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CRIMINAL LAW — Jury Charges — Reversal Due To Fundamental Error In The Jury Charge Requires A Showing Of “Egregious Harm” To The Accused If The Error Is Not Objected To At Trial

Almanza v. State
686 S.W.2d 157 (Tex. Crim. App. 1985)

Cipriano Ramon Almanza and a friend, Archie, forced their way into the house of Mary and Michael Hayes on the night of December 28, 1979.¹ Almanza held a pistol on Mr. Hayes, forcing him to watch while Archie raped Mrs. Hayes.² The woman submitted out of fear for her life and the life of her husband.³ Although Almanza admitted on direct examination that he and Archie had been at the Hayes's home and that Archie had raped the woman, Almanza denied being a party to the rape.⁴ The indictment charging Almanza with aggravated rape connected the aggravating factors with “and” while the jury charge connected the aggravating factors with “or.”⁵ This change from the conjunctive to the disjunctive allowed the jury to convict on an alternate theory of aggravated rape not alleged in the indictment.⁶ Almanza was convicted in the 213th Judicial District Court, Tarrant

1. See Record Vol. III at 33, reprinted in McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 842 (1984). Since no decision has been rendered reciting the full facts of this case, the facts are taken from the statement of facts and transcript of the trial. For a detailed discussion of the facts in *Almanza*, see McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 842-44 (1984). Both the Hayeses and Almanza only knew Almanza's friend as Archie. See *Almanza v. State*, No. 2-81-340-CR, slip op. at 2 (Tex. App.—Fort Worth, Sept. 25, 1985, no pet.) (not yet reported). Archie was never apprehended. See *id.* at 2.

2. See Record Vol. III at 53, reprinted in McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 842 (1984).

3. See Record Vol. III at 58, 66, reprinted in McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 842-43 (1984).

4. See Record Vol. IV at 49, 52, reprinted in McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 843 (1984).

5. See *Almanza v. State*, 645 S.W.2d 885, 886 (Tex. App.—Fort Worth 1983) (allegations of threats of death joined by “and” in indictment but by “or” in jury charge), *rev'd*, 686 S.W.2d 157 (Tex. Crim. App. 1985).

6. See *id.* at 886 (approach of changing “and” to “or” is fatal where matters of aggravation involved).

County, for aggravated rape.⁷ The Fort Worth Court of Appeals reversed, and the State filed for discretionary review.⁸ Thereafter, the Court of Criminal Appeals granted, and then dismissed, the State's petition, holding that it had been improvidently granted.⁹ The Texas Court of Criminal Appeals, en banc, granted the State's motion for rehearing to determine if fundamental error existed in the jury charge.¹⁰ *Held* — Reversed and remanded.¹¹ Reversal due to fundamental error in the jury charge requires a showing of "egregious harm" to the accused if the error is not objected to at trial.¹²

Fundamental error is generally defined as error threatening the fairness of a trial or the integrity and reputation of the system of justice.¹³ Texas courts

7. *See Almanza v. State*, 686 S.W.2d 157, 157-58 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g). *Almanza* appealed the conviction. *See id.* at 158. The jury charge upon which *Almanza* was convicted read as follows:

Now, if you find from the evidence, beyond a reasonable doubt that on or about the 28th day of December, 1979, in Tarrant County, Texas, a person known as "Archie" did then and there intentionally or knowingly without the consent of Mary Hayes, a female, have sexual intercourse with the said Mary Hayes, and that the said Mary Hayes was not then the wife of said "Archie" and that said "Archie" intentionally and knowingly compelled submission to such sexual intercourse by a force that overcame such earnest resistance as might reasonably be expected under the circumstances or that said "Archie" intentionally or knowingly compelled submission to the sexual intercourse by a threat of death to be imminently inflicted upon Michael Hayes, and that such threat was such that it would prevent resistance by a woman of ordinary resolution, under the same or similar circumstances because of a reasonable fear of harm, and if you further believe from the evidence beyond a reasonable doubt that on such occasion the Defendant, Cipriano Ramon Almanza, Jr., acting with intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid said "Archie" in the commission of the offense, if any, then you will find the Defendant guilty of the offense of aggravated rape as charged in Count Two of the indictment and so say be your verdict.

See Transcript at 39-40, reprinted in McCormick, Convery & Icenhauer-Ramirez, Fundamental Defect in Appellate Review of Error in the Texas Jury Charge, 15 ST. MARY'S L.J. 827, 843-44 n.96 (1984).

8. *See Almanza v. State*, 686 S.W.2d 157, 159 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g).

9. *See id.* at 159.

10. *See id.* at 159.

11. *See id.* at 174. The court reasoned that proper procedural practice compelled that the case be remanded. *See id.* at 174. On remand, the Fort Worth Court of Appeals found that, based on the "totality of the circumstances," *Almanza* had not suffered egregious harm. *See Almanza v. State*, No. 2-81-340-CR, slip op. at 9 (Tex. App.—Fort Worth, Sept. 25, 1985, no pet.) (not yet reported).

12. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g). In *Almanza* the court held that when no objection is made to the jury charge at trial, defendant must claim the error is fundamental. *See id.* at 171. The court also held that reversal will occur only when the error is "egregious" in the sense that it denies the defendant a "fair and impartial trial." *See id.* at 171.

13. *See United States v. Anderson*, 654 F.2d 1264, 1268 (8th Cir. 1981) (fundamental error arises when actions of trial court affect defendant's "substantial" rights resulting in "mis-

classify an error as fundamental if it is "calculated to injure the rights of the appellant to the extent he has not had a fair and impartial trial."¹⁴ In most jurisdictions, the existence of fundamental error does not mandate automatic reversal.¹⁵ In fact, Texas stands as the only jurisdiction to require automatic reversal if fundamental error occurs.¹⁶ This automatic reversal approach in Texas is based on the defendant's right to due process in criminal proceedings.¹⁷ Thus, the fundamental error/automatic reversal procedure has be-

carriage of justice"); *United States v. Mosquiz*, 445 F.2d 963, 966 (5th Cir. 1971) (error fundamental if denying recognition of error would degrade "fairness, integrity, or public reputation of judicial proceedings"); *see also* *State v. Williamson*, 389 So. 2d 1328, 1331 (La. 1980) (fundamental error is error of such "importance and significance" that it violates "fundamental requirements of due process"); *Saylor v. State*, 503 P.2d 226, 228 (Okla. Crim. App. 1972) (error fundamental in nature when it denies defendant "a fair and impartial trial"). Fundamental error can also arise in civil proceedings. *See Texas Indus. Traffic League v. Railroad Comm'n of Texas*, 633 S.W.2d 821, 823 (Tex. 1982) (fundamental error arises when record shows on its face that court lacked jurisdiction or when public interest is adversely affected).

14. *See, e.g., Harris v. State*, 522 S.W.2d 199, 201 (Tex. Crim. App. 1975) (reversal on appeal due to error only when defendant denied a "fair and impartial trial"); *Smith v. State*, 513 S.W.2d 823, 829 (Tex. Crim. App. 1974) (fundamental error that which is "calculated to injure the rights of the appellant to the extent that he has not had a fair and impartial trial"); *Fennell v. State*, 424 S.W.2d 631, 632 (Tex. Crim. App. 1968) (reversal for alleged error in jury charge only where error "calculated to injure the rights of the defendant or unless it appears that he has not had a fair and impartial trial").

15. *See, e.g., People v. Watson*, 299 P.2d 243, 254 (Cal. 1956) (reversal due to fundamental error occurs after court examines "entire charge" and is content that more "favorable" result for defendant would have been reached but for fundamental error); *People v. Jones*, 440 N.Y.S.2d 248, 255 (N.Y. App. Div. 1981) (simply because alleged fundamental error may impinge on federal Bill of Rights does not alone "render it immune from the need and requirement of proper preservation"); *Lunde v. State*, 270 N.W.2d 180, 184 (Wis. 1978) ("nature" of alleged fundamental error must be thoroughly examined before court will consider it in depth); *see also* *Braswell, The Texas Approach to Fundamental Error in the Criminal Jury Charge*, 48 TEX. B.J. 278, 283 (1985) (federal courts rejected "per se" approach to review of fundamental error).

16. *See, e.g., Ford v. State*, 615 S.W.2d 727, 728 (Tex. Crim. App. 1981) (fundamental error in jury charge "requires" reversal); *Ward v. State*, 615 S.W.2d 752, 752-53 (Tex. Crim. App. 1981) (judgment of conviction reversed in "interest of justice" where error appeared in jury charge); *Williams v. State*, 612 S.W.2d 934, 935 (Tex. Crim. App. 1981) (fundamental error in indictment required automatic reversal "in the interest of justice"); *see also* *Gellis, Reasons for Case Reversal in Texas: An Analysis*, 16 ST. MARY'S L.J. 299, 314 (1985). One commentator has called for Texas appellate courts to abandon the "per se" reversal approach to fundamental error. *See id.* at 314. The courts are also urged to adopt the standard of review used by the United States Supreme Court and other jurisdictions: unless the defendant is harmed by the alleged error, no reversal is required. *See id.* at 314.

