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Federal Conviction for Offense Not Constituting Felony under Texas Law May be Used to Enhance Punishment under Section 12.42 of Texas Penal Code When Federal Conviction in Punishable by Possible Confinement in Prison.

Leo D. Figueroa

CRIMINAL LAW—Sentencing—Federal Conviction for Offense Not Constituting Felony Under Texas Law May be Used to Enhance Punishment Under Section 12.42 of Texas Penal Code When Federal Conviction is Punishable by Possible Confinement in Prison.

Ex parte Blume,
618 S.W.2d 373 (Tex. Crim. App. 1981).

In August 1978, Lynn Dale Blume was convicted of felony possession of marihuana.[1] His punishment was enhanced from a third degree felony to a second degree felony on the basis of a prior felony conviction in federal court.[2] Blume applied to the Texas Court of Criminal Appeals for a writ of habeas corpus alleging that his prior federal conviction was not a felony offense under Texas law, thus it could not be used to enhance his punishment.[3] The court of criminal appeals remanded Blume's application to the trial court for determination of whether his federal conviction was, in fact, used to enhance his punishment.[4] The trial court found the federal conviction had been used to enhance Blume's punishment, and recommended that his punishment be set aside because the prior federal conviction was not a felony under Texas law.[5] *Held*—Relief denied. A federal conviction for an offense not constituting a felony under Texas law may be used to enhance punishment under section 12.42 of the Texas Penal Code when the federal conviction is punishable by possible confinement in prison.[6]

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1. *Ex parte* Blume 618 S.W.2d 373, 374 (Tex. Crim. App. 1981).
2. *See id.* at 374. The statute under which Blume's punishment was enhanced provides for enhancement from a third-degree felony to a second-degree felony for a defendant who is convicted of a third-degree felony and who has previously been convicted of any felony. *See* TEX. PENAL CODE ANN. § 12.42(a) (Vernon 1974). A defendant convicted of a third-degree felony may be sentenced to a term of imprisonment not to exceed 10 years, while a defendant convicted of a second-degree felony may be sentenced to a maximum term of 20 years. *See* TEX. PENAL CODE ANN. §§ 12.34, 12.33 (Vernon 1974). Blume was convicted under a federal statute which prohibited the receiving or selling of stolen vehicles. *See Ex parte* Blume, 618 S.W.2d 373, 376 (Tex. Crim. App. 1981); 18 U.S.C. § 2313 (1976). The violation of this federal statute carried a possible punishment of up to five years in the penitentiary. *See* 18 U.S.C §§ 2313, 4083 (1976).
3. *See Ex parte* Blume, 618 S.W.2d 373, 374 (Tex. Crim. App. 1981).
4. *Ex parte* Blume, 607 S.W.2d 924, 924 (Tex. Crim. App. 1981) (en banc).
5. *Ex parte* Blume, 618 S.W.2d 373, 374 (Tex. Crim. App. 1981).
6. *Id.* at 374.

All states, through laws enacted by their legislatures, have the power to define crimes and set punishments.[7] Further, state legislatures may promulgate laws which provide enhanced penalties for those who are habitual criminals.[8] Recidivist statutes,[9] found in a majority of jurisdictions,[10] provide harsher punishment for those who, by their continued or repeated criminal conduct, show that they cannot conform to the laws of the state.[11] Most recidivist statutes have been held to be constitutional.[12]

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7. *See* Knapp v. Schweitzer, 357 U.S. 371, 375 (1958); Rochin v. California, 342 U.S. 165, 168 (1952); Moore v. Illinois, 55 U.S. (14 How.) 13, 18 (1852). *See generally* 12 ST. MARY'S L.J. 525, 526 (1980). The power of the state to punish those who disregard its laws is said to arise from the state's inherent police power to protect the public's "health, safety, and morals." *See generally* W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 117 (1972).

8. *See* Rummel v. Estelle, 445 U.S. 263, 268 (1980); Puckett v. Ellis, 157 F. Supp. 923, 926 (E.D. Tex. 1958); Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 104 (1971); Note, *Habitual Criminal Statute 12:42(d)—Open Door To Disproportionate Sentences*, 29 BAYLOR L. REV. 629, 629 (1977); Note, *Recidivist Laws Under The Eighth Amendment—Rummel v. Estelle*, 10 U. TOL. L. REV. 606, 609 (1979).

9. *See* People v. Rave, 3 N.E.2d 972, 976 (Ill. 1936). A recidivist is a habitual or incorrigible criminal. *Id.* at 976.

