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Sentence Modification in Texas: The Plenary Power of a Trial Court to Alter Its Sentence after Pronouncement Comment.

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COMMENT

SENTENCE MODIFICATION IN TEXAS: THE PLENARY POWER OF A TRIAL COURT TO ALTER ITS SENTENCE AFTER PRONOUNCEMENT

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I. INTRODUCTION

Midmorning in a Texas district courtroom, a defendant, found guilty of a serious felony after a long, hard-fought trial, awaits the pronouncement of his sentence. The judge emerges, and with confidence, announces a valid, statutorily prescribed sentence of twenty years. After the crime's victim gives an emotional statement describing the pain and suffering the defendant has caused, the defendant is placed in the custody of the sheriff who will take the defendant to prison, and the prosecutor is left satisfied

that justice has been served. Half-a-day later, however, with adjournment looming, the judge recalls the defendant, the defendant's counsel, and the prosecutor back to the courtroom. The judge announces that after deeper contemplation he has decided that twenty years in prison is too harsh and that he is modifying the sentence to a ten-year term. This time, as the defendant is led away, the prosecutor is left with less of a feeling of justice and more of a sense of bewilderment. What happened to the first sentence—valid, properly pronounced, and accepted by the defendant?[1] Was it simply thrown out as if it were a practice sentence? The same lack of respect for the initial sentence may be seen in the inverse scenario, where the judge increases the severity of the sentence. Imagine the defendant, coping with the thought of spending a quarter of his life in prison, then being brought back before the judge and given even more years to serve. Questions come to mind, such as: why the judge would modify a sentence he spent so much time deciding, what could have affected his opinion to cause such a change, and were any double jeopardy violations involved? However, both parties will have to forego these questions because the current answer in Texas is simply that the trial court has plenary power.

Post-sentence plenary power of a trial court is not statutorily defined in Texas criminal law, and its boundaries are far from being fully delineated.[2] The Texas Court of Criminal Appeals recently added to the defini-

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1. *See* Romero v. State, 712 S.W.2d 636, 638 (Tex. App.—Beaumont 1986, no pet.) (expressing that when a defendant fails to give notice of an appeal, he accepts the sentence).

2. *See* McClinton v. State, 121 S.W.3d 768, 777 (Tex. Crim. App. 2003) (per curiam) (Hervey, J., joined by Johnson, J., dissenting) (recognizing that no statute governs a court's plenary power to modify a sentence), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc); *Ex parte* Donaldson, 86 S.W.3d 231, 233-34 (Tex. Crim. App. 2002) (en banc) (per curiam) (Keasler, J., joined by Keller, P.J., and Hervey, J., concurring) (admitting that while Texas precedent recognizes a trial court's plenary power to modify its orders, the full scope and length of its plenary power is still unknown); Ware v. State, 62 S.W.3d 344, 355 (Tex. App.—Fort Worth 2001, pet. ref'd) (noting that while Texas civil courts have the authority to modify their rulings during their period of plenary power, whether Texas criminal courts have such power is unclear). The court in *Ware* further states that "[t]he term 'plenary power' is almost never used in criminal cases." *Id.* at 355 n.5; *see also* Meineke v. State, 171 S.W.3d 551, 555 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (acknowledging a trial court's inherent powers to correct an illegal sentence, but stating that "the bounds of these powers are unclear"). However, the court in *Meineke* gives examples of some of the rules surrounding a court's plenary power: (1) courts can receive motions for new trial and motions in arrest of judgment during their plenary power; (2) they have seventy-five days to rule on such motions; and (3) they have the authority to correct clerical errors after plenary power has expired. *Id.*; *cf.* Matchett v. State, 941 S.W.2d 922, 932-33 (Tex. Crim. App. 1996) (en banc) (agreeing that the legislature decides what constitutes criminal behavior and what the penalty for such actions are, but that the judiciary has the inherent power to apply law to the facts presented);

tion of plenary power in *State v. Aguilera*[3] in two important respects. The first part of the opinion's definition provides that "[a]t a minimum, a trial court retains plenary power to modify its sentence if a motion for new trial or motion in arrest of judgment is filed within 30 days of sentencing."[4] This means that as long as either of these two motions has been filed, a trial court may grant the motion, "rehear the defendant's plea, and re-sentence him."[5] Overlooking the dissent's argument that this rule is not backed by any majority case law or statutory law in Texas,[6] this

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Swartzbaugh v. State, No. 13-04-067-CR, 2005 WL 1845764, at *2 (Tex. App.—Corpus Christi Aug. 4, 2005, pet. ref'd) (mem. op.) (admitting that precedent shows that "some sort of plenary power to reform a defendant's sentence" exists, and that it lasts for thirty days after the sentence is given).

A trial court's plenary jurisdiction is confined to the "term of court" in which the case was decided. *Donaldson*, 86 S.W.3d at 235 (Keasler, J., joined by Keller, P.J., and Hervey, J., concurring) (explaining that "even if the court had plenary power . . . , those powers expired" when the court's term ended); *see also* Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482, 486 (1943) (per curiam) (stating that the general rule is that a trial court's power over its judgments and orders exists during the term in which they were made); Cardwell v. State, 119 Tex. Crim. 186, 44 S.W.2d 681, 682 (1931) (per curiam) ("[T]he trial court has jurisdiction of its orders, judgments, and decrees during the term of court during which the orders, judgments, and decrees were entered, with the power to dispose of them as right and justice might suggest.").

3. 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc).

4. State v. Aguilera, 165 S.W.3d 695, 697-98 (Tex. Crim. App. 2005) (en banc).

5. *See id.* at 698 n.6 (explaining that while a court cannot retry the punishment phase only, if a motion for new trial is granted, the defendant may re-plea and a new sentence may be given); *see also* State v. Hight, 907 S.W.2d 845, 846 (Tex. Crim. App. 1995) (en banc) (agreeing with *Bates* in saying that trial courts cannot grant new trials dealing only with punishment and stating further that only appellate courts have the ability to grant such trials); State v. Bates, 889 S.W.2d 306, 310 (Tex. Crim. App. 1994) (en banc) (noting that trial courts are not among those courts mentioned in article 44.29(b) of the Texas Code of Criminal Procedure which are allowed to grant a new trial as to punishment only). *See generally* TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (Vernon Supp. 2006) (outlining the procedures to follow when "the court of appeals or the Texas Court of Criminal Appeals" grants a new trial as to punishment only). It should be noted that in 2005 the legislature adopted changes to the Texas Code of Criminal Procedure article 37.07, which states that if a jury is used to determine punishment and cannot agree, then a mistrial shall be declared as to punishment phase only. Act of June, 17 2005, 79th Leg., R.S., ch. 660, § 2, 2005 Tex. Gen. Laws 1641. Then, a new jury is empanelled to decide the defendant's punishment. *Id.*; *see also* TEX. CODE CRIM. PROC. ANN. art. 37.07 §§ 2, 3 (Vernon Supp. 2006) (adopting the changes laid out in House Bill 3265). However, because these changes only deal with punishment phases that are decided by a jury, they have no direct impact on the scope of this Comment and will not be discussed further.

6. *See Aguilera*, 165 S.W.3d at 704 (Keasler, J., joined by Hervey, J., dissenting) (examining the first part of the majority's plenary power ruling and stating that "there is no support for this statement"). The dissent explained that while the majority did rely upon Texas Rules of Appellate Procedure 21.4 and 22.3 in coming to its decision, "neither [rule] mentions anything about a trial judge's plenary power to modify a sentence." *Id.*; *see* TEX.

Comment focuses on the problems stemming from the second component of *Aguilera*'s plenary power definition.

The second component of the *Aguilera* court's plenary power definition states that trial courts have plenary power to modify their sentences if "the modification is made on the same day as the assessment of the initial sentence . . . before the court adjourns for the day" and "in the presence of the defendant, his attorney, and counsel for the State."[7] In other words, from the time the judge pronounces the sentence until the time that court adjourns, the judge has full and complete discretion to alter the defendant's sentence, subject only to the applicable sentencing statute.[8] The court's interpretation of the Texas Code of Criminal Procedure supports this holding, for article 42.09, section 1[9] states that "[t]he defendant's sentence begins to run on the day that it is pronounced" and article 42.03, section 1(a)[10] asserts that a felony "sentence shall be pronounced in the defendant's presence."[11]

While the court's ruling in *Aguilera* helps to characterize plenary power in Texas, several potential problems flow from this expanded definition. In Texas, great importance is placed upon the moment the trial judge orally pronounces the defendant's sentence.[12] Sentencing is the act that

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R. APP. P. 21.4 (defining the time frame for filing a motion for new trial); TEX. R. APP. P. 22.3 (defining the time frame for filing a motion in arrest of judgment). Furthermore, the majority cited only to concurring opinions that mention plenary power and failed to cite any majority opinions to support its rule. *Aguilera*, 165 S.W.3d at 704-05 (Keasler, J., joined by Hervey, J., dissenting); *see id.* at 698 n.7 (majority opinion) (supporting its plenary power rules by citing only to concurring opinions of the Texas Court of Criminal Appeals and three Texas courts of appeals decisions).

7. *Aguilera*, 165 S.W.3d at 698 (majority opinion).

8. *See id.* (clarifying that a trial judge's modified sentence must be authorized by statute). This means that if the initial sentence is twenty years and the applicable statute for the crime allows for a sentence of between fifteen and twenty-five years, the judge can modify the sentence anywhere within the ten-year range. *Compare id.* at 697 n.3 (discussing how the trial judge's decision to decrease Aguilera's sentence from twenty-five years to fifteen years was within the statutorily allowable sentencing range), *with* Harris v. State, 153 S.W.3d 394, 396 n.4 (Tex. Crim. App. 2005) (conceding, in dicta, that while a trial court does have plenary power to modify a sentence while a case is within its jurisdiction, the modified sentence must stay "within the same statutory range of punishment," which the trial judge failed to do in resentencing the defendant).

9. TEX. CODE CRIM. PROC. ANN. art. 42.09, § 1 (Vernon Supp. 2006) (making a sentence commence on the day of its pronouncement).

10. *Id.* at art. 42.03 § 1(a) (establishing, in very succinct terms, that a defendant must be present when his sentence is pronounced).

11. *Aguilera*, 165 S.W.3d at 698 (majority opinion) (qualifying its plenary power rule by stating that it comports with the statutory mandate that sentences pronounced in the felony defendant's presence begin to run on the day they are pronounced).

12. *See Ex parte* Madding, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002) (explaining "that the imposition of [the] sentence is the crucial *moment* when all of the parties are

"closes the door on the trial because it is the final action at the trial stage without which punishment cannot be carried out and appeal cannot be taken."[13] Additionally, it is the most important part of the judgment because "[w]ith the pronouncement of a sentence[,] the court breathes life into the judgment."[14] Furthermore, the oral pronouncement of a sentence governs over the written judgment should the two conflict.[15] Also, when a sentence is not pronounced, a long line of cases hold that an ap-

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physically present at the sentencing hearing and able to hear and respond to the imposition of [the] sentence") (emphasis added); *see also* McClinton v. State, 121 S.W.3d 768, 770 (Tex. Crim. App. 2003) (per curiam) (Cochran, J., concurring) (comparing the oral pronouncement of a sentence with the judgment, which is but a written rendition of what was orally pronounced (quoting *Madding*, 70 S.W.3d at 135)), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc). In *McClinton*, the court stated that a system where a judge could simply alter a sentence after orally pronouncing it in the presence of the parties would create havoc because a defendant would wonder if his sentence would become longer than pronounced, and the State would worry that the defendant's sentence could be lowered without any warning. *Id.* at 770-71; *see also* Annotation, *Power of Court to Set Aside Sentence After Commitment*, 44 A.L.R. 1203, 1211 (1926) (suggesting that if a defendant knows that a judge is free to decrease the prescribed sentence, "he will occupy his thoughts with the expectation, . . . and scheme and labor for the result. In such a state of mind reformation would be out of the question" (quoting Commonwealth v. Mayloy, 57 Pa. 291, 298 (1868))). *See generally* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, § 8 (1983 & Supp. 2006) (providing an entire section dedicated to cases from around the United States that have held that after a sentence's oral pronouncement, a defendant can no longer be resentenced upward).

13. Casey v. State, 924 S.W.2d 946, 949 (Tex. Crim. App. 1996) (en banc); *see also* Coffey v. State, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998) (en banc) (pointing to a sentence's pronouncement as "the appealable event"); Rodarte v. State, 860 S.W.2d 108, 109-10 (Tex. Crim. App. 1993) (en banc) (explaining that the appellate timetable begins "to run on the day sentence is imposed or suspended in open court"); Parks v. State, 553 S.W.2d 114, 116 (Tex. Crim. App. 1977) (stating that if a "sentence was not pronounced, the trial court may now pronounce sentence and an appeal may be taken therefrom if appellant so desires").

14. Stokes v. State, 688 S.W.2d 539, 541 (Tex. Crim. App. 1985) (en banc). *See generally* 25 TEX. JUR. 3D *Criminal Law* § 4175 (2005) (giving a brief overview of the importance and significance of the sentencing phase of a criminal trial).

