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REASONS FOR CASE REVERSAL IN TEXAS: AN ANALYSIS

SUSAN L. GELLIS*

I. Purpose and Scope of Inquiry

The purpose of this study is to analyze the reasons the appellate courts of Texas reverse cases. If we can determine the reasons for reversals, we can assist in avoiding the waste of time and resources.

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We can make the judicial system more efficient by revising laws, rules, and practices, by educating judges and lawyers about the weaknesses in the system, and by seeking clarity in the legislation enacted.

The scope of this article encompasses a review of reversals handed down by the Texas appellate courts during a portion of 1983. The Texas appeals courts include the supreme court, which is the highest state appellate court for civil matters,[1] the court of criminal appeals, which is the highest state appellate court for criminal matters,[2] and the fourteen courts of appeals, which have intermediate appellate jurisdiction in both civil and criminal cases.[3] Supreme court reversals handed down in the combined five-month period from May 1 through July 31, 1983, and October 1 through November 30, 1983, were examined.[4] The supreme court reversed fifty-three cases during this period. Reversals by the court of criminal

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1. *See* TEX. CONST. art. V, § 3; TEX. REV. CIV. STAT. ANN. art. 1728 (Vernon Supp. 1984). The Supreme Court of Texas is composed of a chief justice and eight justices. TEX. CONST. art. V, § 2.

2. *See* TEX. CONST. art. V, § 5. The Texas Court of Criminal Appeals is composed of a presiding judge and eight judges. *Id.* § 4; TEX. REV. CIV. STAT. ANN. art. 1801 (Vernon Supp. 1984). Additionally, special commissioners may be designated to serve as needed to aid and assist the court. *See id.* art. 1811e, § 1a(a). On September 1, 1981, article V of the Texas Constitution was amended to confer jurisdiction over criminal cases on the former courts of civil appeals and to provide for discretionary review of their decisions in criminal cases by the court of criminal appeals. *See* TEX. CONST. art. V, § 5. The constitutional amendment came in response to a continual lag in time from filing to disposition of criminal cases by the court of criminal appeals. *See* Dally & Brockway, *Changes In Appellate Review In Criminal Cases Following The 1980 Constitutional Amendment,* 13 ST. MARY'S L.J. 211, 215 (1981). In 1980, for example, the period of pendency from notice of appeal to ultimate disposition was frequently greater than three years, and this was so despite the court's record for extraordinary productivity and a progressive increase in judicial manpower over the years. *See* 53 TEX. JUD. COUNCIL ANN. REP. 98 (1981). *See generally* Guittard, *The Expanded Texas Courts of Appeals,* 14 TEX. TECH L. REV. 549, 553 (1983) (period of three years substantially longer than six month standard recommended by ABA). Due to the 1981 amendments, the usual pendency from notice of appeal to denial of discretionary review by the court of criminal appeals has been shortened to less than 18 months. *See id.* at 553.

3. *See* TEX. CONST. art. V, § 6. Each court of appeals has at least one chief justice and two associate justices. *See* TEX. CONST. art. V, § 6; TEX. REV. CIV. STAT. ANN. art. 1812(a) (Vernon Supp. 1984). Five of the 14 courts of appeals have three justices each, and the others range in size with the largest being the Dallas court, which had 13 justices in 1983. *See* 55 TEX. JUD. COUNCIL ANN. REP. 113 (1984).

4. The Texas Supreme Court term adjourns on the last Saturday in June and reconvenes on the first Monday in October. *See* TEX. REV. CIV. STAT. ANN. art. 1726 (Vernon 1962). Due to the small number of cases handed down by the court during August through September, those months were excluded from this study.

appeals during the five-month period from February 1 through June 30, 1983, were also examined.[5] The court of criminal appeals reversed 103 cases (28%) of the 364 it considered during the five-month period under study. Lastly, all cases reversed by the courts of appeals in the three-month period from May 1 through July 31, 1983, were analyzed.[6] During that time, 1,737 cases were considered, of which 283 were reversed (16.3%). Of the 283 reversals by those courts, 144 (50.8%) were criminal and 139 (49.2%) were civil. A total of 439 cases decided by the Texas appeals courts were used in this study.

II. METHOD OF INQUIRY

A list of the decisions rendered by each appellate court during the time frames studied was obtained from the Texas Judicial Council, Office of Court Administration, in Austin. The study included both reported and unpublished opinions.[7] Cases that were reversed[8] were read and analyzed to determine the type of error causing reversal. Many of the decisions reviewed listed more than one reason for reversal.[9] Each reason was noted separately along with a brief ex-

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5. The term of the court of criminal appeals begins and ends with each calendar year. *See* TEX. CONST. art. V, § 5; TEX. REV. CIV. STAT. ANN. art. 1804 (Vernon Supp. 1984).

6. A shorter time span was used for the courts of appeals because the courts of appeals hear a proportionately greater number of cases in a given time than either the supreme court or the court of criminal appeals. *Compare* 55 TEX. JUD. COUNCIL ANN. REP. 93 (1984) (supreme court added 996 cases during year, disposed of 1,005 cases during year, and left 236 cases pending at end of year) *and id.* at 103 (court of criminal appeals added 492 cases during year, disposed of 1,276 cases during year, and left 555 cases pending at end of year) *with id.* at 113 (courts of appeals added 7,314 cases during year, disposed of 8,038 cases during year, and left 6,092 cases pending at end of year).

7. Copies of unpublished opinions were obtained from the clerks of the respective courts. Courts of appeals opinions are published only when the decision is one that either: "(1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority." TEX. R. CIV. P. 452(b).

8. For purposes of this study, reversal means all appeals resulting in reversals or in remand for further trial court proceedings.

9. *See, e.g.*, Vick v. George, 671 S.W.2d 541, 551-52 (Tex. App.—San Antonio 1983, no writ) (statutory requirements of DTPA misinterpreted by court; no evidence to support claim was in bad faith); Cruz v. State, 657 S.W.2d 850, 851 (Tex. App.—Texarkana 1983, no pet.) (art. 28.01, § 2 of Texas Code of Criminal Procedure misinterpreted by court; state offered no evidence at trial on merits); Sandoval v. Hartford Casualty Ins. Co., 653 S.W.2d 604, 607 (Tex. App.—Amarillo 1983, no writ) (trial court erroneously interpreted insurance policy; testimony erroneously disregarded).

planation of the error. Upon completion of the analysis, the charts on pages 323 through 327 were compiled.

The cases reversed during the period under observation were divided into twenty-four categories. The chart on reasons for reversal by the courts of appeals, reflecting both civil and criminal cases, contains a complete listing of the categories used.[10] Those categories include: erroneous interpretation of, application of, or failure to apply a particular statute or case law; misinterpretation of a document, such as a contract or a will; erroneous or inadequate instruction by the court to the jury; an inadequate record, or an erroneous or inadequate jury charge or instruction; fundamental error; jurisdictional error; mitigated or absence of error; improper computation of damages; trial or appellate court error; evidentiary errors; errors involving summary judgments; post-trial ruling errors; community property division errors; sentencing errors; prosecutorial errors; jury misconduct; faulty indictments or information; and ineffective assistance of counsel. Categories involving criminal law were not applicable to the supreme court and were not included in the supreme court chart. Similarily, categories that were unique to civil cases were not included in the court of criminal appeals charts. The most frequent reasons for reversal are more thoroughly discussed below.

III. Reasons for Reversals by the Courts of Appeals—Civil Cases

A. *Errors Involving Statutes*

During the period under study, the courts of appeals reversed a proportionately significant number of cases, 33 of 283 (12%), because the trial court had erroneously applied, failed to apply, or misinterpreted a statute.[11] About half of these cases involved statutory provisions relating to contracts,[12] the Texas Deceptive Trade

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10. *See* Chart B, *infra* p. 324.

11. *See, e.g.*, Oak Forest Bank v. Harlingen State Bank, 656 S.W.2d 589, 592 (Tex. App.—Corpus Christi 1983, no writ) (trial court erroneously applied venue statute); Turner v. Lutz, 654 S.W.2d 57, 59 (Tex. App.—Austin 1983, no writ) (trial court's failure to apply § 11.10(a) of Family Code reversible error); Amarillo Equity Investors, Inc. v. Craycroft Lacy Partners, 654 S.W.2d 28, 30 (Tex. App.—Fort Worth 1983, no writ) (Texas Miscellaneous Corporation Laws Act misapplied by trial court).

12. *See, e.g.*, Dockside Terminal Serv. v. Port Houston Marine, Inc. 658 S.W.2d 191, 193 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (Longshoremen's and Harbor

Practices Act,[13] the Family Code,[14] the Rules of Civil Procedure,[15] the Probate Code,[16] taxation,[17] automobiles,[18] attorneys' fees,[19] and a federal workers' compensation statute.[20] In these cases, the most common problem requiring reversal by the appellate court was that the trial court erroneously construed the language of the statute itself.[21]

In suits involving statutory construction, courts look to the clear meaning of the statute at issue.[22] Careless use of words by the legis-

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Workers' Compensation Act); Amarillo Equity Investors v. Craycroft Lacy Partners, 654 S.W.2d 28, 30 (Tex. App.—Fort Worth 1983, no writ) (Texas Miscellaneous Corporation Laws Act); Board of Regents v. Denton Const. Co., 652 S.W.2d 588, 592-93 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (Worker's Compensation Act).

13. *See* Vick v. George, 671 S.W.2d 541, 550 (Tex. App.—San Antonio 1983, no writ); Wolfe Masonry, Inc. v. Stewart, 664 S.W.2d 102, 104 (Tex. App.—Corpus Christi 1983, no writ).

14. *See* Hernandez v. Valls, 656 S.W.2d 153, 154-55 (Tex. App.—San Antonio 1983, no writ); Turner v. Lutz, 654 S.W.2d 57, 59 (Tex. App.—Austin 1983, no writ); *In re* H.G., Minor Child, No. 11-82-330-CV, slip op. at 1 (Tex. App.—Eastland, May 7, 1983, no writ).