10. *See* ALA. CODE §§ 13A-5-9 to 5-10 (1977 & 1981 Supp.); ALASKA STAT. § 17-10-200 (1975); ARIZ. REV. STAT. ANN. § 13-604 (1978); ARK. STAT. ANN. §§ 41-1001 to -1005 (1977); CAL. PENAL CODE § 667.5 (Supp. 1981); COLO. REV. STAT. § 16-13-101 (Supp. 1980); CONN. GEN. STAT. ANN. §§ 53a-40 (West Supp. 1981); DEL. CODE ANN. tit. 11, §§ 4214-4215 (1979); FLA. STAT. ANN. § 775.084 (West 1976 & Supp. 1981); GA. CODE ANN. § 27.2511 (1978); HAWAII REV. STAT. § 706-661 to -662 (1976 & Supp. 1980); IDAHO CODE § 19-2514 (1979); ILL. ANN. STAT. ch. 38 § 33A-3 (Smith-Hurd 1981 Supp.); IND. CODE ANN. § 35-50-2-8 (Burns Supp. 1981); IOWA CODE ANN. § 902.8 (West 1979); KAN. STAT. ANN. § 21-4504 (Supp. 1980); KY. REV. STAT. § 532.080 (1975); LA. REV. STAT. ANN. § 15:529.1 (West 1981); MD. ANN. CODE art. 27, § 643B (Supp. 1980); MASS. ANN. LAWS ch. 279, § 25 (Michie/Law. Co-op 1980); MICH. STAT. ANN. §§ 28.1082, 28.1083 (Callaghan 1978 & Supp. 1981-1982); MINN. STAT. ANN. §§ 609.15 (West 1964); MISS. CODE ANN. §§ 99-19-81 to -83 (1981 Supp.); MO. ANN. STAT. § 558.016 (Vernon Supp. 1981); MONT. CODE ANN. § 95-1507 (Supp. 1977); NEB. REV. STAT. § 29-2221 to 2222 (1979); NEV. REV. STAT. § 207.010 (1979); N.H. REV. STAT. ANN. § 651:6 (1974); N.J. STAT. ANN. §§ 2A:85-12 to -13 (West 1969); N.M. STAT. ANN. § 40A-29-5 (1972); N.Y. PENAL LAW §§ 70.06 to .10 (McKinney 1975 & Supp. 1980); N.C. GEN. STAT. §§ 14-7.1 to 14-7.6 (1981); N.D. CENT. CODE § 12.1-32-09 (1976 & Supp. 1981); OKLA. STAT. ANN. tit. 21, § 51-54 (West 1958 & Supp. 1981-1982); OR. REV. STAT. §§ 161.725, 161.735 (1977); R.I. GEN. LAWS § 12-19-21 (1981); S.C. CODE ANN. § 17-553.1 (1962); S.D. CODIFIED LAWS ANN. §§ 22-7-7 to -12 (1969); TENN. CODE ANN. §§ 40-2801 to -2806 (1975); TEX. PENAL CODE ANN. § 12.42 (Vernon 1974); UTAH CODE ANN. §§ 76-8-1001 to -1002 (1978); VT. STAT. ANN. tit. 13, § 11 (1974); WASH. REV. CODE ANN. § 9.92.090 (1977); W. VA. CODE §§ 61-11-18 to -19 (1977); WIS. STAT. § 939.62 (West 1958 & Supp. 1981); WYO. STAT. §§ 6-1-109 to -111 (1977). There is also a federal habitual criminal statute. *See* 18 U.S.C. §§ 3575-3576 (1976).

11. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 276 (1980); Linley v. State, 501 S.W.2d 121, 123 (Tex. Crim. App. 1973); Mullins v. State, 409 S.W.2d 869, 872 (Tex. Crim. App. 1966). *See generally* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 104 (1971); Note, *Habitual Criminal Statute 12.42(d) - Open Door To Disproportionate Sentences*, 29 BAYLOR L. REV. 629, 629 (1977); Note, *Disproportionality In*

Recidivist statutes are only invoked against defendants who have been previously convicted of a felony offense.[13] Such statutes do not create a new offense, but rather enhance a defendant's punishment upon a subsequent conviction.[14] When prior convictions are to be used to enhance a defendant's punishment it must be shown that each succeeding crime was committed subsequent to the prior convictions becoming final.[15] The prior conviction must also be valid.[16] Additionally, recidivist statutes

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Sentences Of Imprisonment, 79 COLUM. L. REV. 1119, 1163 (1979); 12 ST. MARY'S L.J. 526, 529 (1980). One of the objectives of the Texas Penal Code is to prevent recidivism. *See* TEX. PENAL CODE ANN. § 1.02(1)(C) (Vernon 1974).

12. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 285 (1980) (mandatory life imprisonment under Texas recidivist statute not cruel and unusual punishment); Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (recidivist statute not violative of due process); Spencer v. Texas, 385 U.S. 554, 559-560 (1967) (recidivist statute not violative of ban on double jeopardy). *See generally* Note, *Disproportionality In Sentences Of Imprisonment*, 79 COLUM. L. REV. 1119, 1162 (1979). One court, however, overturned a life sentence imposed under a recidivist statute because it constituted cruel and unusual punishment, thereby violating the eighth amendment. *See* Hart v. Coiner, 483 F.2d 136, 143 (4th Cir. 1973), *cert. denied*, 415 U.S. 938, 938 (1974).

13. *See* TEX. PENAL CODE ANN. § 12.42 (Vernon 1974). The Texas recidivist statute is invoked upon conviction of a second felony. *Id.* California's recidivist statute is applied upon conviction of a second or subsequent violent felony. *See* CAL. PENAL CODE § 667.5(a)(b) (Deering Supp. 1981). New York's habitual criminal statute is available upon conviction for a second felony, two or more felonies, and two or more violent felonies. *See* N.Y. PENAL LAW § 70.06, 70.08, 70.10 (McKinney 1975 & Supp. 1980-81).

14. *See* Chandler v. Fretag, 348 U.S. 3, 7 (1954) (recidivist statute only imposes harsher punishment for second offense); McDonald v. Massachusetts, 180 U.S. 311, 312 (1901) (statute imposes heavier penalty on those found habitual criminals); Porier v. State, 591 S.W.2d 482, 484 (Tex. Crim. App. 1979) (Texas recidivist statute inflicts harsher punishment for repeated criminal conduct); *Ex parte* Davis, 412 S.W.2d 46, 51 (Tex. Crim. App. 1967) (creates no offense, merely provides increased punishment on subsequent convictions); Mullins v. State, 409 S.W.2d 869, 872 (Tex. Crim. App. 1966) (recidivist statute enhances punishment, it does not create a new offense).