15. *See Coffey*, 979 S.W.2d at 328 (holding that the oral pronouncement controls over the written judgment); *see also* Thompson v. State, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003) (stating that "[w]hen there is a conflict between the oral pronouncement of sentence in open court and the sentence set out in the written judgment, the oral pronouncement controls"); *Madding*, 70 S.W.3d at 135 (explaining the reasoning for the *Coffey* holding by asserting that at the moment of a sentence's pronouncement, all parties to the trial are in the courtroom, hear, and may respond to the sentence given); Mazloum v. State, 772 S.W.2d 131, 132 (Tex. Crim. App. 1989) (en banc) (per curiam) (reforming a written judgment to include the specific findings pronounced by the trial court).

pellate court fails to have jurisdiction over the appeal,[16] and statutory law states that sentences may not run cumulatively if they were not pronounced to run as such.[17] Moreover, as mentioned above, Texas law de-

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16. *See Thompson*, 108 S.W.3d at 293 (holding that the court below properly dismissed an appeal because of the lack of jurisdiction due to the trial court's failure to orally pronounce the count); Reagan v. State, 594 S.W.2d 71, 71 (Tex. Crim. App. 1980) (en banc) (dismissing an appeal due to a lack of jurisdiction stemming from the absence of a pronounced sentence on the record); Williams v. State, 478 S.W.2d 441, 442 (Tex. Crim. App. 1972) (stating that it must dismiss the appeal due to the trial court's failure to pronounce a sentence); Clemons v. State, 414 S.W.2d 940, 941 (Tex. Crim. App. 1967) (per curiam) (dismissing an appeal due to the absence of a sentence pronouncement); McCaleb v. State, 396 S.W.2d 416, 417 (Tex. Crim. App. 1965) (stating that the appellant was convicted, but dismissing because the record was void of a pronounced sentence); Aguirre v. State, 162 Tex. Crim. 417, 271 S.W.2d 819, 819 (1954) (stating that "[w]here no sentence has been pronounced in the trial court, this court is without jurisdiction to enter any order except to dismiss the appeal").

17. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (Vernon Supp. 2006) (stating that "[w]hen the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction," and the trial judge has discretion to make the second conviction's sentence run cumulatively or concurrently with the prior sentence); *see also Madding*, 70 S.W.3d at 136 (ruling that once a defendant begins serving a sentence that is concurrent with another sentence, it is too late to make the sentences run cumulatively). "A trial court does not have the statutory authority . . . to orally pronounce one sentence in front of the defendant, but enter a different sentence in his written judgment, outside the defendant's presence." *Madding*, 70 S.W.3d at 136. The *Madding* decision discusses *Ex parte Vasquez*, 712 S.W.2d 754 (Tex. Crim. App. 1986) (en banc), and states that *Vasquez* incorrectly uses the term "void," when it holds that a written judgment is "void" if it makes sentences run cumulatively when the sentence pronouncement did not. *Id.* The *Madding* decision states that the written judgment is not void, but instead it violates defendants' constitutionally guaranteed due process rights, which require notice to be given "of the punishment to which [they have] been sentenced." *Id.* at 136-37. However, the court in *Vasquez* never used the term "void"; rather it relied upon Texas Code of Criminal Procedure article 42.08 in holding that trial courts only have the discretion to choose between making sentences run cumulatively or concurrently at the time of sentence pronouncement. *Vasquez*, 712 S.W.2d at 754-55. In actuality, it was other cases that used the word "void." For instance, in *Ex parte Voelkel*, 517 S.W.2d 291 (Tex. Crim. App. 1975), the term "void" is used and article 42.09 is relied upon in a legal analysis that led to the invalidation of the court's cumulation order, because the defendant had already begun serving a sentence that was not made to run cumulatively with another sentence when it was pronounced. *Id.* at 292-93. Likewise, *Ex parte Brown*, 477 S.W.2d 552 (Tex. Crim. App. 1972), declares that an attempt to make a defendant's sentence run cumulatively that has already begun is "null and void of effect." *Id.* at 554. Finally, *Ex parte Reynolds*, 462 S.W.2d 605 (Tex. Crim. App. 1970), holds that the trial court lacked authority to cumulate the defendant's sentences because the defendant "had already suffered punishment under the sentence originally imposed[,]" and therefore, the opinion concludes that the "attempted cumulation is null and void and is of no legal effect." *Id.* at 608; *see also* Powell v. State, 124 Tex. Crim. 513, 63 S.W.2d 712, 713 (1933) (per curiam) (holding that judges may not make sentences run cumulatively once the defendant has started serving punishment under the first sentence, since doing so would violate

mands that a person convicted of a felony be present in the courtroom for the moment when his or her sentence is pronounced.[18]

The *Aguilera* holding, however, lessens the pronouncement's importance by ignoring the significance of the moment of pronouncement, instead making sentence pronouncement into a potentially day-long affair.[19] The selection of the trial court's adjournment as the point when the judge may no longer modify the sentence sua sponte also suggests arbitrariness—article 42.09 gives no direction for when a sentence is supposed to start other than on the day it is pronounced.[20] However, the opinion gives little reason for selecting adjournment as the commencement point of a sentence, other than it comports with articles 42.09, section 1 and 42.03, section 1(a).[21]

Another concern, which the majority,[22] concurring,[23] and dissenting[24] opinions of *Aguilera* each recognize, is the potential for the "victim allocution statement" to affect the judge's decision on whether to modify a sentence.[25] Because a crime's victim is allowed to make a statement

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double jeopardy). Thus, regardless of the reasoning for so holding, Texas law clearly indicates that the moment for making sentences run cumulatively is the moment of pronouncement.

18. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(a) (Vernon Supp. 2006) ("Except as provided in article 42.14, sentence shall be pronounced in the defendant's presence."). Article 42.14 states that "[t]he judgment and sentence in a misdemeanor case may be rendered in the absence of the defendant." TEX. CODE CRIM. PROC. ANN. art. 42.14 (Vernon 1979); *see also* Marshall v. State, 860 S.W.2d 142, 143 (Tex. App.—Dallas 1993, no pet.) (asserting that the importance of article 42.03, § 1(a) is not that it makes a trial court pronounce all of its findings in front of the defendant, but rather that it requires the sentence, including the length of prison term and size of fine, to be pronounced in the defendant's presence).

19. *See* State v. Aguilera, 165 S.W.3d 695, 696, 698 (Tex. Crim. App. 2005) (en banc) (affirming a trial judge's decision to modify a valid, legal sentence and holding that sentence modification can occur *anytime* before adjournment).

20. *See* TEX. CODE CRIM. PROC. ANN. art. 42.09, § 1 (Vernon Supp. 2006) (directing that "[t]he defendant's sentence begins to run on the day it is pronounced"). It had been previously stated that "[o]nce he leaves the courtroom, the defendant begins serving the sentence imposed." *Madding*, 70 S.W.3d at 135. However, Judge Cochran clarified this statement in *Aguilera* by asserting that the majority's holding in *Aguilera* destroys any interpretation of *Madding* that might render a sentence cast in stone as soon as the defendant leaves the courtroom. *Aguilera*, 165 S.W.3d at 701 n.6 (Cochran, J., joined by Price, J., concurring).

21. *See Aguilera*, 165 S.W.3d at 698 (majority opinion) (rationalizing that its rule is authorized since it comports with article 42.09, section 1 and 42.03, section 1(a)).

22. *Id.* at 697 n.2.

23. *Id.* at 703 n.16 (Cochran, J., joined by Price, J., concurring).

24. *Id.* at 706 (Keasler, J., joined by Hervey, J., dissenting).

25. *See id.* at 697 (majority opinion) (listing, as one of the state's arguments on appeal, that allowing "modification of a valid sentence could permit victim impact-statements to affect the fact finder at punishment").

about the crime's impact to the court after the sentence is pronounced,[26] the defendant's sentence could be influenced. The court did not address this concern, however, because the State failed to assert it in its sole issue on appeal.[27]

With these problems come several potential consequences. Unaddressed by the *Aguilera* opinion is the potential for different sentencing opportunities depending on when the trial judge pronounces a sentence. Under the *Aguilera* ruling, because sentencing can be altered and modified anytime before the court's adjournment, those defendants sentenced earlier in the day have a larger timeframe within which their sentence could be modified because the trial judge has a longer period of plenary power to modify the sentence sua sponte than a trial judge who pronounces the sentence later in the day.[28] Such a disparity in sentencing procedure should not arise due to the time of day the sentence is pronounced. This ruling turns a previously important moment into a variable length of time that depends upon when the initial sentence is given.[29]

In the same vein, allowing judicial modification after sentencing allows the victim allocution statement to "affect the partiality" of the judge.[30] In *Aguilera*, the victim statement was given directly after sentencing; afterwards, the court held an in-chambers discussion and the judge decided to

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26. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2006) (describing victim allocution in Texas as allowing "a victim, close relative of a deceased victim, or guardian of a victim" to present before the court and the defendant, a statement pertaining to the crime's impact on the speaker). However, the statement must be given after the court has assessed punishment and the sentence has been pronounced. *Id.*

27. *Aguilera*, 165 S.W.3d at 697 n.2.

28. *Cf.* Appellee Angel Aguilera's Brief at 10, State v. Aguilera, 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc) (No. PD-0024-04) (showing that the defendant's sentence was modified twenty minutes after the original sentence was pronounced). Thus, under *Aguilera*, if the trial judge had initially sentenced Aguilera ten minutes before the court adjourned for the day, the judge would not have had the chance to modify the sentence, and Aguilera's original sentence would have become final. Because of this, a new rule is created; the earlier in the day a defendant is sentenced, the longer the period of time a judge has to consider sentence alterations or to have a change of heart.

29. *See, e.g.*, Stokes v. State, 688 S.W.2d 539, 541 (Tex. Crim. App. 1985) (en banc) (stating that "[t]he sentence comes into existence on the day and at the time it is pronounced," and therefore, it is an important part of the punishment phase of a trial). Because the defendant can now be resentenced at any time during the day of the initial sentence's pronouncement, his or her sentence no longer "comes into existence . . . at the time it is pronounced." *Id.* Instead, the last sentence that was decreed by the judge before the time of court adjournment becomes the sentence.

30. *See* Garcia v. State, 16 S.W.3d 401, 408 (Tex. App.—El Paso 2000, pet. ref'd) (noting that allowing a victim to give an allocution statement during the punishment phase runs the risk of affecting the decision of the fact finder (citing Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1114-15 (1995))).

lower the sentence by ten years.[31] The record is silent as to any specific justifications explaining the judge's decision to make the change,[32] which could have resulted for a variety of reasons.[33] It is not out of the realm of possibilities to imagine a situation where an emotional victim allocution statement could cause a judge to consider modifying the sentence.[34] However, such a result simply cannot be allowed, because the "[l]egislature specifically enacted article 42.03 . . . to alleviate any risk that the statement would affect the partiality of the fact finder at the punishment phase."[35]

This Comment looks at possible solutions to the potential consequences of *Aguilera*. Section II discusses the background leading up to *Aguilera*, beginning with the United States Supreme Court in the late 1800s and then addressing the relevant Texas precedent. Section III analyzes the problems stemming from the court's decision in *Aguilera* and suggests possible solutions. Section IV summarizes these points and explains why the shortcomings of *Aguilera* should be remedied quickly.

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31. State v. Aguilera, 130 S.W.3d 134, 136 (Tex. App.—El Paso 2003) (mem. op.), *rev'd*, 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc).

32. *Id.* However, in a bill of exceptions, the trial judge stated a very broad and ambiguous reason for making the change a mere reconsideration of testimony. *Aguilera*, 165 S.W.3d at 706 (Keasler, J., joined by Hervey, J., dissenting). The trial judge also specifically mentioned she did not consider the victim's allocution statement. *Id.*

33. *See, e.g.*, Harris v. State, 153 S.W.3d 394, 397 n.8 (Tex. Crim. App. 2005) (refusing to state that a trial judge, who found previously submitted sentence enhancements correct during a second sentencing, was acting dishonestly, but asserting that he may have corrected the sentence either because he mistakenly omitted the enhancements at the initial sentencing, or because he simply changed his mind about the truth of the enhancements, neither of which he had the authority to do). Notably, in *Aguilera*, Judge Keasler declared that the trial judge's statement that she did not consider the allocution statement in modifying the defendant's sentence "defies credibility." *Aguilera*, 165 S.W.3d at 706 (Keasler, J., joined by Hervey, J., dissenting).

34. *See, e.g.*, Blevins v. State, 884 S.W.2d 219, 231 (Tex. App.—Beaumont 1994, no pet.) (stating that the decedent's mother read a poem she wrote about her son's death); *cf.* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1114-15 (1995) (describing how a victim allocution statement resulted in a courthouse brawl); John W. Stickels, *Victim Impact Evidence: The Victims' Right That Influences Criminal Trials*, 32 TEX. TECH L. REV. 231, 237-46 (2001) (discussing pre-sentence pronouncement victim impact statements, and providing several examples of horrific crimes that victims have faced and the victim impact statements they have made).

35. *Garcia*, 16 S.W.3d at 408; *see also* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1115 (1995) (explaining that during the committee hearing on the bill that became article 42.03, "panel members expressed concern that victim statements could influence the judge" and thus, the bill was amended to allow victim allocution only after sentence pronouncement).

II. BACKGROUND

A. *Overview of United States Supreme Court Decisions*

A look at the history of sentence modification starts with the 1873 United States Supreme Court case *Ex parte Lange*.[36] The issue before the Court in *Lange* was to what extent a district court could modify its own judgments.[37] The petitioner, Edward Lange, was found guilty by jury for appropriating Post Office Department mailbags.[38] The statute governing the crime's punishment called for *either* a fine or no more than one year's imprisonment.[39] Erroneously, the trial judge sentenced Lange to *both* a year's imprisonment and a fine.[40] On the following day, Lange began serving his sentence and paid the fine.[41] Five days later, during the same court term in which his trial took place, Lange was brought back before the same judge, who vacated the former illegal judgment and re-sentenced him to a one-year prison term.[42] Granting petitioner's writs of habeas corpus and certiorari, the Supreme Court quickly pointed out that while it is undeniable that a court has power over its own judgments during the term in which they are made,[43] it would be a "gross injustice" to allow any court the power to give additional punishment after the defendant's previous sentence has been executed.[44] The Court further stated that "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence."[45] Relying on this prohibition against double jeopardy and punishment, the Court held that because Lange "had fully suffered one of the

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36. 85 U.S. 163 (1873).

37. *Ex parte Lange*, 85 U.S. 163, 166 (1873) (asserting that "[t]he first inquiry which presents itself is as to the nature and extent of the power of the [c]ircuit [c]ourt over its own judgments, in reversing, vacating, or modifying them").

38. *Id.* at 164.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Lange*, 85 U.S. at 164.

43. *Id.* at 167 (citing Basset v. United States, 9 Wall. 38, 76 U.S. 38 (1869)). Courts have the power to set aside their own judgments during "the same term of court." *Basset*, 76 U.S. at 41.

