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Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment.

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CHANGES IN APPELLATE REVIEW IN CRIMINAL CASES FOLLOWING THE 1980 CONSTITUTIONAL AMENDMENT

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I. INTRODUCTION

In 1980, the people of the State of Texas voted to amend their constitution to create an intermediate level of appellate review of criminal cases in order to relieve the congested docket of the Texas Court of Criminal Appeals.¹ The constitutional amendment, which became effective September 1, 1981, transformed the courts of civil appeals into the courts of appeals, broadened their intermediate appellate jurisdiction to include criminal as well as civil appeals, and modified the jurisdiction of the Court of Criminal Appeals.² This article will review the changes in jurisdiction, and the modifications in post-trial and appellate procedures contained in the implementing legislation enacted by the 67th Legislature, and the rules promulgated by the Court of Criminal Appeals.³

II. HISTORY

The 1980 courts amendment is not the first constitutional amendment which formed an intermediate appellate level of courts to relieve the congested dockets of an appellate forum; a similar situation arose almost a century ago when the dockets of the Supreme Court of Texas had become seriously crowded. Prior to the adoption of the Texas Constitution of 1876, the Supreme Court had final appellate jurisdiction over both criminal and civil appeals.⁴ The constitution of 1876 divided this jurisdiction, vesting a newly created court of appeals with final appellate jurisdiction over all criminal cases and civil appeals cases in which county courts had original or appellate jurisdiction,⁵ and limiting the Supreme Court's final appellate jurisdiction to the remaining civil appeals.⁶ Despite this more limited jurisdiction, by 1891 the dockets of the Supreme Court had become overburdened.⁷ In order to alleviate this situation, the constitution was amended to authorize the creation of courts of civil appeals with intermediate civil appellate ju-

1. See TEX. CONST. art. V, §§ 5, 6 (as amended in 1980).

2. See *id.* §§ 5, 6 (as amended in 1980).

3. See *id.* §§ 5, 6 (as amended in 1980); 1981 Tex. Sess. Law Serv., ch. 291, § 139, at 817 (Vernon).

4. See TEX. CONST. art. V, § 3 (1869); TEX. CONST. art. IV, § 3 (1866); TEX. CONST. art. IV, § 3 (1861); TEX. CONST. art. IV, § 3 (1845); TEX. CONST. art. IV, § 8 (1836).

5. See TEX. CONST. art. V, § 4 (as originally enacted).

6. See *id.* § 3 (as originally enacted).

7. See *id.* § 6, comment (Vernon 1955).

risdiction.⁸ At the same time, the court of appeals was divested of its civil jurisdiction, and renamed the Court of Criminal Appeals.⁹ Civil cases which had been pending before the court of appeals, as well as civil cases pending before the Supreme Court were transferred to the three newly created courts of civil appeals.¹⁰ By 1967, fourteen supreme judicial districts, each having a court of civil appeals, had been created.¹¹ Until 1977, each court of civil appeals consisted of a chief justice and two associate justices; however, in 1977, the Texas Legislature increased the membership of the Courts of Civil Appeals for the First and Fourteenth Districts sitting in Houston and for the Fifth Supreme Judicial District, sitting in Dallas to a chief justice and five associate justices each.¹²

The appeal of civil cases was expedited by the creation of the courts of civil appeals. However, criminal cases continued to be appealed directly from the trial courts to the Court of Criminal Appeals. In 1925, the Texas Legislature authorized the Court of Criminal Appeals to appoint a Commission of Criminal Appeals, composed of two commissioners, to assist the court in deciding the cases before it.¹³

In 1966, the Texas Constitution was amended to increase the membership of the Court of Criminal Appeals from three to five judges; the two commissioners then in office became the new judges of the court.¹⁴ The court retained its authority to appoint commissioners, and two commissioners were appointed in 1971. In 1977 the constitution was again amended to increase the membership of the Court of Criminal Appeals to nine judges.¹⁵ Again, the two commissioners then in office became judges, and the governor was authorized to appoint two additional judges.¹⁶ Despite this increased number of judges and the large number of cases decided by

8. *See id.* § 6 (as amended in 1891).

9. *See id.* § 4 (as amended in 1891).

10. *See Mexican Nat'l Ry. v. Mussette*, 86 Tex. 708, 713, 26 S.W. 1075, 1076 (1894); TEX. CONST. art V, § 6 (as amended in 1891).

11. *See* 1967 Tex. Gen. Laws, ch. 728, § 2 at 1953.

12. *See* 1977 Tex. Gen. Laws, ch. 624, § 1, at 1531.

13. *See* 1925 Tex. Gen. Laws, ch. 95, § 1, at 269.

14. *See* 1966 Tex. Gen. Laws, art. V, § 4, at LVI.

15. *See* 1977 Tex. Gen. Laws, S.J.R. 18, § 2, at 3359.

16. The amendment of article V, section 4 of the Texas Constitution in 1977 did not effect the Court of Criminal Appeal's authority to appoint commissioners. *See* TEX. CONST. art. V, § 4 (as amended in 1977).

the Court of Criminal Appeals each year, the docket was overcrowded.¹⁷ By December 31, 1980, pending cases numbered 4,011 and the filing of new cases continued at a more rapid rate than cases could be decided.¹⁸ In order to relieve the congestion and facilitate the prompt appellate review of criminal convictions, the constitution was again amended, creating an intermediate appellate system to assume jurisdiction over appeals in criminal cases.

III. LEGISLATION AND RULES OF POST-TRIAL AND APPELLATE PROCEDURE

Senator Ray Farabee sponsored and the 67th Legislature passed a series of statutory amendments, contained in Senate Bill 265, to implement the changes in jurisdiction provided by the courts amendment.¹⁹ These changes gave the Court of Criminal Appeals the responsibility to make rules of post-trial and appellate procedure to complement the new statutory provisions.²⁰

A. *Jurisdiction*

1. *Courts of Appeals*

Consistent with the constitutional amendment, article 4.03 of the Texas Code of Criminal Procedure has been amended to provide the courts of appeals with appellate jurisdiction over all criminal cases which were previously appealable to the Court of Criminal Appeals, except cases in which the death penalty has been assessed.²¹ Death penalty cases are appealed directly to the Court

17. Statistics compiled in the 1979 Report by the Texas Judicial Council and Office of Court Administration show that each of the judges on the Court of Criminal Appeals wrote an average of 298 opinions in 1979. See 51 TEX. JUD. COUNCIL ANN. REP. 114-117 (1979).

18. See *id.* at 114-17.

19. See 1981 Tex. Sess. Law Serv., ch. 291, § 1, at 761 (Vernon) (Senate Bill 265).

20. See TEX. CONST. art. V, §§ 5, 6 (as amended in 1980) (creation of courts of appeal and discretionary appellate review by Court of Criminal Appeals); TEX. CODE CRIM. PRO. ANN. art. 44.45(c) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon) (rules promulgated by Court of Criminal Appeals); *id.* art. 44.33, as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 139, at 817 (Vernon) (rules of post-trial and appellate procedure promulgated by Court of Criminal Appeals); *id.* art. 40.10, as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 109, at 808 (Vernon) (application of rules of civil procedure to "bills of exception and statements of fact."). Pursuant to articles 40.10, 44.33, and 44.45 the Court of Criminal Appeals has promulgated the Texas Rules of Post-Trial and Appellate Procedure in Criminal Cases.

21. Compare TEX. CONST. art. V, §§ 5, 6 (as amended in 1980) with TEX. CODE CRIM.

of Criminal Appeals.²² Previously, the Court of Criminal Appeals did not have appellate jurisdiction over cases appealed to county courts in which the county courts imposed a fine not in excess of \$100.00.²³ Such cases are now similarly excluded from the appellate jurisdiction of the courts of appeals, except for cases where the issue involved is the constitutionality of the statute or ordinance on which the conviction is based.²⁴ The amended statutes now provide that cases where the issue involved is the constitutionality of the statute or ordinance on which the conviction is based may be appealed from county courts to the courts of appeals.²⁵

Included among the criminal cases previously appealable to the Court of Criminal Appeals and now within the appellate jurisdiction of the courts of appeals are appeals from judgments denying relief in preconviction habeas corpus proceedings.²⁶ These appeals include judgments refusing to set or reduce bail, or refusing to discharge from custody one who challenges the validity of an extradition or contempt order.²⁷

PRO. ANN. art. 4.03 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 102 at 802 (Vernon).

22. See TEX. CONST. art. V, § 5 (as amended in 1980); TEX. CODE CRIM. PRO. ANN. art. 4.04 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 103 at 802 (Vernon).

23. See TEX. CODE CRIM. PRO. ANN. art. 4.03 (Vernon 1977).

24. See TEX. CONST. art. V, § 6 (as amended in 1980); TEX. CODE CRIM. PRO. ANN. art. 4.03 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 103 at 802 (Vernon).

25. See TEX. CONST. art. V, § 6 (as amended in 1980); TEX. CODE CRIM. PRO. ANN. art. 4.03 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 103 at 802 (Vernon).