15. *See, e.g.*, Jackson v. State, 449 S.W.2d 279, 281-82 (Tex. Crim. App. 1970) (enhancement disallowed where no finding that second conviction occurred after first); Wheat v. State, 442 S.W.2d 363, 366 (Tex. Crim. App. 1969) (enhancement proper where second conviction occurred after first as to both time of commission and conviction); Haines v. State, 391 S.W.2d 58, 60 (Tex. Crim. App. 1965) (no evidence that second conviction was committed after first conviction). Only a prior conviction which is final may be used to enhance punishment. *See, e.g.*, Davis v. Estelle, 529 F.2d 437, 440 (5th Cir. 1976) (probated or suspended sentence not final conviction for enhancement purposes); Mays v. Estelle, 505 F.2d 116, 117 (5th Cir. 1974) (probated sentence not final conviction under Texas enhancement statute); Aaron v. State, 546 S.W.2d 277, 279 (Tex. Crim. App. 1976) (use of conviction not yet final precluded at punishment phase of trial).

16. *See, e.g.*, Martinez v. Estelle, 612 F.2d 173, 175 (5th Cir. 1980) (prior conviction resulting from tricked confession may not be used to enhance punishment); *Ex parte* Stewart, 582 S.W.2d 144, 145 (Tex. Crim. App. 1979) (conviction based on fatally defective indictment not available to enhance sentence); *Ex parte* Rogers, 519 S.W.2d 861, 863 (Tex. Crim. App. 1975) (enhanced sentence of life imprisonment overturned when prior conviction

must be strictly construed.[17]

Courts are in disagreement whether a conviction in another jurisdiction may be used for enhancement purposes where the foreign conviction is not defined as a felony in the forum state.[18] Some courts have held that in order to utilize a prior felony conviction in another jurisdiction the foreign offense must be one which constitutes a felony in the state seeking enhancement.[19] Other courts have ruled that the prior conviction need

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invalid).

17. *See, e.g.*, Puckett v. Ellis, 157 F. Supp. 923, 926 (E.D. Tex. 1958) (Texas recidivist statute strictly construed); Tyra v. State, 534 S.W.2d 695, 698 (Tex. Crim. App. 1976) (habitual criminal statute strictly construed); Garcia v. State, 140 Tex. Crim. 340, 343-44, 145 S.W.2d 180, 181 (1940) (since habitual criminal statutes are harsh, strict construction required). *But see* TEX. PENAL CODE ANN. § 1.05(a) (Vernon 1974). Section 1.05 abolished the common law rule that penal statutes are to be strictly construed in favor of the accused, and states that provisions of the code are to be interpreted "according to the fair import of their terms, to promote justice and effect the objectives of the code." TEX. PENAL CODE ANN. § 1.05(a) (Vernon 1974); Bubany, *The Texas Penal Code of 1974*, 28 SW. L.J. 292, 294-95 (1975). The court of criminal appeals has not expressly abolished the rule of strict construction. *See* Searcy & Patterson, *Commentary on The Penalties For Repeat and Habitual Offenders*, TEX. PENAL CODE ANN. 26 (Vernon 1974). The court has, however, cited section 1.05 (a) without discussion. *See Ex parte* Mercado, 590 S.W.2d 464, 465 (Tex. Crim. App. 1979); Ahearn v. State, 588 S.W.2d 327, 337 (Tex. Crim. App. 1979). Citing section 1.05 (a), a recent dissenting opinion stated that the language of the code is to be interpreted according to the "fair import" of their terms. *See* Johnson v. State, 606 S.W.2d 894, 896 (Tex. Crim. App. 1980) (Clinton, J., dissenting). The objectives of the Texas Penal Code are, *inter alia*, to deter criminal activity, to rehabilitate those convicted of crimes, to prevent recidivism, to give fair warning of what is deemed criminal and the punishment therefor, to provide sentences proportionate to the crime, and to protect conduct that is blameless. *See* TEX. PENAL CODE ANN. § 1.02 (Vernon 1974). *Compare* Puckett v. Ellis, 157 F. Supp. 923, 926 (E.D. Tex. 1958) (Texas recidivist statute strictly construed) *and* Tyra v. State, 534 S.W.2d 695, 698 (Tex. Crim. App. 1976) (habitual criminal statute strictly construed) *with* U.S. v. McClain, 545 F.2d 988, 996 (5th Cir. 1977) (applying federal law) (strict construction doctrine not absolute, legislative intent governs) *and* Faulk v. State, 608 S.W.2d 625, 631 (Tex. Crim. App. 1980) (en banc) ("rule of statutory interpretation is to ascertain legislative intent in enacting statute by looking at language of statute itself").

18. *Compare* Tyrell v. Crouse, 422 F.2d 852, 853 (10th Cir. 1970) (sufficient that prior conviction was felony in convicting state) *and* People v. Swain, 607 P.2d 396, 397-98 (Colo. Ct. App. 1979) (no need for proof that out-of-state conviction would have been felony if committed in state) *with* State v. Silas, 589 P.2d 674, 675 (N.M. 1979) (conviction in another jurisdiction not felony under New Mexico law would not support enhanced sentence) *and* Clonce v. State, 588 P.2d 584, 591-92 (Okla. Crim. App. 1978) (for purposes of enhancement prior conviction in foreign jurisdiction must be denominated as penitentiary offense under Oklahoma law).