15. *See, e.g.,* Fajkus v. First Nat'l Bank, 654 S.W.2d 42, 44 (Tex. App.—Austin 1983, no writ) (plea of privilege improperly sustained); Balderson-Berger Equip. Co. v. Blount, 653 S.W.2d 902, 908 (Tex. App.—Amarillo 1983, no writ) (venue statute improperly applied by trial court); Campbell & Son Constr. Co. v. Housing Auth., 655 S.W.2d 271, 276 (Tex. App.—Corpus Christi 1983, no writ) (trial court erroneously overruled defendant's plea of privilege).

16. *See* Reed v. Valley Fed. Sav. & Loan Co., 655 S.W.2d 259, 264 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); McAdams v. Glover, No. 12-81-0147-CV, slip op. at 1 (Tex. App.—Tyler, July 7, 1983, no writ).

17. *See* Christian Jew Found. v. State, 653 S.W.2d 607, 617 (Tex. App.—Austin 1983, no writ); Lacy v. Moody Indep. School Dist., No. 10-83-037-CV, slip op. at 5 (Tex. App.—Waco, July 14, 1983, no writ).

18. *See* Everett v. United States Fire Ins. Co., 653 S.W.2d 948, 950-51 (Tex. App.—Fort Worth 1983, no writ).

19. *See* City of Fort Gates v. McKieran, No. 10-82-182-CV, slip op. at 3 (Tex. App.—Waco, May 5, 1983, no writ).

20. *See* Dockside Terminal Servs. v. Port Houston Marine, 658 S.W.2d 191, 193 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

21. *See, e.g.,* Amarillo Equity Investors, Inc. v. Craycroft Lacy Partners, 654 S.W.2d 28, 30-31 (Tex. App.—Fort Worth 1983, no writ) (when no agreement to specific interest rate, maximum rate not 18% but 6%); Everett v. United States Fire Ins. Co., 653 S.W.2d 948, 950 (Tex. App.—Fort Worth 1983, no writ) (trial court incorrectly ruled that § 2.403 of Tex. Bus. & Comm. Code controls over Texas Certificate of Title Act); Christian Jew Found. v. State, 653 S.W.2d 607, 616-17 (Tex. App.—Austin 1983, no writ) (trial court misinterpreted word "church" as used in art. 5221b-17(g)(5)(E)).

22. *See* Taylor v. Fireman's & Policeman's Civil Serv. Comm'n, 616 S.W.2d 187, 189 (Tex. 1981); Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570, 573 (Tex. 1971); Satterfield v. Satterfield, 448 S.W.2d 456, 458 (Tex. 1969); Railroad Comm'n v. Miller, 434 S.W.2d 670, 672 (Tex. 1968).

lature in enacting legislation, however, frequently causes courts difficulty in discerning just what that clear meaning is.[23] When an ambiguity in the language exists, courts look to the legislative intent contained in the legislative histories of statutes and interpret a statute so as to effectuate that intent.[24] Therefore, when the outcome of a case turns on the interpretation of a statute, the courts and practitioners should try to ascertain the legislative intent by examining the legislative history and by consulting case law interpreting the statute.[25]

Unfortunately, access to legislative history materials at the present time requires either phone contact with information sources by one familiar with the legislative documents needed, or a visit to the capitol complex offices in Austin.[26] While the legislative histories of statutes are readily available to the supreme court, court of criminal appeals, and the Austin court of appeals, other courts not located in Austin have difficulty in gaining access to this information. The move toward computer technology, staff professionalism, and open government in the past decade has, however, increased the availability and accessibility of legislative histories.[27] As the use of these documents becomes more widespread, such information should be more generally available in law libraries throughout Texas.[28]

Interestingly, the single greatest number of reversals caused by erroneous statutory construction was attributable to errors in the ap-

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23. *See* Thompson v. Railroad Comm'n, 150 Tex. 307, 312, 240 S.W.2d 759, 763 (1951) (word "void" has various meanings; rarely implies absolute nullity); State v. Central Power & Light Co., 139 Tex. 51, 55-56, 161 S.W.2d 766, 768 (1942) (word "corporation" usually only applies to private corporations; not municipal corporations).

24. *See* Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 384 (Tex. 1982); State v. Terrell, 588 S.W.2d 784, 786 (Tex. 1979); TEX. REV. CIV. STAT. ANN. art. 10(6) (Vernon 1969). Article 10(6) provides: "In all interpretations, the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy." *Id.*

25. For suggestions on compiling a legislative history and a checklist of legislative history sources, see generally Allison & Hambleton, *Research in Texas Legislative History*, 47 TEX. B.J. 314, 315-17 (1984).

26. *See id.* at 317.

27. *See id.* at 314-15. For example, starting in 1973, the Texas Senate and House began tape recording all public hearings and public and floor debates. *See id.* at 314. That same year, the Legislative Information System of Texas (LIST) began operating to provide computer based bill tracking, allowing access to tape recordings produced during each session which provide more detailed bill histories than that in the House and Senate journals. *See id.* at 314.

28. *See id.* at 317.

plication and interpretation of article 1995, the former Texas Venue Statute.[29] In fact, almost half of all the cases reversed due to problems of statutory construction and application involved the former venue statute.[30] As stated by one commentator in reference to the former Texas venue statute,

> so many new exceptions have been added, and each exception has been encrusted by so many judicial interpretations, that a casual glance at standard reference works leaves the impression that Texas venue has generated a greater volume of appellate decisions than the venue laws of all other forty-nine states combined.[31]

The results of this study underscore the magnitude of problems caused by the venue statute prior to its most recent amendments.

The 68th legislature recently responded to the problems caused by the Texas Venue Statute by amending article 1995, effective September 1, 1983, and repealing article 2008, which granted interlocutory appeals from venue orders.[32] Moreover, the Supreme Court of Texas has recently promulgated new rules to regulate procedure applicable to the new venue statute.[33] These changes represent a significant departure from previous venue practice regarding the general rule, its exceptions, and procedure. The developments attributable to the new venue scheme, as well as a comparison between the new statute and its predecessor, are more fully addressed

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29. *See* Act of May 27, 1953, ch. 107, 1953 Tex. Gen. Laws 390, 390-91, *amended by* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon Supp. 1984).

30. *See, e.g.,* Oak Forest Bank v. Harlingen State Bank, 656 S.W.2d 589, 592 (Tex. App.—Corpus Christi 1983, no writ) (question of proper venue where C.D. in issue); Texoma Nat'l Bank v. First State Bank, 653 S.W.2d 91, 93 (Tex. App.—Dallas 1983, no writ) (erroneous overruling of plea of privilege); Balderson-Berger Equip. Co. v. Blount, 653 S.W.2d 902, 907 (Tex. App.—Amarillo 1983, no writ) (application of venue exception for suits against private corporations).

31. Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue,* 32 BAYLOR L. REV. 563, 566 (1980). In this article, Justice Guittard, of the fifth court of appeals, and John Tyler discuss at length the pre-1984 venue practice in Texas and its shortcomings. Some of the problems discussed that were common to the cases in this study include: (1) the requirement of trying most of the issues relating to the merits of a lawsuit at the venue hearing; (2) definition of essential venue facts in broad terms often incapable of precise determination, such as "trespass," "negligence," "fraud," "necessary party," "agency or representative," and "cause of action"; (3) fragmentation of a single action into several lawsuits for trials in several counties; (4) joinder for venue purposes of parties that would not otherwise be sued; and (5) discrimination between litigants based upon classifications irrelevant to fairness in the choice of a site for trial. *See id.* at 566-84.

32. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon Supp. 1984).

33. *See* TEX. R. CIV. P. 86-89.

by several recent articles on the subject.[34]

B. *Miscellaneous Errors*

The miscellaneous error category consists of a collection of widely scattered forms of error that arose in various fields of law but that did not fit into any pattern. A total of thirty civil cases reversed by the courts of appeals came within this category. Examples of miscellaneous errors occurred where the lower court judge erroneously instructed a verdict when fact issues existed,[35] sustained defenses,[36] granted an injunction,[37] modified a divorce decree where there was no change in circumstances,[38] rendered judgment by default,[39] decreed specific performance,[40] denied a new trial, hearing, or dismissed an action,[41] incorrectly computed retirement benefits or child support,[42] quashed a garnishment,[43] sustained a plea in abatement,[44]

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34. *See* Hazel, *Venue Procedure In the Trial Court,* 47 TEX. B.J. 625 (1984); Price, *New Texas Venue Statute: Legislative History,* 15 ST. MARY'S L.J. 855 (1984).

35. *See* Kieswetter v. Center Pavilion Hosp., 662 S.W.2d 24, 31 (Tex. App.—Houston [1st Dist.] 1983, no writ).

36. *See* Hunter v. Guzman, No. 01-82-0661-CV, slip op. at 5-6 (Tex. App.—Houston [1st Dist.], May 19, 1983, no writ).

37. *See* Murphy v. Tribune Oil Corp., 656 S.W.2d 587, 589 (Tex. App.—Fort Worth 1983, no writ); Placemaker, Inc. v. Greer, 654 S.W.2d 830, 832 (Tex. App.—Tyler 1983, no writ); 53 Apartment Venture Preferred Properties Corp. v. The Nest, No. 05-82-01479-CV, slip op. at 3 (Tex. App.—Dallas, May 27, 1983, no writ).

38. *See* Werlein v. Werlein, 652 S.W.2d 538, 539-40 (Tex. App.—Houston [1st Dist.] 1983, no writ).

39. *See* Turnbow v. Borden, No. 2-82-208-CV, slip op. at 2-3 (Tex. App.—Fort Worth, June 29, 1983, no writ).

40. *See* Guyer v. Rose, No. 05-82-00664-CV, slip op. at 1 (Tex. App.—Dallas, May 24, 1983, no writ).