26. See TEX. CODE CRIM. PRO. ANN. art. 44.34 (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 140, at 818 (Vernon).

27. See *Ex Parte* Spring, 586 S.W.2d 482, 484 (Tex. Crim. App. 1979) (habeas corpus relief sought on basis that statute creating system of inferior courts was unconstitutional denial to equal protection of law); *Ex Parte* Reid, 581 S.W.2d 686, 688 (Tex. Crim. App. 1979) (challenge of order of extradition to Montana); *Ex Parte* Gray, 564 S.W.2d 713, 714 (Tex. Crim. App. 1978) ("proper method for challenging the denial or excessiveness of bail, whether prior to trial or after conviction, is by habeas corpus"); *Ex Parte* Supercinski, 561 S.W.2d 482, 483 (Tex. Crim. App. 1977) (relator unlawfully restrained of liberty for contempt inasmuch as order of commitment must be written). See generally TEX. CODE CRIM. PRO. ANN. art. 11.01 (Vernon 1977) (writ of habeas corpus "used when any person is restrained in his liberty.").

2. *Court of Criminal Appeals*

The jurisdiction of the Court of Criminal Appeals has been substantially altered. Review of decisions of the courts of appeals by the Court of Criminal Appeals is entirely discretionary.²⁸ This discretion may be invoked by petition of either party. The Court of Criminal Appeals, however, may review courts of appeals decisions without petition by either party.²⁹

In death penalty cases, review by the Court of Criminal Appeals continues to be a matter of right; death penalty cases are appealed directly from the trial court to the Court of Criminal Appeals.³⁰

The court's original jurisdiction over post-conviction applications for writs of habeas corpus likewise remains unchanged.³¹ Such applications are not appeals; they are within the court's original jurisdiction, and accordingly remain unaffected by changes in the court's appellate jurisdiction. As before, the trial court makes preliminary findings and recommendations, but the decision whether to grant relief is left to the Court of Criminal Appeals.³²

The statutory authority of the Court of Criminal Appeals to issue certain writs is expanded to include writs of habeas corpus, procedendo, prohibition, and "such other writs as may be necessary to enforce its jurisdiction"³³

B. *Increases in the Number of Justices of the Courts of Appeals*

The statutes provide for the addition of twenty-eight new justices to the courts of appeals. The Courts of Appeals for the Sixth, Ninth, Tenth, Eleventh, and Twelfth Supreme Judicial Districts

28. See TEX. CODE CRIM. PRO. ANN. art. 4.04, § 2 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 103, at 802 (Vernon).

29. See *id.* § 2, as amended.

30. See *id.* § 2, as amended.

31. See *id.* art. 11.07, § 2 (Vernon Supp. 1980-1981).

32. See *id.* § 2(d).

33. TEX. CODE CRIM. PRO. ANN. art. 4.04, § 1 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 103, at 802 (Vernon). This expanded statutory jurisdiction is consistent with the 1977 amendment to article V of the Texas Constitution broadening the constitutional power of the Court of Criminal Appeals to issue writs including writs of habeas corpus, mandamus, procedendo, prohibition, certiorari, "and such other writs as may be necessary to the enforcement of its jurisdiction." Compare TEX. CONST. art. V, § 5 (as amended in 1977) with TEX. CODE CRIM. PRO. ANN. art. 4.04 (Vernon 1977).

will each continue to have a chief justice and two associate justices.³⁴ Effective September 1, 1981, the Courts of Appeals for the First and Fourteenth Supreme Judicial Districts will each increase from a chief justice and five associate justices to a chief justice and eight associate justices;³⁵ the Courts of Appeals for the Second and Thirteenth Supreme Judicial Districts will each increase from a chief justice and two associate justices to a chief justice and five associate justices;³⁶ the Court of Appeals for the Fourth Supreme Judicial District will increase from a chief justice and two associate justices to a chief justice and six associate justices;³⁷ the Courts of Appeals for the Seventh and Eighth Supreme Judicial Districts will each increase from a chief justice and two associate justices to a chief justice and three associate justices;³⁸ the Court of Appeals for the Fifth Supreme Judicial District will increase from a chief justice and five associate justices to a chief justice and eleven associate justices.³⁹ Effective January 1, 1983, an additional associate justice is authorized for the Fifth Supreme Judicial District, bringing the membership of that court to thirteen.⁴⁰ Effective September 1, 1982, the Court of Appeals for the Third Supreme Judicial District will increase from a chief justice and two associate justices to a chief justice and five associate justices.⁴¹

C. *Post-Trial Procedures*

1. *Judgment and Sentence*

The statutes are amended to integrate the sentence as a part of the judgment.⁴² This is a departure from the previous law under which judgment and sentence were regarded as distinct and inde-

34. See TEX. REV. CIV. STAT. ANN. art. 1812(a)(6), (9), (10), (11), (12) (Vernon Supp. 1980-1981), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 31, at 777 (Vernon).

35. See *id.* art. 1812(a)(1), (14), as amended.

36. See *id.* art. 1812(a)(2), (13), as amended.

37. See *id.* art. 1812(a)(4), as amended.

38. See *id.* art. 1812(a)(7), (8), as amended.

39. See *id.* art. 1812(a)(5)(i)(1), as amended.

40. See *id.* art. 1812(a)(5)(i)(2), as amended.

41. See *id.* art. 1812(b), as amended.

42. See TEX. CODE CRIM. PRO. ANN. art. 42.01, § 1 (8), (9), (10) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 111, at 809 (Vernon); *id.* art. 42.02, as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 112, at 809 (Vernon).

pendent.⁴³ A sentence is now defined as "that part of the judgment, or order revoking a probated sentence, that orders that the punishment be carried into execution in the manner prescribed by law."⁴⁴

A judgment must now reflect the following: the title and number of the case;⁴⁵ "that the case was called and the parties appeared";⁴⁶ the names of the prosecution and defense attorneys;⁴⁷ that a defendant not represented by counsel knowingly, intelligently and voluntarily waived the right to representation;⁴⁸ "the plea or pleas";⁴⁹ "whether the case was tried before a jury or a jury was waived";⁵⁰ "the submission of the evidence, if any";⁵¹ that the "jury was charged by the court" in cases "tried before a jury";⁵² "the verdict or verdicts of the jury or the finding or findings of the court";⁵³ that a convicted defendant is adjudged guilty by verdict of the jury or finding of the court and is to be punished in accordance with the jury's verdict or the court's finding;⁵⁴ that a defendant whose punishment is death be sentenced to death;⁵⁵ that a defendant whose punishment is a nonprobated term of imprisonment or fine be sentenced to the particular punishment assessed⁵⁶ (the provision requiring the judge to pronounce an indeterminate sentence has been eliminated);⁵⁷ where a "probated punishment is assessed that the imposition of sentence is suspended and the defendant is placed on probation," including the length of sentence, length of

43. See *Scott v. State*, 461 S.W.2d 619, 620 (Tex. Crim. App. 1971); TEX. CODE CRIM. PRO. ANN. art. 42.01, § 1 (8), (9), (10) & art. 42.02 (Vernon 1977).

44. TEX. CODE CRIM. PRO. ANN. art. 42.02 (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 111, at 809 (Vernon).

45. See *id.* art. 42.01, § 1(1), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 111, at 809 (Vernon).

46. *Id.* § 1(2), as amended.

47. See *id.* § 1(2), as amended.

48. See *id.* § 1(2), as amended.

49. See *id.* § 1(3), as amended.

50. See *id.* § 1(4), as amended.

51. See *id.* § 1(5), as amended.

52. See *id.* § 1(6), as amended.

53. See *id.* § 1(7), as amended.

54. See *id.* § 1(8), as amended.

55. See *id.* § 1(9), as amended.

56. See *id.* § 1(9), as amended.

57. See art. 42.09, § 1, as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 117, at 810-11 (Vernon). Subsequent provisions have been renumbered. See *id.* § 117, as amended.

probation, and terms and conditions of probation;⁵⁸ and that an acquitted defendant be discharged.⁵⁹

The sentencing procedures have also been revised. Under previous law, sentence was not pronounced until after the appeal of a death penalty case,⁶⁰ and sentence was not required to be pronounced in misdemeanor cases carrying a maximum possible punishment of a fine only.⁶¹ Sentence must now be pronounced before appeal in death penalty cases as well as other cases in which a non-probated punishment has been assessed, and the defendant must be present at pronouncement of sentence in all except misdemeanor cases.⁶²

The time period which previously existed between the entry of judgment and pronouncement of sentence has necessarily been eliminated. Since motions for new trial and in arrest of judgment are made after pronouncement of sentence, the former provisions for a defendant to defer sentencing by asserting he had grounds for such motions have obviously been eliminated.⁶³ Also, by reversing the order of pronouncement of sentence and the filing of these motions for new trial and in arrest of judgment, the amended provisions should foreclose the premature sentencing problems which arose under the previous statute.⁶⁴

2. *Motion for New Trial and Amended Motion for New Trial*

As was previously the law, a motion for new trial is not a prerequisite for appeal, nor has the new legislation altered the grounds on

58. *Id.* art. 42.01, § 1(10), as amended by 1981 Tex. Sess. Law Serv. ch. 291, § 111, at 809 (Vernon).