44. *Lange*, 85 U.S. at 167-68 (announcing that there must be some limit to the power courts have over their judgments).

45. *Id.* at 168; *see also* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (listing as three constitutional protections of the Double Jeopardy Clause: (1) protection against another prosecution after acquittal; (2) protection against another prosecution after a conviction; and (3) protection "against multiple punishments for the same offense"), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989). *See generally* U.S. CONST. amend. V (declaring "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

alternative punishments to which alone the law subjected him, the power of the court to punish further was gone."[46] Thus, it was established that a court loses its power to punish any further once a defendant has served his sentence.[47]

Half-a-century later, the Supreme Court interpreted *Lange* when it decided *United States v. Benz*.[48] In *Benz*, the Court stated that *Lange* applied the authority of a court to amend, modify, or vacate its judgment to criminal cases during the term in which it was made.[49] In describing the scope of *Lange*'s holding, the Court expressed that a trial court may decrease the punishment of an imposed sentence, but it cannot increase the punishment because doing so would violate the Double Jeopardy Clause.[50] Thus, a sentence was given finality as to any upward alteration of the sentence's length, and any increase in punishment after the sentence's imposition was considered a double jeopardy violation.[51]

However, another half-century witnessed the Supreme Court's dismissal of the *Benz* rule as mere dictum.[52] *United States v. DiFrancesco*[53]

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46. *Lange*, 85 U.S. at 176.

47. *See id.* (using powerful language to support its holding when stating that "[u]nless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone . . . . [t]he power was exhausted"). The Court also defended its ruling against the argument that the resentencing of the defendant was valid because the trial court had jurisdiction over the defendant and subject matter by analogizing it with a justice of the peace who, while having jurisdiction over a misdemeanor charge, could not sentence the defendant to be hanged merely because he had jurisdiction over the case. *Ex parte Lange*, 85 U.S. 163, 176 (1873); *see also* United States v. Murray, 275 U.S. 347, 357-59 (1927) (interpreting a federal probation act to mean probation cannot be given once a defendant has begun serving the prescribed sentence and stating in dictum that *Lange* means that "[t]he beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it").

48. 282 U.S. 304 (1931).

49. United States v. Benz, 282 U.S. 304, 307 (1931) (discussing the effects of the *Lange* holding on criminal cases).

50. *Id.*; *see also* Donald T. Kramer, Annotation, *Double Jeopardy Considerations in Federal Criminal Cases—Supreme Court Cases*, 162 A.L.R. FED. 415, § 30 (2000) (explaining that *Benz* stands for the proposition that a sentence cannot be increased without a double jeopardy violation, but it may be decreased).

51. *See also Ex parte* Madding, 70 S.W.3d 131, 135 n.6 (Tex. Crim. App. 2002) (giving a brief sentence modification timeline and asserting that "the imposition of a sentence, . . . was tantamount to a verdict of acquittal on the possibility of greater punishment"); *cf.* Crist v. Bretz, 437 U.S. 28, 33 (1978) (expressing that a main purpose of the Double Jeopardy Clause was "to preserve the finality of judgments"); United States v. Scott, 437 U.S. 82, 92 (1978) (stating that "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment").

52. *See* United States v. DiFrancesco, 449 U.S. 117, 138 (1980) (labeling the *Benz* rule as dictum because the real issue in the case was whether the trial court could decrease a sentence after it had commenced, not whether it may increase a sentence). *See generally*

dealt with federal statutes that allowed for an increased sentence to be given to a person convicted as a "special dangerous offender" and allowed the Government to bring that sentence to the court of appeals on review, where it was possible, following strict rules, to increase the severity of the sentence.[54] The issues before the Court were whether a pronounced sentence has the same finality as an acquittal and whether these statutes were in violation of the Double Jeopardy Clause.[55] The Court of Appeals for the Second Circuit, basing its opinion in part on *Benz*, found that a sentence increased under the statute was a double jeopardy violation.[56] Subsequently, however, the Supreme Court ruled the *Benz* Court had no authority to hold that a sentence could not be increased after it had commenced because that Court's main concern was whether a trial court had the power to reduce a sentence after it had begun.[57] The *DiFrancesco* Court asserted that such dictum was a misinterpretation of *Lange*, which really meant that a trial court could not resentence a defendant who had already fully suffered an alternative punishment set by statute.[58]

DiFrancesco held that "a sentence does not have the qualities of constitutional finality that attend an acquittal"[59] because, among other things,

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Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, § 2[a] (1983) (discussing *DiFrancesco* and advocating that the *DiFrancesco* case repudiated *Benz*'s holding "as being both dictum and based on an erroneous interpretation of *Lange*," and concludes "that the pronouncement of sentence had never historically carried the finality that attached to an acquittal for double jeopardy purposes").

53. 449 U.S. 117 (1980).

54. United States v. DiFrancesco, 449 U.S. 117, 118-21 (1980) (delineating federal statutes and the process necessary to increase severity of a sentence); *cf.* Timothy Cone, *Double Jeopardy, Post*-Blakely, 41 AM. CRIM. L. REV. 1373, 1375-76 (2004) (expressing that *DiFrancesco*'s upholding of the statute granting government appeals allowed for the broad government appeals under the Sentencing Reform Act of 1984 to be free from a Double Jeopardy violation). Double Jeopardy, its relationship to the Sentencing Reform Act of 1984, and the Federal Sentencing Guidelines are beyond the scope of this Comment.

55. *DiFrancesco*, 449 U.S. at 136, 138.

56. *See* United States v. DiFrancesco, 604 F.2d 769, 784-87 (2d Cir. 1979) (mentioning *Benz* as meaning that an upward modification of a valid sentence is a double jeopardy violation while coming to the conclusion that the government may not appeal the trial court's sentence under this federal statute), *rev'd*, 449 U.S. 117 (1980) (determining that the Second Circuit Court of Appeals relied upon *Benz* when it held that the federal statute violates the Double Jeopardy Clause).

57. *DiFrancesco*, 449 U.S. at 138.

58. *Id. But see* Ralston v. Robinson, 454 U.S. 201, 224 n.3 (1981) (Stevens, J., joined by Brennan and O'Connor, JJ., dissenting) (interpreting the holding in *DiFrancesco* as being limited to situations where Congress has specifically "authorized an increase of sentence after the initial sentence has been set aside on *direct appeal*").

59. *DiFrancesco*, 449 U.S. at 134.

"[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be."[60] Further, the Court stated that "a defendant may not receive a greater sentence than the legislature has authorized" and that an increase in a pronounced sentence is not automatically a double jeopardy violation.[61] However, for the purpose of this Comment, it is important to point out that the statute held constitutional by *DiFrancesco* only allowed an increase on appeal when the trial court committed certain abuses.[62] Thus, while increasing a proscribed sentence is not always a violation of double jeopardy under the Fifth or Fourteenth Amendments,[63] the legislature decides the procedure for any upward sentence modification.[64]

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60. *Id.* at 137 (reviewing precedent and determining there is a "distinction between acquittals and sentences"). The Court analogizes the circumstances that face a defendant under this federal statute to that of a probationer who is aware probation can be revoked and a sentence imposed; both are aware that their current situation may be worsened by a sentence, whether it is revoked or increased. *Id.*

61. *See id.* at 139 (explaining that so long as the increase exists within the bounds of a punishment scheme set by the legislature, no double jeopardy violation exists).

62. *See id.* at 141 (noting that the appellate court may only correct legal errors, such as an abuse of discretion, use of unlawful procedures, or an obviously erroneous finding).

63. *See DiFrancesco*, 449 U.S at 131 n.12 (stating that the Double Jeopardy Clause's "application to the States through the Fourteenth Amendment" is settled); Benton v. Maryland, 395 U.S. 784, 794 (1969) (applying the Double Jeopardy Clause to the states using the Fourteenth Amendment).

64. *See, e.g.*, *DiFrancesco*, 449 U.S. at 138-39 (using *Lange* to demonstrate that a double jeopardy violation would not have occurred "if Congress had provided that the offense [in *Lange*] was punishable by both fine and imprisonment"); *see also* Ralston v. Robinson, 454 U.S. 201, 224 n.3 (1981) (Stevens, J., joined by Brennan and O'Connor, JJ., dissenting) (stating that the holding of *DiFrancesco* "is limited to the situation in which *Congress* has expressly authorized an increase of sentence after the initial sentence has been set aside on *direct appeal*"); *cf.* State v. Johnson, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991) (en banc) (summarizing that courts may act "only if that action is authorized by constitutional provision, statute, or common law, or the power to take the action arises from an inherent or implied power"). The Fifth Circuit has declined to define the scope of *DiFrancesco* or to apply it as overruling *Lange*. *See* United States v. Henry, 709 F.2d 298, 309-10 (5th Cir. 1983) (noting that although the scope of *DiFrancesco* is uncertain, it was unnecessary in its decision to decide whether *DiFrancesco* overrules prior double jeopardy decisions). *See generally* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, 910 n.5 (1983) (stating that the holding of *DiFrancesco* is limited in scope to the issue of special statutes that allow for upward sentence modifications).

B. *Texas Sentence Modification*

1. Early Precedent Following *Ex parte Lange*

A review of Texas sentence modification begins seven years after *Lange* with *Grisham v. State*.[65] The Texas Court of Criminal Appeals, relying on *Lange*, stated that "in criminal cases the power of courts over their judgments during the term at which they are rendered does not extend to cases where punishment has already been inflicted in whole or in part."[66] Thus, from early on, Texas has espoused the belief that a sentence, once begun, may not be increased.[67]

Two Texas cases are viewed as guides for the prohibition against modifying a defendant's sentence once he has suffered punishment.[68] In *Pow-*

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65. 19 Tex. Ct. App. 504 (1885).

66. Grisham v. State, 19 Tex. Ct. App. 504, 515 (1885). The court stated that because the defendant had suffered punishment under the sentence, "it was then beyond the power of the court either to set it aside, vacate, annul or change it in any substantial respect, unless at the instance or on motion of defendant." *Id.*; *see also* Turner v. State, 116 Tex. Crim. 154, 31 S.W.2d 809, 810 (1930) (per curiam) (following *Grisham* in holding that a double jeopardy violation occurred when a defendant's sentence was increased after he had already suffered punishment under it).

67. *See generally* TEX. CONST. art. I, § 14 (providing the Texas Double Jeopardy Rule as it has existed since 1876: "No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction"). The *Turner* court quoted this constitutional provision to support the finding that the defendant could not have his sentence length increased after he had suffered punishment under the first sentence. *See Turner*, 31 S.W.2d at 810 (reasoning that because the defendant had suffered punishment under the first sentence, any additional punishment would punish the defendant twice for the same crime in violation of double jeopardy). *See generally* Annotation, *Power of Court to Set Aside Sentence After Commitment*, 44 A.L.R. 1203, 1203-04 (1926) (listing the cases of several states, including Texas, which prescribe to the general rule that trial courts lack the power to "set aside a sentence after the defendant has been committed . . . and impose a new or different sentence increasing the punishment, even at the same term").

68. *See, e.g.*, State v. Aguilera, 165 S.W.3d 695, 702-04 (Tex. Crim. App. 2005) (en banc) (Cochran, J., joined by Price, J., concurring) (expressing that when discussing a trial court's power to alter a commenced sentence, *Powell v. State*, 124 Tex. Crim. 513, 63 S.W.2d 712 (1933) (per curiam), and *Williams v. State*, 145 Tex. Crim. 536, 170 S.W.2d 482 (1943) (per curiam), are binding precedent). The *Aguilera* dissent also mentioned *Powell* and *Williams*, saying this tandem disallows the judge to resentence the defendant because he has started serving his sentence. *Id.* at 703-04 (Keasler, J., joined by Hervey, J., dissenting). The dissent also pointed out that it might be able to join the holding of *Aguilera* if *Powell* and *Williams* were overruled, but since they were not, they must be followed. *Id.* at 707; *see also* McClinton v. State, 121 S.W.3d 768, 775 (Tex. Crim. App. 2003) (per curiam) (Hervey, J., joined by Johnson, J., dissenting) (reviewing the State's assertion that *Powell* and *Williams* "stand generally for the proposition that a trial court cannot modify a defendant's sentence once the defendant has begun to serve it"), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc). Judge Hervey contended, in her

ell v. State,[69] the defendant appealed after receiving a sentence of five years in prison, but subsequently, he requested that his appeal be dismissed.[70] The State, after learning that the defendant had previously been convicted and sentenced in a different cause, but that the trial judge had failed to make these two sentences run cumulatively, filed a motion using a nunc pro tunc order seeking the judge to correct the sentences and make them run cumulatively.[71] The trial judge issued the order, and the defendant appealed arguing that the judge was without power to amend the sentence because he had already suffered punishment under the initial sentence.[72] The Texas Court of Criminal Appeals agreed with the defendant, stating that when a judgment is appealed, the sentence begins to run when the appellate court issues its mandate, which can occur when an appellant requests dismissal of the appeal.[73] The court held that to allow the corrected sentence to stand would be a double jeopardy violation, and thus, it affirmed the original sentence.[74]

In *Williams v. State*,[75] the court recognized the "general rule that a trial court has full power and control of its judgments, orders and decrees, during the term at which they have been made . . . and . . . may, at the same term of court, correct, modify, or set them aside."[76] The court qualified this rule, however, in recognizing that an exception occurs "when the accused has accepted the judgment and has performed a part thereof, or has suffered some punishment as a result thereof, in which event the court is powerless to change the judgment in any substantial respect."[77] With these decisions, the spirit of *Lange* was solidified in Texas, and it

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dissenting opinion, that *Powell* and *Williams* should be overruled since they have roots in *Lange*, which has been limited by *DiFrancesco*. *McClinton*, 121 S.W.3d at 777.

69. 124 Tex. Crim. 513, 63 S.W.2d 712 (1933) (per curiam).