41. *See* McGary v. State, 658 S.W.2d 673, 674-75 (Tex. App.—Dallas 1983, pet. ref'd) (trial court erroneously denied new trial); State v. Boren, 654 S.W.2d 547, 549 (Tex. App.—Waco 1983, no writ) (trial court erred in dismissing case); Johnson v. State, 652 S.W.2d 541, 541-42 (Tex. App.—Dallas 1983, no pet.) (trial court erred in denying motion for new trial); Edwards v. Edwards, 651 S.W.2d 940, 942-43 (Tex. App.—Fort Worth 1983, no writ) (trial court's failure to grant new trial resulted in reversible error).

42. *See* McGehee v. Epley, 655 S.W.2d 305, 309 (Tex. App.—San Antonio) (retirement benefits incorrectly computed by trial court), *rev'd on other grounds,* 661 S.W.2d 924, 925-26 (Tex. 1983); Smith v. Smith, 651 S.W.2d 953, 955-56 (Tex. App.—Fort Worth 1983, no writ) (child support improperly calculated by lower court).

43. *See* Odeneal v. Collora, No. 05-82-00799-CV, slip op. at 2 (Tex. App.—Dallas, June 20, 1983, no writ).

44. *See* Phillips v. Russ, No. 05-82-00773-CV, slip op. at 1 (Tex. App.—Dallas, July 20, 1983, no writ).

and overruled a plea of privilege.[45] Of all the civil cases studied, 35 out of 192 reversals (18%) were attributable to these miscellaneous errors.

C. *No or Insufficient Evidence*

This study reveals a clear pattern of cases was reversed because the appellate court determined that there was either insufficient or no evidence to support the judgment of the lower court. The Texas courts of appeals reversed 44 out of the 192 civil cases (23%) studied for these reasons.[46] There were three categories of evidentiary errors. The majority of reversals fell within the first category, which contains cases where there was either no evidence or insufficient evidence to support the plaintiff's substantive cause of action or the defendant's defensive issue.[47] In other words, these cases were reversed because there was either no or insufficient evidence to support one or more of the elements of the cause of action or defense. The second group of cases involving evidentiary errors was reversed because there was either no or insufficient evidence to support the court's award of damages or attorneys' fees.[48] The third group of reversals involved cases in which the jury's findings were against the great weight and preponderance of the evidence.[49]

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45. *See* Texoma Nat'l Bank v. First State Bank, 653 S.W.2d 91, 92, 93 (Tex. App.—Dallas 1983, no writ).

46. *See, e.g.,* Benavides v. Steward, 655 S.W.2d 298, 300 (Tex. App.—Corpus Christi 1983, no writ) (evidence insufficient to establish claim of adverse possession); North Star Dodge Sales, Inc. v. Luna, 653 S.W.2d 892, 898 (Tex. App.—San Antonio 1983, no writ) (no evidence as to damages); Crow v. Central Soya Co., 651 S.W.2d 392, 395 (Tex. App.—Fort Worth 1983, no writ) (no evidence as to damages).

47. *See, e.g.,* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 656 S.W.2d 928, 941 (Tex. App.—Austin 1983, no writ) (commission's findings of facts insufficient to support denial of license); Archer v. Bill Pearl Drilling Co., 655 S.W.2d 338, 344 (Tex. App.—San Antonio 1983, no writ) (no evidence to show plaintiff is necessary party); Perry v. Oro Negro Operations, Inc., 653 S.W.2d 923, 927 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) (insufficient evidence to establish option contract).

48. *See, e.g.,* Vick v. George, 671 S.W.2d 541, 550 (Tex. App.—San Antonio 1983, no writ) (evidence insufficient to support award of attorney's fees under DTPA); North Star Dodge Sales v. Luna, 653 S.W.2d 892, 898 (Tex. App.—San Antonio 1983, no writ) (no evidence to support damages caused by loss of vehicle use); Crow v. Central Soya Co., 651 S.W.2d 392, 396 (Tex. App.—Fort Worth 1983, no writ) (no evidence to support award of attorney's fees).

49. *See* Veale v. Rose, 657 S.W.2d 834, 838 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (jury's findings against great weight and preponderance of evidence as to counterclaim); Texas Employers' Ins. Ass'n v. Terry, 656 S.W.2d 233, 235 (Tex. App.—El Paso

The study demonstrates that courts of appeals reversed a proportionately greater number of judgments in the insufficient evidence category than in the no evidence category. This finding can be interpreted in one of two ways. First, the trial courts whose decisions are appealed to the courts of appeals may, in fact, be committing reversible error primarily in the area of sufficiency of the evidence questions. Alternatively, this pattern may mean that the courts of appeals, as final decision makers on the question of whether the evidence is sufficient to support a judgment, rule more strictly when called upon to decide sufficiency of the evidence issues than they do in deciding whether there is *any* evidence to support the judgment—issues that may be appealed to the supreme court.[50] Thus, the relatively large number of courts of appeals reversals caused by sufficiency of the evidence errors may result from the court's knowledge that such points will not be reviewed again by a higher court.

The number of cases reversed due to evidentiary error could be reduced if trial courts would more closely scrutinize the requisite elements of the cause of action, the defenses, if any, and the damages involved in the cases they decide. More specifically, before commencing trials, Texas judges should be fully informed of: (1) the elements necessary to sustain the cause of action or defense in the case; (2) the burden of proof; and (3) the measure or standard of proof. Such scrutiny will enlighten trial judges as to the nature and amount of evidence required to sustain an action, a defense, the jury findings, and damages in a given case. Although this approach may appear somewhat simplistic, it would clarify the apparent uncertainty that the courts have had regarding evidentiary problems in the cases before them, thus increasing the number of correct rulings and judgments by the trial courts.

D. *Erroneous Grants of Summary Judgment*

Rule 166-A of the Texas Rules of Civil Procedure, the summary judgment rule, entitles either party to a lawsuit to have all or part of the merits of a case summarily disposed of when the case involves

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1983, no writ) (evidence insufficient to support jury findings in worker's compensation case); Garcia v. Universal Gas Corp., 653 S.W.2d 362, 363 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (evidence insufficient to support jury's finding that defendant gas company was notified of gas leak).

50. *See In re* King's Estate, 150 Tex. 662, 665, 244 S.W.2d 660, 662 (1951).

untenable claims or unmeritorious defenses.[51] The rule provides for prompt disposition of a suit when there is "no issue of material fact" in the case.[52] The Texas appellate courts are cautious about allowing summary judgments to stand; they will reverse these unless the moving party has proven he is entitled to summary judgment as a matter of law.[53] Although there has been a decrease in the massive number of summary judgment reversals since the supreme court analysis of the summary judgment rule in *City of Houston v. Clear Creek Basin Authority,*[54] the charts in this study indicate that summary judgments are still too freely granted. Erroneous grant of summary judgment was the second most common reason for reversal of civil cases by the courts of appeals.[55] In fact, of the 283 cases reversed by those courts, 25 (9%) involved an erroneous grant of summary judgment by the trial court.[56] Most of the cases reversed due to erroneous grant of summary judgment fell into four areas of law: contracts,[57] real property,[58] sworn accounts,[59] and workers'

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51. *See* TEX. R. CIV. P. 166-A(c). To be entitled to summary judgment, each of the provisions of the rule must be strictly complied with by the moving party. *See* Gardner v. Martin, 162 Tex. 156, 159, 345 S.W.2d 274, 276 (1961). In City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671 (Tex. 1979), the Supreme Court of Texas, in what may be considered a landmark decision, refined and clarified summary judgment practice in Texas. *See id.* at 675-81. For an excellent overview of the current status of summary judgment law in Texas, see generally Hittner, *Summary Judgments in Texas,* 35 BAYLOR L. REV. 207 (1983).

52. *See* "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 936 (Tex. 1972); Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970). In adherence to this rule, the Houston appellate court rejected the trial court's grant of summary judgment because the pleadings raised a substantial fact issue as to the water authority's commitment to provide service. *See* Winograd v. Clear Lake City Water Auth., 654 S.W.2d 862, 864 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); *see also* First State Bank v. Hughes, 654 S.W.2d 31, 33 (Tex. App.—Tyler 1983, no writ) (genuine issues of material facts raised by deposition precluded summary judgment).

53. *See* Wilcox v. St. Mary's Univ., 531 S.W.2d 589, 592-93 (Tex. 1975); *In re* Price's Estate, 375 S.W.2d 900, 904 (Tex. 1964).

54. 589 S.W.2d 671 (Tex. 1979).

55. See Chart A, *infra* p. 323.

56. *See, e.g.,* Scroggins v. Twin City Fire Ins. Co., 656 S.W.2d 213, 215 (Tex. App.—El Paso 1983, no writ) (summary judgment precluded because material fact existed as to whether person was "employee" of county); Murphy v. Williams-Dwyer Co., 655 S.W.2d 353, 355 (Tex. App.—Fort Worth 1983, no writ) (summary judgment reversed because fact issues existed as to use of insurance premiums); Eames v. St. Paul Title Ins. Co., 654 S.W.2d 560, 561-62 (Tex. App.—Waco 1983, no writ) (grant of summary judgment incorrect when fact issues existed as to breach of title policy).

57. *See* O'Shea v. Coronado Transmission Co., 656 S.W.2d 557, 564 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); Davis v. Houston Indep. School Dist., 654 S.W.2d

compensation.[60]

To prevent the reversal of a grant of summary judgment it is recommended that attorneys closely follow the procedural guidelines found in rule 166-A when filing a motion for summary judgment, and be aware of the types of suits that are amenable to summary judgment disposition.[61]

IV. Reasons for Reversals by the Courts of Appeals—Criminal Cases & the Court of Criminal Appeals—Direct Appeal Cases

A. *Fundamental Errors*

Distinct patterns of reversal due to fundamental error crystallized upon inspection of the appellate court decisions. The study establishes that fundamental error was a major cause of reversals in criminal cases. According to the results of this study, a total of thirty-nine cases were reversed under this rubric. The different types of cases reversed because of fundamental error are explained below.