19. *See, e.g.*, State v. McMillian, 587 S.W.2d 342, 343 (Mo. Ct. App. 1979) (prior conviction of auto theft in Illinois properly used to enhance defendant's punishment where same act would have been felony in Missouri); State v. Silas, 589 P.2d 674, 675 (N.M. 1979) (conviction in another jurisdiction not felony under New Mexico law would not support enhanced sentence); Clonce v. State, 588 P.2d 584, 591-92 (Okla. Crim. App. 1978) (conviction in another jurisdiction can be used to enhance punishment under recidivist statute if

only be denominated as a felony in the jurisdiction which tried the prior conviction.[20]

Construing the former Texas Penal Code,[21] the Texas Court of Criminal Appeals in *Garcia v. State*[22] held a prior felony conviction in another jurisdiction could not be used for enhancement where the foreign offense was not one which was denounced as a felony by the laws of Texas.[23] The *Garcia* court partially based its decision on the legislature's failure to expressly provide for the use of prior felony convictions rendered by other jurisdictions in the enhancement statute.[24] The Texas legislature signifi-

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foreign offense would be penitentiary offense under Oklahoma law).

20. *See, e.g.*, Tyrell v. Crouse, 422 F.2d 852, 853 (10th Cir. 1970) (sufficient that prior conviction was felony in convicting state); People v. Swain, 607 P.2d 396, 397-98 (Colo. Ct. App. 1979) (no need for proof that out-of-state conviction would have been felony if committed in state); State v. Prince, 132 P.2d 146, 149 (Idaho 1942) (prior felony conviction in sister state need not be felony in forum state). Because of the lack of uniformity among jurisdictions as to whether a foreign offense must also be a felony under the laws of the forum state, it is helpful to look at the wording of their habitual criminal statutes. *Compare* COLO. REV. STAT. § 16-13-101 (1978 & Supp. 1980) (prior conviction "either in this state or elsewhere of a felony, or under the laws of any other state, . . . of a crime which if committed within this state would be a felony"); *and* IDAHO CODE § 19-2514 (1979) (prior conviction "whether . . . had within the state of Idaho or was had without the state of Idaho") *with* N.M. STAT. ANN. § 40A-29-5 (1972) (prior conviction "within this state of a felony, or . . . under the laws of any other state or . . . government . . . of a crime . . . which if committed within this state would be a felony") *and* OKLA. STAT. ANN tit. 21, § 54 (West 1958 & Supp. 1980-81) ("convicted in any other state . . . of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the penitentiary"). It should be noted that the language of the Oklahoma statute is contained in a separate provision within the habitual criminal section which specifically deals with prior convictions in other jurisdictions. *See* OKLA. STAT. ANN. tit. 21, § 54 (West 1958 & Supp. 1980-1981).

21. *See* TEX. PENAL CODE ANN. art. 62 (1925) (provided for enhancement if the defendant was convicted of the same offense or one of a similar nature). The definition of a felony under the old penal code provided that a felony was an "offense . . . to which is annexed, on conviction, any punishment prescribed in this code." *See* TEX. PENAL CODE ANN. art. 47 (1925).

22. 140 Tex. Crim. 340, 145 S.W.2d 180 (1940).

23. *See id.* at 343, 145 S.W.2d at 182; *see also* Puckett v. Ellis, 157 F. Supp. 923, 927 (E.D. Tex. 1958) (prior federal conviction must constitute felony under Texas law); *Ex parte* Scafe, 334 S.W.2d 170, 171 (Tex. Crim. App. 1960) (federal conviction for transporting rubber stamp not offense under Texas law); Clark v. State, 154 Tex. Crim. 581, 582-83, 230 S.W.2d 234, 235-36 (1950) (federal conviction of conspiracy to illegally possess explosives not crime under Texas law). The court in *Garcia* relied on the dictum in one of its prior decisions. *See* Garcia v. State, 140 Tex. Crim. 340, 342-43, 145 S.W.2d 180, 181 (1940). The case which the court relied on was Arnold v. State, 127 Tex. Crim. 89, 74 S.W.2d 997 (1934). In *Arnold*, the court rejected a defendant's argument that his punishment could not be enhanced under article 63 because one of his prior convictions was a federal offense. *See* Arnold v. State, 127 Tex. Crim. 89, 94, 74 S.W.2d 997, 999 (1934).

24. *See* Garcia v. State, 140 Tex. Crim. 340, 344, 145 S.W.2d 180, 181-82 (1940). The court noted the legislature could have used the words "in this or any other state" so that

cantly changed the language of Texas' enhancement statute when it enacted the present penal code in 1974.[25] Under article 62 of the old Penal Code a prior conviction could be used to enhance a defendant's punishment if it could be shown that the prior offense was of the same nature as the instant offense.[26] Subsections (a) through (c) of section 12.42 of the new Penal Code, which replaced article 62, however, contain no such limitation.[27] Furthermore, the definition of felony in the new Penal Code differs from its predecessor in that the new Penal Code does not mention the punishment provided for in the code.[28] Additionally, section 12.41 classifies, for enhancement purposes, those convictions obtained outside