59. *See id.* § 1(11), as amended.

60. *See id.* art. 42.04 (Vernon 1979).

61. *See id.* art. 42.03.

62. *See id.* art. 42.03, as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 113, at 809 (Vernon); *cf.* *Holly v. State*, 494 S.W.2d 178, 179 (Tex. Crim. App. 1973); *Millman v. State*, 487 S.W.2d 750, 751 (Tex. Crim. App. 1972).

63. *See TEX. CODE CRIM. PRO. ANN.* art. 42.07, § 3 (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 115, at 810 (Vernon). Subsequent provisions have been renumbered. *See id.* at 810.

64. *See, e.g., Clark v. State*, 442 S.W.2d 353, 354 (Tex. Crim. App. 1969) (Court of Criminal Appeals without jurisdiction to hear appeal as there was not a proper sentence); *MacDonald v. State*, 442 S.W.2d 352, 352 (Tex. Crim. App. 1969) (no proper sentence pursuant to article 42.03, therefore, Court of Criminal Appeals without jurisdiction); *Gonzales v. State*, 440 S.W.2d 847, 849 (Tex. Crim. App. 1969) ("For want of a proper sentence . . . appeal . . . dismissed.").

which a new trial will be granted.⁶⁵ Certain procedural requisites for filing and hearing the motion, however, have been altered.

Prior to the new legislation, if a motion for new trial were filed, it had to be filed within ten days after conviction, and an amended motion for new trial could have been filed by leave of the court within twenty days after the filing of the preceding motion.⁶⁶ The defendant needed to present the original or amended motion to the trial court within ten days after filing, and the motion was overruled by operation of law unless the trial court acted upon it within twenty days after it was filed.⁶⁷ The court was authorized to extend filing deadlines, but had no authority to extend the twenty day limit for action on the motion.⁶⁸

The procedure as revised establishes a thirty day time limit from the day sentence is imposed or suspended in open court within which the motion for new trial must be filed.⁶⁹ Leave of court is no longer required to amend the motion; the defendant is free to file one or more amended motions before any preceding motion is overruled within the thirty day period after sentencing.⁷⁰ It is the defendant's responsibility to present the original or amended motion to the trial court within ten days after the motion is filed, and if no written order determining the motion is made within seventy-five days after sentencing, the motion is considered overruled by operation of law.⁷¹ The trial judge no longer has the discretion to extend the time limits for filing motions or amended motions for new trial, nor may he extend the seventy-five day limit for action on the motion, but he is given the discretion to permit delayed presentment and hearing on the motion within the seventy-five day period.⁷²

65. See TEX. CODE CRIM. PRO. ANN. art. 40.03-.04 (Vernon 1979).

66. See *id.* art. 40.05.

67. See *id.* art. 40.04.

68. See *Zaragosa v. State*, 588 S.W.2d 322, 323-24 (Tex. Crim. App. 1979); TEX. CODE CRIM. PRO. ANN. art. 40.05 (Vernon 1979).

69. See TEX. CODE CRIM. PRO. ANN. art. 40.05 (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 107, at 803-04 (Vernon). See generally Appellate Timetable I at 241.

70. See TEX. CODE CRIM. PRO. ANN. art. 40.05 (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 107, at 803-04 (Vernon).

71. See *id.* as amended.

72. See *id.* as amended.

3. *Motion in Arrest of Judgment*

The motion in arrest of judgment is an archaic procedure which is rarely used; there was some discussion concerning deleting this provision from the Texas Code of Criminal Procedure. It was, however, ultimately retained simply as a matter of historical precedent. The time limits and the procedures governing motions in arrest of judgment are revised to conform with those governing motions for new trial.⁷³

D. *Perfection of Appeal and Record on Appeal*

1. *Notice of Appeal*

No notice of appeal is necessary to perfect appeal in death penalty cases.⁷⁴ In all other cases, notice of appeal is necessary to perfect an appeal of a judgment or other appealable order from the trial court to the court of appeals.⁷⁵

Oral notice of appeal may be given in open court or written notice of appeal, in duplicate, may be filed with the clerk.⁷⁶ If oral notice is given, the clerk should reduce it to writing in duplicate.⁷⁷ A duplicate copy of notice in either case should be forwarded by the trial court clerk to the appropriate court of appeals.⁷⁸

Notice of appeal under prior law had to be given within ten days after sentence was pronounced, except in death penalty cases or cases in which the defendant received a probated sentence.⁷⁹ In the latter cases, notice of appeal had to be given within ten days after the motion for new trial or motion in arrest of judgment was overruled, or, if there were no motions, within ten days after entry of the judgment.⁸⁰ The trial court had discretion to permit a delayed

73. Compare 1981 Tex. Sess. Law Serv., ch. 291, § 110 at 808 (Vernon) ("30 days after the date the sentence is imposed or suspended in open court") with TEX. CODE CRIM. PRO. ANN. 41.02 (Vernon 1979) ("ten days after conviction").

74. See TEX. CODE CRIM. PRO. ANN. art. 44.08(a) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 127, at 814 (Vernon).

75. See *id.* as amended. See generally Appellate Timetable II at 242.

76. See TEX. CODE CRIM. PRO. ANN. art. 44.08(a) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 127, at 814 (Vernon).

77. See *id.* as amended.

78. See *id.* as amended.

79. See *id.* art. 44.08(b), (c).

80. See *id.* art. 44.08(b).

notice of appeal.⁸¹

The statutes, as amended, now require notice of appeal to be given within fifteen days after sentencing, unless a motion for new trial (or motion in arrest of judgment) is filed, in which case notice of appeal must be given within fifteen days after the motion is overruled by order or operation of law.⁸² Discretion to permit delayed notice of appeal is now vested exclusively in the court of appeals.⁸³

The defendant under the new provision is permitted to withdraw his notice of appeal at any time before his case is decided by the court of appeals.⁸⁴ The motion for withdrawal must be in writing and filed in duplicate with the clerk of the court of appeals.⁸⁵ After the court of appeals has decided the case, notice of appeal may still be withdrawn provided the defendant obtains the consent of the state and the approval of the court of appeals.⁸⁶ The opinion of the court of appeals is then withdrawn and the appeal dismissed.⁸⁷

2. *Record on Appeal*

The time limits for designating matter to be included in the record have been reduced. Under the former law both parties had sixty days after notice of appeal was given;⁸⁸ now, after notice of appeal is given the appellant has twenty days⁸⁹ and the State has thirty days within which to designate material to be included in the record.⁹⁰

81. *See id.* art. 44.08(c).

82. *See id.* art. 44.08(b), (c), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 127, at 814-15 (Vernon). Article 44.08(c), as amended, defines sentencing as "the date the sentence is imposed or suspended in open court or the date the other appealable order is signed by the trial judge." *Id.* art. 44.08(c), as amended.

83. *See id.* art. 44.08(e), as amended.

84. *See id.* art. 44.08(a), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 127, at 814 (Vernon).

85. *See id.* art. 44.08(a), as amended.

86. *See id.* art. 44.08(a), as amended.

87. *See id.* art. 44.08(a), as amended. If the defendant should escape after giving notice of appeal the court of appeals or the Court of Criminal Appeals lose their jurisdiction. *See id.* art. 44.09, as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 128, at 815 (Vernon).

88. *See id.* art. 40.09(2) (Vernon 1979).

89. *See id.* art. 40.09(2), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 804 (Vernon). *See generally* Appellate Timetable II at 242.

90. *See* TEX. CODE CRIM. PRO. ANN. art. 40.09(2) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 804 (Vernon).

The party desiring all or part of the transcription of the court reporter's notes included in the record must obtain it from the court reporter and furnish it to the clerk.⁹¹ The appellant, if he requests a transcription of the court reporter's notes free of cost because of his indigency, must file an affidavit in support of his request within twenty days after notice of appeal is given.⁹² If the transcription is of a proceeding occurring before notice of appeal was given, it must be furnished to the clerk within sixty days after notice of appeal.⁹³ If the proceeding took place after notice of appeal was given, the transcription of the proceeding must be filed with the clerk not later than thirty days after the proceeding.⁹⁴

3. *Formal Bills of Exception*

A formal bill of exception continues to be a necessary predicate to appellate review where the matters complained of on appeal are not otherwise shown by the appellate record. Previously, bills of exception had to be "filed with the clerk and presented to the trial judge within ninety days after notice of appeal" was given.⁹⁵ Under the amended provision, a party has seventy-five days within which to file the bill.⁹⁶ The clerk then notifies the court and sends opposing counsel a copy of the bill, and opposing counsel has ten days from the filing of the bill in which to make objections.⁹⁷

After the time for making objections has elapsed, the bill must be presented to the court within the following ten days.⁹⁸ On presentation, the court may either approve the bill without qualifications, qualify the bill, or refuse it.⁹⁹ As before, if the court takes no action on a timely filed bill within 100 days after giving notice of appeal, the bill is considered approved without qualifications.¹⁰⁰ If

91. *See id. as amended.*

92. *See id. art. 40.09(5), as amended. See generally* Appellate Timetable II at 242.