1. In the Court's Charge

Criminal cases are habitually reversed because of fundamental error contained in the trial court's instructions to the jury. This is so despite the fact that, in many instances, the error was not called to the trial court's attention, and the defendant suffered no prejudicial

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818, 822 (Tex. App.—Houston [14th Dist.] 1983, no writ); Cummins Supply Co. v. K.A. Sparks Contractor, Inc., No. 10-82-196-CV, slip op. at 8-9 (Tex. App.—Waco, June 9, 1983, no writ); Mike & Steve Rhone, Inc. v. Saunders, No. 2-82-143-CV, slip op. at 2 (Tex. App.—Fort Worth, May 12, 1983, no writ).

58. *See* Eames v. St. Paul Title Ins. Co., 654 S.W.2d 560, 561-62 (Tex. App.—Waco 1983, writ ref'd n.r.e.); Bateman v. Rice, 653 S.W.2d 951, 954 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.); Lewis v. Brady, No. 82-00859, slip op. at 1 (Tex. App.—Houston [1st Dist.], June 9, 1983, no writ); Morales v. Friend, No. 2-82-126-CV, slip op. at 1 (Tex. App.—Fort Worth, June 1, 1983, no writ).

59. *See* Murphy v. Williams-Dwyer Co., 655 S.W.2d 353, 355 (Tex. App.—Fort Worth 1983, no writ); Pyro Equip., Inc. v. Dresser Indus., Inc., No. 2-82-171-CV, slip op. at 1 (Tex. App.—Fort Worth, June 9, 1983, no writ); Saenz v. Brush Country Bank, No. 16697, slip op. at 7 (Tex. App.—San Antonio, May 25, 1983, no writ); Allday v. Sears Roebuck & Co., No. 01-82-0520-CV, slip op. at 1-2 (Tex. App.—Houston [1st Dist.], May 19, 1983, no writ).

60. *See* Dockside Terminal Serv. v. Port Houston Marine, 658 S.W.2d 191, 193 (Tex. App.—Houston [1st Dist.] 1983, no writ); Goodwin v. Texas General Indem. Co., 657 S.W.2d 156, 160 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Scroggins v. Twin City Fire Ins. Co., 656 S.W.2d 213, 215 (Tex. App.—El Paso 1983, no writ).

61. *See* Hittner, *Summary Judgments in Texas,* 35 Baylor L. Rev. 207, 207 (1983).

harm.[62] The frequency of reversals in this category is nothing new to Texas criminal jurisprudence. Commentators view this area as ripe for reform.[63]

The Code of Criminal Procedure provides that objections to the court's charge and to the trial court's refusal to submit a specially requested charge must be made at the time of trial.[64] In the absence of such an objection, "the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial."[65]

The Code itself draws no distinction between "fundamental" and "non-fundamental" error in the court's charge. The rules applied to certain types of errors regarded as fundamental are thus a judicial gloss on the Code provisions. A case will automatically be reversed when the charge contains fundamental error even though the defendant did not object to the error at trial.[66] Moreover, once the reviewing court has concluded that the error was fundamental, it abandons the Code's standard of harm.[67] In fact, a case may be reversed for fundamental error in the court's charge even though the error actually benefits the accused.[68] The Texas Court of Criminal Appeals has adopted a short circuit approach to reviewing harm; that is, it considers the standard for prejudice to be automatically met when error is fundamental.[69]

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62. *See* Mims v. State, 612 S.W.2d 933, 934 (Tex. Crim. App. 1981) (McCormick, J., concurring); McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge,* 15 ST. MARY'S L.J. 827, 827 (1984); Odom & Valdez, *A Review of Fundamental Error in Jury Charges in Texas Criminal Cases,* 33 BAYLOR L. REV. 749, 749 (1981).

63. *See* McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge,* 15 ST. MARY'S L.J. 827, 827 (1984).

64. *See* TEX. CRIM. PROC. CODE ANN. art. 36.14 (Vernon Supp. 1984); *id.* art. 36.19 (Vernon 1981).

65. *See id.* art. 36.19 (Vernon 1981).

66. *See, e.g.,* Brown v. State, 595 S.W.2d 550, 552 (Tex. Crim. App. 1980) (fundamental error in charge requires reversal even in absence of objection); Jackson v. State, 591 S.W.2d 820, 824 (Tex. Crim. App. 1980) (when no objection to erroneous charge, court's review limited to fundamental error); Smith v. State, 513 S.W.2d 823, 829 (Tex. Crim. App. 1974) (without objection to court's charge, only fundamental error requires reversal).

67. *See* Newton v. State, 648 S.W.2d 693, 694 (Tex. Crim. App. 1983); Antunez v. State, 647 S.W.2d 649, 650-51 (Tex. Crim. App. 1983).

68. *See* Cleland v. State, 575 S.W.2d 296, 297 (Tex. Crim. App. 1978); Brewer v. State, 572 S.W.2d 940, 940-41 (Tex. Crim. App. 1978).

69. *See* Hill v. State, 640 S.W.2d 879, 883-84 (Tex. Crim. App. 1982); Cleland v. State,

In *Cumbie v. State*,[70] the court of criminal appeals designated four categories of fundamental error which require automatic reversal.[71] According to the court, fundamental defects occur when: (1) the court's charge omits an allegation in the indictment which must be proved; (2) the charge "substitutes a theory of the offense completely different from the theory alleged in the indictment"; (3) the charge "authorizes conviction on the theory alleged in the indictment" as well as on "one or more theories not alleged in the indictment"; (4) "the charge authorizes conviction for conduct which is not an offense, as well as for conduct which is an offense."[72]

This study reveals that a total of forty-four cases were reversed due to error in the court's charge to the jury, twenty of which constituted fundamental error. The types of fundamental error in the cases involved were typical of those set out in *Cumbie*. For example, a recurring error discerned in the study was the court's omission from the charge of an essential allegation in the indictment.[73] Also, the trial court's failure to charge the jury on a defensive issue was a particularly common defect in the cases considered.[74] Charges omitting instructions as to whether the defendant acted with the requisite culpable mental state constituted reversible error in two cases, one of which was found to be fundamental error.[75] Fundamental

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575 S.W.2d 296, 299 (Tex. Crim. App. 1978) (Douglas, J., dissenting); Brewer v. State, 572 S.W.2d 940, 943-44 (Tex. Crim. App. 1978) (Vollers, J., dissenting).

70. 578 S.W.2d 732 (Tex. Crim. App. 1979).

71. *See id.* at 733-35.

72. *See id.* at 733-35.

73. *See, e.g.*, Starling v. State, 651 S.W.2d 937, 939 (Tex. App.—El Paso 1983, no pet.) (charge omitted description of indicted check); Smith v. State, 654 S.W.2d 539, 541 (Tex. App.—Tyler 1983, no pet.) (charge authorized conviction on theory not alleged in indictment); Priego v. State, 658 S.W.2d 655, 658 (Tex. App.—El Paso 1983, no pet.) (charge expanded defendant's liability beyond pleadings). Several unpublished opinions also reversed cases because the language in the jury charge did not reflect that in the indictment. In Sattiewhite v. State, 600 S.W.2d 277 (Tex. Crim. App. 1979), the court reiterated the long-standing rule that "[w]herever the indictment charges an offense, the facts and the charge of the court must conform to the charges contained in the indictment, and it is fundamentally wrong to authorize a conviction on any state of facts other than those which support . . . the indictment." *Id.* at 278 (quoting Moore v. State, 84 Tex. Crim. 256, 257, 206 S.W.2d 683, 684 (1918)).

74. *See, e.g.*, Hall v. State, 649 S.W.2d 627, 628 (Tex. Crim. App. 1983) (trial court failed to instruct jury on issue of voluntary consent); Horn v. State, 647 S.W.2d 283, 285 (Tex. Crim. App. 1983) (trial court failed to give jury instruction on self-defense); Jackson v. State, 646 S.W.2d 225, 227 (Tex. Crim. App. 1983) (trial court committed reversible error by failing to submit defensive issue of mistaken belief to jury).

75. *See* Cronen v. State, 659 S.W.2d 61, 62 (Tex. App.—Houston [14th Dist.] 1983, no

error was detected, as well, in five cases in which the court's charge to the jury failed to apply the law to the specific facts of the case and thus left the jury to speculate as to which, if any, of the defendant's acts constituted the offense.[76]

Other mistakes in charges requiring reversal by the appellate courts were due to the trial court's erroneous instructions regarding presumptions and the burden of proof. For example, in *Goswick v. State,*[77] the charge stated that upon certain evidence, "it *shall* be presumed that the person was intoxicated."[78] The trial court also instructed the jury that the presumption "may be overcome by other evidence showing that the person was not intoxicated . . . ."[79] Section 2.05(2)(A) and (B) of the Code of Criminal Procedure provides, however, that even if the facts giving rise to the presumption are proven beyond a reasonable doubt, the jury "is not bound to so find."[80] The appellate court held that the charge conflicted with the statute.[81]

A similar defect was found in *Young v. State,*[82] which was also a case involving prosecution for driving while intoxicated.[83] In *Young,* an instruction to the jury that an "abiding belief" in defendant's guilt would require a guilty verdict was tantamount to authorizing conviction "on less than proof beyond a reasonable doubt."[84] This was the tenor and effect of the holding in *Biegajski v. State,*[85] in which the court found fundamental error in the charge because it did not require that the state prove lack of sudden passion "beyond

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pet.) (trial court committed fundamental error in instructing jury that defendant intentionally and knowingly acted when such language not in statute); Ledesma v. State, 652 S.W.2d 579, 581 (Tex. App.—Austin 1983, no pet.) (charge failed to state defendants knew peace officer was in fact peace officer).