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there would be no doubt that a prior felony conviction in another state could be used for enhancement though not a felony under Texas law. *See id.* at 344, 145 S.W.2d at 182. The court also reasoned that because enhancement statutes are harsh they are to be strictly construed. *See id.* at 343-44, 145 S.W.2d at 181. Finally, the court concluded that the legislature's failure to act after the *Arnold* decision constituted an endorsement of the court's construction of the statute. *See id.* at 344, 145 S.W.2d at 182; *see also Ex parte* Boehme, 158 Tex. Crim. 278, 288-89, 255 S.W.2d 206, 213 (1952) (Morrison, J., concurring) (leglislature met several times since decision was rendered and did not change or amend statute); Lockhart v. State, 150 Tex. Crim. 230, 235, 200 S.W.2d 164, 167-68 (1947) (on motion for rehearing) (legislature met many times after statute was construed and failed to amend, therefore, construction of statute by court was interpretation intended by legislature); Francis v. State, 90 Tex. Crim. 67, 73-74, 233 S.W. 974, 977 (1921) (when statute is revised without change presumption arises that legislature intended prior construction to govern). Legislative acquiescence alone will not preclude the court from reconsidering a prior decision. *See* Shivers v. State, 574 S.W.2d 147, 150 (Tex. Crim. App. 1978) (Dally, J., concurring). The United States Supreme Court has said, "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." Girouard v. United States, 328 U.S. 61, 69 (1946); *accord* Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970).

25. *See* Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. 413 (Vernon 1974). The practice commentary to section 12.42 states that subsections (a) through (c) of section 12.42 preserved prior article 62, except that under the new section the court is given more discretion as to the length of sentence it may impose upon habitual offenders, and there is no longer a requirement that the offense for which the defendant is on trial be of the same nature as the prior offense. *See id.*

26. *See, e.g.*, King v. State, 519 S.W.2d 651, 652 (Tex. Crim. App. 1975) (offenses must be similar); Doby v. State, 454 S.W.2d 411, 413 (Tex. Crim. App. 1970) (prior convictions not available to enhance punishment when not similar to instant offense); Cherry v. State, 447 S.W.2d 154, 158 (Tex. Crim. App. 1969) (prior conviction must be of same nature as primary offense).

27. *See* TEX. PENAL CODE ANN. § 12.42 (Vernon 1974). For example, subsection (a) of section 12.42 reads, in part, as follows: "If . . . defendant has been once before convicted of any felony . . . . " *Id.* § 12.42(a).

28. *Compare* 1925 Tex. Gen. Laws ch. 104 § 1, at 82 (felony is "offense . . . to which is annexed, on conviction, any punishment prescribed in this code" and "may . . . be punishable by death or by confinement in the penitentiary") *with* TEX. PENAL CODE ANN. § 1.07(a)(14) (Vernon 1974) ("felony means offense so designated by law or punishable by death or confinement in a penitentiary").

the code, including convictions obtained in other jurisdictions.[29] Although the revised Penal Code altered the language of the enhancement statute, the court of criminal appeals continued to follow *Garcia*.[30]

The Texas Court of Criminal Appeals, in *Ex parte Blume*,[31] held a federal conviction for an offense which does not constitute a felony under Texas law may be used to enhance punishment under section 12.42(a) of the Texas Penal Code when the federal conviction is punishable by possible confinement in a penitentiary.[32] The court expressly overruled earlier decisions which adhered to the rule established in *Garcia*,[33] reasoning they neglected to discuss the effects of the new Penal Code on the *Garcia* rule.[34] The majority relied upon a literal reading of the enhancement statute in conjunction with other pertinent provisions of the Penal Code.[35] It stressed the significance of the inclusion of section 12.41 which classifies, for purposes of enhanced sentencing under section 12.42, convictions ob-

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29. *See* Betancourt v. State, 590 S.W.2d 487, 488 (Tex. Crim. App. 1979); TEX. PENAL CODE ANN. § 12.41 (Vernon 1974). Section 12.41 provides that convictions under the former code, or convictions in foreign jurisdictions, shall be considered felonies of the third degree, if a prison term could possibly be assessed. *See* TEX. PENAL CODE ANN. § 12.41(1) (Vernon 1974).

30. *See* Montgomery v. State, 571 S.W.2d 18, 20 (Tex. Crim. App. 1978); *Ex parte* Smith, 548 S.W.2d 410, 412 (Tex. Crim. App. 1977). In *Montgomery*, the court of criminal appeals held a federal offense of making a false and fictitious statement to a licensed firearms dealer was not an offense under Texas law and, therefore, could not be used to enhance a defendant's punishment. *See* Montgomery v. State. 571 S.W.2d 18, 20 (Tex. Crim. App. 1978). The court, in *Montgomery*, simply cited prior case law construing the enhancement statute in the former Penal Code as controlling without discussing the effect of the new Penal Code. *See id.* at 19; *see also Ex parte* Smith, 548 S.W.2d 410, 413 (Tex. Crim. App. 1977).

31. 618 S.W.2d 373 (Tex. Crim. App. 1981).

32. *See id.* at 374.

33. *See* Montgomery v. State, 571 S.W.2d 18, 20 (Tex. Crim. App. 1978); *Ex parte* Smith, 548 S.W.2d 410, 412 (Tex. Crim. App. 1977); Garcia v. State, 140 Tex. Crim. 340, 344, 145 S.W.2d 180, 182 (1940).

34. *See Ex parte* Blume, 618 S.W.2d 373, 376 (Tex. Crim. App. 1981); *see also* Montgomery v. State, 571 S.W.2d 18, 20 (Tex. Crim. App. 1978); *Ex parte* Smith, 548 S.W.2d 410, 412 (Tex. Crim. App. 1977); Garcia v. State, 140 Tex. Crim. 340, 344, 145 S.W.2d 180, 182 (1940). The majority in *Blume* noted that because the court in *Garcia* was without statutory guidance it was forced to rely on the dictum in *Arnold*. *See Ex parte* Blume, 618 S.W.2d 373, 375 (Tex. Crim. App. 1981); *see also* Garcia v. State, 140 Tex. Crim. 340, 342-43, 145 S.W.2d 180, 181 (1940); *cf.* Arnold v. State, 127 Tex. Crim. 89, 94, 74 S.W.2d 997, 999 (1934).