70. Powell v. State, 124 Tex. Crim. 513, 63 S.W.2d 712, 712 (1933) (per curiam).

71. *Id.* *See generally* Bullock v. State, 705 S.W.2d 814, 816 (Tex. App.—Dallas 1986, no pet.) (stating that nunc pro tunc judgments are used "to correct clerical errors and to make the record 'speak the truth'" (quoting *Ex parte* Patterson, 139 Tex. Crim. 489, 141 S.W.2d 319, 320 (1940))).

72. *Powell*, 63 S.W.2d at 713.

73. *Id.*

74. *Id.*; *see also* State v. Aguilera, 165 S.W.3d 695, 703 (Tex. Crim. App. 2005) (en banc) (Keasler, J., joined by Hervey, J., dissenting) (stating that *Powell* stood for the proposition that a trial court has no power to set a sentence aside once it has begun).

75. 145 Tex. Crim. 536, 170 S.W.2d 482 (1943) (per curiam).

76. Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482, 486 (1943) (per curiam).

77. *Id.* (citing Turner v. State, 116 Tex. Crim. 154, 31 S.W.2d 809 (1930) (per curiam)); *see also Aguilera*, 165 S.W.3d at 703 (Keasler, J., joined by Hervey, J., dissenting) (explaining that *Williams* recognized this exception). A defendant accepts the pronounced sentence when he or she fails to give notice of appeal. *See* Romero v. State, 712 S.W.2d 636, 638 (Tex. App.—Beaumont 1986, no pet.) (stating that "[w]hen appellant gave no notice of appeal, he accepted his sentence").

was firmly established that once a sentence has begun, a trial court is without power to modify or alter the sentence.[78]

2. Texas Courts of Appeals Split Concerning a Judge's Right to Correct a Sentence

Even though *Powell* and *Williams* gave clear instruction on post-commencement sentence modification, the Texas courts of appeals were split on the issue prior to *State v. Aguilera*.[79] Two appellate cases that follow the precedent of *Powell* and *Williams* are *Tooke v. State*[80] and *State v. Dickerson*.[81] In *Tooke*, the court found the defendant guilty and orally sentenced him to confinement "for not less than 5 years nor more than 50 years."[82] After the defendant had accepted the sentence, the trial court realized the indictment's enhancement was not included, and subsequently, it modified the minimum sentence to be "for not less than 15 years."[83] The defendant appealed, arguing that the resentencing increase was in error.[84] The court of appeals agreed and, citing *Williams*, held that "after the sentence is first imposed on appellant, the trial court is without power to set aside that sentence."[85] The court reasoned that the trial court's own carelessness in failing to consider the enhancement paragraph should not "enlarge the court's power over the case once sentence has been accepted."[86]

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78. *See Powell*, 63 S.W.2d at 713 (stating that *Lange* held a trial court has no authority to set aside a commenced sentence and listing the decisions of several states that follow *Lange*, including *Turner*); *see also* McClinton v. State, 121 S.W.3d 768, 776-77 (Tex. Crim. App. 2003) (per curiam) (Hervey, J., joined by Johnson, J., dissenting) (noting that both *Powell* and *Williams* rely upon *Lange*).

79. *See Aguilera*, 165 S.W.3d at 705 (Keasler, J., joined by Hervey, J., dissenting) (mentioning and reviewing the split amongst the Texas Courts of Appeals).

80. 642 S.W.2d 514 (Tex. App.—Houston [14th Dist.] 1982, no pet.).

81. 864 S.W.2d 761 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

82. Tooke v. State, 642 S.W.2d 514, 516 (Tex. App.—Houston [14th Dist.] 1982, no pet.).

83. *Id.*

84. *See id.* at 518 (indicating that the defendant believes that the resentencing was "an impermissible increase in the punishment assessed").

85. *Id. See generally* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, 925 (1983) (listing *Tooke* as standing for the proposition that a trial court lacks the power to increase a sentence's severity after the defendant has accepted the pronounced sentence).

86. *Tooke*, 642 S.W.2d at 518. The carelessness the court mentions here is not the same kind that can be corrected by a judgment nunc pro tunc. *See* State v. Bates, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) (en banc) (describing orders nunc pro tunc as being "used only to correct clerical errors in which no judicial reasoning contributed to their entry, and for some reason were not entered of record at the proper time"). In this situation, the trial judge made a judicial mistake in the rendering judgment, and thus, it cannot be corrected by a motion nunc pro tunc. *See, e.g.*, Jones v. State, 795 S.W.2d 199,

Similarly, in *Dickerson*, the trial judge mistakenly forgot to include the sentence enhancement when the sentence was pronounced.[87] After being reminded by the prosecution of the enhancement, and before the defendant was even led away, the judge retracted the initial sentence and resentenced the defendant. This time the enhancement was included.[88] On a motion for new trial, a different judge reaffirmed the defendant's initial sentence, and the State appealed, arguing that the trial court had the power to correct its mistake before the defendant had begun to serve his sentence.[89] The court of appeals looked to the reasoning in *Tooke* and held that because the initial sentence was valid and lawful, and because the defendant accepted the sentence, the modified sentence was void.[90] The *Dickerson* dissent argued that resentencing should have been allowed in this situation because the initial sentence was erroneous and the defendant had not yet suffered punishment under it.[91] The majority defended its holding by stating that the trial judge was not attempting to correct a mere "sentencing error," but rather a valid and accepted sentence; the error was in the judge overlooking the enhancement—a mistake that could have been promptly objected to by the prosecution.[92] Three things happened before the court found the enhancements true: (1) a lawful punishment was given, (2) a valid sentence was pronounced, and

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201 (Tex. Crim. App. 1990) (en banc) (expressing that judgments may not be rendered using a motion nunc pro tunc).

87. State v. Dickerson, 864 S.W.2d 761, 761-62 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

88. *Id.* at 762. Because the enhancement made the defendant a habitual offender, a minimum sentence of twenty-five years was imposed, quite a significant increase from the two-year sentence he had received moments earlier. *Id.*

89. *Id.* at 763.

90. *See id.* (noting the fact similarities to *Tooke*, and thus holding as the *Tooke* Court did). In a footnote, the court explained "[a] defendant accepts his sentence when he gives no notice of appeal in response to it." *Dickerson*, 864 S.W.2d at 763 n.3 (citing Romero v. State, 712 S.W.2d 636, 638 (Tex. App.—Beaumont 1986, no pet.)).

91. *Id.* at 766 (Dunn, J., dissenting). The dissent argued that *Tooke* and similar cases are inapplicable because in those cases the defendant had already begun serving the sentence. *Id.* at 765.

92. *Id.* at 763 (majority opinion). The court noted that if the prosecution did not want to accede to the trial court's failure to include the enhancement, then it should have objected to the court's assessment of the statutory minimum. *Id.* at 764. Instead, the prosecution allowed the trial judge to sentence the defendant and watched as the defendant was led away by the bailiff before it inquired about the enhancements. *Dickerson*, 864 S.W.2d 764. This was a judicial mistake in the rendition of the sentence, and hence, it could not have been corrected with a judgment nunc pro tunc. *See* Jones v. State, 795 S.W.2d 199, 201 (Tex. Crim. App. 1990) (en banc) (noting that nunc pro tunc orders cannot be used to render a correct judgment).

(3) the defendant accepted the sentence.[93] "Under these procedural facts, the trial court was not free to 'retract the sentence' . . . and 'resentence' [the defendant], regardless of the fact that the punishment originally assessed was the product of mistake or oversight."[94] Thus, relying upon established law, *Tooke* and *Dickerson* stand for the importance of a sentence's initial pronouncement and acceptance, and a judge should not be allowed to correct his own negligence by circumventing this importance.[95]

There have been, however, a handful of courts of appeals decisions that in reviewing sentence modification cases have overlooked *Williams* and *Powell*.[96] Instead, these cases relied upon dictum located in the concurring opinion of *Awadelkariem v. State*,[97] which states that a court has the "inherent power to correct, modify, vacate, or amend its own rulings."[98] In *McClinton v. State*,[99] the State cross-appealed the trial court's two-year reduction of the defendant's sentence in a docket entry, three weeks after pronouncement, arguing that such a reduction was granting a new trial on

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93. State v. Dickerson, 864 S.W.2d 761, 762-63 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

94. *Id.* (quoting from the trial record).

95. *See, e.g.*, Meineke v. State, 171 S.W.3d 551, 554 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (agreeing that "*Tooke* and *Dickerson* stand for the proposition that a court cannot retract a valid sentence and resentence a defendant to provide for greater punishment") (emphasis omitted). *See generally* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, 939 (1983 & Supp. 2006) (naming *Dickerson*, along with the decisions of several other states, as holding "that the trial judge's misstatement in pronouncing the initial valid sentence did not justify a correction of the sentence to conform to the judge's original intent where the correction was untimely under the general rule governing the increase of valid sentences").

96. *See* State v. Aguilera, 165 S.W.3d 695, 706 (Tex. Crim. App. 2005) (en banc) (Keasler, J., joined by Hervey, J., dissenting) (listing the Texas Courts of Appeals that failed to address *Williams* or *Powell*).

97. 974 S.W.2d 721 (Tex. Crim. App. 1998) (en banc).

98. Awadelkariem v. State, 974 S.W.2d 721, 728 (Tex. Crim. App. 1998) (en banc) (Meyers, J., joined by Baird, J., concurring). The concurring opinion further stated, "so long as the court does not by its ruling divest itself of jurisdiction or exceed a statutory time table, it can simply change its mind on a ruling. The ability to do so is a necessary function of an efficient judiciary." *Id.* at 728-29. However, it should be pointed out that Judge Meyers relied upon a *civil* case of the Texas Supreme Court in making this statement. *Id.* (citing Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979)). *Eichelberger* lists several civil opinions which recognize the inherent power to set aside and control their own judgments. *Eichelberger*, 582 S.W.2d at 398 n.1.

99. 38 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2001), *pet. dism'd, improvidently granted*, 121 S.W.3d 768 (Tex. Crim. App. 2003), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc).

the issue of punishment only, for which trial courts lack power.[100] The court of appeals, while admitting that sentence modification during a court's plenary power was an unsettled area of law, decided that it was within a trial court's authority to amend its sentences within its period of plenary power.[101] Similarly, in *Ware v. State*,[102] the defendant filed a motion for new trial due to the trial court's erroneous sentence.[103] A few days later, the trial court corrected the sentence using a motion nunc pro tunc.[104] The court of appeals, while deciding that the nunc pro tunc judgment was used improperly, reasoned that because civil courts have inherent power to modify and correct their own sentences, criminal courts should have the same authority, and thus, resentencing was within the court's power.[105] Likewise, in *Junious v. State*,[106] the court of appeals held that while the trial court erred in granting a new trial on the issue of

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100. McClinton v. State, 38 S.W.3d 747, 750 (Tex. App.—Houston [14th Dist.] 2001), *pet. dism'd, improvidently granted*, 121 S.W.3d 768 (Tex. Crim. App. 2003), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc).

101. *Id.* at 751 (quoting Verdin v. State, 13 S.W.3d 121, 123 (Tex. App.—Tyler 2000, no pet.)). The court explained that "[b]ecause the trial court had plenary jurisdiction, its order was not 'null and void.'" *Id.* The trial court retained plenary jurisdiction in this case after it had granted the motion for new trial as to punishment because it still had seventy-five days after the judgment was imposed in which it could rescind this illegal grant. *Id.* (citing *Awadelkariem*, 974 S.W.2d at 728); *see also Verdin*, 13 S.W.3d at 123 (relying upon *Awadelkariem* in holding that a trial court could set aside its own order since it still had plenary power).

102. 62 S.W.3d 344 (Tex. App.—Fort Worth 2001, pet. ref'd).

103. Ware v. State, 62 S.W.3d 344, 353 (Tex. App.—Fort Worth 2001, pet. ref'd) (mentioning that the trial court failed to state either of the counts upon which the defendant was convicted in sentencing him to seventy-five year prison term). The defendant argued such sentencing was in error because the maximum sentence for count two was twenty years. *Id.*

104. *Id.* (altering the sentence by giving seventy-five years for one count and ten years for the other). Interestingly, the court of appeals clarified that the resentencing could not be seen as granting the defendant's motion for new trial because such a grant requires a written order granting the motion, which was lacking in this case. *Id.* at 354. Likewise, the court stated that the sentence modification was not an implicit grant of a motion in arrest of judgment. *Id.*

105. *See Ware*, 62 S.W.3d at 355 (arguing that civil trial courts' plenary power to modify their rulings, as discussed in the concurring opinion of *Awadelkariem*, should apply in criminal cases). In *Ware*, the trial court made an obvious mistake in sentencing the defendant. *Id.* at 354-55. Because the mistake was judicial error, a nunc pro tunc judgment was unavailable. *Id.* at 355. However, the court stated that while civil courts treat judgments nunc pro tunc as a post-plenary-power remedy, they also have modification authority during their plenary power period. *Id.* The court found that additional plenary power to modify sentences exists in criminal trial courts, stating that in the interest of judicial economy, a trial court should be able to modify its sentences in such instances, instead of granting a motion for entirely new trial or letting its decision be reversed on appeal. *Id.*

106. 120 S.W.3d 413 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

punishment, the trial court's sentence reformation was valid because it occurred during the court's period of plenary power.[107] The preceding faction of the courts of appeals focused on broadening a court's authority under its plenary power, instead of following the settled Texas precedent.[108] Thus a split court of appeals existed when the Texas Court of Criminal Appeals granted petition for review in *Aguilera*.

3. *State v. Aguilera*

Before *Aguilera* was decided by the Texas Court of Criminal Appeals, the El Paso Court of Appeals addressed the controversy. In *State v. Aguilera*,[109] the trial court had initially sentenced the defendant to a twenty-five year prison term.[110] However, after hearing the victim's allocution statement and holding an in-chambers discussion, the judge stated that she had reconsidered the sentence and subsequently lowered the prison term to fifteen years.[111] The State objected to the modification, but the trial judge responded that such an action was within the court's plenary power.[112] On appeal, the court held that the first sentence was valid and that it had begun on the day that it was pronounced.[113]

The issue before the court was "whether the trial court had the authority to re-sentence Appellee" even though the initial sentence was valid.[114]

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107. Junious v. State, 120 S.W.3d 413, 417 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). The court relied on *Ware* in reasoning that "a trial court has inherent power to vacate, modify or amend its own rulings within the time of its plenary jurisdiction." *Id.*; *cf.* State v. Bates, 889 S.W.2d 306, 310 (Tex. Crim. App. 1994) (en banc) (noting that trial courts may not grant a new trial as to punishment only).

