203 S.W.2d 206, 207 (1947).

156. *See* Green v. State, 533 S.W.2d 769, 770 (Tex. Crim. App. 1976). The importance of being alert to the differences between provisions in the former Penal Code and the corresponding versions in the 1974 Penal Code is indicated by the case of Lewis v. State, 527 S.W.2d 533 (Tex. Crim. App. 1975). In *Lewis* the offense, robbery by firearms, was governed by the former Penal Code. *Id.* at 534. An essential element of the offense was that a person "fraudulently take from the person or possession of another any property . . . ." Tex. Penal Code art. 1408 (1953). The indictment charged, in the language of the 1974 Penal Code, that the robbery was committed "in the course of committing theft." Lewis v. State, 527 S.W.2d 533, 534 (Tex. Crim. App. 1975). This language was held sufficient to allege the "fraudulent taking" on the ground that "theft" was formerly defined as a "fraudulent taking." *Id.* at 534-35; *see* Tex. Penal Code art. 1410 (1953). In the 1974 Penal Code, however, "in the course of committing theft" does not require the actual commission of theft. *See* TEX. PENAL CODE ANN. § 29.01(1) (Vernon 1974). An actual "fraudulent taking," therefore, is not necessarily committed as part of a robbery under the new robbery statute. As the *Lewis* case was governed by the old statute, substitution of the new terminology may have resulted in failure to allege a robbery.

These decisions are unsettling because inherent in any further liberalization of indictment standards[157] is the risk of putting changeable and subjective notions of justice ahead of certain and objective principles. One unsuccessful legislative attempt to modify the standards of criminal pleading would have completely eliminated the right to challenge the sufficiency of an indictment for the first time on appeal.[158] As one commentary has pointed out, such legislation would have run afoul of the constitutional requirement that an indictment inform the accused of the nature of the charges against him.[159]

The decision in *Slavin* contrasts with the court's tendencies to relax standards of pleading. *Slavin* may have unnecessarily raised the standard of sufficient particularity for the pleading of particular intent which is embodied in separate definitions of essential elements. Clearly, that decision demonstrates that analysis of the relationship between the 1974 Penal Code and established standards of indictment sufficiency has resulted in the adoption of stricter, as well as more liberal standards.

The immediate task facing the court on issues of indictment sufficiency is to make a more careful discrimination among the elements of offenses as they are delineated in the 1974 Penal Code to determine which defects in allegations should properly be considered fundamental. The successful completion of this task will require a willingness on the part of the court to better integrate the substantive and procedural aspects of Texas criminal jurisprudence.

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157. *See Ex parte* Cannon, 546 S.W.2d 266, 275 (Tex. Crim. App. 1976) (dissenting opinion) (proposing enactment of legislation limiting right to challenge indictment which "substantially charges an offense"); H.B. 1403, 65th Leg., Reg. Sess. § 1 (1977), *quoted in* Foreman & Jones, *Indictments Under The New Texas Penal Code*, 15 HOUS. L. REV. 1, 14-15 n.79 (1977).

158. *See* H.B. 1403, 65th Leg., Reg. Sess. § 1 (1977), *quoted in* Foreman & Jones, *Indictments Under The New Texas Penal Code*, 15 HOUS. L. REV. 1, 14-15 n.79 (1977).

159. Foreman & Jones, *Indictments Under The New Texas Penal Code*, 15 HOUS. L. REV. 1, 14-15 n.79 (1977). *See also* TEX. CONST. art. I, § 10.

WORDS TO INDICT BY

In the name and by authority of Levity:

Many things thought of in terms of Omission
Could better be viewed as lack of Precision.[1]
Frequently, also, an Indictment may fail
If it lacks Particularity or, in other words, detail.[2]
To allege that "Attempt" is what's been committed,
It's not Fatal Defect if "Intent" is omitted.[3]
The easiest way to end this confusion
Is to realize "Attempt" is just a Conclusion.[4]
If "Intent" should, however, be part of an Element,
It must be alleged and there might be no equivalent.[5]
For "Attempt" it's essential to know what's been done;
But a statement of acts is no better than none.[6]
A recent example of Indictment held Void
Is where "promise" was used, instead of "employed."[7]
Toward liberal construction the court often leans,
Except for Mens Rea and "Manner and Means."[8]
When indicting for Crime it's still good advice
To make Allegations Particular and Precise.

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1. *See* Chance v. State, 563 S.W.2d 812, 813-16 (Tex. Crim. App. 1978) (on motion for rehearing) (rejecting argument that "unlawfully" sufficiently alleged culpable mental state).

2. *See* Bocanegra v. State, 552 S.W.2d 130, 131 (Tex. Crim. App. 1977) (necessary to go beyond statutory language).

3. Dovalina v. State, 564 S.W.2d 378, 380-81 (Tex. Crim. App. 1978) (on motion for rehearing).

4. *See id.* at 387 (dissenting opinion on motion for rehearing).

5. *See* Slavin v. State, 548 S.W.2d 30, 31 (Tex. Crim. App. 1977). *But see* Pollard v. State, 567 S.W.2d 11, 13 (Tex. Crim. App. 1978).

6. *Compare* Williams v. State, 544 S.W.2d 428, 429-30 (Tex. Crim. App. 1976) (attempt indictment not fundamentally defective for failure to track offense attempted) *with* Green v. State, 533 S.W.2d 769, 770 (Tex. Crim. App. 1976) (attempt indictment not fundamentally defective for failure to allege specific conduct).

7. Hobbs v. State, 548 S.W.2d 162, 163 (Tex. Crim. App. 1977).

8. *See* Bocanegra v. State, 552 S.W.2d 130, 131 (Tex. Crim. App. 1977) (mens rea); Posey v. State, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977) (manner and means).