35. *See Ex parte* Blume, 618 S.W.2d 373, 375-76 (Tex. Crim. App. 1981). More specifically, the court compared the wording of the enhancement statute and the definition of a felony as it appeared in the old Penal Code with that in the new Penal Code. *See id.* at 375-76. The court noted that former articles 62 and 63 used the term "a felony", whereas section 12.42 used the term "any felony". *See id.* at 374-76. The court also contrasted the definitions of felony as contained in both the old and new Penal Codes. *See id.* at 374-76.

tained in foreign jurisdictions.[36] Contrasting the former Penal Code with the new one, the court stated that the obvious intention of the legislature was to make convictions for felonies in other jurisdictions available for enhancement purposes.[37] Judge Clinton, in his concurring opinion, agreed with the result reached by the court, inasmuch as the Texas Legislature had clearly expressed its intention to change prior case law concerning enhancement.[38] He warned, however, that the court's decision could lead to possible conflicts with public policy.[39]

In a strong dissent, Judge Teague argued that the court's decision in *Montgomery* should have been followed on the ground of *stare decisis*.[40] The dissent's argument centered on the Texas Legislature's failure to act after the court's decision in *Montgomery*.[41] By failing to act in 1978, the legislature impliedly endorsed that decision.[42] Additionally, Judge Teague stated that section 12.42 was simply a recodification of the former Penal Code, and that the wording was changed because of the new categorization of felonies.[43] Judge Teague echoed Judge Clinton's assessment that the court's decision could give rise to a possible conflict with the public policy of the state of Texas.[44] Finally, the dissent noted that the majority seemed to have ignored the strict rule of construction generally applied to enhancement statutes.[45]

The holding in *Blume* is consistent with the import of the language in the new enhancement statute.[46] The differences between the wording of

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36. *See id.* at 376. Section 12.41 reads as follows: "For purposes of this chapter, any conviction not obtained from a prosecution under this code shall be classified as follows: (1) 'felony of the third degree' if confinement in a penitentiary is affixed to the offense as a possible punishment, ... " TEX. PENAL CODE ANN. § 12.41 (Vernon 1974).

37. *See Ex parte* Blume, 618 S.W.2d 373, 376 (Tex. Crim. App. 1981).

38. *See id.* at 377 (Clinton, J., concurring).

39. *See id.* at 377 (Clinton, J., concurring). Judge Clinton posed a hypothetical situation in which constitutional protections might be implicated. For example, a citizen of Texas might have a prior felony conviction in a sister state for conducting a bingo game. In a recent election the voters of the state of Texas empowered the legislature to authorize and regulate bingo games. Under the court's decision in *Blume* this prior conviction could be used to enhance punishment. *See id.* at 377 (Clinton, J., concurring).

40. *See id.* at 377 (Teague, J., dissenting).

41. *See id.* at 377-78 (Teague, J., dissenting).

42. *See id.* at 377-78 (Teague, J., dissenting).

43. *See id.* at 378 (Teague, J., dissenting).

44. *See id.* at 378 (Teague, J., dissenting).

45. *See id.* at 378 (Teague, J., dissenting).

46. *See* Faulk v. State, 608 S.W.2d 625, 631 (Tex. Crim. App. 1980) ("rule of statutory interpretation is to ascertain legislative intent in enacting statute by looking at language of statute itself."). The Texas Penal Code provides that the "code shall be construed according to the fair import of their terms . . . . " *See* TEX. PENAL CODE ANN. § 1.05(a) (Vernon 1974).

the new enhancement statute and the former one are significant.[47] Under the old enhancement statute the prior conviction had to be the same as or similar in nature to the primary offense.[48] On the other hand, section 12.42 of the new Penal Code provides that "any felony" may be used to enhance a defendant's punishment, provided, however, the prior offense carried as a possible punishment confinement in a penitentiary.[49] By rejecting the requirement under the old enhancement statute that the prior conviction resemble the instant offense, the obvious intent of the legislature was to expand the scope of the enhancement statute to incorporate a wider range of felonies.[50] Although the definition of the term "felony" in the former code and in our present Penal Code contain similar language,[51] the definition of felony in the former began by first defining the term "offense" as an act "forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this code."[52] Unlike article 47 of the former Penal Code, there is no language in the definition of felony in the new Penal Code which limits the definition to punishments provided for in the code.[53] Additionally, the present Penal Code contains section 12.41 which specifically addresses the question of how felony convictions in other jurisdictions are to be treated for enhancement purposes.[54] Section 12.41 classifies "for purposes of enhancement of punishment under section 12.42, those convictions obtained either under our

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47. *See* Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. 413 (Vernon 1974).

48. *See, e.g.*, King v. State, 519 S.W.2d 651, 652 (Tex. Crim. App. 1975) (offenses must be similar); Doby v. State, 454 S.W.2d 411, 413 (Tex. Crim. App. 1970) (prior convictions not available to enhance punishment when not similar to instant offense); Cherry v. State, 447 S.W.2d 154, 158 (Tex. Crim. App. 1969) (prior conviction must be of same nature as primary offense).

49. *See* TEX. PENAL CODE ANN. §§ 12.41, .42 (Vernon 1974).