17. *See, e.g., Doyle v. State*, 631 S.W.2d 732, 738 (Tex. Crim. App. 1982) (failure of application paragraph "infringes upon accused's federal and state constitutional rights to due process of law"; defendant failed to receive fair jury trial); *Ex parte Clark*, 597 S.W.2d 760, 761 (Tex. Crim. App. 1980) (total failure of charge in application paragraph denies appellant state and federal constitutional guarantee to fair and impartial trial); *Harris v. State*, 522 S.W.2d 199, 202 (Tex. Crim. App. 1975) (error presented to court calculated to injure appellants'

come a key concept in Texas criminal procedure, due to the the large number of reversals in the areas of jury charges and charging instruments.¹⁸

Fundamental error is that error that can be raised for the first time on appeal,¹⁹ whereas nonfundamental error must be objected to during trial or

rights because appellants failed to get fair trial which they are guaranteed under federal and state constitutions). The court has held that where the jury charge required the jury to find each essential element of the offense charged, comported with the legal theory in the indictment, and proved every factual allegation made in the indictment, the charge was not fundamentally defective since the accused was apprised of everything that due process and due course of law require. See *Sattiewhite v. State*, 600 S.W.2d 277, 285 (Tex. Crim. App. 1980) (Opinion on Motion for Reh'g); see also Braswell, *The Texas Approach to Fundamental Error in the Criminal Jury Charge*, 48 TEX. B.J. 278, 280 (1985) (rationale behind automatic reversal approach is "that it is enough that a constitutional right of the accused has been violated"); Braswell, *Fundamental Error in the Court's Charge to the Jury in Texas Criminal Cases*, 46 TEX. B.J. 409, 410 (1983) (main reason for doctrine to insure criminally accused afforded substantial justice and integrity of judicial system maintained).

18. See *Thomas v. State*, 605 S.W.2d 290, 294 (Tex. Crim. App. 1980) (Opinion on Motion for Reh'g) (fundamental error occurs when jury charge fails to charge jury on allegation required to be proven in indictment); *Thomas v. State*, 599 S.W.2d 812, 814 (Tex. Crim. App. 1980) (error in jury charge fundamental if "calculated to injure the rights of the defendant" or if it "denied a fair and impartial trial"); see also *Ex parte Williams*, 634 S.W.2d 815, 817 (Tex. Crim. App. 1982) (when culpable mental state requisite element of offense and indictment fails to allege this element, indictment will not support conviction since it is fundamentally defective); *American Plant Food Corp. v. State*, 508 S.W.2d 598, 603 (Tex. Crim. App. 1974) (indictment which fails to charge an offense is fundamentally defective and subject to attack at any time). Commentators have also noted the pervasive nature of fundamental error in Texas criminal procedure. See Braswell, *The Texas Approach to Fundamental Error in the Criminal Jury Charge*, 48 TEX. B.J. 278, 278 (1985) (fundamental error reversals "continue to erupt from Texas Court of Criminal Appeals"); Dix, *The Need for Reform in Texas Charging Instrument Law*, 47 TEX. B.J. 490, 490 (1984) (points out peculiarities of charging instrument "body of law" in Texas); 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) (authors note "continued expansion" of automatic reversal standard of review for fundamental error).

19. See *Thomas v. State*, 605 S.W.2d 290, 294 (Tex. Crim. App. 1980) (when accused fails to object at trial, this waives appellate review of all but fundamental error); *Harris v. State*, 522 S.W.2d 199, 201 (Tex. Crim. App. 1975) (only where accused has been denied fair and impartial trial will court consider reversal even though no objection to court's charge raised at trial). Fundamental error in the court's charge to the jury can be raised for the first time on appeal. See *Rubio v. State*, 607 S.W.2d 498, 502 (Tex. Crim. App. 1980) (where no objection to jury charge raised at trial, only fundamental error will be considered on appeal); *Ellison v. State*, 579 S.W.2d 928, 930 (Tex. Crim. App. 1979) (no objection made during trial to jury charge; fundamental error allowed court to review appellant's claim); *Jackson v. State*, 578 S.W.2d 748, 749 (Tex. Crim. App. 1979) (charge authorizing conviction for theory not alleged in indictment is fundamentally erroneous and requires reversal even though accused makes no trial objection to charge). Similarly, fundamental defect in charging instruments does not have to be objected to during trial in order to be raised on appeal. See *Jones v. State*, 622 S.W.2d 109, 110 (Tex. Crim. App. 1981) ("interest of justice" mandates review of fundamental defect in charging instrument for first time on appeal); *Keagan v. State*, 618 S.W.2d 54, 57 (Tex. Crim. App. 1981) (conviction based on fundamentally defective indictment can be

it is waived on appeal.²⁰ Fundamental error was recognized in Texas as early as 1875.²¹ Following this recognition, the statutes concerning fundamental error have been modified on numerous occasions, and as a result, the courts' treatment and definition of fundamental error have changed accordingly.²² Currently, Texas courts define fundamental error as error "calcu-

attacked for first time in Court of Criminal Appeals); *Burrell v. State*, 526 S.W.2d 799, 802 (Tex. Crim. App. 1975) (even if accused fails to object at trial to amendment of indictment, objection can be raised for first time on appeal when indictment involves matter of substance).

20. See *Nelson v. State*, 607 S.W.2d 554, 555 (Tex. Crim. App. 1980) (defendant cannot urge error for first time on appeal if error not timely objected to at trial); *Cooper v. State*, 578 S.W.2d 401, 404 (Tex. Crim. App. 1979) (preservation of error requires timely objection and grounds of objection must be stated); *Dinn v. State*, 570 S.W.2d 910, 915 (Tex. Crim. App. 1978) (since no objections made at trial to alleged errors, they provided no basis for review); *Kerns v. State*, 550 S.W.2d 91, 96 (Tex. Crim. App. 1977) (failure of defendant to object at trial; no error preserved for review). Nonfundamental error, in certain instances, may be deemed by the courts to be harmless. See *Cook v. State*, 611 S.W.2d 83, 87 (Tex. Crim. App. 1981) (failure to provide transcript, in certain instances, can be harmless error); *Maldonado v. State*, 507 S.W.2d 207, 208 (Tex. Crim. App. 1974) (error can be harmless where juror spoke with defendant after being impaneled); *Lacy v. State*, 424 S.W.2d 929, 931 (Tex. Crim. App. 1967) (admission of hearsay testimony was harmless to defendant).

21. See *Bishop v. State*, 43 Tex. 390, 396 (1875) (reversal could result if error was "calculated to injure the rights of the defendant," even if objection to jury charge first raised on appeal). The court in *Bishop* interpreted article 602 of the Old Code of Criminal Procedure. See TEX. CODE CRIM. PROC. art. 602 (Paschal 2d ed. 1870) (repealed in 1879). Article 602 provided:

Whenever it appears that by the record in any criminal action, taken to the Supreme Court upon appeal by the defendant, that the instructions given to the jury were verbal (except where so given by consent in a case of misdemeanor), or that the District Judge has departed from any of the requirements of the eight preceding Articles, the judgment shall be reversed, provided it appears by the record, that the defendant excepted to the order or action of the Court at the time of the trial.

Id. Other articles set forth the procedures for creating and delivering the jury charge. *Id.* arts. 595-601. The *Bishop* court also noted their constitutional power to reverse error, even if not objected to at trial. See *Bishop v. State*, 43 Tex. 390, 403 (1875) (not necessary to raise jury charge objections at trial in order for supreme court to revise action relating to charge because authority derived from constitutional and legislative sources giving revision and correction power in criminal proceedings). For other discussions of *Bishop*, see *Doyle v. State*, 631 S.W.2d 732, 739-41 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g) (Clinton, J., concurring) (in depth analysis of "calculated to injure" standard and court's reasoning); Braswell, *Fundamental Error in the Court's Charge to the Jury in Texas Criminal Cases*, 46 TEX. B.J. 409, 410 (1983) (citing holding and reasoning behind "calculated to injure" standard); McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 830-31 (1984) (analysis of "calculated to injure" standard).