93. *See* TEX. CODE CRIM. PRO. ANN. art. 40.09(3) (Vernon 1979), *as amended by* 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 804 (Vernon).

94. *See id. art. 40.09(3), as amended.*

95. *Id. art. 40.09(6)(a)* (Vernon 1979).

96. *Id. art. 40.09(6)(a), as amended by* 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 805 (Vernon). *See generally* Appellate Timetable II at 242.

97. *See* TEX. CODE CRIM. PRO. ANN. art. 40.09(6)(a) (Vernon 1979), *as amended by* 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 805 (Vernon).

98. *See id. as amended.*

99. *See id. as amended.*

100. *Compare* 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 805 (Vernon) *with* TEX.

an extension of time for filing the bill has been granted, the trial court must now act on the bill within twenty-five days, an increase from the previous ten day limit, or the bill is deemed approved without qualification.¹⁰¹ Notice of the court's action in qualifying or refusing the bill is now sent to opposing counsel as well as the party filing the bill.¹⁰²

4. *Bystander's Bill*

As before, if the party filing the formal bill of exception is unwilling to accept the trial court's qualification or refusal of the bill, he has fifteen days from the day he receives notice of the court's action to file a bystander's bill.¹⁰³

The bystander's bill is comprised of the signed affidavits of three bystanders who attest that the formal bill of exceptions is correct.¹⁰⁴ Copies of these affidavits are sent to opposing counsel, who may file controverting affidavits within ten days after the filing of the bystander's bill.¹⁰⁵ Each side may file as many as five affidavits supporting or controverting the bystander's bill within this ten day period, and these affidavits will be used on appeal to determine the truth of the formal bill of exceptions.¹⁰⁶

5. *Approval of the Record*

The trial court must approve the record on appeal as well as any supplemental record or modification of the record.¹⁰⁷ Although the time limits for approval of the completed record remain unchanged,¹⁰⁸ notices may now be mailed by registered as well as cer-

CODE CRIM. PRO. ANN. art. 40.09(6)(a) (Vernon 1979).

101. Compare 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 805-06 (Vernon) ("approved without qualification if not acted upon . . . within 25 days . . .") with TEX. CODE CRIM. PRO. ANN. art. 40.09(6)(a) (Vernon 1979) ("within 10 days . . .").

102. See TEX. CODE CRIM. PRO. ANN. art. 40.09(6)(a) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 806 (Vernon).

103. Compare 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 805-06 (Vernon) and TEX. CR. APP. R. 101 with TEX. CODE CRIM. PRO. ANN. art. 44.09(6)(a) (Vernon 1979).

104. See TEX. CRIM. APP. R. 101.

105. See *id.*

106. See *id.*

107. See TEX. CODE CRIM. PRO. ANN. art. 40.09(7) (Vernon 1979); TEX. CRIM. APP. R. 102(a). See generally Appellate Timetable II at 242.

108. See TEX. CODE CRIM. PRO. ANN. art. 40.09(7) (Vernon 1979) (15 days after mailing notice of completion of record).

tified mail.¹⁰⁹ When the record is completed, the clerk notifies the parties. If neither party files objections to the record within fifteen days after notice is mailed and the trial judge has no objection to the record, he approves the record.¹¹⁰ If the judge declines to approve the record, he notifies the parties that he intends to modify or supplement the record, and the parties have five days to object to the judge's intended action.¹¹¹

If the parties file timely objections either to the record, or to the trial judge's intention to modify or supplement the record, or if the record has not been approved within twenty days after notice of completion was mailed, the trial court must hold a hearing, enter any orders he considers appropriate to "cause the record to speak the truth," and approve the record.¹¹² Furthermore, the record should contain these additional proceedings.¹¹³ The approved record is then filed with the clerk of the trial court, who has the duty to transmit it immediately to the appropriate appellate court.¹¹⁴ The clerk at this time notifies the parties by registered or certified mail that the record has been approved.¹¹⁵

6. *Time Limits—Extensions*

A court of appeals in which the case will be filed may, for good cause, extend the time limits for filing a transcription of the court reporter's notes with the clerk, filing bills of exception, and filing objections to the record.¹¹⁶ The time for filing appellate briefs in the courts of appeals may also be extended by the courts.

109. *See id. as amended* by 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 807 (Vernon).

110. *See id. as amended.*

111. *See id. as amended.*

112. *See id. as amended.*

113. *See id. as amended.*

114. *See id. art. 40.09(8), as amended.* At the time notice of appeal is given in a non-death penalty case appealed from a county in more than one supreme judicial district, the trial court clerk writes the numbers of the supreme judicial districts on indistinguishable objects, places them in a container, draws a number at random and transmits the record in that case to the corresponding supreme judicial district court of appeals. TEX. CRIM. APP. R. 103(b).

115. *See* TEX. CODE CRIM. PRO. ANN. art. 40.09(8) (Vernon 1979), *as amended* by 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 807 (Vernon).

116. *See id. as amended.*

E. *Procedures on Appeal to the Courts of Appeals*1. *Introduction*

Many procedural rules for appeals to the courts of appeals have been promulgated by the Court of Criminal Appeals, including: the format of the record on appeal and of the appellate briefs, the method of docketing cases on appeal, the notification of the parties that a cause has been submitted, the request for and presentation of oral arguments, the procedure on submission, and opinions and procedures on rehearing. When not inconsistent with the Texas Code of Criminal Procedure or the rules of the Court of Criminal Appeals, the Texas Rules of Civil Procedure will govern proceedings in the courts of appeals in criminal cases.¹¹⁷

2. *Appellate Briefs*

Appellate briefs should not be filed in the trial court; the provision for the trial court to review appellate briefs to determine if a new trial should be granted has been repealed.¹¹⁸ The appellate briefs should now be filed directly with the clerk of the court of appeals to which the case has been appealed.¹¹⁹ The appellant's brief is due within thirty days after the clerk of the trial court mails notice of approval of the record, and the State's brief is due within thirty days after the appellant's brief has been filed.¹²⁰ The time limits for filing the appellate briefs may be extended by the court of appeals for good cause shown, after timely application to that court.¹²¹ Each party may file supplemental briefs before the case is submitted to the court.¹²² The appellate briefs must be "compact, logically arranged, concise, and free from burdensome,

117. See *id.* art. 40.10, as amended by Tex. Sess. Law Serv., ch. 291, § 109, at 808 (Vernon); TEX. CRIM. APP. R. 211.

118. See TEX. CODE CRIM. PRO. ANN. ART. 40.09 (9)-(13) (VERNON 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 807-08 (Vernon); TEX. CRIM. APP. R. 202.

119. See TEX. CODE CRIM. PRO. ANN. art. 40.09(9) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 807 (Vernon).

120. See *id.* art. 40.09(9), (10), as amended. See generally Appellate Timetable II at 242.

121. See TEX. CODE CRIM. PRO. ANN. 40.09(3), (13) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 108, at 807 (Vernon).

122. See *id.* art. 44.33, as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 139, at 817 (Vernon).

irrelevant, and immaterial matter."¹²³

3. *Oral Argument*

The clerk of the court of appeals should notify the parties of the date the case is set for submission. Counsel desiring oral argument must request it within fifteen days of this notification; otherwise oral argument is waived, unless the court of appeals directs otherwise.¹²⁴ Each side has a total of twenty minutes for oral argument.¹²⁵

4. *Panel Submissions*

Appeals to the courts of appeals will be submitted to and determined by panels of three justices.¹²⁶ Two justices will constitute a quorum of the panel, and a concurrence of two justices will be necessary for a decision.¹²⁷

In those courts of appeals which have more than one panel, the justices are required to rotate among the panels. Permanent civil and criminal panels without rotation may not be established.¹²⁸

In a court of appeals comprised of more than three justices, if only two justices participate in a particular decision, and they are unable to concur in the disposition of the case, the chief justice of the court of appeals will designate another justice of the court to participate in deciding the case, or he may convene the court en banc to decide the case.¹²⁹ In either instance, reargument may be ordered.¹³⁰ If the situation arises in a court comprised of only three justices, the Chief Justice of the Texas Supreme Court may assign a justice of another court of appeals or a qualified retired justice to participate in the decision of the case.¹³¹ Reargument may be or-

123. See TEX. CRIM. APP. R. 202(a).

124. See TEX. CRIM. APP. R. 204. See generally Appellate Timetable II at 242.

125. See TEX. CRIM. APP. R. 205.

126. See TEX. REV. CIV. STAT. ANN. art. 1812(b) (Vernon Supp. 1980-1981), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 31, at 777 (Vernon) (provision for en banc hearings); TEX. CRIM. APP. R. 206(a) & 206(e) (majority vote to review case en banc).