50. *Compare* Tex. Penal Code Ann. art. 62 (1925) (prior conviction must be same as or similar in nature to the instant offense) *with* TEX. PENAL CODE ANN. § 12.42 (Vernon 1974) (prior conviction of any felony).

51. *Compare* Tex. Penal Code Ann. art. 47 (1925) *with* TEX. PENAL CODE ANN. § 1.07(a)(14) (Vernon 1974).

52. Tex. Penal Code Ann. art. 47 (1925). Unlike article 47, there is no definition of the term "offense" in the new Penal Code. *See* TEX. PENAL CODE ANN. § 1.07 (Vernon 1974). The holding in *Garcia* was, therefore, consistent with the definition of the term offense in the former code. *See* Garcia v. State, 140 Tex. Crim. 340, 343, 145 S.W.2d 180, 182 (1940); TEX. PENAL CODE ANN. art. 47 (1925).

53. *See* TEX. PENAL CODE ANN. § 1.07(a)(14) (Vernon 1974). By their failure to incorporate such a limitation in the new Penal Code, it would seem that the legislature intended to enlarge the ambit of the term felony. *See Ex parte* Blume, 618 S.W.2d 373, 376 (Tex. Crim. App. 1981).

54. *See* Betancourt v. State, 590 S.W.2d 487, 489 (Tex. Crim. App. 1979), *cert. denied*, 446 U.S. 942 (1979); TEX. PENAL CODE ANN. § 12.41 (Vernon 1974).

former Penal Code or under those Penal Codes of other jurisdictions."[55] Section 12.41 provides that convictions under the former code, or convictions in foreign jurisdictions, shall be considered felonies of the third degree if a prison term could possibly be assessed.[56]

The dissent's arguments opposing the holding in *Blume* are not well reasoned. The contention that the legislature's inaction after the court's decisions in *Montgomery* and *Smith* evidenced an intention that the legislature endorsed those decisions is unsound, inasmuch as mere inaction on the part of the legislature should never be a controlling factor in determining legislative intent.[57] Further, the dissent's reliance on *Betancourt v. State*[58] is misplaced as that court clearly stated that section 12.41 of the Penal Code classifies foreign convictions for purposes of enhancement.[59] In addition, the argument that the court failed to recognize and apply the well-established rule that recidivist statutes are to be strictly construed is no longer valid.[60] Section 1.05 of the Penal Code expressly abolished the common law rule that penal statutes are to be strictly construed in favor of the accused, rather provisions of the code are to be

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55. *See* Betancourt v. State, 590 S.W.2d 487, 489 (Tex. Crim. App. 1979), *cert. denied*, 446 U.S. 942 (1979) The court, in *Betancourt*, also stated that "standing alone section 12.41 is only definitional, without any operative effect unless coupled with some subsection of section 12.42 for penalty purposes." *Id.* at 489.

56. *See* TEX. PENAL CODE ANN. § 12.41(1) (Vernon 1974). There is at least one other state which has a separate provision in its enhancement statute that classifies prior convictions in other jurisdictions. *See* OKLA. STAT. ANN. tit. 21, § 54 (West 1958 & Supp. 1980-1981). It is interesting to note that the Oklahoma statute explicitly states that before a prior conviction in a sister state may be used to enhance a defendant's punishment it must be shown that the prior offense would also be a felony in Oklahoma. *See id.*

57. *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970) (conclusive weight should not be given to Congress' failure to respond); Girouard v. United States, 328 U.S. 61, 69 (1946) ("it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law"); Shivers v. State, 574 S.W.2d 147, 150 (Tex. Crim. App. 1978) (Dally, J., concurring) (legislative inaction will not preclude a court from re-examining a prior decision). Cases which have implied legislative endorsement of court decisions due to legislative inaction are distinguishable from *Ex parte Blume* in that, in those decisions, a considerable period of time had elapsed between cases, or the statute in issue was merely a re-enactment of a prior statute. *See* Lockhart v. State, 150 Tex. Crim. 230, 235, 200 S.W.2d 164, 167-68 (1947) (on motion for rehearing); Francis v. State, 90 Tex. Crim. 67, 73-74, 233 S.W. 974, 977 (1921). In *Blume*, however, the enhancement statute was not simply re-enacted, rather its language was significantly changed. *See Ex parte* Blume, 618 S.W.2d 373, 374-76 (Tex. Crim. App. 1981).

58. 590 S.W.2d 487 (Tex. Crim. App. 1979), *cert denied*, 446 U.S. 942 (1979).

59. *See Ex parte* Blume, 618 S.W.2d 373, 379 (Tex. Crim. App. 1981) (Teague, J., dissenting); Betancourt v. State, 590 S.W.2d 487, 489 (Tex. Crim. App. 1979), *cert. denied*, 446 U.S. 942 (1979).