22. See TEX. CODE CRIM. PROC. art. 685 (1879) (repealed 1895). Article 685, formerly article 602 of the Old Code, provided:

Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles has been disregarded the judgment shall be reversed; *provided*, the error is excepted to at the time of trial.

lated to injure the rights of the defendant" to the extent that the defendant

Id. (emphasis in original). Under article 685, courts held that reversal was mandated when a proper trial objection to the jury charge was made. *See* *Cunningham v. State*, 27 Tex. Ct. App. 479, 482, 11 S.W. 485, 488 (1889) (when error of stating law occurs, regardless how material, if properly objected to and presented on appeal by proper bill of exception, article 685 mandates reversal without inquiry as to impact of error on jury); *Martin v. State*, 25 Tex. Ct. App. 557, 576, 8 S.W. 682, 682 (1888) (court refused to consider exceptions that defense counsel stated after jury retired since no fundamental error pointed out); *Mace v. State*, 9 Tex. Ct. App. 110, 113 (1880) (if objection made at trial, duty of court to reverse judgment without inquiry into what effect the charge had on trial); *see also* McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 831-32 nn.22-23 (1984) (noting revisions in article 602 and cases construing article 685). In 1895, article 685 was modified, emerging as article 723. *See* TEX. CODE CRIM. PROC. art. 723 (1895) (repealed in 1897). Article 723 was later amended in 1897. *See* S.B. No. 36, ch. 21, sec. 1, 1897 Tex. Gen. Laws 17, 10 H. GAMMEL, LAWS OF TEXAS 1071 (1897). Article 723 provided:

Whenever it appears by the record in any criminal action, upon appeal by the defendant, that any of the requirements of the eight preceding Articles have been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, which error shall be excepted to at the time of the trial, or on a motion for a new trial.

Id.; compare TEX. CODE CRIM. PROC. art. 723 (1895) ("which error shall be excepted to at the time of trial, or on a motion for a new trial") (emphasis added) with TEX. CODE CRIM. PROC. art. 685 (1879) ("provided, the error is excepted to at the time of trial"); *see also* *Doyle v. State*, 631 S.W.2d 732, 742 n.9 (Tex. Crim. App. 1982) (Opinion on Motion for Reh'g) (Clinton, J., concurring) (rewording of article 685 as seen in article 723 revised concept; under article 723 no reversal unless raised by bill of exception or on motion for new trial and error calculated to injure defendant's rights). The courts' interpretations of article 723 allowed for the continuing practice of reviewing fundamental error even though it was not objected to at trial. *See* *Davis v. State*, 28 Tex. Ct. App. 542, 560, 13 S.W. 994, 995 (1890) (if error material in that it injured defendant's rights, judgment should be reversed, even if error raised in motion for new trial); *Leache v. State*, 22 Tex. Ct. App. 279, 314, 3 S.W. 539, 546 (1886) (if jury charge first excepted to at motion for new trial, no revision unless error, upon review, was "calculated to prejudice the rights of the accused."). In 1913, the Texas Legislature enacted article 743. *See* Act of April 5, 1913, ch. 138, § 4, 1913 Tex. Gen. Laws 278, 279. Article 743 provided:

Whenever it appears by the record in any criminal action upon appeal of the defendant that any of the requirements of the nine preceding articles have been disregarded, 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, and all objections to the charge, and on account of refusal or modification of special charges shall be made at the time of the trial.

Id. The impetus for this legislative amendment apparently was the great number of reversals in criminal cases due to errors not being brought to the judge's attention before the charge was given. *See id.* at 279; *see also* McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 832-33 (1984) (analysis of 1913 Act, legislature's reasoning, and interpretative cases). In cases construing article 743, the courts enunciated two standards of review for fundamental error. Compare *McCauley v. State*, 97 Tex. Crim. 1, 4, 259 S.W. 938, 939 (1924) (Opinion on Motion for Reh'g) (no review since no fundamental error) and *Childs v. State*, 81 Tex. Crim. 21, 23-4,

has been denied a "fair and impartial trial."²³ In *Cumbie v. State*,²⁴ the Texas Court of Criminal Appeals recognized only four categories of fundamental error in jury charges:²⁵ (1) the omission from the charge of an allegation from the indictment which is required to be proven;²⁶ (2) the

193 S.W. 664, 665 (1917) (Opinion on Motion for Reh'g) (under article 743, unless fundamental error is present, court can only review exceptions taken to charge before argument began) with *Echols v. State*, 75 Tex. Crim. 369, 381, 170 S.W. 786, 792 (1914) (only objections to jury charge which can be raised for first time on appeal are those that "prevent the appellant from having a fair and impartial trial") and *Clay v. State*, 73 Tex. Crim. 78, 79, 164 S.W. 1, 1 (1914) (only error that "prevent[s] appellant from having a fair and impartial trial" can be objected to after trial). With little modification, article 743 became article 36.19 in 1966. See TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981). Article 36.19 provides:

Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17, and 36.18 has been disregarded, 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. All objections to the charge and to the refusal of special charges shall be made at the time of trial.

Id. Under article 36.19, the current statute defining the standard of review for fundamental error in jury charges, the courts have reversed numerous cases. See, e.g., *Windham v. State*, 530 S.W.2d 111, 112 (Tex. Crim. App. 1975) (fundamental error requiring reversal where jury charge authorized conviction on simple assault while defendant charged with aggravated assault); *Harris v. State*, 522 S.W.2d 199, 201 (Tex. Crim. App. 1975) (if objection not made in accordance with article 36.14, reversal on appeal only if the accused denied fair and impartial trial); *Smith v. State*, 513 S.W.2d 823, 828-29 (Tex. Crim. App. 1974) (if no proper objection made to jury charge at trial, only fundamental error requires reversal under 36.19).

23. See *Ross v. State*, 487 S.W.2d 744, 745 (Tex. Crim. App. 1972).

24. 578 S.W.2d 732 (Tex. Crim. App. 1979).

25. See *id.* at 733-34 (court establishes four grounds for automatic reversal due to fundamental error in jury charge). See generally *Braswell, Fundamental Error in the Court's Charge to the Jury in Texas Criminal Cases*, 46 TEX. B.J. 409, 410-15 (1983) (Braswell discusses not only four *Cumbie* categories but also eleven other grounds of fundamental error enunciated by Texas courts); *McCormick, Convery & Icenhauer-Ramirez, Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 836 (1984) (referring to *Cumbie* as "the mainstay of recent Texas case law regarding fundamental error in the court's charge"); *Odom & Valdez, A Review of Fundamental Error in Jury Charges in Texas Criminal Cases*, 33 BAYLOR L. REV. 749, 750-60 (1981) (in-depth analysis of *Cumbie* categories).

26. See *Cumbie v. State*, 578 S.W.2d 732, 733 (Tex. Crim. App. 1979). Once the indictment alleges an element of the crime, the allegation must be included in the jury charge and the failure to do so is fundamental error. See *Windham v. State*, 530 S.W.2d 111, 113 (Tex. Crim. App. 1975) (jury not required to find knife was "deadly weapon" in charge authorizing conviction for aggravated assault); *Garza v. State*, 162 Tex. Crim. 655, 658, 288 S.W.2d 785, 787 (1956) (defendant charged with possession of beer; jury authorized to convict for possession of empty bottles); *Moore v. State*, 84 Tex. Crim. 256, 257, 206 S.W. 683, 684 (1918) (court's charge must conform to charges in indictment; fundamental error if conviction authorized on any state of facts besides those alleged in indictment). When such an omission occurs, the state's burden of proof is reduced. See *Odom & Valdez, A Review of Fundamental Error in Jury Charges in Texas Criminal Cases*, 33 BAYLOR L. REV. 749, 751-54 (1981). Every essential element of the offense charged in the indictment must be proven. See *id.* at 751. The most common omission is the failure in the jury charge to require the jury to find the defend-

substitution in the jury charge of a theory of the offense completely different from the theory alleged in the indictment;²⁷ (3) authorization by the charge to convict on the theory alleged in the indictment and on one or more other theories not alleged;²⁸ and (4) authorization by the charge to convict for conduct which is not an offense.²⁹ Classifying error as fundamental under

ant acted with the culpable mental state. *See id.* at 751. Even though omission of an entire element of an offense is fundamental error, the jury charge is not required to exactly conform to every single factual allegation made in the indictment. *See id.* at 752; *cf. West v. State*, 567 S.W.2d 515, 517 (Tex. Crim. App. 1978) (when jury charge allows conviction without requiring jury to find all elements of offense alleged in indictment, fundamental error present).

27. *See Cumbie v. State*, 578 S.W.2d 732, 733 (Tex. Crim. App. 1979). A jury charge authorizing conviction on a theory not alleged in the indictment is fundamental error. *See Gooden v. State*, 576 S.W.2d 382, 383 (Tex. Crim. App. 1979) (in application paragraph, jury charge authorized conviction on theory not alleged in indictment, thus fundamental error resulted); *Peoples v. State*, 548 S.W.2d 893, 895 (Tex. Crim. App. 1977) (fundamental error present when jury charge authorized conviction on "forgery by making" but defendant indicted on "forgery by passing"; in essence, jury could convict defendant on theory totally different than alleged in indictment); *Long v. State*, 548 S.W.2d 897, 899 (Tex. Crim. App. 1977) (when jury charge authorizes conviction upon theory not alleged in indictment, fundamental error results); *accord Ross v. State*, 487 S.W.2d 744, 745 (Tex. Crim. App. 1972). The court held the jury charge fundamentally defective since it erroneously authorized defendant's conviction on a theory not alleged in the indictment. *See id.* at 745. "Even though there was no objection to the charge at trial, the error was fundamental and calculated to injure the rights of the appellant to the extent that he has not had a fair and impartial trial." *Id.* at 745. If the jury charge contains elements of conduct other than those alleged in the indictment, this allows the jury to convict the defendant on charges to which he has no notice, thus fundamental error exists. *See generally Odom & Valdez, A Review of Fundamental Error in Jury Charges in Texas Criminal Cases*, 33 BAYLOR L. REV. 749, 754-55 (1981) (discussing nature and effect of substitution in jury charges).