127. See TEX. REV. CIV. STAT. ANN. art. 1812(b) (Vernon Supp. 1980-1981), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 31, at 777 (Vernon); TEX. CRIM. APP. R. 206(a).

128. See TEX. REV. CIV. STAT. ANN. art. 1812(b) (Vernon Supp. 1980-1981), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 31, at 777 (Vernon).

129. See TEX. CRIM. APP. R. 206(b).

130. See *id.*

131. See TEX. REV. CIV. STAT. ANN. art. 1812(d) (Vernon Supp. 1980-1981), as amended

dered by the reconstituted panel.¹³²

A case should be reviewed by a court of appeals en banc only under extraordinary circumstances.¹³³ If, however, a justice of a court requests a vote on whether en banc review is appropriate, and a majority of the court votes that it is, the case will be submitted to the full court.¹³⁴

5. *Opinions in the Courts of Appeals*

The courts of appeals may affirm the trial court judgment, reverse and remand for a new trial, reverse and dismiss the case, reform and correct the judgment, or enter any other appropriate order required by the law and the nature of the case.¹³⁵

Each case must be decided by written opinion setting out the reasons underlying the decision.¹³⁶ An exception is provided in situations where the outcome is controlled by precedent. In such cases the panel or the court en banc may decide the case by certificate of affirmance or reversal which identifies the issues determined and cites the pertinent authorities.¹³⁷ Any justice may file an opinion dissenting to or concurring in the determination of the court.¹³⁸

Whether a panel opinion is to be signed, or issued per curiam, and whether it is to be published is determined by a majority of the panel. These determinations may be modified or overruled by the court en banc.¹³⁹ Panel and en banc opinions and orders may be delivered at any time, and copies will be sent to counsel for both parties, to the State's attorney, to the clerk of the Court of Criminal Appeals, and to the clerk of the trial court.¹⁴⁰

by 1981 Tex. Sess. Law Serv., ch. 291, § 31, at 777 (Vernon); TEX. CRIM. APP. R. 206(c).

132. See TEX. CRIM. APP. R. 206(c).

133. See TEX. CRIM. APP. R. 206(e).

134. See *id.*

135. See TEX. CODE CRIM. PRO. ANN. art. 44.24(b) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 133, at 816 (Vernon).

136. See *id.* as amended.

137. See *id.* as amended.

138. See *id.* as amended.

139. See TEX. CRIM. APP. R. 207(a) "An unpublished opinion shall not be deemed or cited as precedent." TEX. CRIM. APP. R. 207(c).

140. See TEX. CRIM. APP. R. 207(f) & 207(g).

6. *Rehearing*

A party has fifteen days after the panel's decision is delivered within which to file a motion for rehearing.¹⁴¹ The motion for rehearing should state the grounds being urged, and should be supported by written argument.¹⁴² Oral argument on the motion is not permitted, and the opposing party need not file a reply unless it is requested by the court.¹⁴³

Unless the court en banc votes to rehear the case, the panel which initially decided the case will also dispose of the motion for rehearing.¹⁴⁴ If a majority of the justices of this panel conclude the case should be reheard, the motion will be granted, and the case resubmitted to the panel; otherwise, the motion will be overruled.¹⁴⁵ If rehearing is granted, the panel may request further oral argument.¹⁴⁶ The majority of the panel on rehearing may modify or overrule the original decision.¹⁴⁷ The losing party may then request a second rehearing within fifteen days after the opinion on rehearing is delivered.¹⁴⁸

Although en banc review in the courts of appeals is not favored, a majority of the en banc membership of a court of appeals may order reconsideration en banc of any panel decision rendered on original submission or on rehearing, within fifteen days after such decision is issued.¹⁴⁹ In that event, the panel decision does not become final, and the case is submitted to the court en banc for review and disposition.¹⁵⁰

7. *Finality and Mandate*

A decision of a court of appeals becomes a "final ruling" on the

141. See TEX. CRIM. APP. R. 208(b). See generally Appellate Timetable II at 242.

142. See TEX. CRIM. APP. R. 208(b).

143. See *id.*

144. See TEX. CRIM. APP. R. 208(a). This procedure differs from that which has been followed in the Court of Criminal Appeals of submitting panel decisions to the full court on rehearing.

145. See TEX. CRIM. APP. R. 208(b).

146. See *id.*

147. See TEX. CRIM. APP. R. 208(a).

148. See TEX. CRIM. APP. R. 208(d).

149. See TEX. CRIM. APP. R. 208(c).

150. See *id.*

sixteenth day after it is delivered, absent a motion for rehearing.¹⁵¹ When a motion for rehearing is timely filed, the decision becomes a "final ruling" the day after the motion is overruled, or the day after the case is disposed of on rehearing.¹⁵²

Forty-five days after the "final ruling" of the court of appeals, the decision becomes final and the mandate is issued to the trial court, unless a petition for discretionary review has been filed within thirty days after the "final ruling," or the Court of Criminal Appeals has filed an order for review within forty-five days.¹⁵³ If a petition is filed with the Court of Criminal Appeals and is denied, the decision of the court of appeals becomes final fifteen days after that denial.¹⁵⁴

F. *Procedures on Appeal to the Court of Criminal Appeals*

The same rules which govern appeals to the courts of appeals concerning the record on appeal and the filing of appellate briefs and oral argument apply to appeals in death penalty cases to the Court of Criminal Appeals.¹⁵⁵

These appeals, as in the past, are submitted to the Court of Criminal Appeals en banc,¹⁵⁶ and each case is decided by written opinion.¹⁵⁷

The procedure on rehearing of these appeals is the same as followed for rehearing cases before the court on discretionary review.

G. *Discretionary Review by the Court of Criminal Appeals*

The Court of Criminal Appeals may, in its discretion, review any decision of a court of appeals before it becomes final.¹⁵⁸ Such discretionary review is on the court's own motion, whether or not ei-

151. See TEX. CRIM. APP. R. 209(b)(2). See generally Appellate Timetable II at 242.

152. See TEX. CRIM. APP. R. 209(c).

153. See 1981 Tex. Sess. Law Serv., ch. 291, § 116, at 810 (Vernon); TEX. CRIM. APP. R. 209. See generally Appellate Timetable IV at 245.

154. See 1981 Tex. Sess. Law Serv., ch. 291, § 116, at 810 (Vernon); TEX. CRIM. APP. R. 209.

155. See TEX. CRIM. APP. R. 301.

156. See TEX. CRIM. APP. R. 312.

157. See TEX. CODE CRIM. PRO. ANN. art. 44.24(d) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 133 at 816 (Vernon).

158. See TEX. CONST. art. V, § 5 (as amended in 1980); TEX. CODE CRIM. PRO. ANN. art. 4.04, § 2 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 103, at 802 (Vernon); TEX. CRIM. APP. R. 302. See generally Appellate Timetable IV at 245.

ther party has filed a petition for review, and whether or not a motion for rehearing was filed in the court of appeals.¹⁵⁹ Article 44.45 of the Texas Code of Criminal Procedure is a new provision to establish the framework for discretionary review by the Court of Criminal Appeals,¹⁶⁰ and it is supplemented by the new rules 302,¹⁶¹ 303,¹⁶² and 304.¹⁶³

The Court of Criminal Appeals will sit en banc to hear and determine all cases in which discretionary review is granted, all death penalty cases, all post-conviction applications for writs of habeas corpus, and usually all original applications for extraordinary writs.¹⁶⁴

Among the kinds of cases in which the Court of Criminal Appeals may choose to exercise its discretionary review authority are cases in which the decision of a court of appeals conflicts with a decision of another court of appeals on the same matter;¹⁶⁵ cases in which the decision involves an important state or federal law issue which should be settled by the Court of Criminal Appeals;¹⁶⁶ cases deciding an important state or federal law issue in conflict with decisions of the Court of Criminal Appeals or the United States Supreme Court;¹⁶⁷ cases in which the court of appeals has either declared unconstitutional or misconstrued a statute, rule, regulation or ordinance;¹⁶⁸ cases in which the justices of the court of appeals have disagreed on a material question of law necessary to the decision;¹⁶⁹ and cases in which a "court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision."¹⁷⁰ These examples merely illustrate some of the circumstances in which the Court of Criminal Appeals may deem discre-

159. See TEX. CRIM. APP. R. 302(d).

160. See 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon).

161. See TEX. CRIM. APP. R. 302 (general provisions for discretionary review).

162. See TEX. CRIM. APP. R. 303 (discretionary review without petition).

163. See TEX. CRIM. APP. R. 304 (discretionary review with petition).

164. See TEX. CRIM. APP. R. 312(a).

165. See TEX. CRIM. APP. R. 302(c)(1).

166. See TEX. CRIM. APP. R. 302(c)(2).

167. See TEX. CRIM. APP. R. 302(c)(3).

168. See TEX. CRIM. APP. R. 302(c)(4).

169. TEX. CRIM. APP. R. 302(c)(5).

170. See TEX. CRIM. APP. R. 302(c)(6).

tionary review to be appropriate; the list is neither complete nor binding.¹⁷¹

1. *Petition For Discretionary Review*

Both the appellant and the State have the right to petition the Court of Criminal Appeals for discretionary review of a decision by a court of appeals.¹⁷² It should be emphasized that the right of the State to seek discretionary review of a decision by the court of appeals, which is expressly established in the new provisions added by Senate Bill 265, does not conflict with the Texas constitutional and statutory provisions denying the State the right of appeal in criminal cases.¹⁷³ Discretionary review by the Court of Criminal Appeals after the appellant has invoked the appellate process does not constitute an appeal.¹⁷⁴