108. *See* State v. Aguilera, 165 S.W.3d 695, 705-06 (Tex. Crim. App. 2005) (en banc) (Keasler, J., joined by Hervey, J., dissenting) (reviewing the circuit split amongst the courts of appeals that faced *Aguilera*).

109. 130 S.W.3d 134 (Tex. App.—El Paso 2003) (mem. op.), *rev'd*, 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc).

110. State v. Aguilera, 130 S.W.3d 134, 136 (Tex. App.—El Paso 2003) (mem. op.), *rev'd*, 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc).

111. *Id.*; *see also Aguilera*, 165 S.W.3d at 706 (Keasler, J., joined by Hervey, J., dissenting) (pointing out that the trial judge made a bill of exceptions saying the sentence reduction was only the result of a reconsideration of the trial testimony and not of the victim allocution statement).

112. *Aguilera*, 130 S.W.3d at 137 (showing that the trial judge justified her resentencing by saying "I do have plenary power and plenary jurisdiction for at least 30 days after the imposition of any sentence").

113. *Id.* at 139. The court of appeals held that the original sentence was valid because, first, the defendant was present when the sentence was pronounced. *Id.* Second, the sentence fell within the statutorily prescribed range. *Id.* And lastly, the sentence was accepted since the defendant failed to appeal his conviction. *Id.*; *see also* Romero v. State, 712 S.W.2d 636, 638 (Tex. App.—Beaumont 1986, no pet.) (noting that defendants accept their sentences when they fail to file a notice of appeal).

114. *Aguilera*, 130 S.W.3d at 139.

The court pointed out that the trial judge had based her ability to resentence the defendant on her plenary power, but the record failed to state any authority that gave her such power.[115] Rationalizing that the trial judge might have used authority found in the Texas Rules of Civil Procedure,[116] the court explained that such a rule would be inapplicable in a criminal case.[117] Appellee argued that a trial court has plenary power over its judgments, relying upon the ruling of *Williams v. State*, which held trial courts have full power over their judgments.[118] The court of appeals replied with the *Powell v. State* exception to this general rule, which says "[a] trial court is without power to set aside a sentence after the defendant has been committed thereunder."[119] The court furthered the analysis by quoting both *Tooke* and *Dickerson* and noting the similarities between those cases and the case at bar.[120] The court stated that "[e]ven if the *Tooke* and *Dickerson* courts had explicitly required that the Appellee have begun serving his sentence to void a re-sentencing, a good case could be made that the twenty minutes following Appellee's original

115. *Id.*

116. *Id.* at 139-40. The court of appeals surmised that the trial judge relied on Rule 329b(d) by noting the similarities between the language of the rule and the trial judge's comments in saying that she had plenary power over both her civil and criminal judgments for at least thirty days after sentence imposition. *Id.*; *see also* TEX. R. CIV. P. 329b(d) ("The trial court . . . has plenary power to . . . vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.").

117. *See Aguilera*, 130 S.W.3d at 139-40 (ruling that the plenary powers under Rule 329b(d) do not extend to criminal trials (citing *Ex parte* Donaldson, 86 S.W.3d 231, 233 (Tex. Crim. App. 2002) (en banc) (per curiam))); *see also Donaldson*, 86 S.W.3d at 233 (holding that the civil rules do not apply in criminal cases).

118. State v. Aguilera, 130 S.W.3d 134, 140 (Tex. App.—El Paso 2003) (mem. op.) (stating that Appellee relies upon the statement from *Williams* that says a "trial court has full power and control of its judgments, orders, and decrees" (quoting Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482, 486 (1943) (per curiam))), *rev'd*, 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc).

119. *Aguilera*, 130 S.W.3d at 141 (quoting *Ex parte* Reynolds, 462 S.W.2d 605, 607 (Tex. Crim. App. 1970)). The *Powell* court quoted from 44 A.L.R. 1203 when discussing the trial court's period of post-sentencing powers. *See* Powell v. State, 124 Tex. Crim. 513, 63 S.W.2d 712, 713 (1933) (per curiam) (explaining that the consensus among states was that after a sentence has begun, trial courts cannot increase or set aside the sentence (quoting Annotation, *Power of Court to Set Aside Sentence after Commitment*, 44 A.L.R. 1203, 1203 (1926))).

120. *See Aguilera*, 130 S.W.3d at 142-43 (stating that "[s]imilar to *Tooke* and *Dickerson*, the trial court in the instant case did not have the power to resentence Appellee after the initial sentence was imposed"). The court of appeals noted its facts were similar to *Dickerson* because in both cases the trial court's initial sentence was valid, within the legal range of punishment, and accepted by the defendant. *Id.* at 142. The court of appeals also pointed out that like *Tooke* and *Dickerson*, only a few moments had "elapsed between the pronouncement of the original sentence and the re-sentencing." *Id.* at 143.

sentence were enough to satisfy the requirement."[121] Based on this line of reasoning, the court of appeals held that the trial court lacked plenary power to resentence Appellee, and the modified sentence was ruled null and void.[122]

The case's next stop was the Texas Court of Criminal Appeals, whereupon the court of appeals decision was reversed.[123] Even though the appellant cited *Williams* and *Powell* in his brief,[124] the court failed to discuss either case.[125] Instead, the court compared this case with *Harris v. State*,[126] a case that dealt with "re-sentencing . . . outside of the statutory range of punishment,"[127] and only mentioned in dicta a court's plenary power to modify a sentence.[128] After noting that Texas Rules of Appellate Procedure 21.4 and 22.3 give trial courts plenary power to grant "a

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121. *Id.* (announcing that regardless of why the trial judge resentenced Appellee, according to *Tooke* and *Dickerson*, trial courts cannot resentence a defendant once he or she has accepted a valid sentence).

122. *See id.* at 144 (reasoning "the trial court lacked plenary power to reduce Appellee's sentence").

123. State v. Aguilera, 165 S.W.3d 695, 699 (Tex. Crim. App. 2005) (en banc) (majority opinion) (reversing the court of appeals and reinstating the original fifteen-year sentence).

124. *See id.* at 696 (observing that Appellee cites both *Williams* and *Powell*); *see also* Appellee Angel Aguilera's Brief at 9-10, State v. Aguilera, 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc) (No. PD-0024-04) (arguing that *Williams* and *Powell* increase the plenary power of the trial court). The appellee argues that *Powell* stands for the rule that a sentence may not be reformed "upward," and thus his sentence reduction was allowed under the rules. *Id.* at 10. However, such an interpretation goes against a century-old Texas precedent that states once a defendant has "suffered some punishment under said judgment, . . . it [is] then beyond the power of the court either to set it aside, vacate, annul or change it in any substantial respect, unless at the instance or on motion of defendant." Grisham v. State, 19 Tex. Ct. App. 504, 515 (1885). Appellee's argument also ignores those courts of appeals that have held that once a defendant has accepted a valid sentence, the trial court loses its ability to modify the sentence. *See* State v. Dickerson, 864 S.W.2d 761, 763 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (holding that the valid and accepted sentence makes any resentencing void); Tooke v. State, 642 S.W.2d 514, 518 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (agreeing with Appellant's contention that once he accepted the court's sentence, resentencing was an impermissible increase).

125. *See Aguilera*, 165 S.W.3d at 696-99 (failing to explore *Williams* or *Powell* other than to relate each case's principle that Appellee urged the court to accept).

126. 153 S.W.3d 394 (Tex. Crim. App. 2005).

127. *Aguilera*, 165 S.W.3d at 697.

128. *See id.* (explaining that while *Harris* mentioned in dicta that plenary power could be used for sentence modification, its holding was based on the constitutional violation of resentencing outside the statutorily prescribed range (citing Harris v. State, 153 S.W.3d 394, 397-98 (Tex. Crim. App. 2005)); *see also Harris*, 153 S.W.3d at 396 n.4 (finding it unnecessary to address the State's plenary power arguments because the trial court's modified sentence was outside the statutorily prescribed range for the defendant's crime).

motion for new trial or motion in arrest of judgment,"[129] the court added to this definition by holding:

> [A] trial court also retains plenary power to modify its sentence if, as in this case, the modification is made on the same day as the assessment of the initial sentence and before the court adjourns for the day. The re-sentencing must be done in the presence of the defendant, his attorney, and counsel for the [S]tate.[130]

The rationale given for the rule's implementation is that it comports with article 42.09, section 1 of the Texas Code of Criminal Procedure,[131] which states that a "defendant's sentence begins to run on the day it is pronounced," and with article 42.03, section 1(a),[132] which states "that a felony sentence shall be pronounced in the defendant's presence."[133] Applying this new grant of power, the court reinstated the fifteen year sentence and reversed the court of appeals.[134] Even though the Texas Court of Criminal Appeals stated the issue to be whether trial courts have plenary power to modify or amend sentences downward, the holding applies to a judge's plenary power to both increase *and* decrease a sentence.[135] The following analysis delves deeper into *State v. Aguilera*

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129. *Aguilera*, 165 S.W.3d at 697. This power exists if either motion "is filed within 30 days of sentencing." *Id.* at 697-98. A trial court may not, however, "grant a new trial on its own motion," but may do so if the defendant timely files a motion. *Id.* at 698 n.9 (citing Zaragosa v. State, 588 S.W.2d 322 (Tex. Crim. App. [Panel Op.] 1979); Harris v. State, 958 S.W.2d 292 (Tex. App.—Fort Worth 1997, pet. ref'd)); *see also* TEX. R. APP. P. 21.4 (announcing that defendants have thirty days after sentencing to file any motions for new trial); TEX. R. APP. P. 22.3 (giving defendants thirty days after sentencing in which to file their motions in arrest of judgment).

130. *Aguilera*, 165 S.W.3d at 698.

131. *See* TEX. CODE CRIM. PROC. ANN. art. 42.09, § 1 (Vernon Supp. 2006) (declaring that a defendant's sentence starts on the day it is pronounced).

132. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(a) (Vernon Supp. 2006) (requiring defendants to be present when their sentence is pronounced).

133. *See* State v. Aguilera, 165 S.W.3d 695, 698 (Tex. Crim. App. 2005) (en banc) (expressing that its plenary power rule comports with these two Texas Rules of Criminal Procedure). In a footnote, the court also mentions cases that have touched upon criminal plenary power, including *Awadelkariem v. State*, 974 S.W.2d 721, 728-29 (Tex. Crim. App. 1998) (en banc) (Meyers, J., joined by Baird, J., concurring), and the courts of appeals decisions that follow it: *Junious v. State*, 120 S.W.3d 413, 417 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd), *Ware v. State*, 62 S.W.3d 344, 353-55 (Tex. App.—Fort Worth 2001, pet. ref'd), and *McClinton v. State*, 38 S.W.3d 747, 750-51 (Tex. App.—Houston [14th Dist.] 2001), *pet. dism'd, improvidently granted*, 121 S.W.3d 768 (Tex. Crim. App. 2003) (per curiam), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc). *Id.* at 698 n.7.

134. *Aguilera*, 165 S.W.3d at 698-99.

135. *See id.* at 702-03 (Cochran, J., joined by Price, J., concurring) (noting that while the majority rule did not expressly state so, the holding means that a trial judge may modify a "sentence either up or down on the day of sentencing as long as the defendant has not

and its effects, discusses the potential consequences of these effects, and suggests plausible solutions to these problems.

III. ANALYSIS

A. *Analysis of* State v. Aguilera

1. Issues Addressed (or Not) by the Court

In *Aguilera*, the Texas Court of Criminal Appeals further defined plenary power for Texas criminal trial courts and in effect resolved a split amongst the Texas courts of appeals.[136] The scope of *Aguilera* only applies to judge-imposed sentences; sentences assessed by a jury cannot be modified by the trial court unless they fall outside the statutory range.[137] The court further noted that its rule upholds the decisions of *Junious v. State* and *Ware v. State* because both decisions held that once a defendant has filed a motion for new trial, "a trial court has the right to re-sentence a defendant within 30 days."[138] However, the majority failed to discuss

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yet begun to serve his sentence"). In fact, the Texas Courts of Appeals are already applying *Aguilera* in situations where the defendant's sentence is increased by the trial judge. *See* Swartzbaugh v. State, No. 13-04-067-CR, 2005 WL 1845764, at *2-4 (Tex. App.—Corpus Christi Aug. 4, 2005, pet. ref'd) (mem. op.) (relying heavily upon *Aguilera* in holding that the trial court properly modified the defendant's sentence upwards on the day of the initial sentencing).

136. *See Aguilera*, 165 S.W.3d at 697-98 & n.7 (majority opinion) (describing its plenary power rule clarifications and also establishing that *Junious* and *Ware* are correct decisions under its rules). Judge Cochran points out in her concurring opinion that *Tooke* and *Dickerson* do not survive the majority's ruling. *Aguilera*, 165 S.W.3d at 701 n.8 (Cochran, J., joined by Price, J., concurring).