28. *See Cumbie v. State*, 578 S.W.2d 732, 734 (Tex. Crim. App. 1979). Allowing a jury to convict on theories not alleged in the indictment constitutes fundamental error. *See Brewer v. State*, 572 S.W.2d 940, 941 (Tex. Crim. App. 1978) (jury charge authorized conviction for aggravated robbery under theories not alleged in indictment which requires reversal); *Edmond v. State*, 566 S.W.2d 609, 612 (Tex. Crim. App. 1978) (jury charge authorized conviction on theory not alleged in indictment, fundamental error occurred); *Robinson v. State*, 553 S.W.2d 371, 374 (Tex. Crim. App. 1977) (jury charge authorized conviction for aggravated robbery on variety of theories under Penal Code sections, instead of charging only theory in indictment); *see also Dowden v. State*, 537 S.W.2d 5, 6 (Tex. Crim. App. 1976) (fundamental that conviction for offense cannot stand unless charge authorized jury to find defendant guilty only for conduct constituting offense). This type of jury charge error "enlarges" the indictment, allowing conviction on proof less than or different than that required to be proven in the indictment. *See generally Odom & Valdez, A Review of Fundamental Error in Jury Charges in Texas Criminal Cases*, 33 BAYLOR L. REV. 749, 755-58 (1981) (discussing "enlargement" type error and types of charges commonly exhibiting such error).

29. *See Cumbie v. State*, 578 S.W.2d 732, 734-35 (Tex. Crim. App. 1979); *see also Smith v. State*, 603 S.W.2d 846, 847 (Tex. Crim. App. 1980) (defendant indicted on offense of injury to child; jury charge authorized conviction if defendant guilty of failure to act; fundamental error since failure to act not offense); *Sattiewhite v. State*, 600 S.W.2d 277, 283 (Tex. Crim. App. 1980) (Opinion on Motion for Reh'g). In *Sattiewhite*, the court found clear fundamental

Cumbe is important because the appellate courts presume harm to the defendant.³⁰ Under the *Cumbe* categories, fundamental error, and its concomitant presumed harm, results in automatic reversal even when raised for the first time on appeal.³¹

The frequent application of the fundamental error/automatic reversal procedure³² has prompted severe criticism from both the judiciary and commentators.³³ This criticism has often focused on the court's "per se" or

error where the proof in the jury charge fell short of the offense alleged in the indictment, thus denying the defendant notice of the crime with which he was charged with. *See id.* at 283. "Adequate notice to the accused is the touchstone of a valid conviction — notice that is first imparted by the accusatory instrument, then conformably effectuated by the evidence and, in a sense, reflected by a charge to the jury." *Id.* at 282; *see also* *Jackson v. State*, 576 S.W.2d 88, 90 (Tex. Crim. App. 1979) (Opinion on Motion for Reh'g) (defendant charged with aggravated robbery and jury charge authorized conviction for "recklessly" threatening or placing in fear; not an offense under Penal Code; error in charge fundamental). *See generally* Odom & Valdez, *A Review of Fundamental Error in Jury Charges in Texas Criminal Cases*, 33 BAYLOR L. REV. 749, 759-60 (1981) (error of this type differs from other three because it not only enlarges on indictment but allows conviction for non-criminal conduct).

30. *See* *Cumbe v. State*, 578 S.W.2d 732, 733-35 (Tex. Crim. App. 1979) (court delineated four types of fundamental error requiring automatic reversal); Braswell, *The Texas Approach to Fundamental Error in the Criminal Jury Charge*, 48 TEX. B.J. 278, 280 (1985) (under *Cumbe*, court makes no attempt to determine if alleged error affected outcome of case; harm presumed); McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 836 (1984) (in *Cumbe*, error in any one of four categories requires automatic reversal because of presumed harm).

31. *See* *Scott v. State*, 599 S.W.2d 618, 618-19 (Tex. Crim. App. 1980) (even though defendant failed to object at trial to alleged error, fundamental error found and case automatically reversed); *Williams v. State*, 547 S.W.2d 18, 19 (Tex. Crim. App. 1977) (defendant failed to object at trial; fundamental error discovered, therefore, automatic reversal); *see also* Braswell, *The Texas Approach to Fundamental Error in the Criminal Jury Charge*, 48 TEX. B.J. 278, 278 (1985) (fundamental error triggers reversal on appeal whether or not waived at trial); McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 836 (1984) (automatic reversal required under *Cumbe*, makes no difference whether or not error objected to during trial).

32. *See, e.g.*, *Wilson v. State*, 625 S.W.2d 331, 335 (Tex. Crim. App. 1981) (Clinton, J., concurring) (doctrine of fundamental error "firmly founded" and "well established" in Texas criminal appellate review); *Brown v. State*, 595 S.W.2d 550, 552 (Tex. Crim. App. 1980) (fundamental error in court's charge to jury requires reversal even in absence of objection); *Smith v. State*, 513 S.W.2d 823, 829 (Tex. Crim. App. 1974) (in absence of contemporaneous objection, only fundamental error requires reversal).

33. *See* *Wilson v. State*, 625 S.W.2d 331, 336 (Tex. Crim. App. 1981) (McCormick, J., dissenting) ("Until this court realizes that perpetuation of this magical doctrine has lost all logical nexus with the protection of the rights of the defendant, but rather subjects our system of justice to abuse and disrespect by the public, the doctrine will continue to flourish."). The court's stance on fundamental error has been subject to criticism by both the judiciary and commentators. *See* *Antunez v. State*, 647 S.W.2d 649, 653 (Tex. Crim. App. 1983) (Onion, J., dissenting) (difficult for judges or lawyers to know where court is going regarding fundamental error; "our weekly maps are utterly useless"); *Wilson v. State*, 625 S.W.2d 331, 336 (Tex. Crim. App. 1981) (McCormick, J., dissenting) ("fundamentally defective" has become "man-

automatic reversal standard and its elimination of the need for contemporaneous objection to preserve a perceived error for appellate review.³⁴ Several authors have suggested that the Texas Court of Criminal Appeals reevaluate the presumed harm/automatic reversal rule for fundamental error in jury charges and create a more rigid standard for reversal, requiring the defendant to demonstrate actual harm from the alleged fundamental error.³⁵

tra for this court, its chant" blinds court from even considering merits of case or applicable law); *Brewer v. State*, 572 S.W.2d 940, 942 (Tex. Crim. App. 1978) (court has blindly followed definition in *Ross* of fundamental error; definition is misstatement of law). Commentators have also voiced opposition to the past standard of review for fundamental error. See Braswell, *Fundamental Error in the Court's Charge to the Jury in Texas Criminal Cases*, 46 TEX. B.J. 409, 416 (1983) (as result of extensive reversals and controversies surrounding court's view of fundamental error, one must seriously examine view held by court of appeals and methods used by trial courts in instructing juries); 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) (no doctrine of criminal procedure has spawned as much discussion as review of fundamental error in jury charge); Odom & Valdez, *A Review of Fundamental Error in Jury Charges in Texas Criminal Cases*, 33 BAYLOR L. REV. 749, 749 (1981) (fundamental error seen repeatedly infecting jury charges and requiring automatic reversal).

34. See, e.g., *Martinez v. State*, 641 S.W.2d 526, 529 (Tex. Crim. App. 1982) (McCormick, J., dissenting) (appellant should object if he perceives error to be potentially harmful); *Mims v. State*, 612 S.W.2d 933, 934 (Tex. Crim. App. 1981) (McCormick, J., dissenting) (fundamental error doctrine lead to court's ignoring article 36.14 requirements relating to jury charge objections); *Cleland v. State*, 575 S.W.2d 296, 299-300 (Tex. Crim. App. 1978) (Douglas, J., dissenting) (defense counsel not required since expansion of fundamental error doctrine means failure to object does not waive error in jury charge); see also McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 838 (1984) (*per se* reversal under *Cumbie* unsound and results in appellate courts engaging in "rote, technical operation" leading to automatic reversal). Reviewing those cases reversed for fundamental error, it is evident that most of the time, the defendant did not even urge the error on appeal. See *id.* at 848; see Odom & Valdez, *A Review of Fundamental Error in Jury Charges in Texas Criminal Cases*, 33 BAYLOR L. REV. 749, 749 (1981) (court committed to stance that fundamental error in jury charge results in automatic reversal). *Per se* reversal has also led to criticism that this practice subverts proper trial procedure. See Braswell, *Fundamental Error in the Court's Charge to the Jury in Texas Criminal Cases*, 46 TEX. B.J. 409, 409 (1983) (main problem with court's treatment of fundamental error is that encourages defense counsel to "lay behind the log" during trial and not aid judge in correcting possible errors in jury charge, hoping to gain automatic reversal on appeal); McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 848 (1984) (fundamental error doctrine in jury charges has eliminated need for contemporaneous objection rule during trial).