76. *See* Alvarez v. State, 649 S.W.2d 613, 617 (Tex. Crim. App. 1983); Newton v. State, 648 S.W.2d 693, 694-95 (Tex. Crim. App. 1983); Antunez v. State, 647 S.W.2d 649, 653 (Tex. Crim. App. 1983); Oliver v. State, 651 S.W.2d 384, 385 (Tex. App.—Fort Worth 1983, no pet.).

77. 656 S.W.2d 68 (Tex. Crim. App. 1983).

78. *See id.* at 69.

79. *See id.* at 69.

80. *See* TEX. PENAL CODE ANN. § 2.05(2)(A) & (B) (Vernon Supp. 1984).

81. *See* Goswick v. State, 656 S.W.2d 68, 70 (Tex. Crim. App. 1983).

82. 648 S.W.2d 2 (Tex. Crim. App. 1983).

83. *See id.* at 3.

84. *See id.* at 3.

85. 653 S.W.2d 624 (Tex. App.—San Antonio 1983, pet. ref'd).

a reasonable doubt."[86]

Additional reasons cited by appellate courts for finding reversible error in the court's charge include: failure to delineate which of two statutorily defined ways the defendant was alleged to have committed the crime;[87] erroneous introduction of extraneous offenses;[88] failure of the trial court to submit a jury issue as to whether the defendant was an accomplice witness;[89] failure to charge the jury on a lesser included offense;[90] and, substitution of a theory in the charge different from the theory in the indictment.[91]

To avoid reversals, the bench and bar should be on constant guard against potential errors in the charge to the jury. Commentators considering the pitfalls in the doctrine of fundamental error in the court's charge call on the appellate courts to adopt the rule of law followed by the United States Supreme Court[92] and other jurisdictions:[93] absent a clear showing of harm to the defendant, a review of fundamental error should not require reversal if the defendant's counsel consciously failed to follow the "proper trial

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86. *See id.* at 627-28.

87. *See* Gibbons v. State, 652 S.W.2d 413, 415 (Tex. Crim. App. 1983).

88. *See* Nance v. State, 647 S.W.2d 660, 663 (Tex. Crim. App. 1983).

89. *See* Harris v. State, 645 S.W.2d 447, 458 (Tex. Crim. App. 1983); Emmett v. State, 654 S.W.2d 48, 50 (Tex. App.—Dallas 1983, no pet.); *cf.* Jaycon v. State, 651 S.W.2d 803, 808 (Tex. Crim. App. 1983) (charge not sufficient to require jury to find whether co-defendant caused death of victim and whether defendant criminally responsible for acts of co-defendant).

90. *See* Salinas v. State, 644 S.W.2d 744, 745 (Tex. Crim. App. 1983). The court stated:

> In determining whether a charge on a lesser included offense is required, a two-step analysis is to be used. First, the lesser included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty he is not guilty of the alleged offense but is guilty only of the lesser offense.

Id. at 745.

91. *See* Milczanowski v. State, 645 S.W.2d 445, 446 (Tex. Crim. App. 1983) (conviction void where defendant charged with "agreeing to engage in sex for a fee" but convicted of "engaging in sex for a fee"). Despite the absence of an objection at trial, a defendant may challenge, for the first time on appeal, the validity of an indictment underlying a *prior* conviction used for enhancement purposes. *See* Duplechin v. State, 652 S.W.2d 957, 958 (Tex. Crim. App. 1983).

92. *See* Namet v. United States, 373 U.S. 179, 190 (1963); Boyd v. United States, 271 U.S. 104, 108 (1926).

93. *See* Brooks v. State, 511 S.W.2d 654, 655 (Ark. 1974); People v. Washington, 416 N.Y.S.2d 626, 633 (App. Div. 1979).

procedure in objecting to the charge."[94]

2. Miscellaneous Errors

The remaining cases involved in this study that were reversed for fundamental error fell into several categories. There were six instances of reversal based on faulty charging instruments.[95] Certain types of defects in charging instruments which need not be raised by pretrial challenge are labeled "fundamental defects."[96] As with fundamental defects in the court's charge to the jury, a fundamental defect found in a charging instrument requires automatic reversal by the appellate court, even if raised for the first time before that court.[97]

Perhaps the most troublesome requirement that must be met to avoid fundamental error is that the charging instrument charge an offense.[98] Other requirements include use of a particular com-

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94. *See* Namet v. United States, 373 U.S. 179, 190 (1963); Boyd v. United States, 271 U.S. 104, 108 (1926); McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge,* 15 ST. MARY'S L.J. 827, 850 (1984).

95. *See, e.g.,* Jones v. State, No. 04-81-00203-CR, slip op. at 16 (Tex. App.—San Antonio, July 27, 1983, no pet.) (indictment failed to sufficiently describe transaction state would rely on to prove theft of currency); Tibbs v. State, No. 11-83-105-CR, slip op. at 2 (Tex. App.—Eastland, June 2, 1983, no pet.) (indictment alleged wrong crime); Castillo v. State, No. 04-81-00261-CR, slip op. at 2 (Tex. App.—San Antonio, May 19, 1983, no pet.) (indictment failed to give adequate notice of offense).

96. *See* Peralez v. State, 630 S.W.2d 330, 331 (Tex. App.—Houston [14th Dist.] 1982, no pet.).

97. *See* Keagan v. State, 618 S.W.2d 54, 57 (Tex. Crim. App. 1981); Peralez v. State, 630 S.W.2d 330, 331 (Tex. App.—Houston [14th Dist.] 1982, no pet.).

98. *See* TEX. CODE CRIM. PROC. ANN. art. 21.11 (Vernon 1966). To avoid a fundamental defect caused by failing to completely charge an offense, a charging instrument must set out facts which establish all elements of the crime. *See* Bollman v. State, 629 S.W.2d 54, 55 (Tex. Crim. App. 1982); TEX. CODE CRIM. PROC. ANN. art. 21.11 (Vernon 1966). Due to the numerous offenses and the various ways of committing offenses, avoiding fundamental defects forces prosecutors to make some difficult decisions when they draft charging instruments. It is generally proper for the prosecution to track the language of the statute or use similar language when charging an offense. *Cf. id.* art. 21.17. Article 21.17 provides that "[w]ords used in a statute to define an offense need not be strictly pursued in the indictment; it is sufficient to use other words conveying the same meaning, or which include the sense of the statutory words." *Id.* art. 21.27. In some situations the simplicity of this rule is obliterated by the requirement that the prosecution specify the "manner and means" by which the defendant committed the crime, even when that is not required by the language of the statute. *See* Miller v. State, 647 S.W.2d 266, 267 (Tex. Crim. App. 1983) (charging instrument failed to specify "manner and means" by which defendant destroyed property). *But see* Smith v. State, 652 S.W.2d 410, 410 (Tex. Crim. App. 1983) (indictment in burglary case that specified "act of intrusion" did not require further elaboration on means of entry of habita-

mencement and conclusion in the instrument[99] and an allegation that the offense occurred on "some date anterior to the presentment of the indictment [or the filing of the information], and not so remote that the prosecution of the offense is barred by limitation."[100] In considering the need for reform of Texas charging instrument law, Professor George Dix has gone so far as to suggest that the fundamental error doctrine be abolished.[101]

Many of the cases reversed for fundamental error involved violations of the defendant's constitutional rights.[102] In *Mays v. State,*[103] for example, the trial court permitted a court-appointed psychiatrist to testify concerning the defendant's personality at the punishment phase of the trial.[104] The court of criminal appeals held that such testimony violated the defendant's sixth amendment right to counsel. The trial court, in ordering the defendant to participate in the pretrial examination, did not give notice to counsel that the examination would encompass the issue of future dangerousness and to what end the psychiatrist's findings could be employed during trial.[105] The appellate court reasoned that, as a result, the defendant was denied assistance of counsel in deciding whether to submit to

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tion). Thus, in some cases, even though the prosecution's evidence shows that the accused violated a statute, there may be cause for reversal if the evidence shows the defendant violated it in a manner that varies from the manner pleaded. This ad hoc requirement is troublesome because the pleader has no guidance and no general standard as to when the "manner and means" of committing the crime must be set out to prevent a later finding of fundamental error. Regrettably, the criminal courts have not provided guidelines for the pleader to follow.

99. *See* TEX. CODE CRIM. PROC. ANN. arts. 21.02(1), 21.21(1), 21.02(8), 21.21(8) (Vernon 1966). These articles contain what has been termed the "magic words" requirements. *See* Dix, *Texas Charging Instrument Law: Recent Developments and the Continuing Need for Reform,* 35 BAYLOR L. REV. 689, 719 (1983). Since 1891, article V, § 12 of the Texas Constitution has required all prosecutions to be carried on "in the name and by authority of the State of Texas" and to conclude "[a]gainst the peace and dignity of the State."

100. *See* TEX. CODE CRIM. PROC. ANN. art. 21.02(6) (Vernon 1966); *see also id.* art. 21.21(6) (rephrasing of requirements).

101. *See* Dix, *The Need for Reform—Texas Charging Instrument Law,* 47 TEX. B.J. 490, 496 (1984).

102. *See, e.g.,* Phifer v. State, 651 S.W.2d 774, 781 (Tex. Crim. App. 1983) (trial court violated defendant's fifth amendment rights); Schaffer v. State, 649 S.W.2d 637, 639-40 (Tex. Crim. App. 1983) (trial court erred by overruling defendant's plea of double jeopardy); Skelton v. State, 655 S.W.2d 302, 303 (Tex. App.—Tyler 1983, pet. ref'd) (trial court violated defendant's due process rights).

103. 653 S.W.2d 30 (Tex. Crim. App. 1983).

104. *See id.* at 33-34.