137. *See Aguilera*, 165 S.W.3d at 697 (majority opinion) (stating that "[a]bsent a sentence not authorized by the applicable statute, a trial court may not alter a sentence assessed by a jury, but if the defendant elects sentencing by the judge after a jury trial, the situation is analogous to" a plea of guilty and modification is allowed); *see also Swartzbaugh*, 2005 WL 1845764, at *1 (relying on *Aguilera* in deciding that a sentence proclaimed by a *trial judge* may be modified on the same day as its initial pronouncement). If a defendant is found guilty, it is the trial judge's duty to assess punishment, unless the defendant has exercised his right to have the punishment assessed by a jury. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon Supp. 2006) (making it the judge's responsibility to assess punishment, unless (1) the jury has recommended community supervision and the defendant requested the same in a sworn motion before trial, or (2) the defendant requested a jury punishment assessment prior to voir dire). In the latter case, upon receiving a guilty verdict, a defendant may change his election of who will assess punishment. *Id.*

138. *See Aguilera*, 165 S.W.3d at 698 n.7 (showing that in both *Junious* and *Ware* a motion for new trial had been filed). Although the court's ruling found *Junious* and *Ware* to be correct representations of law, the court noted that *McClinton v. State*, 38 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2001), *pet. dism'd, improvidently granted*, 121 S.W.3d 768 (Tex. Crim. App. 2003) (per curiam), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc), did not survive its holding. *Id.* The *Aguilera* opinion

Tooke v. State, *State v. Dickerson*, or the split amongst the Texas Courts of Appeals.[139] These cases are mentioned in the concurring opinion, where it is announced that they are effectively overruled by the *Aguilera* decision.[140]

The dissenting opinion firmly states that the majority should have addressed these cases in coming to its plenary power definition.[141] As noted above, *Tooke* and *Dickerson* followed the precedent set down by *Powell v. State* and *Williams v. State*, and refused to allow trial judges to circumvent sentences simply to remedy their own mistakes.[142] Surely such precedent should have been taken into consideration, especially since the *Aguilera* decision goes further than merely allowing a judge to correct a mistake—it allows a judge to completely change his mind.[143] The dissenter, Judge Keasler, concluded with the following rationale:

> If the majority wants to overrule *Williams* and *Powell*, it should do so. If it believes that *Junious*, *Ware* and *McClinton* are better reasoned tha[n] *Tooke* and *Dickerson*, it should explain why. If it be-

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says that a trial judge may modify the initial sentence on the same day it is made. *Id.* at 698. The *McClinton* court, however, allowed a judge to modify the sentence several weeks after the initial sentence was given. *McClinton*, 38 S.W.3d at 751.

139. *See* State v. Aguilera, 165 S.W.3d 695, 705 (Tex. Crim. App. 2005) (en banc) (Keasler, J., joined by Hervey, J., dissenting) (pointing out that the majority mentions *Junious*, *Ware*, and *McClinton*, but fails to note the cases on the opposite side of the split court of appeals, namely *Tooke* and *Dickerson*). The dissenting opinion also expresses that none of the cases mentioned by the majority discuss the precedent found in *Williams* and *Powell*. *Id.* at 706.

140. *See id.* at 701 n.8 (Cochran, J., joined by Price, J., concurring) (announcing that "neither *Dickerson* nor *Tooke* survive the majority's holding").

141. *See id.* at 705-706 (Keasler, J., joined by Hervey, J., dissenting) (discussing how the courts of appeals are split, some following *Tooke* and *Dickerson*, and others following *Williams* and *Powell*; meanwhile, those cases that the majority mentioned do not even address *Williams* and *Powell*).

142. *See* State v. Dickerson, 864 S.W.2d 761, 763 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (noting that while the trial judge might have meant to include enhancements, he nonetheless gave a valid, legal sentence, and should not be allowed to simply resentence the defendant to fix his own mistake); Tooke v State, 642 S.W.2d 514, 518 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (commenting that a trial judge's "failure to consider the enhancement paragraph . . . should not enlarge the court's power over the case once sentence has been accepted"). *See generally* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, §12[b] (1983 & 2006 Supp.) (listing cases from around the country that have held judicial misstatements made in pronouncing a valid sentence do not justify allowing the judge to make a correction).

143. *See* State v. Aguilera, 165 S.W.3d 695, 698 (Tex. Crim. App. 2005) (en banc) (majority opinion) (extending to trial judges plenary power to modify their sentences for any reason so long as the modification is authorized by statute and occurs on the day of sentencing in front of the parties).

> lieves that Appellate Rules 21.4 and 22.3 grant trial judges plenary power to alter sentences, it should explain why. Since the majority opinion does none of this, I cannot join it.[144]

In other words, the *Aguilera* majority extends further plenary power to trial judges without adequately explaining why it does so and without properly addressing the existing law that is contradictory to its holding.

Not only does the *Aguilera* decision ignore the courts of appeals decisions that are opposed to its plenary power expansion, but it also fails to address Texas precedent that already allows sentence modification in situations where the sentence is illegal.[145] If a sentence is illegal in its pronouncement given the facts and findings of a case, Texas case law dictates that a judge should be allowed to remedy the problem.[146] Conversely, before *Aguilera*, if the initial sentence was valid, a court could not, under its own power, retract the sentence and resentence the defendant.[147]

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144. *Id.* at 707 (Keasler, J., joined by Hervey, J., dissenting).

145. *See id.* at 697-98 (majority opinion) (adding to the plenary power definition of trial courts, but neglecting to mention or discuss the already prevalent authority of trial judges to modify illegal and invalid sentences).

146. *See* Mizell v. State, 119 S.W.3d 804, 806 & n.6 (Tex. Crim. App. 2003) (en banc) (holding that "[a] trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence," regardless of whether a "contemporaneous objection to the imposition of an illegal sentence" was made (citing *Ex parte* Pena, 71 S.W.3d 336, 336-37 & n.1 (Tex. Crim. App. 2002))). In *Mizell*, when an illegal sentence of "$0" was given, the appellate court stated that this could be rectified by the trial court on its own motion. *Mizell*, 119 S.W.3d at 805. The court further stated that "[t]here has never been anything in Texas law that prevented *any* court with jurisdiction over a criminal case from noticing and correcting an illegal sentence." *Id.* at 806; *see also* McClinton v. State, 121 S.W.3d 768, 772 (Tex. Crim. App. 2003) (per curiam) (Cochran, J., concurring) (discussing how courts with jurisdiction may take notice of illegal sentences, "with or without the prompting of the parties"), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc); Meineke v. State, 171 S.W.3d 551, 555 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (noting that "Texas jurisprudence undoubtedly recognizes a court's authority to correct an invalid sentence"). *See generally* Bozza v. United States, 330 U.S. 160, 166-67 (1947) (holding that where a defendant is brought back to court to remedy an initial illegal sentence, "the fact that petitioner has been twice before the judge for sentencing and in a federal place of detention during the five hour interim cannot be said to constitute double jeopardy"); Donald T. Kramer, Annotation, *Double Jeopardy Considerations in Federal Criminal Cases—Supreme Court Cases*, 162 A.L.R. FED. 415, 510-11 (2000) (discussing the correction of invalid sentences by federal judges); Lee R. Russ, Annotation, *Power of Court to Increase Severity of Unlawful Sentence—Modern Status*, 28 A.L.R.4TH 147 (1984 & 2006 Supp.) (reviewing state and federal cases that have decided whether a court may increase punishment on resentencing after giving an unlawful sentence initially).

147. *See* McClinton v. State, 121 S.W.3d 768, 772 (Tex. Crim. App. 2003) (per curiam) (Cochran, J., concurring) (exclaiming that "a trial court . . . does not have the inherent authority to modify, alter, or vacate a valid sentence . . . solely by means of a later written judgment"), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005)

Aguilera abrogates part of the latter rule by extending to the trial court plenary power to modify a sentence anytime on the day of sentencing before the court adjourns, regardless of the original sentence's correctness or validity.[148] This is quite a step to take, considering that the court failed to address the line of Texas cases that have held a *valid* sentence to be beyond sua sponte sentence modification.[149]

For all that it failed to address, *Aguilera* did make a distinction between those cases in which a defendant pleads pursuant to a plea bargain and those where a defendant does not.[150] The Texas Court of Criminal Appeals began its analysis by comparing *Harris v. State* to the facts of *Aguilera*.[151] In *Harris*, the court overruled the trial judge's fifteen-year increase given during resentencing because it was an unconstitutional sentence increase outside of the statutorily set punishment range.[152] The *Aguilera* court decided that *Harris* differed from its case because the resentencing in *Harris* occurred the day after the original sentence was pronounced, and thus, the defendant had already begun serving his sentence.[153] However, *Harris* was found to be relevant because in both cases the defendant pleaded without a plea bargain; "the trial court's

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(en banc); *Ex parte* Madding, 70 S.W.3d 131, 136 (Tex. Crim. App. 2002) (noting that trial courts do not have the statutory power to pronounce a sentence with the defendant present, but later enter a different sentence in the written judgment); State v. Dickerson, 864 S.W.2d 761, 763 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (ruling that resentencing is void if it modifies a valid sentence accepted by the defendant); Tooke v. State, 642 S.W.2d 514, 518 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (refusing to allow a trial court to modify a "valid and proper sentence"); *see also* Meineke v. State, 171 S.W.3d 551, 555 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (stating that *Tooke* and *Dickerson* do not allow for the retraction of a valid sentence and noting the difference between changing a valid sentence and correcting an invalid sentence).

148. *See Aguilera*, 165 S.W.3d at 698 (majority opinion) (holding that courts have plenary power to modify their sentences before adjournment on the day the sentences are announced).

149. *Id.* at 705-06 (Keasler, J., joined by Hervey, J., dissenting) (emphasizing the majority's shortcoming in not addressing the *Tooke* and *Dickerson* precedent).

150. *See id.* at 697 (majority opinion) (discussing the differing outcomes that would have resulted had the defendant plead using a plea bargain).

151. *Aguilera*, 165 S.W.3d at 697 (comparing the court's ruling in *Harris* with the issues in the instant situation).

152. Harris v. State, 153 S.W.3d 394, 397 (Tex. Crim. App. 2005). However, the court did foreshadow its *Aguilera* holding by stating in dicta that it is true where "the first sentence [is] statutorily authorized and thus unable to subsequently be corrected by the trial court, it [is] within the *plenary power* of the trial court to change the sentence so long as the case [is] within its jurisdiction." *Id.* at 396 n.4. The court qualified this proposition by stating a trial court may only exercise its plenary power to modify within the constraints of the "statutory range of punishment." *Id.*

153. *Aguilera*, 165 S.W.3d at 697; *see Harris*, 153 S.W.3d at 395 (resentencing the defendant on the day following the initial sentence pronouncement).

choice of sentence was limited only by the applicable statute."[154] If the defendant pleaded using a plea bargain that was accepted by the trial court, the trial court could not have modified the sentence without the defendant's consent, because the defendant would be given a chance to withdraw the plea.[155] The *Aguilera* dissent, baffled as to the majority's discussion of the relevancy of plea bargains and open pleas, argued that *Williams* and *Powell* make no distinction between the procedural statuses of sentences.[156] It seems contradictory that the majority adds the authority to modify sentences to the plenary power definition— which includes the power to grant a motion for a new trial and a motion in arrest of judgment, neither of which are granted based on plea procedure—but then states differing sentence modification rules exist based on how the defendant pleads.[157] Thus, while neglecting to review those cases which hold that a validly pronounced sentence is beyond the trial court's power to modify on its own motion, *Aguilera* did take the time to discuss what might have occurred had the defendant pleaded pursuant to a plea bargain, a situation beyond the scope of its decision.

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154. *See Aguilera*, 165 S.W.3d at 697 (noting that the procedural status of *Harris* is relevant to the decision before the court).

155. *Id.*; *see* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (Vernon 1989 & Supp. 2006) (making the sentence recommendation of the state pursuant to a plea bargain non-binding upon the judge, but establishing that if the judge decides to reject the agreement, the defendant must be given a chance to withdraw his plea); Escobedo v. State, 643 S.W.2d 243, 246 (Tex. App.—Austin 1982, no pet.) (emphasizing that a sentence different from that used to induce a guilty plea cannot be given "unless the accused is advised of the court's intention to consider the new circumstances and is given the opportunity to either withdraw his plea or to knowingly and voluntarily affirm his plea and consent to consideration of the new circumstances"); *see also* Santobello v. New York, 404 U.S. 257, 262-63 (1971) (holding that where the prosecutor breaches his agreement not to recommend a sentence as part of his plea bargain with the defendant, the trial court should decide whether to give the defendant specific performance of his agreement or allow him to withdraw his guilty plea).

156. *Aguilera*, 165 S.W.3d at 705 (Keasler, J., joined by Hervey, J., dissenting).

157. *See* State v. Aguilera, 165 S.W.3d 695, 705 (Tex. Crim. App. 2005) (en banc) (Keasler, J., joined by Hervey, J., dissenting) (asking whether the court's ruling means that plenary power allows for sentence change after an open plea, but not after a plea bargain or a trial, and stating that such a rule is "contrary to its own rationale that plenary power to change sentences is somehow based on motions for new trial and motions in arrest of judgment, which can obviously be filed regardless of whether the case involves a guilty plea or a trial").

2. Defining When a Sentence Starts

Perhaps the most important thing the *Aguilera* decision accomplished was its clarification of when the commencement of a sentence begins.[158] As previously mentioned, the court specifically pointed out that its plenary power rule comported with Texas Rule of Criminal Procedure article 42.09, section 1.[159] This rule mandates "defendant's sentence begins to run on the day it is pronounced."[160] A quick glance at the recent history of sentence pronouncement in Texas will reveal the importance of the *Aguilera* ruling.

Prior to 1998, the written judgment generally controlled over the oral pronouncement of a sentence.[161] Therefore, if the reasons behind the judge's oral pronouncement of probation revocation differed from the reasons in the written probation revocation, the written order would prevail.[162] This rule changed in the 1998 decision of *Coffey v. State*.[163] When confronted with a sentencing pronouncement that assessed only a prison term and a written judgment that added a fine, the court held "that when there is a variation between the oral pronouncement of sentence and the

158. *See id.* at 699 (Cochran, J., joined by Price, J., concurring) (announcing that *Aguilera* has helped to further clarify "*Williams* and *Powell* on the question of when a sentence commences").

159. *Id.* at 698 (majority opinion) (rationalizing its plenary power rule because of its compliance with article 42.09, section 1); TEX. CODE CRIM. PROC. ANN. art. 42.09, § 1 (Vernon Supp. 2006).