35. See Braswell, *The Texas Approach to Fundamental Error in the Criminal Jury Charge*, 48 TEX. B.J. 278, 283 (1985) (article 36.19 clearly mandates review of entire trial record to determine if defendant harmed by alleged fundamental error and thus reversal required); McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 849 (1984) (argument has been for return to requirement that reversal occurs only in cases where appellant sustained some prejudicial harm). Under the pre-*Almanza* standard, it is noted that an appellant can obtain a reversal for a fundamental error, even if it is beneficial to him. See *id.* at 838. It has been

In *Almanza v. State*,³⁶ the Texas Court of Criminal Appeals created a new standard of review for fundamental error in jury charges.³⁷ Justice Clinton, writing for the majority, began with an extensive review of the Texas statutes and cases involving fundamental error in jury charges in criminal cases.³⁸ Justice Clinton concluded that article 36.19 contains standards of review for both nonfundamental error and fundamental error.³⁹ There must be a timely trial objection to nonfundamental error in order to preserve the error as a viable basis for reversal.⁴⁰ If nonfundamental error is properly preserved, reversal occurs only if the error is "calculated to injure the rights of the defendant,"⁴¹ and the accused proves that the alleged error resulted in "some" harm.⁴² If the error is not objected to at trial, and therefore potentially waived, the majority requires the defendant to satisfy two criteria to obtain a reversal.⁴³ First, the accused must demonstrate that the error was

suggested that review of fundamental error be on a case-by-case basis, with an examination of the entire trial court record, reversal occurring only in those rare cases where "error is so egregious that it directly affects the outcome of case." *See id.* at 849; *see also* Braswell, *Fundamental Error in the Court's Charge to the Jury in Texas Criminal Cases*, 46 TEX. B.J. 409, 409 (1983) (large number of cases being reversed due to fundamental error justifies deep concern of everyone interested in proper criminal justice administration).

36. 686 S.W.2d 157 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g).

37. *See id.* at 171. The majority overruled *Cumbie* and all other cases to the extent that they espoused the old "automatic reversal" standard. *See id.* at 174; *see also* 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) (noting that after *Almanza* was first decided on state's petition for discretionary review, court did not seem as "firmly committed" to past method of review as others had indicated).

38. *See Almanza v. State*, 686 S.W.2d 157, 160-71 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g). Judge Clinton traced the evolution of fundamental error in jury charges from the old Code article 602 through article 36.19. *See id.* at 160-71.

39. *See id.* at 171. The majority based this conclusion on their research of statutory and decisional law concerning fundamental error. *See id.* at 171. The phrase "or unless it appears from the record that the defendant has not had a fair and impartial trial" was viewed as the legislature's recognition of a separate and distinct standard of review for fundamental error. *See id.* at 172. The majority stated that their examination and conclusion concerning article 36.19 and its predecessors was "more defensible than any other reading of the statute. . . ." *See id.* at 172; *see also* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981) ("[t]he 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").

40. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g).

41. *See id.* at 171. "If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is calculated to injure the rights of the defendant. . . ." *Id.* at 171.

42. *See id.* at 171. The majority stated that any error which had been properly preserved would result in reversal "as long as the error is not harmless." *See id.* at 171.

43. *See id.* at 171. The accused would have to show the error as fundamental, and also that he has suffered egregious harm. *See id.* at 171.

fundamental;⁴⁴ in that it was “calculated to injure the rights of the appellant to the extent that the appellant has not had a fair and impartial trial.”⁴⁵ Secondly, the accused must show that the fundamental error resulted in “egregious harm,” leading to the denial of a “fair and impartial trial.”⁴⁶ The majority stated that the egregious harm requirement will be satisfied only after the court examines the entire trial record, including the jury charge as a whole.⁴⁷ After summarily overruling the automatic reversal rule of *Cumbie*, the Court of Criminal Appeals remanded the case to the Fort Worth Court of Appeals, instructing the appellate court to review the conviction in light of the newly established egregious harm standard of review.⁴⁸

In a lengthy concurrence and dissent, Justice Onion began by attacking the majority's conclusion that article 36.19 contains standards of review for both nonfundamental error and fundamental error.⁴⁹ Justice Onion concluded that article 36.19 contained only a standard of review for nonfundamental error.⁵⁰ Justice Onion also stated that it is the duty of the courts, and

44. *See id.* at 171. The majority noted that past decisions had been far from consistent in enunciating the standard for fundamental error. *See id.* at 171-72. This inconsistency was rationalized by the majority's conclusion that the inherent confusion in this area naturally would result in some cases which would simply be wrong. *See id.* at 172.

45. *See id.* at 172. Even though the majority had arrived at a workable definition of fundamental error, they noted that this only satisfied one prong of the new test. *See id.* at 172.

46. *See id.* at 171; *see also* McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 849 (1984) (authors define fundamental error as “error so egregious that it directly affects the outcome of the case”).

47. *See Almanza v. State*, 686 S.W.2d 157, 173-74 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (majority quotes extensively from *Davis v. State*, 28 Tex. Ct. App. 542, 14 S.W. 994 (1890)). The review of the entire jury trial record would be to ascertain any facts which “may illuminate the actual, not just theoretical, harm to the accused.” *See id.* at 174.

48. *See id.* at 174. The majority stated that since the Fort Worth Court of Appeals had based their decision solely on *Messenger v. State*, 638 S.W.2d 883 (Tex. Crim. App. 1982), they could not have examined the entire record to see if the error complained of was “so egregiously harmful as to require reversal.” *See id.* at 174. The majority reasoned that “orderly review procedure and a measure of deference to factual determinations by the Court of Appeals” mandated remanding the case. *See id.* at 174.

49. *See id.* at 174 (Onion, P.J., concurring in part and dissenting in part). Judge Onion stated that the majority had arrived at this conclusion by merely “removing commas in earlier opinions and reinterpreting them,” and by selecting excerpts from other cases. *See id.* at 174 (Onion, P.J., concurring in part and dissenting in part). He went on to question the majority's conclusion that the legislature evidently had adopted a fundamental error doctrine and thrust it upon the judiciary, without defining it, choosing instead to “[bury] the phrase in question” into the middle of article 36.19. *See id.* at 175 (Onion, P.J., concurring in part and dissenting in part).

50. *See id.* at 175 (Onion, P.J., concurring in part and dissenting in part). Both “calculated to injure” and “fair and impartial trial” tests are to be applied to nonfundamental error. *See id.* at 175-76 (Onion, P.J., concurring in part and dissenting in part). “I find no support for any claim that the legislature has ever adopted a fundamental error doctrine or a test that

not the legislature, to determine whether fundamental error exists in the jury charge.⁵¹ He concluded that fundamental error is that error “affecting the very foundation of the conviction’s validity” and results in reversal “only in the most compelling cases.”⁵² Justice Onion did however agree with the majority’s holding that the court should examine the entire trial record before finding fundamental error.⁵³ Noting the majority’s overruling of the automatic reversal requirement of *Cumbe*, Justice Onion expressed frustration at the possibility of a conviction being upheld even though fundamental error existed in the court’s charge to the jury.⁵⁴ He termed this new creation — “harmless fundamental error” — a contradiction he could not accept.⁵⁵ Finally, Justice Onion strongly disagreed with the majority’s actions in remanding the case without any guidance for determining whether Almanza suffered egregious harm.⁵⁶

In a strong dissent, Justice Teague voiced concern that the new egregious harm requirement will reduce the quality of jury charges since reversal now occurs in only the most egregious cases.⁵⁷ Justice Teague noted that the courts were not given any guidance in how to determine if egregious harm exists in a jury charge.⁵⁸ He also criticized the majority’s promulgation of

must be applied by the judiciary, the third branch of the government, to a claim of fundamental error in the court’s charge. . . .” *Id.* at 176 (Onion, P.J., concurring in part and dissenting in part).

51. *See id.* at 176 (Onion, P.J., concurring in part and dissenting in part). Fundamental error is a matter for the courts to decide and the legislature has no constitutional authority in the matter. *See id.* at 176 (Onion, P.J., concurring in part and dissenting in part).

52. *See id.* at 177 (Onion, P.J., concurring in part and dissenting in part). Justice Onion stated that fundamental harm is error that has “resulted in actual harm, remarkable or extraordinary in some bad way, of a glaring or flagrant nature.” *See id.* at 177 (Onion, P.J., concurring in part and dissenting in part).

53. *See id.* at 177 (Onion, P.J., concurring in part and dissenting in part) (Justice Onion “fully” agreed with majority that entire jury charge, evidence, argument of counsel and entire record should be examined to determine if fundamental error exists).