When a judgment is reversed by a court of appeals, and the State seeks discretionary review by the Court of Criminal Appeals, the appellant is entitled to have the Court of Criminal Appeals set

171. See TEX. CRIM. APP. R. 302(c).

172. See 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon). See generally Appellate Timetable III at 244.

173. Compare TEX. CONST. art V, § 5 (as amended in 1980) (discretionary review by Court of Criminal Appeals) and TEX. CODE CRIM. PRO. ANN. art. 4.04, § 2 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 123, at 812 (Vernon) (discretionary review by Court of Criminal Appeals) with TEX. CONST. art V, § 26 ("state has no right of appeal in criminal cases") and TEX. CODE CRIM. PRO. ANN. art. 44.01 (Vernon 1979) ("[s]tate has no right of appeal in criminal actions").

174. See TEX. CONST. art. V, § 5 (as amended in 1980); TEX. CODE CRIM. PRO. ANN. art. 4.04, § 2 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 103, at 802 (Vernon) & art. 44.01 (Vernon 1977), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 123, at 812 (Vernon). Amended article 44.01 provides: "The State shall have no right of appeal in criminal actions. However, this statute shall not be construed to prevent the state from petitioning the Court of Criminal Appeals to review a decision by the court of appeals in a criminal case, on its own motion." TEX. CODE CRIM. PRO. ANN. art. 44.01 (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 123, at 812 (Vernon). The commentary of the American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Criminal Appeals* (Approved Draft 1970), Section 1.4 on "Prosecution Appeals," states:

f. Appeals from intermediate appellate courts to the highest court No limitations should exist on the right of the prosecution to take the decision of an intermediate appellate court to a higher tribunal. No problems of double jeopardy exist in such a case. If the defendant appealed from the trial court and won a reversal at an intermediate level, the further review at the highest level should be considered an extension of the appeal initiated by the defendant ABA STANDARDS RELATING TO CRIMINAL APPEALS, *Prosecution Appeals*, § 1.4, at 40 (Approved Draft 1970).

reasonable bail regardless of the length of the sentence imposed.¹⁷⁵

A petition for review must be filed with the clerk of the court of appeals within thirty days after the "final ruling" of the court of appeals, and copies of the petition must be sent by the petitioner to the opposing counsel and the State's attorney.¹⁷⁶ Even though the thirty day time limit would be extended, if a petition for review has been timely filed by one party, another party may have ten days within which to file his own petition.¹⁷⁷

The petition should be as brief as possible. It should be addressed to the Court of Criminal Appeals; identify the petitioner; index the grounds for review by subject and list the authorities cited in alphabetical order; concisely set out grounds or questions for review, and supporting argument and authority applicable to each; and state the relief sought.¹⁷⁸

The petition, together with the original record and the opinion of the court of appeals, will be forwarded by the clerk of the court of appeals to the clerk of the Court of Criminal Appeals within fifteen days after a petition for review is filed.¹⁷⁹ The respondent may file a reply with the clerk of the Court of Criminal Appeals within thirty days from receipt of his copy of the petition.¹⁸⁰ The petition is considered submitted for disposition when the reply is filed or the thirty day period elapses without reply.¹⁸¹

The petition will be assigned to a judge who makes a preliminary review and report to the court. A petition will only be granted if at least four judges vote to do so; if four judges do not vote to grant the petition, it is refused with a docket notation "refused."¹⁸² The

175. See TEX. CODE CRIM. PRO. ANN. art. 44.04(h) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 125, at 813-14 (Vernon). Otherwise, a defendant whose punishment exceeds fifteen years imprisonment is not entitled to release on bail pending appeal. See *id.* art. 44.04(b), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 125, at 813 (Vernon).

176. See *id.* art. 44.45(b)(2), (4), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon); TEX. CRIM. APP. R. 304(b) & 304(c).

177. See TEX. CRIM. APP. R. 304(c).

178. See TEX. CODE CRIM. PRO. ANN. art. 44.45(b)(3) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon); TEX. CRIM. APP. R. 304(d).

179. See TEX. CODE CRIM. PRO. ANN. art. 44.45(b)(5) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon); TEX. CRIM. APP. R. 304(f).

180. See TEX. CODE CRIM. PRO. ANN. art. 44.45(b)(4) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon); TEX. CRIM. APP. R. 304(h).

181. See TEX. CRIM. APP. R. 304(h).

182. See TEX. CODE CRIM. PRO. ANN. art. 44.45(b)(6) (Vernon 1979), as amended by

court is not required to explain why the petition has been refused.¹⁸³ If review is granted, a notation to that effect is made on the docket and the case is set for submission or oral argument.¹⁸⁴ Even after review is granted, however, the petition may be dismissed if five judges believe that review was improvidently granted.¹⁸⁵

A petition which is refused or dismissed will be retained in the Court of Criminal Appeals for at least fifteen days.¹⁸⁶ Thereafter, provided no motion for rehearing to reconsider the refusal or dismissal of the petition has been timely filed, or if filed has been overruled or dismissed, the clerk of the Court of Criminal Appeals will return the record to the clerk of the court of appeals together with the pertinent orders of the court.¹⁸⁷ The decision of the court of appeals becomes final fifteen days from the refusal by the Court of Criminal Appeals to grant a petition for review.¹⁸⁸

2. *Discretionary Review Without Petition*

As previously noted, the Court of Criminal Appeals may also grant discretionary review of a decision by a court of appeals in the absence of any petition by either party.¹⁸⁹ Review must be granted, however, before the decision of the court of appeals becomes final.¹⁹⁰ When no petition has been filed, the order granting the review must be filed within forty-five days after the "final ruling" of the court of appeals.¹⁹¹ A vote of four judges to review a case is

1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon); TEX. CRIM. APP. R. 304(k).

183. Compare 1981 Tex. Sess. Law Serv., ch. 291, § 133, at 816 (Vernon) (court of appeals required to deliver written opinion in each case) with TEX. CODE CRIM. PRO. ANN. art. 44.24(c) (Vernon 1979) (Court of Criminal Appeals required to deliver written opinion in each case).

184. See TEX. CRIM. APP. R. 304(k).

185. See TEX. CODE CRIM. PRO. ANN. art. 44.45(b)(6), (7) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon); TEX. CRIM. APP. R. 304(k).

186. See TEX. CRIM. APP. R. 304(k)(1).

187. See *id.*

188. See TEX. CODE CRIM. PRO. ANN. art. 42.02a(b)(2), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 116, at 810 (Vernon); TEX. CRIM. APP. R. 209(b)(2).

189. See TEX. CODE CRIM. PRO. ANN. art. 44.45(a) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 147, at 819 (Vernon). See generally Appellate Timetable IV at 245.

190. See TEX. CODE CRIM. PRO. ANN. art. 42.04a(b), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 116, at 810 (Vernon); TEX. CRIM. APP. R. 209(b)(1)(B) & 303.

191. See TEX. CODE CRIM. PRO. ANN. art. 42.04a(b), as amended by 1981 Tex. Sess. Law

necessary for the court to grant review.¹⁹²

Since, in certain circumstances more than forty-five days may be necessary in order to properly evaluate whether discretionary review is appropriate, the court or a judge of the court may file an order for review within forty-five days, which will operate to extend the forty-five day time limit for finality of the decision by another forty-five days.¹⁹³ If at the end of this extended time limit four judges do not agree to review the decision, the decision of the court of appeals becomes final.¹⁹⁴

3. *Procedures When Review is Granted*

When review has been granted, with or without petition, the following procedures apply.

a. *Briefs*

Thirty days after review is granted the petitioner's brief is due.¹⁹⁵ If the review is granted on the court's own motion the brief will be filed by the party losing in the court of appeals.¹⁹⁶ Thirty days after the filing of this brief the answering brief of the opposing party is due.¹⁹⁷

b. *Oral Arguments*

A defendant is permitted to have at least two counsel present oral argument on his behalf.¹⁹⁸ If the parties desire oral argument, they must so inform the clerk of the Court of Criminal Appeals

Serv., ch. 291, § 116, at 810 (Vernon); TEX. CRIM. APP. R. 209(b)(1)(B) & 303. This order is filed with the clerk of the Court of Criminal Appeals who sends a copy to the clerk of the court of appeals. See TEX. CRIM. APP. R. 303(a).