160. TEX. CODE CRIM. PROC. ANN. art. 42.09, § 1 (Vernon Supp. 2006).

161. *See* Coffey v. State, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998) (en banc) (stating that in Texas, it has been held that the written finding controls over the oral pronouncement); *see also* Eubanks v. State, 599 S.W.2d 815, 817 (Tex. Crim. App. [Panel Op.] 1980) (recognizing the written judgment's control over the oral pronouncement); Aguilar v. State, 542 S.W.2d 871, 874 (Tex. Crim. App. 1976) (mentioning that the oral pronouncement is governed over by the written judgment); Ablon v. State, 537 S.W.2d 267, 269 (Tex. Crim. App. 1976) (noting that "the written order controls over the oral announcement, and this is particularly true where the written order is included in the appellate record to which no objection has been addressed"); Balli v. State, 530 S.W.2d 123, 125 (Tex. Crim. App. 1975) (concluding that the written judgment controlled over the oral pronouncement), *overruled on other grounds by* Chudleigh v. State, 540 S.W.2d 314 (Tex. Crim. App. 1976). *But see* Mazloum v. State, 772 S.W.2d 131, 132 (Tex. Crim. App. 1989) (en banc) (per curiam) (ruling that the trial court's specific finding that the defendant had violated probation controlled over the written judgment void of such finding); Banks v. State, 708 S.W.2d 460, 461-62 (Tex. Crim. App. 1986) (en banc) (reforming the written judgment to reflect the trial court's pronouncement).

162. *See, e.g.*, *Ablon*, 537 S.W.2d at 269 (observing that while the trial court orally pronounced that it was revoking probation because of dangerous drug possession, the written judgment also showed that the revocation was due to a "failure to work faithfully at suitable employment as far as possible"; the court then noted that the written judgment is the controlling order).

163. 979 S.W.2d 326 (Tex. Crim. App. 1998) (en banc).

written memorialization of the sentence, the oral pronouncement controls."[164] The court explained its rule by saying that because the opportunity to appeal starts at sentence imposition, that moment or event is obviously the event that can be appealed, and thus, a subsequent alteration by the written judgment, whether increasing or decreasing the punishment, cannot override what was pronounced in open court.[165] The importance of oral pronouncement is seen with this ruling and rationale.

The reasons for having such a rule were further delineated in *Ex parte Madding*.[166] Describing the rule change in *Coffey*, the court said the basis "for this rule is that the imposition of sentence is the crucial moment when all of the parties are physically present at the sentencing hearing and able to hear and respond to the imposition of sentence."[167] The moment of sentence pronouncement is not merely another point in a long line of court actions, but it is the awaited culmination when the parties hear what fate confronts the defendant.[168] Such a moment should be given respect and significance and not be treated as something that can be haphazardly tossed away on the whim of a judge's reconsideration.[169] This is the sort of deference that the *Madding* court extended to the pronounced sentence when it stated, only four years ago, that "[o]nce he leaves the courtroom, the defendant begins serving the sentence imposed."[170]

Unfortunately, the *Aguilera* decision dashes this deference. Judge Cochran's concurring opinion dedicates an entire section to what *Aguilera* meant to the moment of sentence commencement.[171] The question is asked: what exactly the article 42.09, section 1 order—that sentences start

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164. *Coffey*, 979 S.W.2d at 327-28; *see also* Taylor v. State, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) (en banc) (following the rule that the oral pronouncement controls over the written judgment); Thompson v. State, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003) (acknowledging the governance of the oral pronouncement over the written judgment).

165. *Coffey*, 979 S.W.2d at 328-29.

166. 70 S.W.3d 131 (Tex. Crim. App. 2002).

167. *Ex parte* Madding, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002).

168. *See, e.g.*, Stokes v. State, 688 S.W.2d 539, 541 (Tex. Crim. App. 1985) (en banc) (calling the sentence an "integral part" of the punishment phase and the act which "breathes life into the judgment").

169. *See* State v. Aguilera, 165 S.W.3d 695, 706 (Tex. Crim. App. 2005) (en banc) (Keasler, J., joined by Hervey, J., dissenting) (quoting the trial judge as saying her sentence modification was the result of a mere reconsideration of the trial evidence).

170. *Madding*, 70 S.W.3d at 135. In this decision, the court held that when the defendant was led out the courtroom doors, his sentence had begun, and the trial court could not modify defendant's sentence on its own motion. *Id.* at 136.

171. *Aguilera*, 165 S.W.3d at 699-702 (Cochran, J., joined by Price, J., concurring) (announcing that the majority's rule clarifies when a sentence begins to run).

on the day they are pronounced—represents.[172] In noting that the State relied upon *Madding* to argue that a sentence begins at pronouncement, the concurring opinion states that in *Madding* the defendant was not brought back before the trial court for resentencing on the same day as the original sentence was given.[173] The defendant in *Aguilera* was brought back the same day so any possibility of interpreting *Madding* as meaning that a sentence commences and a trial judge's power to modify ends when the defendant leaves the courtroom is destroyed by the *Aguilera* holding.[174] While Judge Cochran, who authored the *Madding* opinion, claimed *Aguilera* to be a clarification of the proposition made in *Madding*[175] that the moment of pronouncement is the "crucial moment" in criminal sentencing, it clearly goes against that decision.[176] The moment of sentencing should not be considered "crucial" if the trial judge may reconsider and modify the sentence pronounced at will.

The legislature recognized the importance of sentence pronouncement in dictating that a sentence starts on the day that it is pronounced.[177] *Aguilera*'s decision to allow the trial judge to modify the sentence anytime during the day of its pronouncement is an overly literal reading of the rule that "exalts form over substance."[178] The court took the word

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172. *See id.* at 700 (summarizing the issue of the case as "when does a sentence go into operation?").

173. *Id.* at 700 n.6.

174. *See id.* ("To the extent that *Madding* could be construed as suggesting that the second the courtroom door closes upon the sentenced person's back, that person has begun serving his sentence, . . . regardless of how speedily the defendant is returned to open court, the majority's opinion today clarifies *Madding*.").

175. *See id.* (explaining that the majority's holding clarifies any interpretation of *Madding* that has a sentence commence the moment the defendant leaves the courtroom). However, when this statement is viewed within the context of how it was written in *Madding*—in the midst of a section discussing how oral pronouncement is the "crucial moment" of sentencing—it is simple and logical to construe the statement to mean that a sentence becomes final when the defendant exits the courtroom. *See Madding*, 70 S.W.3d at 135 (discussing the importance of a sentence's oral pronouncement).

176. *See Madding*, 70 S.W.3d at 135 (calling oral pronouncement the "crucial moment" of the sentencing process). The court also relies upon due process grounds in making its argument, asserting that "[a] defendant has a due process 'legitimate expectation' that the sentence he heard orally pronounced in the courtroom is the same sentence that he will be required to serve." (citation omitted) *Id.* at 136. Apparently, *Aguilera* means that the defendant might be given two or more different sentences pronounced in court before adjournment on the day of sentencing; perhaps, then, the due process rule in this situation should instead read that a defendant has a "legitimate expectation" that the last sentence he hears before court is adjourned "is the same sentence he will be required to serve." *Id.*

177. TEX. CODE CRIM. PROC. ANN. art. 42.09, § 1 (Vernon Supp. 2006).

178. *See* United States v. DiFrancesco, 449 U.S. 117, 142 (1980) (noting that "[t]he exaltation of form over substance is to be avoided"); *see also* Garza v. Garcia, 137 S.W.3d

"day" from the text of article 42.09, section 1 and created a rule that essentially says that a defendant's sentence may be modified so long as it begins sometime during the day that it is first pronounced.[179] The court then arbitrarily selected the adjournment of the sentencing court as the time of day when the sentence begins to run.[180] In rationalizing its rule, the court explained in a footnote that the Texas Department of Criminal Justice does not begin keeping track of a sentence at an exact moment, but rather on the date it is given.[181] However, this fact actually detracts from the rule the court created, which chooses an exact moment for when a sentence begins—adjournment. Thus, instead of picking the more obvious and rational moment of pronouncement as the moment when a sentence begins and can no longer be modified by the trial court, the court selected the moment of adjournment.[182] If the legislature had intended

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36, 41 (Tex. 2004) (Phillips, C.J., joined by Wainwright, J., dissenting) (disagreeing with the majority opinion by stating that while the majority's holding may "be supported by a literal reading of the . . . statute, . . . it exalts form over substance").

179. *See* State v. Aguilera, 165 S.W.3d 695, 698 (Tex. Crim. App. 2005) (en banc) (majority opinion) (pointing out that its plenary power rule, which allows a judge modification powers until adjournment on the day of sentencing, "comports with the provisions of [a]rticle 42.09, [section] 1").

180. *See id.* (holding that the trial judge can alter the sentence on the day it is given anytime before court adjournment). The court provides no explanation for why court adjournment should be the moment when a defendant's sentence begins.

181. *Id.* at 698 n.8.

182. *See id.* at 704 (Keasler, J., joined by Hervey, J., dissenting) (agreeing with the prosecution in saying "it is only logical that the sentence begin to run, not just on the day it is pronounced, but at the moment it is pronounced"); *see also* Tooke v. State, 642 S.W.2d 514, 518 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (agreeing with the appellant's contention that the moment he was validly sentenced and had accepted the sentence, his sentence could no longer be increased). It is important to keep in mind that the plenary power expansion of *Aguilera* not only allows trial judges to decrease sentences sua sponte on the day of pronouncement, but also it allows for sentence *increases*. *See Aguilera*, 165 S.W.3d at 702-03 (Cochran, J., joined by Price, J., concurring) (pointing out that the majority's rule grants the power to decrease *and* increase sentences). Other states join *Aguilera*'s dissenting opinion providing that a sentence cannot be modified upward after oral pronouncement. *See, e.g.*, Sonnier v. State, 483 P.2d 1003, 1005 (Alaska 1971) (disallowing the Alaskan trial judge's modification of the defendant's initial sentence that came only three hours after the initial sentencing by holding that once a sentence has been validly imposed, it cannot be increased); State v. Snow, 942 P.2d 57, 60 (Kan. Ct. App. 1997) (announcing the Kansas rule to be that "[o]nce a sentence is . . . announced from the bench, a sentence cannot be increased"); State v. Brewer, 212 N.W.2d 90, 91, 95 (Neb. 1973) (applying the Nebraska rules holding that "[a] sentence validly imposed takes effect from the day it is pronounced" and that "when a valid sentence has been put into execution the trial court cannot modify. . . it in any way," and ruling that since the first sentence the defendant was given was valid, it could not be altered later that same day); State v. Bryan, 316 N.W.2d 335, 337 (N.D. 1982) (looking at North Dakota law and deciding that, absent a motion by the defendant, the prison term "commenced when the trial judge pro-

court adjournment as the point when a sentence begins, it would have expressed that wish in article 42.09.[183] The next section looks at the problems that follow *Aguilera* and the consequences that may occur as a result.

B. *Problems and Consequences*

1. Sentence Commencement Issues

The prosecution in *Aguilera* argued the rule—that a sentence begins on the day of its pronouncement—found in Texas Code of Criminal Procedure article 42.09, section 1, really means a sentence begins the moment it is pronounced.[184] While, concededly, such an argument lends itself to being very "bright line," the concurring opinion says such a reading fails because judges, like anyone else, make mistakes.[185] Thus, if a judge makes an occasional misstatement or mistake in pronouncing a sentence, and the moment of pronouncement begins the sentence, then the trial court would lose the ability to modify and quickly correct any mistake in the sentence on its own motion.[186] However, such a fear is exaggerated for several reasons.

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nounced the sentence"); State v. Ford, 328 N.W.2d 263, 267-68 (S.D. 1982) (holding that the defendant began "serving his sentence immediately after the oral sentence" and that it was of no concern that the sentence had not been put into a written judgment). *See generally* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, § 8 (1983 & 2006 Supp.) (reviewing courts which held "that a state trial court which had orally pronounced a valid sentence could not thereafter resentence the defendant in a manner that increased the severity of the sentence").

183. *See* Tex. Parks & Wildlife Dep't v. Morris, 129 S.W.3d 804, 808 (Tex. App.—Corpus Christi 2004, no pet.) (reviewing how courts should approach the interpretation of a statute, and saying the "starting point is to look to the plain and common meaning of the statute's words, viewing its terms in context and giving them full effect" (citing Liberty Mut. Ins. Co. v. Garrison Contractors, Inc., 966 S.W.2d 482, 484 (Tex. 1998))). The court then stated that if the language of a statute is unambiguous, it should be construed "according to its plain meaning." *Id.* (citing State *ex rel.* State Dep't of Highways & Pub. Transp. v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2000)). When one looks at the plain meaning of article 42.09, section 1, how the *Aguilera* court arrived at court adjournment as the starting point for defendants' sentences is difficult to ascertain.

184. *See* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc) (Cochran, J., joined by Price, J., concurring) (discussing the state's argument that sentencing begins at pronouncement).

185. *See id.* (admitting the ease of application of the prosecution's argument, but claiming that it fails for a lack of flexibility). Both judges and parties sometimes simply make misstatements. *Id.*

186. *See id.* at 700-01 (pronouncing that "[t]he Constitution does not require that sentencing should be a game in which a wrong move of the judge means immunity for the prisoner" (quoting Bozza v. United States, 330 U.S. 160, 166-67 (1947))). The concurring

Admittedly, if the moment of pronouncement is viewed as the commencement point of a valid sentence, the judge cannot sua sponte fix some of the mistakes that might have been made in pronouncing the judgment.[187] However, precedent clearly shows that the defendant must first accept the sentence before it will commence and before punishment begins.[188] The parties do have an opportunity to object to the sentence before it commences, and thus, trial courts will be able to modify sentences that they realize, or are told, were mistakenly given.[189]

Even if the mistaken sentence is not corrected by the trial judge, corrective procedures still exist.[190] If the defendant does not agree with the sentence, a motion for new trial or a motion in arrest of judgment can be filed.[191] The defendant and State also have procedures and rules under

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opinion further explains that this quote is similar to the prosecution's proposed rule because it does not "allow for a sudden change of heart if made swiftly enough." *Id.* at 701.