54. *See id.* at 178 (Onion, P.J., concurring in part and dissenting in part). “With the limited surgery performed on *Cumbe* and its progeny, will we be left with four kinds of fundamental error that may be in the light of the record ‘harmless fundamental error?’” *Id.* at 178 (Onion, P.J., concurring in part and dissenting in part).

55. *See id.* at 178 (Onion, P.J., concurring in part and dissenting in part). “I would have hoped the majority would go far enough to spare us the doctrine of ‘harmless fundamental error.’” *Id.* at 178 (Onion, P.J., concurring in part and dissenting in part).

56. *See id.* at 178 (Onion, P.J., concurring in part and dissenting in part). Noting the absolute lack of “judicial economy” in the court’s action, Judge Onion asked, “[i]s the purpose to run the new rule up the flag pole to see how many salutes it receives before proceeding to utilize it ourselves?” *See id.* at 178 (Onion, P.J., concurring in part and dissenting in part).

57. *See id.* at 179 (Teague, J., dissenting). “After today, harmless error should prevent even the most egregiously worded jury charge from constituting reversible error.” *Id.* at 179 (Teague, J., dissenting).

58. *See id.* at 179 (Teague, J., dissenting). “*Cumbe v. State*, 578 S.W.2d 732 (Tex. Crim.

"nebulous rules" which jeopardize the defendant's right to a fair trial.⁵⁹ Justice Teague concluded by urging that trial judges, despite the majority's ruling, continue to place great emphasis on the quality of the jury charge in criminal cases.⁶⁰

Prior to *Almanza*, error in criminal proceedings could be classified by three categories: (1) nonfundamental harmful error;⁶¹ (2) nonfundamental harmless error;⁶² and (3) fundamental presumed harmful error.⁶³ *Almanza*, however, specifically creates a new type of error in Texas criminal proce-

App. 1979), and like decisions of this court, are no more as they have been expressly overruled by today's majority opinion." *Id.* at 179 (Teague, J., dissenting).

59. *See id.* at 179 (Teague, J., dissenting). Justice Teague points out that Justice Clinton failed to give the slightest hint of what may constitute reversible error but then reasons that Justice Clinton could not formulate a reasonable hypothetical. *See id.* at 179 (Teague, J., dissenting).

60. *See id.* at 179-80 (Teague, J., dissenting). "To the majority's efforts to have our juries served with flawed jewels, and a tasteless smorgasbord, I respectfully dissent." *Id.* at 180 (Teague, J., dissenting). Justice Teague's view of jury charges has been echoed in other cases. *E.g.*, *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977). "It is not the function of the charge to merely avoid misleading or confusing the jury: it is the function of the charge to lead and prevent confusion." *Id.* at 20.

61. *See, e.g.*, *Timmons v. State*, 586 S.W.2d 509, 512 (Tex. Crim. App. 1979) (harmful nonfundamental error required reversal where defendant demonstrated he had been denied statement of facts without any fault of his own); *Lumberas v. State*, 560 S.W.2d 644, 645 (Tex. Crim. App. 1977) (harmful nonfundamental error required reversal where defendant convicted for sale of phentermine and penalty no longer existed for such offense); *Hooper v. State*, 557 S.W.2d 122, 122 (Tex. Crim. App. 1977) (nonfundamental harmful error required reversal where defendant not represented by counsel at trial and there was no voluntary and intelligent waiver of counsel).

62. *See, e.g.*, *Ayers v. State*, 606 S.W.2d 936, 941 (Tex. Crim. App. 1980) (harmless nonfundamental error where prosecutor improperly bolstered state's witness); *Lejeune v. State*, 538 S.W.2d 775, 780 (Tex. Crim. App. 1976) (harmless nonfundamental error where envelope containing marijuana admitted into evidence and defendant made no objection to admission); *Fazzino v. State*, 531 S.W.2d 818, 819-20 (Tex. Crim. App. 1976) (harmless nonfundamental error where witness' statement admitted that witness heard gossip that defendant pushed dope and ran whore house due to admission of other testimony showing defendant committed many other offenses).

63. *See, e.g.*, *Dulkes v. State*, 610 S.W.2d 500, 502 (Tex. Crim. App. 1981) (fundamental error where defendants charged with robbery by "threats" with aggravating element of "using and exhibiting a deadly weapon" and jury charge allowed conviction for robbery by "causing bodily injury" with aggravating factor of "causing serious bodily injury"); *Lee v. State*, 577 S.W.2d 736, 736 (Tex. Crim. App. 1979) (fundamental error where indictment charged aggravated robbery by using and exhibiting handgun and "placing" witness in fear of imminent bodily injury and death and jury charge allowed conviction if defendant either "threatened" or placed witness in fear of imminent bodily injury and death); *Armstead v. State*, 573 S.W.2d 231, 231-32 (Tex. Crim. App. 1978) (fundamental error where indictment charged robbery on theory that defendant intentionally or knowingly threatened or placed victim in fear of imminent bodily injury and death and charge allowed conviction if jury found defendant intentionally, knowingly, and recklessly caused bodily injury to victim).

dure: fundamental error resulting in egregious harm.⁶⁴ This new standard affects fundamental error in the same way that harm affects nonfundamental error.⁶⁵ A reversal results in either case only when the attendant harm standard is satisfied.⁶⁶ Unlike the easily satisfied "some harm" standard of nonfundamental error, the egregious harm requirement appears to be impossible to satisfy.⁶⁷ Absent a clear definition of what constitutes egregious harm,⁶⁸ the courts consistently fail to reverse for fundamental error.⁶⁹ Had

64. See *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (failure to properly object to perceived error in jury charge requires defendant to demonstrate that alleged error not only fundamental but caused him egregious harm). *Almanza* also allows for the existence of "harmless fundamental error." See *id.* at 178 (Onion, P.J., concurring in part and dissenting in part) (questions majority's creation of harmless fundamental error under *Cumbie*). By inference, the majority has also allowed for the situation whereby fundamental error is objected to at trial and results in reversal on appeal simply by showing "some" harm to the defendant. Cf. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (*any* error in charge subject to objection at trial results in reversal on appeal if "some" harm to accused shown) (emphasis added) see also *Burns v. State*, No. 68,942 (Tex. Crim. App., Dec. 4, 1985) (not yet reported) (objection at trial to fundamental error; on appeal "some" harm standard applied).

65. Compare *Melancon v. State*, 690 S.W.2d 78, 80 (Tex. App.—Houston [14th Dist.] 1985, no pet.) (although fundamental error existed in jury charge, no automatic reversal required since defendant not egregiously harmed) and *Bonfanti v. State*, 686 S.W.2d 149, 152-53 (Tex. Crim. App. 1985) (fundamental error in jury charge did not require automatic reversal since no egregious harm shown) with *Jordan v. State*, 576 S.W.2d 825, 830 (Tex. Crim. App. 1978) (nonfundamental error to admit illegally obtained evidence but reversal not required since error harmless) and *Myre v. State*, 545 S.W.2d 820, 826-27 (Tex. Crim. App. 1977) (nonfundamental error to admit hearsay testimony into evidence but since error harmless, no reversal required).

66. Compare *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (reversal due to non-objected to fundamental error occurs only if egregious harm shown) with *Hooper v. State*, 557 S.W.2d 122, 122 (Tex. Crim. App. 1977) (reversal due to nonfundamental error required when defendant harmed by lack of representation at trial).

67. See, e.g., *Johnson v. State*, 688 S.W.2d 560, 561 (Tex. Crim. App. 1985) (Teague, J., dissenting) (*Almanza* is test that no one will ever pass; "no pass — penitentiary" rule); *Kucha v. State*, 686 S.W.2d 154, 157 (Tex. Crim. App. 1985) (Teague, J., concurring) (new harmless fundamental error standard will prevent even most egregiously worded jury charges from constituting reversible fundamental error); *Bonfanti v. State*, 686 S.W.2d 149, 154 (Tex. Crim. App. 1985) (Teague, J., concurring) (under *Almanza*, egregiously harmful, fundamental error will never occur).

68. See *Almanza v. State*, 686 S.W.2d 157, 179 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (Teague, J., dissenting) (Teague notes majority has provided "nebulous rules" to aid judges and attorneys in determining what constitutes egregiously harmful fundamental error).