192. See TEX. CRIM. APP. R. 303(a).

193. See TEX. CRIM. APP. R. 303(c).

194. See TEX. CRIM. APP. R. 303(e). See also TEX. CODE CRIM. PRO. ANN. art. 42.04a(b), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 116, at 810 (Vernon) (provides when decision at court of appeals is final).

195. See TEX. CRIM. APP. R. 306(a). See generally Appellate Timetable III at 244.

196. See TEX. CRIM. APP. R. 306(a).

197. See TEX. CRIM. APP. R. 306(b). The requisites of these briefs are the same as those for briefs on appeal to the courts of appeals, and are set out in TEX. CRIM. APP. R. 202(a). An original and ten legible copies must be filed with the Clerk of the Court of Criminal Appeals. See TEX. CRIM. APP. R. 304(i).

198. See TEX. CODE CRIM. PRO. ANN. art. 44.33 (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 139, at 817 (Vernon).

within fifteen days after they are sent notification that review has been granted.¹⁹⁹ Additionally, the court may require oral argument in certain cases. Each side is entitled to a total of twenty minutes in which to present his argument, and petitioner's counsel is entitled to open and conclude the arguments.²⁰⁰

c. Opinions

The Court of Criminal Appeals will decide each case in which it grants discretionary review by written opinion. Any judge may file a concurring or dissenting opinion.²⁰¹ Whether the opinion is to be published, and whether it will be signed or issued per curiam, are determinations made by the majority of the judges.²⁰²

d. Rehearing

A motion for rehearing may be filed within fifteen days after an opinion by the Court of Criminal Appeals is delivered.²⁰³ No reply is necessary absent the court's request, and oral argument on the motion will not be entertained.²⁰⁴ The motion will be granted and the case set for submission if five judges of the court conclude that rehearing should be granted in whole or in part; otherwise it will be denied.²⁰⁵

If the motion is granted, the case may be submitted with or without oral argument, at the court's discretion.²⁰⁶ If oral argument is permitted, each side will be limited to fifteen minutes.²⁰⁷ If the court changes the disposition of the case on rehearing, the losing party may file a motion for rehearing within fifteen days after the opinion on rehearing is delivered, and the procedures outlined above will apply.²⁰⁸

199. See TEX. CRIM. APP. R. 305. See generally Appellate Timetable III, IV at 244-45.

200. See TEX. CRIM. APP. R. 307.

201. See TEX. CODE CRIM. PRO. ANN. art. 44.24(d) (Vernon 1979), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 133, at 816 (Vernon).

202. See TEX. CRIM. APP. R. 308(a).

203. See TEX. CRIM. APP. R. 309(a). See generally Appellate Timetable III, IV at 244-45.

204. See TEX. CRIM. APP. R. 309(b).

205. See TEX. CRIM. APP. R. 309(c).

206. See TEX. CRIM. APP. R. 309(e).

207. See *id.*

208. See TEX. CRIM. APP. R. 309(f).

e. *Finality and Mandate*

A decision of the Court of Criminal Appeals becomes final fifteen days after the ruling on the final motion for rehearing, or from the delivery of the decision if there is no motion for rehearing.²⁰⁹ The clerk of the Court of Criminal Appeals then issues a mandate to the court of appeals.²¹⁰

H. *Duties of County Attorneys, District Attorneys, and the State Prosecuting Attorney*

The duties of the county attorneys, district attorneys, and the State Prosecuting Attorney, and how they relate, are clarified. Under the previous statutes, neither the county nor the district attorneys were explicitly required to represent the State on appeal of criminal convictions, although as a practical matter they generally did so with the State Prosecuting Attorney.²¹¹ County and district attorneys are now explicitly required to represent the State on appeal from cases which they prosecuted in the trial court.²¹² The State Prosecuting Attorney may provide them with assistance before the courts of appeals if they so request or if the State Prosecuting Attorney believes the interests of justice require it.²¹³ The primary responsibility to represent the State shifts to the State Prosecuting Attorney in cases before the Court of Criminal Appeals, with assistance to be provided by the district and county attorneys.²¹⁴

I. *Disposition of Appeals Pending in the Court of Criminal Appeals on September 1, 1981*

To implement the purpose of the constitutional amendment to reduce the serious backlog of cases pending before the Court of

209. See TEX. CODE CRIM. PRO. ANN. art. 42.04a(c), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 116, at 810 (Vernon); TEX. CRIM. APP. R. 310.

210. See TEX. CODE CRIM. PRO. ANN. art. 42.04a(a), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 135, at 817 (Vernon); TEX. CRIM. APP. R. 310.

211. See TEX. CODE CRIM. PRO. ANN. arts. 2.01, 2.02 (Vernon 1977).

212. See *id.* art. 2.01, 2.02, as amended by 1981 Tex. Sess. Law Serv., ch. 291, §§ 98, 99, at 801 (Vernon).

213. See TEX. REV. CIV. STAT. ANN. art. 1811 (Vernon Supp. 1980-1981), as amended by 1981 Tex. Sess. Law Serv., ch. 291, § 30, at 776 (Vernon).

214. See *id.* as amended.

Criminal Appeals, provision has been made to distribute a portion of the pending non-death penalty appeals among the courts of appeals on which the number of judges have been increased to meet the workload.²¹⁵ The statute provides for the transfer to the courts of appeals receiving new judges of not more than seventy-five cases for each new judge when he is seated.²¹⁶ The remainder of the cases, but not less than 1800, will be retained in the Court of Criminal Appeals.²¹⁷

The constitutionality of such a procedure was debated when this measure was before the legislature. The suggestion was raised that such a procedure might offend *ex post facto*, due process, or equal protection clauses of the United States Constitution.

United States Supreme Court cases, however, have held that procedural changes do not come within the *ex post facto* provisions.²¹⁸ A defendant does not have a vested right to have his case disposed of under those procedures in effect at the time of the commission of the offense.²¹⁹ Furthermore, neither the equal protection clause nor the due process clause compel a state to afford a criminal defendant any appeal whatsoever from a criminal conviction;²²⁰ they simply require that if any appellate process is established, access to the appellate system be free from arbitrary discrimination.²²¹ No defendant in a criminal case in Texas will be denied access to an appellate forum by virtue of the new procedures established; each will be afforded substantially equal access

215. See 1981 Tex. Sess. Law Serv., ch. 291, § 149, at 820 (Vernon).

216. See *id.* § 149, at 820.

217. See *id.* § 149, at 820.

218. See *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *Mallett v. North Carolina*, 181 U.S. 589, 597 (1901); *Duncan v. Missouri*, 152 U.S. 377, 382-83 (1894); U.S. CONST. art. 1, § 10, cl 1.

219. See *Mallett v. North Carolina*, 181 U.S. 589, 597 (1901).

220. See *Abney v. United States*, 431 U.S. 651, 656 (1977) (right to appeal in criminal cases "[i]s purely a creature of statute"); *Estelle v. Dorough*, 420 U.S. 534, 536 (1975) (federal constitution provides no right of state appellate review for state convictions); *Ross v. Moffitt*, 417 U.S. 600, 611 (1974) ("[S]tate need not provide any appeal at all."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (although state not required to provide appellate review, if such review is provided it must comport with due process and equal protection clauses); *State v. Jackson*, 16 S.W. 829, 829-30 (Mo. 1891) (amendment to Missouri state constitution providing for appellate court with exclusive criminal jurisdiction did not violate defendant's right to due process and equal protection of the laws).

221. See, e.g., *Estelle v. Dorough* 420 U.S. 534, 536 (1975); *Griffin v. Illinois*, 351 U.S. 12, 18-20 (1956); *Dowd v. United States ex rel Cook*, 340 U.S. 206, 208 (1951).