60. *See Ex parte* Blume, 618 S.W.2d 373, 378 (Tex. Crim. App. 1981) (Teague, J., disssenting).

interpreted "according to the fair import of their terms, to promote justice and effect the objectives of the code."[61]

Under *Blume*, it is possibile for a defendant's punishment to be enhanced by a conviction for a crime which does not constitute an offense in Texas.[62] This result would be consistent with previous decisions in which the court of criminal appeals has affirmed enhanced sentences of defendants whose prior convictions were felonies under the old Penal Code, but merely misdemeanors under the present code.[63] Moreover, the determin-

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61. *See* TEX. PENAL CODE ANN. §§ 1.05, 1.02 (Vernon 1974); Bubany, *The Texas Penal Code of 1974*, *28* S.W. L.J. 292, 294-295 (1975). The Texas Court of Criminal Appeals has cited section 1.05 (a) without discussion. *See Ex parte* Mercado, 590 S.W.2d 464, 465 (Tex. Crim. App. 1979); Ahearn v. State, 588 S.W.2d 327, 337 (Tex. Crim. App. 1979). In discussing the purpose of the Texas recidivist statute the United States Supreme Court has said, "Thus the interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is an addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." Rummel v. Estelle, 445 U.S. 273, 276 (1980). The holding in *Blume*, therefore, is consistent with the proposition that the overriding concern of a court which is interpreting a statute is to give effect to the intention of the legislature. *Compare* United States v. Sayklay, 542 F.2d 942, 944 (5th Cir. 1976) (applying federal law) (criminal statutes are subject to strict construction) *and* Tyra v. State, 534 S.W.2d 695, 698 (Tex. Crim. App. 1976) (habitual criminal statute strictly construed) *with* United States v. McClain, 545 F.2d 988, 996 (5th Cir. 1977) (applying federal law) (strict construction doctrine not absolute, legislative intent governs) *and* Faulk v. State, 608 S.W.2d 625, 630 (Tex. Crim. App. 1980) (en banc) ("rule of statutory interpretation is to ascertain legislative intent in enacting statute by looking at language of statute itself"). Although the dissent argued that the court should have adhered to the rule of stare decisis by reaffirming the decisions in *Montgomery* and *Smith*, that rule is not absolute. *See* Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("stare decisis is principle of policy not mechanical formula of adherence to latest decision . . . "). "The rule of stare decisis should control only if it makes sense or follows logical reasoning." Middleton v. State, 476 S.W.2d 14, 16 (Tex. Crim. App. 1972). *See also* Shivers v. State, 574 S.W.2d 147, 150 (Tex. Crim. App. 1978) (Dally, J., concurring).

62. *See Ex parte* Blume, 618 S.W.2d 373, 377-78 (Tex. Crim. App. 1981) (Teague, J., dissenting). Judge Teague, quoting *Garcia*, wrote "[I]nasmuch as each state has a criminal code peculiar to itself, so that what may be regarded as an infamous crime in one state may not be in another . . . . " *See id.* at 378. Judge Teague did not, however, specifically refer to Judge Clinton's concurring opinion which seems to state the same proposition, but in a different way. *See id.* at 377 (Clinton, J., concurring).

63. *See* Alvarado v. State, 596 S.W.2d 904, 906 (Tex. Crim. App. 1980) (prior felony conviction under old Penal Code could be used to enhance defendant's punishment for burglary under new Penal Code, despite fact that prior offense no longer felony under new code). The holding in *Blume* is consistent with the decision in *Alvarado*. *Compare* Alvarado v. State, 596 S.W.2d 904, 906 (Tex. Crim. App. 1981) (prior felony conviction under old Penal Code need not be felony under present Code) *with Ex parte* Blume, 618 S.W.2d 373, 374 (Tex. Crim. App. 1981) (federal conviction for offense not constituting felony in Texas may be used to enhance punishment under § 12.42 of Texas Penal Code when federal conviction punishable by possible confinement in penitentiary).

ing factor under section 12.41 is whether the prior conviction was punishable by possible confinement in a penitentiary, not whether the prior conviction is one which is a felony under our present Penal Code.[64]

Blume provided the Texas Court of Criminal Appeals with an opportunity to reassess its traditional stance on the issue of enhancement based on prior convictions. In so doing, the court recognized that the obvious differences in language between the former and present penal codes represented a deliberate attempt by the legislature to enhance the sentences of repeat offenders, regardless of the nature of the offenders previous foreign conviction. The determinative issue under section 12.41 is simply whether the prior conviction was punishable by incarceration. The code, in light of *Blume*, may be construed to allow enhancement on the basis of a conviction for conduct which is not prohibited by Texas law. Despite the harshness of such an outcome, the majority in *Blume* declined to give a strict reading of the statute in deference to the perceived will of the legislature.

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64. *See* Betancourt v. State, 590 S.W.2d 487, 489 (Tex. Crim. App. 1979), *cert. denied*, 446 U.S. 942 (1979); TEX. PENAL CODE ANN. § 12.41 (Vernon 1974); Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. 413 (Vernon 1974). The holding in *Blume* follows other jurisdictions. *See, e.g.*, Tyrrell v. Crouse, 422 F.2d 852, 853 (10th Cir. 1970) (sufficient that prior conviction was felony in convicting state); People v. Swain, 607 P.2d 396, 397-98 (Colo. App. 1979) (no need for proof out-of-state conviction would have been felony if committed in forum state); State v. Prince, 132 P.2d 146, 149 (Idaho 1942) (prior felony conviction in sister state need not be offense defined as felony in forum state). The wording of their statutes was in each case determinative. *Compare* COLO. REV. STAT. § 16-13-101 (1978 & Supp. 1980) (prior conviction "either in this state or elsewhere of a felony, or under the laws of any other state . . . . ") *and* IDAHO CODE § 19-2514 (1979) (prior conviction "whether had within the state of Idaho or was had without the state of Idaho . . . . ") *with* N.M. STAT. ANN. § 40A-29-5 (1972) (prior conviction " . . . within this state of a felony, or under the laws of any other government . . . , of a crime . . . which if committed within this state would be a felony") *and* OKLA. STAT. ANN tit. 21, § 54 (West 1958) ("convicted in any other state . . . of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in a penitentiary").