69. See, e.g., *Khan v. State*, 689 S.W.2d 324, 326 (Tex. App.—Fort Worth 1985, no pet.) (any error which existed not so egregious to deny defendant fair and impartial trial); *Ishmael v. State*, 688 S.W.2d 252, 261 (Tex. App.—Fort Worth 1985, no pet.) (court summarily finds no egregious harm in charge and thus no reversible fundamental error); *Fara v. State*, 688 S.W.2d 235, 239 (Tex. App.—El Paso 1985, no pet.) (no egregiously harmful, fundamental error in jury charge containing typographical error).

the courts utilized the pre-*Almanza* automatic reversal standard, reversal due to fundamental error would have been required in every recent decision.⁷⁰ For example, under the old automatic reversal standard which presumed harm,⁷¹ any time the jury charge allowed conviction on a theory not alleged in the indictment, fundamental error occurred and automatic reversal was required.⁷² But under the new egregious harm criterion, the courts under the same facts have failed to reverse for fundamental error.⁷³ Therefore, a criminal defense attorney is faced with a newly minted classification of fundamental error requiring the satisfaction of a standard of harm of such magnitude that it has yet to be defined.⁷⁴ As a result, the Texas Court of Criminal Appeals, through *Almanza*, may have completely eliminated the possibility of reversal for fundamental error in jury charges in Texas criminal cases.⁷⁵

70. Compare *Bonfanti v. State*, 686 S.W.2d 149, 153 (Tex. Crim. App. 1985) (no denial of fair and impartial trial where jury authorized to convict on theory not alleged in indictment) and *Melancon v. State*, 690 S.W.2d 78, 80-81 (Tex. App.—Houston [14th Dist.] 1985, no pet.) (jury charge authorized conviction on theory not alleged in indictment; not egregiously harmful even though fundamental error existed) with *Gooden v. State*, 576 S.W.2d 382, 383 (Tex. Crim. App. 1979) (jury charge authorized conviction on theory not alleged in indictment; fundamental error resulted) and *Ross v. State*, 487 S.W.2d 744, 745 (Tex. Crim. App. 1972) (court found jury charge contained fundamental error since it authorized defendant's conviction on theory not alleged in indictment).

71. See *Braswell, The Texas Approach to Fundamental Error in the Criminal Jury Charge*, 48 TEX. B.J. 278, 280 (1985) (under the court's pre-*Almanza* approach to fundamental error "[h]arm is presumed").

72. See *Shaw v. State*, 557 S.W.2d 305, 306-07 (Tex. Crim. App. 1977) (indictment alleged burglary by entry, attempting theft, and committing theft; charge substituted entering with intent to commit theft); *Peoples v. State*, 548 S.W.2d 893, 895 (Tex. Crim. App. 1977) (indictment alleged forgery by passing; jury charge substituted forgery by making).

73. See *Melancon v. State*, 690 S.W.2d 78, 80 (Tex. App.—Houston [14th Dist.] 1985, no pet.) (jury charge authorized conviction for "break or enter"; indictment charged "break and enter"; not egregiously harmful even though fundamental error found); *Ishmael v. State*, 688 S.W.2d 252, 261 (Tex. App.—Fort Worth 1985, no pet.) (indictment used "fire" for charge of murder; court charged jury with "shooting"; no egregiously harmful, fundamental error found).

74. Compare *Mercado v. State*, 695 S.W.2d 25, 25-27 (Tex. App.—Corpus Christi 1985, no pet.) (not egregiously harmful for court to instruct jury that intent to kill can be inferred from use of deadly weapon) with *Evans v. State*, 606 S.W.2d 880, 883 (Tex. Crim. App. 1980) (under pre-*Almanza* standard of review, jury charge allowing conviction without requiring jury to establish all elements of offense was fundamental error); compare *Starling v. State*, 693 S.W.2d 47, 48-49 (Tex. App.—Fort Worth 1985, no pet.) (not egregiously harmful for court to fail to instruct jury on proper potential range of punishment) with *Stein v. State*, 515 S.W.2d 104, 108 (Tex. Crim. App. 1974) (under pre-*Almanza* standard of review, failure of court to correctly charge jury on range of punishment was fundamental error).

75. See *Johnson v. State*, 688 S.W.2d 560, 561 (Tex. Crim. App. 1985) (Teague, J., dissenting) (juries can now second-guess court on what law should be, and in effect, convict for crimes not alleged in indictment); *Ex parte Maldonado*, 688 S.W.2d 114, 117 (Tex. Crim. App. 1985) (Teague, J., dissenting) ("something sadly wrong" with criminal procedure system

Since charging instruments directly affect the submission of the court's charge to the jury,⁷⁶ it is also important to consider *Almanza* in light of its potential impact upon charging instrument law in Texas.⁷⁷ Although automatic reversal for fundamental error in jury charges is an extinct procedure after *Almanza*, automatic reversal for fundamental defects in indictments remains a prevalent procedure in Texas.⁷⁸ The interrelationship between jury charges and charging instruments is illustrated in *Cumbie*,⁷⁹ where three of the four categories of fundamental error in jury charges arise due to deviations between the charge and the indictment.⁸⁰ In addition, prior to *Almanza*, automatic reversal resulted whenever a fundamental error was found in the jury charge⁸¹ or when a fundamental defect existed in the

which allows defendant to be denied relief due to egregious error in trial jury charge); *Almanza v. State*, 686 S.W.2d 157, 179 (Tex. Crim. App. 1985) (Teague, J., dissenting) (majority's new standard will prevent even most egregiously constructed jury charges from constituting reversible error); *Kucha v. State*, 686 S.W.2d 154, 156 (Tex. Crim. App. 1985) (Teague, J., concurring) (*Almanza's* reasoning inherently wrong since egregious harm rule espouses principles of unfairness when determining if alleged error in jury charge is fundamental error requiring automatic reversal). *But see Burns v. State*, No. 68,942 (Tex. Crim. App., Dec. 4, 1985) (not yet reported) (reversal duty to jury charge error but only because trial objection established "some" harm standard was appropriate).

76. See R. O. DAWSON & G. E. DIX, TEXAS CRIMINAL PROCEDURE 273 (1984) ("Obviously the charging instrument affects the submission of the case to the jury."). Only those theories of guilt charged in the indictment can be submitted to the jury. *See id.* at 273.

77. See Braswell, *The Texas Approach to Fundamental Error in the Criminal Jury Charge*, 48 TEX. B.J. 278, 280 (1985) ("safe to say" that 90% of automatic reversals due to fundamental error in jury charge result of variance in jury charge from charging instrument).

78. See, e.g., *Ex parte Munoz*, 657 S.W.2d 105, 105 (Tex. Crim. App. 1983) (indictment that is fundamentally defective subject to collateral attack at any time); *Ex parte Cooper*, 589 S.W.2d 130, 130 (Tex. Crim. App. 1979) (indictment not commencing with "In the Name and by the Authority of the State of Texas" fundamentally defective since these words are "indispensable" to valid indictment); *American Plant Food Corp. v. State*, 508 S.W.2d 598, 603 (Tex. Crim. App. 1974) (indictment failing to charge offense fundamentally defective and subject to attack at any time). The ease of raising an objection to fundamental defect in charging instruments makes this option very attractive to defendants. See R. O. DAWSON & G. E. DIX, TEXAS CRIMINAL PROCEDURE 297 (1984). Fundamental defects can be raised after a conviction has been affirmed or the time for appeal has expired. *See id.* at 297. Even a voluntary and intelligent waiver of a fundamental defect does not bar the defendant from later attacking the sufficiency of the indictment. *See id.* at 297. The opportunity to object to fundamental defect is also available to the defendant even if he was previously unaware of the defect or merely made no attempt to raise such an objection. *See id.* at 289.

79. See *Cumbie v. State*, 578 S.W.2d 732, 733-34 (Tex. Crim. App. 1979) (court enumerates four instances when fundamental error arises in court's charge to jury).

80. *See id.* at 733-34. Fundamental error arises in the jury charge if: (1) court's charge omits allegation from indictment required to be proven; (2) charge substitutes theory of offense completely different from theory alleged in the indictment; and (3) charge authorizes conviction on theory alleged in the indictment and on one or more theories not alleged. *See id.* at 733-34.

81. See *Williams v. State*, 622 S.W.2d 578, 580 (Tex. Crim. App. 1981) (under pre-*Al-*

charging instrument.⁸² After *Almanza* however, automatic reversal survives only with fundamental defects in charging instruments.⁸³ Finally, criticism similar to that levelled against the automatic reversal procedure for fundamental error in jury charges, has also been raised against the court's automatic reversal procedure for fundamental defects in charging instruments.⁸⁴ Based on these similarities between jury charges and charging instruments, it appears that *Almanza's* egregious harm standard could soon emerge as the criterion for reviewing fundamental defects in charging instruments.⁸⁵

manza standard of review, failure of court to instruct jury on what circumstances they could convict appellant constituted fundamental error and automatic reversal); *Perez v. State*, 537 S.W.2d 455, 456 (Tex. Crim. App. 1976) (under pre-*Almanza* standard of review, failure of jury charge to instruct jurors under what circumstances they could convict defendant mandated reversal since error went to "basis" of case).

82. See *Hobbs v. State*, 548 S.W.2d 884, 885-86 (Tex. Crim. App. 1977) (indictment which fails to allege defendant committed an offense is fundamentally erroneous and any resulting conviction void); *American Plant Food Corp. v. State*, 508 S.W.2d 598, 602 (Tex. Crim. App. 1974) (omission of conclusion, although not technically formal part of indictment, renders indictment fundamentally defective).