105. *See id.* at 35.

the examination.[106]

Another instance of fundamental error resulted from the denial of the right to counsel during custodial interrogation.[107] The defendant in *Coleman v. State,*[108] after receiving the Miranda warnings, invoked his right to counsel but, because of the lateness of the hour, was unable to have counsel present that night.[109] Subsequent questioning was held to fundamentally violate the defendant's sixth amendment right to counsel.[110] Other fundamental errors of constitutional stature involved the fourth amendment protection against unreasonable search and seizure,[111] the protection against double jeopardy,[112] the right to confront witnesses through reasonable cross-examination,[113] the constitutional right of due process,[114] and the defendant's right to a jury trial.[115] One final area in which the appellate courts found fundamental error was in the context of denial by the trial courts of the defendant's right to a speedy trial, pursuant to the Speedy Trial Act.[116]

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106. *See id.* at 35.

107. *See* Phifer v. State, 651 S.W.2d 774, 781 (Tex. Crim. App. 1983); Wilkerson v. State, 657 S.W.2d 784, 793 (Tex. Crim. App. 1983); Coleman v. State, 646 S.W.2d 937, 940-41 (Tex. Crim. App. 1983).

108. 646 S.W.2d 937 (Tex. Crim. App. 1983).

109. *See id.* at 939.

110. *See id.* at 940-41.

111. *See* Vicknair v. State, No. 01-82-0155-CR, slip op. at 1 (Tex. App.—Houston [1st Dist.], July 14, 1983, no pet.).

112. *See* Schaffer v. State, 649 S.W.2d 637, 639-40 (Tex. Crim. App. 1983) (double jeopardy resulted because trial court failed to give explanation for granting mistrial); Allen v. State, 656 S.W.2d 592, 594 (Tex. App.—Austin 1983, no pet.) (double jeopardy where trial court did not show necessity for declaring mistrial).

113. *See* Bonds v. State, No. 05-82-00142-CR, slip op. at 10 (Tex. App.—Dallas, July 27, 1983, no pet).

114. *See* Skelton v. State, 655 S.W.2d 302, 304 (Tex. App.—Tyler 1983, pet. ref'd) (trial court's erroneous striking of testimony by three defense character witnesses violated right of due process); Thompson v. State, 654 S.W.2d 26, 28 (Tex. App.—Tyler 1983, no pet.) (defendant denied fundamental due process right of competency hearing before jury).

115. *See* Stark v. State, No. 3-84-205-CR, slip op. at 1 (Tex. App.—Austin, June 15, 1983, no pet.); Higgs v. State, No. B14-82-248-CR, slip op. at 2-3 (Tex. App.—Houston [14th Dist.], May 5, 1983, no pet.).

116. *See* TEX. CRIM. PROC. CODE ANN. art. 32A.02 (Vernon Supp. 1982-1983); Apple v. State, 647 S.W.2d 290, 292 (Tex. Crim. App. 1983) (state did not establish prima facie that it was ready to proceed to trial before expiration of 120 days); Cuvillier v. State, No. 13-81-359-CR, slip op. at 3-4 (Tex. App.—Corpus Christi, May 26, 1983, no pet.) (state failed to bring defendant to trial within 120 days).

B. *Evidentiary Errors*

1. No or Insufficient Evidence

Insufficient evidence was the most frequently cited reason for reversal in criminal cases during the period of this study. For example, the courts of appeals held that the evidence was not sufficient to support a defendant's conviction in approximately 12% of the cases it reversed (33 out of 283 cases).[117] Similarly, the court of criminal appeals cited this reason in approximately 17% of the cases it reversed (17 out of 103).[118] By comparison, only 2% of the criminal reversals were a result of no evidence to support the conviction (9 out of 386).[119] It is recommended that a close examination by practitioners and trial judges of the elements of an action, its defenses, if any, and the burden and measure of proof would help reduce the number of reversals that occur from insufficient evidence to support a judgment.

2. Admission or Suppression Errors

The court of criminal appeals and courts of appeals often reverse cases because the lower court has erroneously admitted evidence. Twenty-seven of the cases reversed by those courts cited this type of error as a reason for reversal.[120] On the other hand, the court of

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117. *See, e.g.*, DeGay v. State, 663 S.W.2d 459, 460 (Tex. App.—Beaumont 1983, no pet.) (evidence insufficient to sustain unlawful possession of firearm conviction); Cosper v. State, 657 S.W.2d 166, 170 (Tex. App.—San Antonio 1983, no pet.) (evidence insufficient to establish at least five persons collaborated to commit theft); Seidel v. State, 654 S.W.2d 39, 40 (Tex. App.—Dallas 1983, pet. ref'd) (evidence insufficient to show value of property stolen exceeded $200).

118. *See, e.g.*, Jackson v. State, 652 S.W.2d 415, 419 (Tex. Crim. App. 1983) (evidence insufficient to show defendant caused child's death); Flores v. State, 650 S.W.2d 429, 430 (Tex. Crim. App. 1983) (evidence insufficient to support conviction of possession of narcotics); Simpson v. State, 648 S.W.2d 1, 2 (Tex. Crim. App. 1983) (evidence insufficient to convict defendant of larceny).

119. *See, e.g.*, Apple v. State, 647 S.W.2d 290, 293 (Tex. Crim. App. 1983) (no evidence of conviction of forgery); Jackson v. State, 645 S.W.2d 303, 306 (Tex. Crim. App. 1983) (no evidence that defendant committed crime of unauthorized use of motor vehicle); Cruz v. State, 657 S.W.2d 850, 850-51 (Tex. App.—Texarkana 1983, no pet.) (no evidence to sustain defendant's conviction of unlawfully carrying a handgun).

120. *See, e.g.*, Moore v. State, 652 S.W.2d 411, 413 (Tex. Crim. App. 1983) (hearsay objection should have been sustained); King v. State, 657 S.W.2d 109, 111 (Tex. Crim. App. 1983) (oral statements made by accused while in custody inadmissible); Brewer v. State, 649 S.W.2d 628, 632 (Tex. Crim. App. 1983) (objection to introduction of tape recording should have been sustained).

criminal appeals has been more reluctant to find reversible error resulting from suppression of evidence by the trial court. In fact, the court of criminal appeals found only three errors of this type.[121] The large number of reversals due to erroneous admission of evidence reflects a sentiment by appellate courts that the trial courts are too liberal in admitting evidence against an accused. The most typical admission errors occurred where the trial court admitted evidence obtained by virtue of an illegal search and seizure, illegal arrest, or because of an invalid confession.[122]

V. REASONS FOR REVERSALS BY THE COURT OF CRIMINAL APPEALS—PETITION FOR DISCRETIONARY REVIEW CASES

Effective September 1, 1981, article V of the Texas Constitution was amended to confer criminal jurisdiction on the former courts of civil appeals.[123] The amendment further provides for discretionary review by the court of criminal appeals of criminal cases decided by the courts of appeals.[124] Therefore, the court of appeals became an intermediate appellate court in both criminal and civil cases. Prior to the amendment, criminal cases were appealed directly from the trial court to the court of criminal appeals.[125] Such cases are referred to as direct appeals.[126] The constitutional amendment came in response to an increase in cases which led to an unreasonable delay in the appellate process and an obsolescence of the former

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121. *See, e.g.*, Acosta v. State, 650 S.W.2d 827, 828 (Tex. Crim. App. 1983) (court of appeals committed reversible error in disallowing evidence of defendant's prior convictions to enhance punishment); Cook v. State, 646 S.W.2d 952, 953 (Tex. Crim. App. 1983) (lower court committed reversible error by not allowing witness to testify); Baxter v. State, 645 S.W.2d 812, 816 (Tex. Crim. App. 1983) (court of appeals erred in reversing trial court's decision to allow evidence of extraneous offense).

122. *See, e.g.*, Linnett v. State, 647 S.W.2d 672, 675 (Tex. Crim. App. 1983) (evidence acquired from search of defendant's automobile erroneously admitted); English v. State, 647 S.W.2d 667, 672 (Tex. Crim. App. 1983) (entry and arrest illegal so admission of evidence obtained was error); King v. State, 657 S.W.2d 109, 111 (Tex. Crim. App. 1983) (confession obtained from defendant while in custody inadmissible).

123. *See* TEX. CONST. art. V, § 6.

124. *See id.* § 5.

125. *See* Tex. S.J. Res. 18, § 5, 65th Leg., 1977 TEX. GEN. LAWS 3359, 3359-60, *repealed by* TEX. CONST. art. V, § 5.

126. Twenty-nine judges were added to the courts of appeals to accommodate the change in the appellate structure. *See* Guittard, *The Expanded Texas Courts of Appeals,* 14 TEX. TECH. L. REV. 549, 553 (1983).

appellate system.[127] The amendment has been effective in reducing the time lag in the appeal of cases. The usual period of pendency from notice of appeal to final disposition has been reduced from more than three years to less than eighteen months.[128]

The benefits of the change are also reflected by the court of criminal appeals chart on petitions for discretionary review.[129] There is an obvious difference in the pattern of reversals shown on the court of criminal appeals chart where there were direct appeals from the trial court to that court, and the court of criminal appeals chart where there was an intermediate court of appeals.[130] There are virtually no established patterns as to why cases which came to the court of criminal appeals by petitions for discretionary review were reversed. Once the courts of appeals took jurisdiction in criminal cases, they effectively wiped out the pattern of trial court error with which the court of criminal appeals had previously been faced. The amendment is working not only to reduce the time lag in the appellate courts, but it has also made it possible for reversible error to be caught at an earlier stage in the appellate process. The court of criminal appeals now shows little, if any, consistency in the reasons it reverses cases it hears by petitions for discretionary review.

VI. Reasons for Reversals by the Supreme Court

The chart on reasons for reversal by the supreme court indicates that, unlike the court of appeals and court of criminal appeals (direct appeals), there are few, if any, established patterns of reversals by that court.[131] Further, the cases the supreme court reversed are fairly evenly split between cases in which it reversed both lower courts and cases in which the court of appeals initially reversed the trial court and the supreme court then reversed the court of appeals. The most frequent reason for reversals by the supreme court during the five-month period of study was erroneous interpretation or application of a statute.[132]

There were fifteen different statutes cited by the supreme court in

127. *See id.* at 552.

