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## Appellate Review of Criminal Cases in Texas - Foreword Foreword.

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## ARTICLES

### APPELLATE REVIEW OF CRIMINAL CASES IN TEXAS— FOREWORD

CHARLES F. BAIRD\*

On September 17, 1787, our United States Constitution was born of fifty-five delegates who drafted a republican form of government wherein the people ruled themselves with separate but divided powers. The concept appeared simple. Congress, the legislative body, was vested with the power to enact law.<sup>1</sup> The President was vested with the executive power to enforce it.<sup>2</sup> Finally, the power to interpret the law was vested in the United States Supreme Court and other courts of law.<sup>3</sup> Four years later, the people ratified ten amendments to the Constitution, appropriately referring to them as their “Bill of Rights.”<sup>4</sup> In the Bill of Rights, the people set forth a list of general rights held by each person. However, the United States Constitution and its Bill of Rights are not the sum of the rights held by the people. The states have their own constitutions, which may provide greater individual rights.<sup>5</sup> “The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.”<sup>6</sup> Thus, the individ-

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1. U.S. CONST. art. I, § 8.

2. *Id.* art. II, § 2.

3. *Id.* art. III, § 1.

4. U.S. CONST. amends. I–X. The Bill of Rights was ratified effective December 15, 1791.

5. *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).

6. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986).

ual rights held by each person are greater than those the Framers perceived.

It has been said that “[n]o rule is so general, which admits not some exception.”<sup>7</sup> Such is certainly true in our criminal justice system. The legislature continues to enact new laws, while the courts continue to struggle with the old laws. As their guiding principle, both bodies strive to never lose sight of the rights of each person. In this vein, the Texas Legislature enacted the Texas Penal Code and the Texas Code of Criminal Procedure. The legislature further provided the Court of Criminal Appeals, our highest criminal court, with the authority to promulgate rules to apply to the criminal justice system.<sup>8</sup> Thereafter, the Court of Criminal Appeals promulgated the Texas Rules of Criminal Evidence and the Texas Rules of Appellate Procedure. In review, it would appear that our separate powers embraced the historical view that “liberty has largely been the history of observance of procedural safeguards.”<sup>9</sup>

Consequently, our individual rights, originally embodied only in the federal constitution and its ten amendments, are now embodied in the Texas Constitution, a multitude of statutes, codes, and rules, and the common law. Stated differently, our constitutionally guaranteed individual rights are enforced through a legal maze that at times baffles the most artful and talented attorney. Therefore, at no time in our past has a greater need existed to recognize the practice of criminal law as a specialty. While in simpler times we considered the “procedural safeguard,” we are today confronted with the concept of “procedural default.” Indeed, the bench and bar of our criminal justice system are quite familiar with this con-

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7. ROBERT BRUTON, *THE ANATOMY OF MELANCHOLY* [1621-1651], *THE AUTHOR'S ABSTRACT*, pt. 1, § 2, member 2, subsec. 3.

8. *E.g.*, TEX. PENAL CODE ANN. § 1.01 (Vernon 1989); TEX. CODE CRIM. PROC. ANN. art. 1.02 (Vernon 1977).

9. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

cept.<sup>10</sup> Those who are not confront another: ineffective assistance of counsel.<sup>11</sup>

It is with this in mind that I recommend Ellen Mitchell's *Appellate Review of Criminal Cases in Texas*. The article is a current and comprehensive guide that should assist all attorneys, regardless of their level of experience, in avoiding some of the pitfalls of practicing criminal law.

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10. *See, e.g.*, *Garcia v. State*, 887 S.W.2d 862, 869–83 (Tex. Crim. App. 1994) (overruling 40 of 45 points of error because they were not preserved or were inadequately briefed); *Fuller v. State*, 829 S.W.2d 191, 198 (Tex. Crim. App. 1992) (noting that several objections are insufficient to preserve error when trial judge carries objection and defendant does not object and move to strike testimony at close of State's case).

11. *See Ex parte Menchaca*, 854 S.W.2d 128, 133 (Tex. Crim. App. 1993) (finding that counsel's deficient performance undermined credibility of defendant and therefore adversely impacted his defense).