83. Compare *Bonfanti v. State*, 686 S.W.2d 149, 153 (Tex. Crim. App. 1985) (Teague, J., concurring) (under *Almanza*, there can never be error denying defendant fair and impartial trial) with R. O. DAWSON AND G. E. DIX, TEXAS CRIMINAL PROCEDURE 258-59 (1984) (authors note that although the complexities of charging instrument law in Texas are unique to American criminal procedure, they are an important part of current Texas criminal practice).

84. Compare *Ex parte Cannon*, 546 S.W.2d 266, 274 (Tex. Crim. App. 1976) (Douglas, J., dissenting) (majority's automatic reversal stance regarding fundamental defects in indictments gives accused "free ride" since even if proof shows him guilty, he receives new trial by raising objection by collateral attack) with *Mims v. State*, 612 S.W.2d 933, 934 (Tex. Crim. App. 1981) (McCormick, J., concurring) (contemporaneous objection requirements of article 36.14 eliminated by adoption of automatic reversal procedure with fundamental error in jury changes).

85. Compare *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (if no proper objection made during trial to perceived error in jury charge, on appeal, defendant must satisfy egregious harm standard to gain reversal) with Tex. S.B. 169, 68th Leg. (1985) (amendment to Texas Constitution as of November 5, 1985) (if defendant fails to object to perceived errors in charging instrument before trial begins, he waives right to raise any such objection on appeal). *Almanza's* egregious harm standard of review is now being applied in other areas of Texas criminal procedure. See *Navarro v. State*, No. 01-83-0478-CR, slip op. at 2 (Tex. App.—Houston [1st Dist.] Sept. 12, 1985, no pet.) (not yet reported). In *Navarro*, appellants had waived the appearance of witnesses by stipulation as allowed by TEX. CODE CRIM. PROC. ANN. art. 1.15. See *id.* at 1. Under article 1.5, the judge's signature is required to approve the waiver but no such signature was obtained. See *id.* at 2. The judge did orally agree to the waiver and made a corresponding notation on the docket sheet. See *id.* at 2. The court, relying directly on *Almanza*, stated that since the appellants failed to show how they were harmed by the alleged fundamental error, this ground of error was overruled. See *id.* at 4. *Almanza's* egregious harm standard has also been applied where the State's attorney failed to sign appellant's waiver to a jury trial as required by TEX. CODE CRIM. PROC. ANN. art. 1.13. See *Hoobler v. State*, No. 01-84-0434-CR, slip op. at 2 (Tex. App.—Houston [1st Dist.] Aug. 8, 1985, no pet.) (not yet reported). Appellant made no objection at trial to the absence of the prosecutor's signature. See *id.* at 2. Applying *Almanza*, the court concluded that since the appellant had neither urged nor shown harm as a result of the

The impact of *Almanza*'s egregious harm standard of review will also be felt in the area of trial strategy, especially contemporaneous objection to perceived error in the jury charge.⁸⁶ Before *Almanza*, a criminal defense attorney could intentionally fail to object at trial to fundamental error in the jury charge since reversal was automatic on appeal.⁸⁷ After *Almanza*, if a criminal defense attorney purposely fails to object at trial to a fundamental error in the jury charge, the case will be subject to the new egregious harm rule on appeal.⁸⁸ This standard, as noted previously, has not yet mandated reversal of any conviction based on fundamental error in the jury charge; therefore, not objecting to fundamental error is now a risky trial strategy.⁸⁹ If the attorney does choose to object to the jury charge during trial, his objection

prosecutor's failure to sign the waiver, this ground of error was overruled. *See id.* at 4. More importantly the court stated that although *Almanza* dealt with fundamental error in jury charges, "it's re-examination of fundamental error should be applicable to other instances of failure to comply fully with statutory requirements." *See id.* at 4.

86. *See, e.g., Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (if no proper trial objection made to jury charge, reversal occurs only where egregiously harmful fundamental error found from examining entire jury charge, evidence, arguments of counsel and any other relevant information); *Walters v. State*, 694 S.W.2d 610, 611 (Tex. App.—Eastland 1985, no pet.) (under *Almanza*, since defendant failed to raise objection to jury charge at trial, court found no egregiously harmful, fundamental error in light of entire jury charge, state of evidence, and argument of counsel); *Starling v. State*, 693 S.W.2d 47, 49 (Tex. App.—Fort Worth 1985, no pet.) (under *Almanza*, since no objection made to jury charge at trial, court looked to argument of counsel, state of evidence, and other relevant information but found no egregiously harmful fundamental error).

87. *See Braswell, Fundamental Error in the Court's Charge to the Jury in Texas Criminal Cases*, 46 TEX. B.J. 409, 409 (1983) (pre-*Almanza* standard of review encourages counsel, in hope of automatic reversal on appeal, to purposely not aid trial judge in detecting potential errors in jury charge); McCormick, Convery & Icenhauer-Ramirez, *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY'S L.J. 827, 848 (1984) (pre-*Almanza* approach to review of fundamental error in jury charge eliminates need for contemporaneous trial objection).

88. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (if no proper objection made to jury charge during trial, reversal occurs only where egregiously harmful, fundamental error found). But does *Almanza* also encourage a trial strategy whereby a criminal defense attorney will bury an objection to fundamental error in the jury charge among various other objections, hoping the judge will not correct the error, thus allowing reversal of the objected to fundamental error by satisfying the "some" harm standard? *Cf. Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (any error in charge subject to objection at trial results in reversal on appeal if "some" harm to accused shown) (emphasis added); *cf. also Burns v. State*, No. 68,942 (Tex. Crim. App., Dec. 4, 1985) (not yet reported) (jury charge error objected to at trial, not corrected by court; on appeal fundamental error measured by "some" harm standard and reversal granted).

89. *See Ishmael v. State*, 688 S.W.2d 252, 261 (Tex. App.—Fort Worth 1985, no pet.) (court summarily finds no egregiously harmful fundamental error in jury charge); *see also Kucha v. State*, 686 S.W.2d 154, 156 (Tex. Crim. App. 1985) (alleged error in jury charge not egregiously harmful, fundamental error in light of entire trial record); *Bonfanti v. State*, 686

will allow the court the opportunity to correct the alleged error, thus eliminating any hope of obtaining a reversal based on the initial error.⁹⁰ Taken one step further, if *Almanza's* standard of review is extended into charging instrument law, defense attorneys will be compelled to raise objections prior to appeal to both jury charges and charging instruments, thereby giving the state and the court the ability to eradicate any initial error which could serve as a basis for reversal on appeal.⁹¹

Fundamental error in jury charges, and its attendant automatic reversal standard, had existed in Texas since as early as 1875. This settled routine came to an abrupt halt with the Texas Court of Criminal Appeals' holding in *Almanza v. State*. *Almanza* has not only specifically created a new category of error in Texas criminal procedure, but its egregious harm standard of review has neither been defined by the courts nor satisfied by any alleged error in cases presented for review. *Almanza's* immediate impact on review of fundamental error in jury charges is evident, but the potential for wider application of its egregious harm standard of review is what makes the decision especially important. *Almanza* distorts the court-imposed symbiotic relationship between jury charges and charging instruments. Fundamental error in jury charges is now subject to the exacting egregious harm standard of review, while fundamental defects in charging instruments remain subject to the traditional automatic reversal/presumed harm procedure. Based upon the undeniable link between jury charges and charging instruments in Texas, *Almanza's* egregious harm standard of review will undoubtedly emerge in review procedures for fundamental defects in charging instruments. Until the tension between the two standards of review is resolved, the imbalance will continue to plague the judiciary and, especially, the criminal defense attorney who is required to provide zealous adversarial representation for his client.

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S.W.2d 149, 153 (Tex. Crim. App. 1985) (no egregiously harmful fundamental error to defendant who received fair and impartial trial in light of evidence, argument and verdict).

90. See, e.g., *Marks v. State*, 617 S.W.2d 250, 252 (Tex. Crim. App. 1981) (timely jury instruction to disregard alleged error in jury charge generally sufficient to cure error); *Eanes v. State*, 546 S.W.2d 312, 314 (Tex. Crim. App. 1977) (where jury charge erroneously included "recklessly" in definition of assault and error specifically called to court's attention, subsequent instruction informing jury to find "intentionally" or "knowingly" prevented reversible error); *Rivas v. State*, 496 S.W.2d 600, 602 (Tex. Crim. App. 1973) (omission of "voluntary" from jury charge for offense of murder did not constitute reversible error since subsequent instruction informed jury they were required to find intent to kill).

91. Compare *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (Opinion on Motion for Reh'g) (unobjected to error will be grounds for reversal only if it is egregiously harmful fundamental error) with *Tex. S.B. 169, 68th Leg. (1985)* (amendment to Texas Constitution as of November 5, 1985) (if defendant fails to object to perceived errors in indictment before trial begins, this waives those objections on appeal).