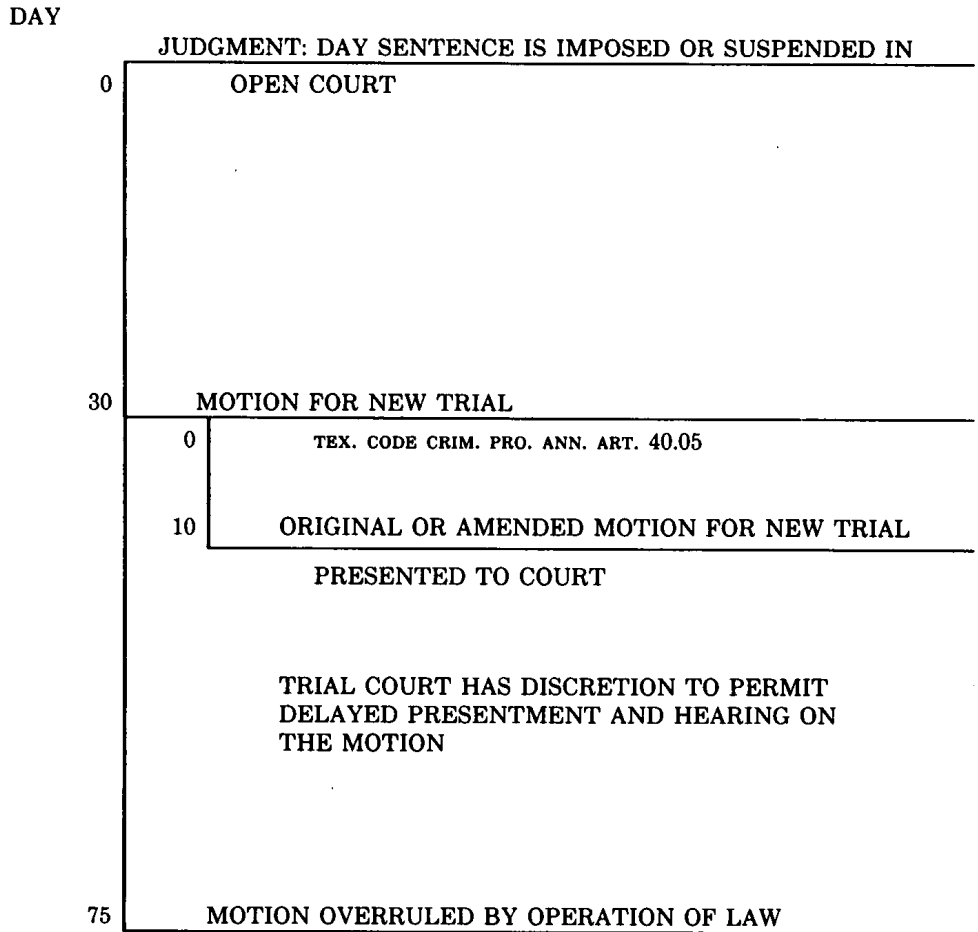
to appellate review.

J. Conclusion

The rapid disposition of criminal cases through expediting appeals should be the result of the constitutional amendment, the implementing legislation, and the rules. There will be a shift in the nature of the review exercised by the Court of Criminal Appeals in non-death penalty cases; the court will now concentrate on those cases involving important legal issues of wide application the resolution of which is necessary to the criminal jurisprudence of the State. The courts of appeals will review all appeals, except those in death penalty cases, to determine whether error has been committed in the trial court and whether the evidence supports the convictions.

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APPELLATE TIME TABLE I
MOTION FOR NEW TRIAL



*The authors wish to express their gratitude to John W. Berry, Articles Editor, for his assistance in the preparation of the Appellate Timetables.

APPELLATE TIME TABLE II

DEFENDANT'S APPEAL TO COURT OF APPEALS

DAY

0	DAY SENTENCE IS IMPOSED, OR, IF FILED, MOTION FOR NEW TRIAL IS OVERRULED
15	NOTICE OF APPEAL
0	TEX. CODE CRIM. PRO. ANN. art. 44.08(a)
20:(a)	APPELLANT DESIGNATES MATTER TO BE INCLUDED IN RECORD TEX. CODE CRIM. PRO. ANN. art. 40.09(2)
20:(b)	AFFIDAVIT IN SUPPORT OF FREE TRANSCRIPT DUE TO INDIGENCY TEX. CODE CRIM. PRO ANN. art. 40.09(5)
30	STATE DESIGNATES MATTER TO BE INCLUDED IN RECORD TEX. CODE CRIM. PRO. ANN. art. 40.09(2)
75	FORMAL BILL OF EXCEPTIONS
0	TEX. CODE CRIM. PRO. ANN. art. 40.09(6)(a) (Extension of time granted for good cause shown) TEX. CODE CRIM. PRO. ANN art. 40.09(13)
10	OBJECTIONS OF OPPOSING COUNSEL TO BILL
0	TEX. CODE CRIM. PRO. ANN. art. 40.09(6)(a)
10	PRESENTATION OF BILL OF EXCEPTIONS TO TRIAL COURT
100	TEX. CODE CRIM. PRO. ANN. art. 40.09(6)(a) IF NO ACTION TAKEN, TIMELY FILED BILL OF EXCEPTIONS APPROVED WITHOUT QUALIFICATION TEX. CODE CRIM. PRO. ANN. art. 40.09(6)(a)
	NOTICE OF COMPLETION OF RECORD MAILED
0	
15	OBJECTIONS TO RECORD DUE
	TEX. CODE CRIM. PRO. ANN. art. 40.09(f)
	ABSENT OBJECTIONS, COURT APPROVES RECORD OR
0	NOTIFIES PARTIES OF INTENDED MODIFICATIONS TEX. CODE CRIM. PRO. ANN. art. 40.09(7)
5	OBJECTIONS TO TRIAL COURT'S INTENDED ACTION DUE TEX. CODE CRIM. PRO. ANN. art. 40.09(7)
20	IF RECORD NOT APPROVED, HEARING HELD, APPROPRIATE ORDERS ENTERED, RECORD APPROVED TEX. CODE CRIM. PRO. ANN. art. 40.09(7)

APPELLATE TIME TABLE II (cont'd)

DEFENDANT'S APPEAL TO COURT OF APPEALS

DAY

NOTICE OF APPROVAL OF RECORD MAILED	
0	
30	APPELLANT'S BRIEF DUE AT COURT OF APPEALS
0	TEX. CODE CRIM. PRO. ANN. art. 40.09 (9) TEX. CRIM. APP. R. 202(b) 1 original and 3 copies
30	STATE'S BRIEF DUE AT COURT OF APPEALS
	TEX. CODE CRIM. PRO. ANN. art. 40.09 (10) TEX. CRIM. APP. R. 202(b) 1 original and 3 copies
NOTICE OF DATE CASE SET FOR SUBMISSION	
0	TEX. CRIM. APP. R. 305
15	REQUEST FOR ORAL ARGUMENT
	TEX. CRIM. APP. R. 305
PANEL DECISION DELIVERED	
0	
15	MOTION FOR REHEARING
	TEX. CRIM. APP. R. 208(b)
16	ABSENT MOTION FOR REHEARING DECISION IS
	'FINAL RULING' TEX. CRIM. APP. R. 209(c)
RULING ON REHEARING	
1	DECISION BECOMES 'FINAL RULING' DAY AFTER
0	MOTION FOR REHEARING DENIED OR DAY AFTER DECISION ON REHEARING DELIVERED
	TEX. CRIM. APP. R. 209(c)
45	UNLESS PETITION FOR REVIEW TIMELY
	FILED (TIMETABLE III) OR COURT OF CRIMINAL APPEALS OR JUDGE ORDERS DISCRETIONARY REVIEW (TIMETABLE IV) 'FINAL RULING' BECOMES FINAL DECISION AND MANDATE ISSUES
	TEX. CRIM. APP. R. 209(b), (c)

APPELLATE TIME TABLE III

DISCRETIONARY REVIEW BY COURT OF CRIMINAL APPEALS WITH PETITION DAY

DAY JUDGMENT OF COURT OF APPEALS BECOMES	
0	'FINAL RULING' TEX. CRIM. APP. R. 209(c)
30	PETITION FOR REVIEW FILED WITH COURT OF APPEALS
0	TEX. CODE CRIM. PRO. ANN. art. 44.45(b) TEX. CRIM. APP. R. 304(a) 10 legible copies TEX. CRIM. APP. R. 304(d)(8)
15	PETITION AND RECORD FORWARDED TO COURT OF CRIMINAL APPEALS TEX. CRIM. APP. R. 304(e)
30	RESPONDENT MAY FILE REPLY WITH COURT OF CRIMINAL APPEALS TEX. CRIM. APP. R. 306(b)
COURT OF CRIMINAL APPEALS REFUSES REVIEW	
0	TEX. CODE CRIM. PRO. ANN. art. 44.45(a)
16	'FINAL RULING' OF COURT OF APPEALS BECOMES FINAL DECISION TEX. CODE CRIM. PRO. ANN. art. 42.04a(b)(B)(2) TEX. CRIM. APP. R. 209(b)(2)
COURT OF CRIMINAL APPEALS GRANTS REVIEW	
PARTIES NOTIFIED REVIEW HAS BEEN GRANTED	
0	TEX. CRIM. APP. R. 305
15	PARTY INFORMS CLERK OF DESIRE FOR ORAL ARGUMENT TEX. CRIM. APP. R. 305
30	PETITIONER'S BRIEF DUE
0	TEX. CODE CRIM. PRO. ANN. art. 40.09(a) 1 original and 10 copies TEX. CRIM. APP. R. 304(i)
30	RESPONDENT'S BRIEF DUE TEX. CODE CRIM. PRO. ANN. art. 40.09(10)
WRITTEN OPINION BY COURT OF CRIMINAL APPEALS DELIVERED	
0	
15	MOTION FOR REHEARING TEX. CRIM. APP. R. 309(a)
	RULING ON MOTION FOR REHEARING
0	
16	ABSENT SECOND MOTION FOR REHEARING DECISION OF COURT OF CRIMINAL APPEALS BECOMES FINAL TEX. CODE CRIM. PRO. ANN. art. 42.04a(c) TEX. CRIM. APP. R. 310.

APPELLATE TIMETABLE IV

DISCRETIONARY REVIEW BY COURT OF CRIMINAL APPEALS WITHOUT PETITION