128. *See id.* at 553.

129. *See* Chart C, *infra* p. 325.

130. *Compare* Chart D, *infra* p. 326 *with* Chart C, *infra* p. 325.

131. *See* Chart E, *infra* p. 327.

132. *See, e.g.,* Borderlon v. Peck, 661 S.W.2d 907, 909 (Tex. 1983) (art. 4590i, § 10.01 erroneously interpreted by lower courts); Varela v. American Petrofina Co., 658 S.W.2d 561,

the twenty cases it reversed because of statutory misinterpretation and misapplication.[133] This finding indicates that, unlike the trial courts confronted with the former venue statute, the courts of appeals have not had repeated difficulty with a particular statutory scheme. The statutes involved in more than one supreme court reversal during the period of this study were: the Medical Liability and Insurance Improvement Act,[134] the attorney's fees statute,[135] and the Administrative Procedure and Texas Register Act.[136]

VII. CONCLUSION

This study establishes that reversals by the appellate courts fall within distinct patterns. On the civil side, a significant number of cases studied were reversed because of erroneous statutory construction, evidentiary errors, and improper rendition of summary judgment. Criminal cases were reversed chiefly because of evidentiary errors, mistakes in the court's charge, and fundamental error. Categories containing large numbers of reversals reveal that particular types of errors occur repeatedly. For example, overall, Texas appellate courts reversed sixty-five cases for a variety of reasons which did not fall within any particular pattern. By comparison, they reversed nearly this number of cases in *each* category in which a pattern was found, e.g., statutory construction errors (90 cases), sufficiency of the evidence errors (77 cases), errors in the court's charge (55 cases), and fundamental errors (50 cases).[137] The original premise of this article was that if the source of errors could be sys-

562 (Tex. 1983) (art. 2212a misapplied by appellate court); First Nat'l Bank v. Sledge, 653 S.W.2d 283, 288 (Tex. 1983) (lower courts erred in applying art. 2226).

133. *See, e.g.*, Hervey v. Passero, 658 S.W.2d 148, 149 (Tex. 1983) (appellate court erroneously awarded pre-judgment interest on attorney's fees contrary to art. 5069-1.03); Ellis v. Waldrop, 656 S.W.2d 902, 905 (Tex. 1983) (trial court erred in awarding attorney's fees under art. 2226); Peterson v. Shields, 652 S.W.2d 929, 931 (Tex. 1983) (Medical Liability Insurance Improvement Act misinterpreted by lower courts).

134. *See* Borderlon v. Peck, 661 S.W.2d 907, 908-09 (Tex. 1983); Schepps v. Presbyterian Hosp., 652 S.W.2d 934, 938 (Tex. 1983); Peterson v. Shields, 652 S.W.2d 929, 931 (Tex. 1983); *see also* TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1984).

135. *See* Hervey v. Passero, 658 S.W.2d 148, 149 (Tex. 1983); Ellis v. Waldrop, 656 S.W.2d 902, 905 (Tex. 1983); *see also* TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon Supp. 1984).

136. *See* Railroad Comm'n v. Lone Star Gas Co., 656 S.W.2d 421, 425 (Tex. 1983); R.J. Reagan Co. v. Kent, 654 S.W.2d 532, 533 (Tex. 1983); *see also* TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1984).

137. *See* Chart A, *infra* p. 323.

tematically revealed and studied, the most frequent errors could be corrected. It is hoped that this article will provide the impetus for the courts and legislature to do so.

CHART A

Texas Appellate Courts*
Summary of Type of Errors

Reason for Reversal	Times Reasons for Reversal Cited		
	Criminal	Civil	Total
A. Interpretation Errors			
1. statutes	37	53	90
2. case law	17	15	32
3. document	4	11	15
B. Erroneous or Inadequate			
1. advice	1	0	1
2. record	3	3	6
3. charge/instruction	46	9	55
C. Fundamental Error	42	8	50
D. Jurisdiction Error	6	4	10
E. Mitigated Error	6	3	9
F. Absence of Error	1	4	5
G. Damage Computation Error	0	11	11
H. Miscellaneous Error	30	35	65
I. Evidentiary Error			
1. sufficiency of the evidence	52	25	77
2. no evidence	9	22	31
3. admission or suppression	30	15	45
J. Erroneous Grant of Summary Judgment	0	33	33
K. Post Trial Ruling Error	4	4	8
L. Error Involving Community Property	0	6	6
M. Sentencing Error	3	0	3
N. Prosecutor Error	22	1	23
O. Jury Misconduct	3	1	4
P. Faulty Indictment or Information	15	0	15
Q. Ineffective Assistance of Counsel	3	0	3

* This chart includes reversals by the courts of appeals, court of criminal appeals, and the supreme court.

CHART B

REASONS FOR REVERSALS BY THE TEXAS COURTS OF APPEALS

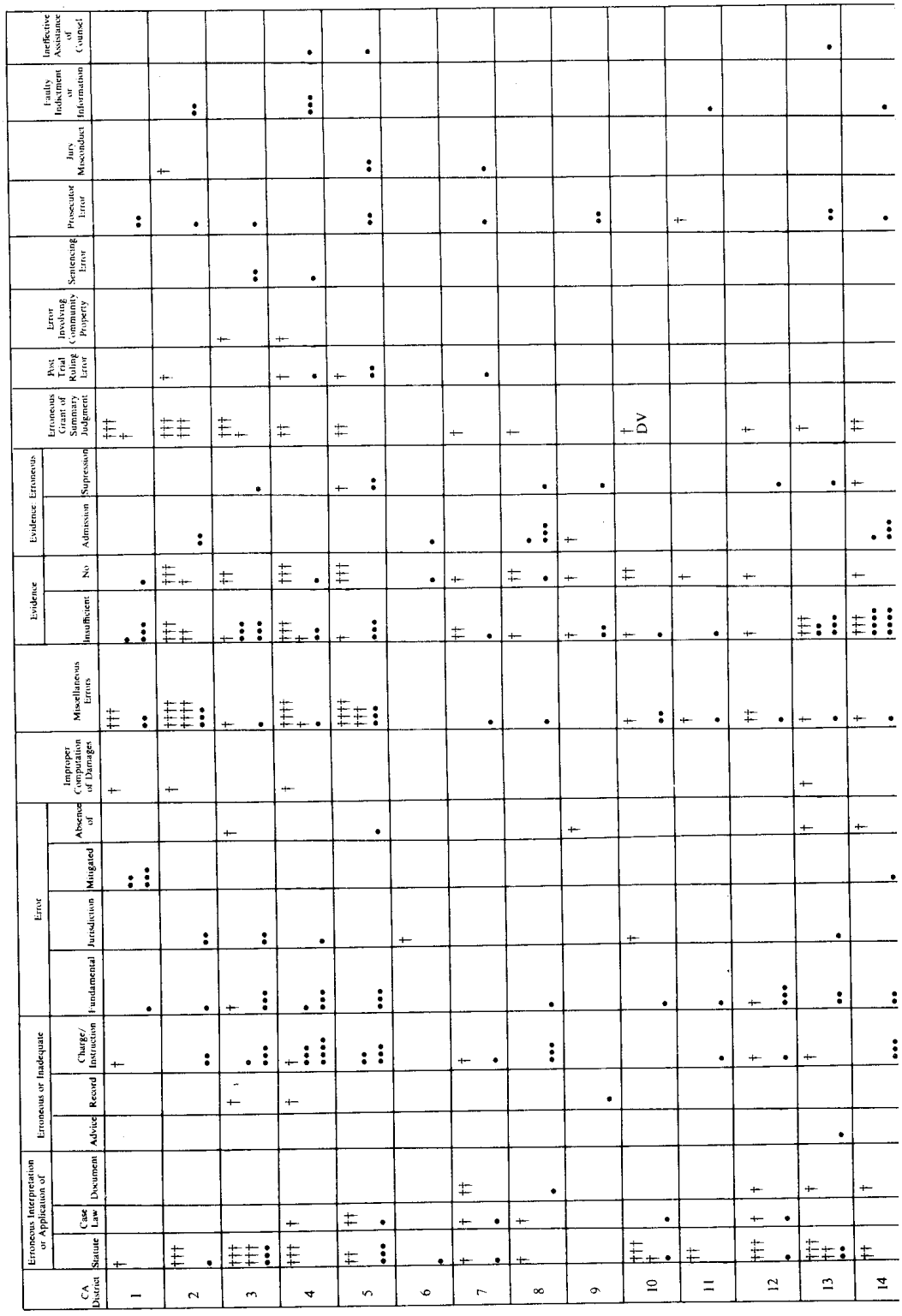


CHART C

REASONS FOR REVERSALS BY THE TEXAS COURT OF CRIMINAL APPEALS

Petitions for Discretionary Review

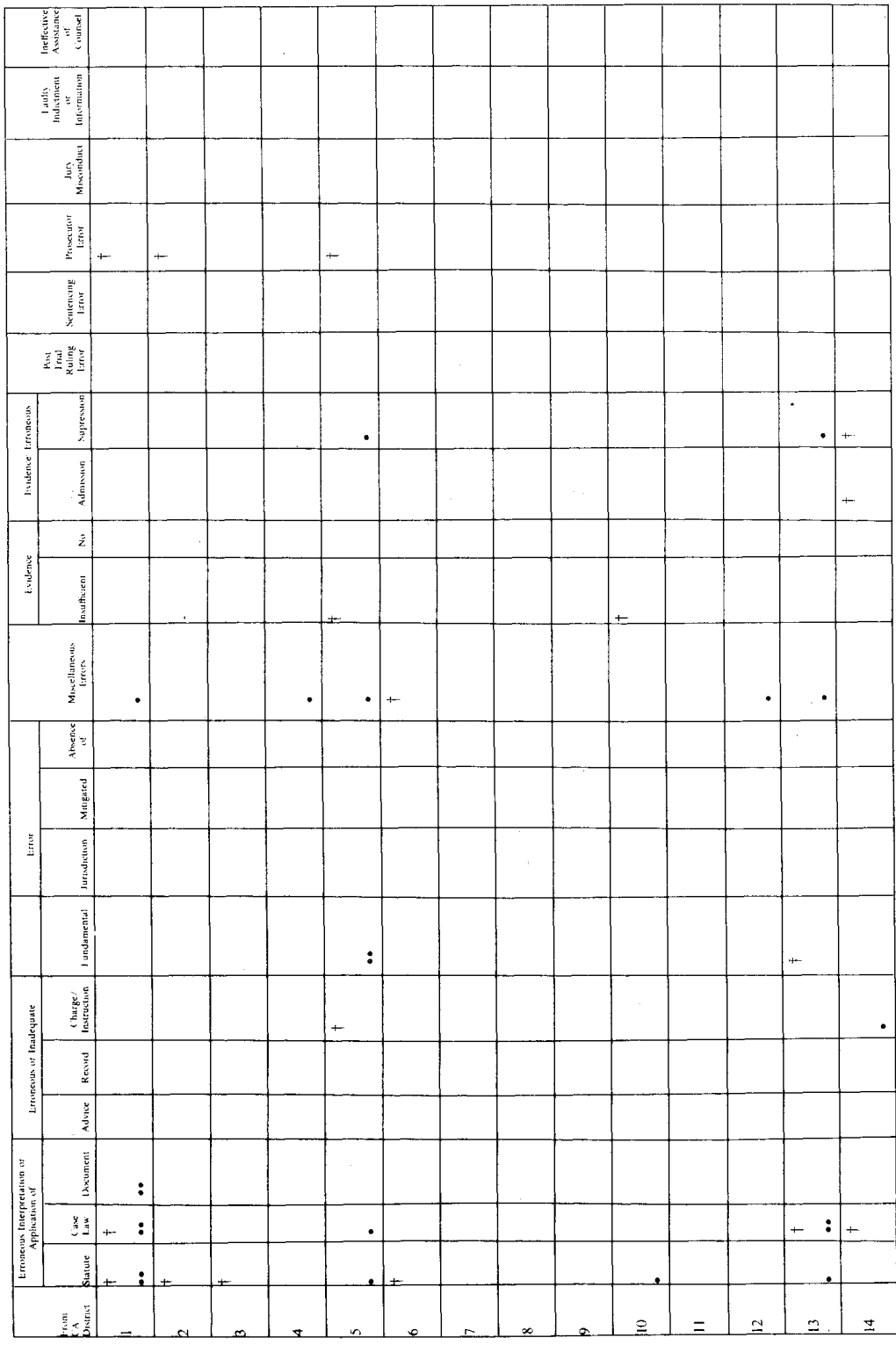


CHART D

REASONS FOR REVERSALS BY THE TEXAS COURT OF CRIMINAL APPEALS

Direct Appeals

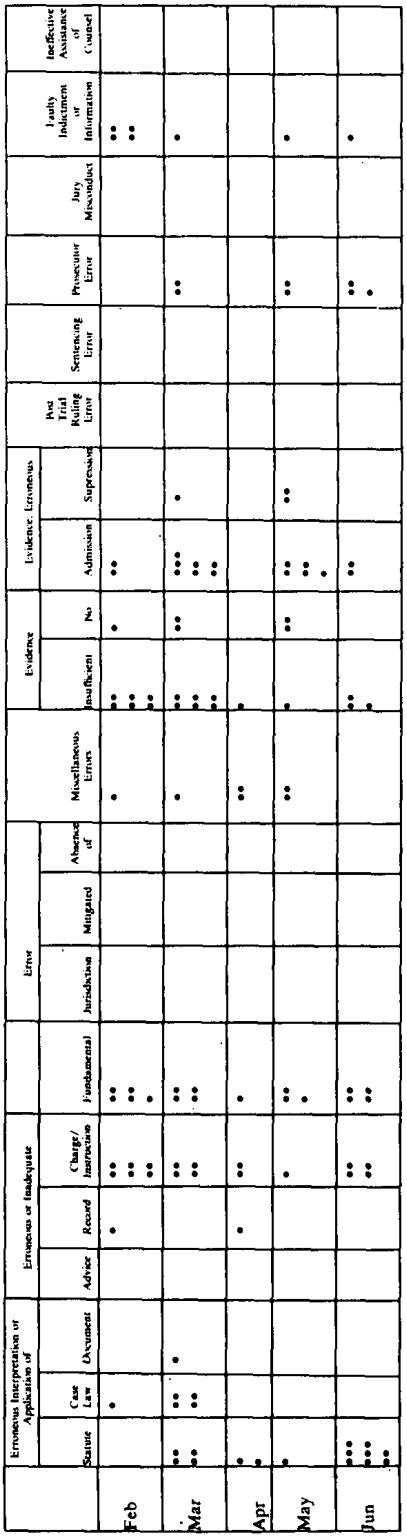
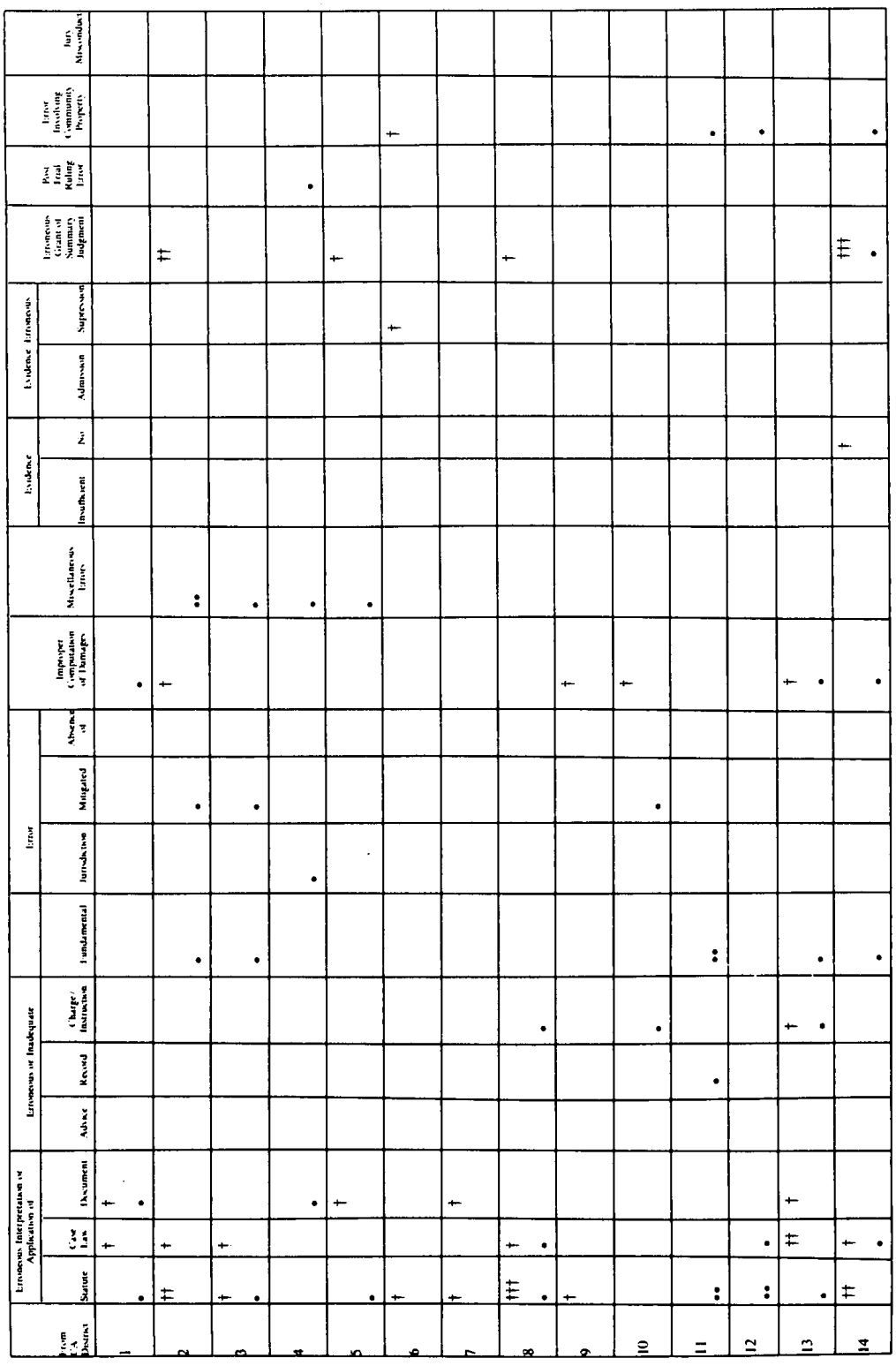


CHART E

REASONS FOR REVERSALS BY THE SUPREME COURT OF TEXAS



From CA District	Erroneous Interpretation or Application of			Erroneous or Inadequate			Error				Improper Computation of Damages	Miscellaneous Error	Evidence			Erroneous Grant of Summary Judgment	Post Trial Ruling Error	Error Involving Community Property	Jury Misconduct
	Statute	Case Law	Document	Advice	Record	Charge/ Instruction	Fundamental	Jurisdictional	Mitigated	Absence of			Insufficient	No	Admission	Suppression			
1	•	†	† •								•								
2	††	†					•		•		†	••				††			
3	† •	†					•		•			•							
4			•					•				•					•		
5	•		†									•				†			
6	†														†			†	
7	†		†																
8	††† •	† •				•										†			
9	†										†								
10						•			•		†								
11	••				•		••											•	
12	••	•																•	
13	•	††	†			† •	•				† •								
14	††	† •					•				•			†		††† •		•	

• - CA reversed TCt. SCt reversed CA † - CA affirmed TCt. SCt reversed both