187. *See Aguilera*, 165 S.W.3d at 701 (Cochran, J., joined by Price, J., concurring) (arguing that if a sentence begins when pronounced, the allowance for quick changes and alterations is no longer possible); *see also* Turner v. State, 116 Tex. Crim. 154, 31 S.W.2d 809, 810 (1930) (per curiam) (holding that because the defendant had suffered some punishment under the original sentence "it was beyond the power of the [trial] court to set aside the original sentence"); Grisham v. State, 19 Tex. Ct. App. 504, 515 (1885) (concluding that since the defendant "had suffered some punishment under said judgment, . . . it was . . . beyond the power of the court either to set it aside, vacate, annul or change it in any substantial respect").

188. *See* Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482, 486 (1943) (per curiam) (determining that a trial court cannot modify a sentence that the defendant has accepted and begun serving); Tooke v. State, 642 S.W.2d 514, 516 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (holding that the trial court acted too late in correcting its unintended sentence since the defendant had accepted it); *see also* Romero v. State, 712 S.W.2d 636, 638 (Tex. App.—Beaumont 1986, no pet.) (noting that the defendant's failure to give notice of an appeal signifies his acceptance).

189. *See, e.g.*, State v. Dickerson, 864 S.W.2d 761, 763-64 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (pointing out that the prosecution should have objected to the sentence before it was accepted).

190. *See, e.g.*, State v. Bates, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) (en banc) (naming "motions for new trial, motions to arrest judgment and motions for judgment nunc pro tunc" as procedures that allow trial courts to modify and correct their judgments); State v. Evans, 843 S.W.2d 576, 578 (Tex. Crim. App. 1992) (en banc) (stressing that the three procedures a defendant may use to return to pre-sentence position are a motion for new trial, a motion in arrest of judgment, and an appeal).

191. *See* TEX. R. APP. P. 21.1 (defining a motion for new trial as a "rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt"). The prosecution may contest, in a written report, the defendant's reason for a motion for a new trial. TEX. R. APP. P. 21.5; *see* TEX. R. APP. P. 22.1 (declaring a motion in arrest of judgment to be "a defendant's oral or written suggestion that, for the reasons stated in the motion, the judgment rendered against the defendant was contrary to law"). A trial court's denial of a motion in arrest of judgment is also considered to be a denial of a motion for new trial. TEX. R. APP. P. 22.5. *See generally* B. Finberg, Annotation, *Propriety, and Effect of Double Jeopardy, of Court's Grant of New Trial on Own*

which they can file a motion of appeal.[192] Furthermore, if a simple clerical error occurs, a judgment nunc pro tunc allows the judge to fix the mistake—even outside the court's period of plenary power.[193] If the sen-

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Motion in Criminal Case, 85 A.L.R.2D 486 (1960 & 2006 Supp.) (reviewing cases, including *Aguilera*, that have discussed whether a criminal court may grant a new trial on its own motion).

It should be noted that a wide body of precedent exists dealing with the trial court's ability to give the defendant a more severe sentence after his first conviction and sentence has been set aside at re-trial. *See* North Carolina v. Pearce, 395 U.S. 711, 723 (1969) (holding that "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon revocation"), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989). In *Alabama v. Smith*, the Court further stated that there was "no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea." *Smith*, 490 U.S. at 801-03. Because the defendant may be brought before the same judge on retrial, due process is also concerned with prosecutorial vindictiveness of the overturned judge. *See* Texas v. McCullough, 475 U.S. 134, 140 (1986) (allowing for the trial judge's explanation that her first sentence was "unduly lenient" to bypass the presumption of vindictiveness); *see also* Hood v. State, 185 S.W.3d 445, 450 (Tex. Crim. App. 2006) (holding that a trial judge's reasoning that the less severe sentence he issued during the first trial was given by mistake may be sufficient to avoid a claim of vindictiveness).

192. *See* TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon Supp. 2006) (describing the defendant's right to appeal). As stated, the rule reads:

> A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial.

Id.; *see* Tex. Code Crim. Proc. Ann. art. 44.01 (Vernon Supp. 2006) (enumerating the right of the State to appeal). Article 44.01(a) lists several situations under which the State may appeal, including when the court grants a motion for new trial or a motion in arrest of judgment. *Id.* at 44.01(a)(1)-(6). Article 44.01(b) states that "[t]he state is entitled to appeal a sentence in a case on the ground that the sentence is illegal." *Id.* at 44.01(b). Additionally, the article provides that "[t]he state is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment." *Id.* at 44.01(c); *see also* Mizell v. State, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (en banc) (providing that "[i]n 1987, the State obtained a limited right to appeal certain trial court orders and rulings when the Texas Legislature enacted article 44.01"); *Evans*, 843 S.W.2d at 578 (interpreting article 44.01(a)(3) and holding that the state has the right to appeal "a trial court order allowing a defendant to withdraw his plea"); *cf.* TEX. R. APP. P. 21.2 ("A motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record.").

193. *See* TEX. R. APP. P. 23.1 (giving a trial court the power to correct any "failure to render judgment and pronounce sentence" at any time, so long as the defendant has not appealed or a motion for new trial or motion in arrest of judgment has been granted); *see also* Villarreal v. State, 590 S.W.2d 938, 939 (Tex. Crim. App. [Panel Op.] 1979) (explaining

tence is actually *illegal*, Texas precedent allows the judge to correct mistakes sua sponte.[194] These established options at the disposal of the parties and the trial court make it unnecessary to give the court additional plenary power for the short period between sentence pronouncement and court adjournment.

The argument for allowing the modification of sentences is to permit trial judges to correct mistakes made at sentence pronouncement—after all, judges are human and will make mistakes from time to time.[195] What this point misses, however, is that this is a lesser of two evils situation. By taking away the power to amend a sentence on the day it is pronounced, a trial judge will lose the ability to correct errors made in pronouncement. However, if the power to amend is extended, inequity may befall the parties because there will be differing certainty about a judgment depending upon what time of the day the sentence is given.[196] Granted, there are some legislatively created periods of uncertainty, such as in "shock proba-

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that "a nunc pro tunc procedure can never be used to correct a judicial error, because a court can only correct what was done, not what should have been done"); Bullock v. State, 705 S.W.2d 814, 816 (Tex. App.—Dallas 1986, no pet.) (providing that "[t]he purpose of a nunc pro tunc judgment is to correct clerical errors and to make the record 'speak the truth'" (citing *Ex parte* Patterson, 139 Tex. Crim. 489, 141 S.W.2d 319, 320 (1940))).

194. *See, e.g.*, Mizell v. State, 119 S.W.3d 804, 805 (Tex. Crim. App. 2003) (en banc) (holding that a sentence of "$0" was illegal under the Texas Penal Code, and thus could be rectified by the trial court on its own motion). The court further stated that "[t]here has never been anything in Texas law that prevented *any* court with jurisdiction over a criminal case from noticing and correcting an illegal sentence." *Id.* at 806; *see also* McClinton v. State, 121 S.W.3d 768, 772 (Tex. Crim. App. 2003) (per curiam) (Cochran, J., concurring) (noting that "[a] trial or appellate court may always notice and correct an illegal or unauthorized sentence if it otherwise has jurisdiction over the case").

195. *See* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc) (Cochran, J., joined by Price, J., concurring) (declaring that having a defendant's sentence start from the moment of its pronouncement is too inflexible in light of judges' occasional misstatements).

196. *Cf.* Annotation, *Power of Court to Set Aside Sentence After Commitment*, 44 A.L.R. 1203, 1211 (1926) (hypothesizing that if a judge may modify a defendant's sentence at any time, the confined defendant will always be hoping and wishing his sentence to be decreased, instead of receiving the reforming effects confinement is supposed to have on the incarcerated (quoting Commonwealth v. Mayloy, 57 Pa. 291 (1868))). While not perfectly analogous to our situation, this example shows that parties cannot receive the benefits of a criminal punishment with the thought of sentence modification on their minds. Also, while the anxiousness of waiting one day to see if a judge will modify the initial sentence is certainly not as severe as the continuous limbo a prisoner experiences knowing his sentence might be reduced, the parties may question the finality of a sentence that can be altered at the will of the judge. *Cf. Ex parte* Madding, 70 S.W.3d 131, 136 (Tex. Crim. App. 2002) (stating that defendants have a due process expectation that the sentence orally pronounced is the sentence he or she will serve).

tion," that are accepted in Texas criminal jurisprudence.[197] Such a fact, however, does not support a rule where the time of day affects the finality of the sentence.

For example, under *Aguilera*'s rule, if a sentence is pronounced at ten o'clock in the morning, and if the defendant has not begun to serve the sentence,[198] both parties must wait until the court adjourns for the day for the sentence to be final.[199] However, if the defendant's sentence is the last action of the court for the day, the judge has no opportunity to alter the sentence, and the defendant has essentially started serving the sentence.[200] Thus, *Aguilera* replaces the importance of the moment of sentence pronouncement with a sentencing scheme that can be arbitrary and inequitable depending on scheduling.[201]

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197. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 6(a) (Vernon Supp. 2006) (detailing a trial judge's continuing jurisdiction to suspend a defendant's sentence and place him under community supervision in so-called "shock probation"); *see also* Amado v. State, 983 S.W.2d 330, 331-32 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (explaining that under shock probation, the "defendant actually serves a portion of the sentence, and the court, by granting 'shock' probation, suspends the further execution of the sentence").

198. It is important to note that just because a defendant has been moved to a holding tank or is in transit to prison does not mean that his sentence has begun. *See, e.g.*, Rowley v. Welch, 114 F.2d 499, 500-02 (D.C. Cir. 1940) (holding that defendant's sentence had not begun when, after sentence pronouncement, he was led to a courthouse elevator and remained on the elevator for half an hour before being haled back into the court and resentenced). *See generally* H. A. Wood, Annotation, *What Constitutes Commencement of Service of Sentence, Depriving Court of Power to Change Sentence*, 159 A.L.R. 161 (1945 & 2005 Supp.).

199. *See Aguilera*, 165 S.W.3d at 698 (majority opinion) (expressing that trial judge plenary power allows sentence modifications if made before court adjournment on the day the initial sentence is given).

200. *Cf. Ex parte* Voelkel, 517 S.W.2d 291, 292-93 (Tex. Crim. App. 1975) (disallowing a trial judge, after attempting to extend the sentencing hearing by stating he still had a matter to discuss with the prosecutor, to modify the initial sentences the day following sentencing). The court noted that the rule of article 42.09, section 1, that sentences start the day they are pronounced, and the firmly rooted precedent of *Ex parte Reynolds*, 462 S.W.2d 605, 608 (Tex. Crim. App. 1970), that sentence modifications are null and void if they come after the defendant has suffered under the initial sentence, cannot be circumvented by a judge's mention of a caveat. *Id.*

201. *See Madding*, 70 S.W.3d at 135 (arguing that sentence pronouncement is relevant because "the imposition of the sentence is the crucial *moment* when all the parties are physically present at the sentencing hearing and able to hear and respond to the imposition of sentence") (emphasis added). However, if there can theoretically be an infinite number of resentencing pronouncements during the time between when the original sentence is pronounced and when the court adjourns, there is no longer a crucial moment for the parties to endure, but a crucial hour, afternoon, or day, depending on the time of day of the original pronouncement. *See Aguilera*, 165 S.W.3d at 698 (allowing for sentence modification throughout the day of the initial sentencing).

While a bright-line rule that may harshly affect judges is not something to be hoped for, it is certainly the lesser evil when compared with the waiting that defendants and prosecutors will endure after every trial judge's oral pronouncement, if they know the judge is free to modify the sentence for the remainder of the day.[202] The judge runs the trial, not the parties, which is clear when one considers the amount of control and the inherent powers a judge has over a trial's proceedings[203] and the fact that judges are supposed to be able to come to a rational, logical decision when sentencing.[204] Thus, the inability of a judge to remedy his own occasional mistakes pales in comparison to the possible inequity facing the defendant and State in every case.

Furthermore, a recent court of appeals decision has introduced another dimension to the sentence commencement issues under *Aguilera*. In *Riles v. State*,[205] the trial judge initially gave the defendant a five-year sentence.[206] The defendant, however, asked if he could surrender himself the following morning and begin serving his sentence at that time.[207] The trial judge acquiesced, but stated, "If you don't show up I *haven't finalized this five years yet* and I'm just going to double it."[208] The trial judge made good on his promise and pronounced a ten-year sentence after the

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202. *See Aguilera*, 165 S.W.3d at 698 (holding that all trial courts have the plenary power to modify sentences until adjournment). Because the *Aguilera* rule is so broad, every time a sentence is given early in the day, the parties will have to play the waiting game until adjournment in order to see if the sentence given is the true decision of the court.

203. *See* TEX. GOV'T CODE ANN. § 21.001 (Vernon 2004 & Supp. 2006) (listing the inherent powers of courts). "A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders." *Id.* § 21.001(a) (Vernon 2004); *see also Ex parte* Jones, 160 Tex. 321, 331 S.W.2d 202, 204 (1960) (ruling that judges possess "the authority to establish rules and give instructions governing the trial of causes and in the absence of a showing of nullity, it [is] counsel's duty to abide by them even though such instructions may [be] erroneous"); Graham v. State, 96 S.W.3d 658, 660-61 (Tex. App.—Texarkana 2003, pet. ref'd) (discussing the inherent powers judges have over their courtrooms in deciding that they also have the authority to permit or disallow cameras to videotape a trial).

204. *See generally* William G. Reid, *The Texas Code of Criminal Procedure*, 44 TEX. L. REV. 983, 1009 (1966) (explaining that one reason why sentencing is a judicial duty in Texas is because judges make better decisions when they have more information and are "less affected by emotion and prejudice"). By allowing judges to decide punishment, a more uniform system of sentencing will develop due to the judge's experiences. *Id.*

205. Nos. 01-05-00385-CR & 01-05-00386-CR, 2006 WL 2886260 (Tex. App.—Houston [1st Dist.] Oct. 12, 2006, no pet. h.).

206. Riles v. State, Nos. 01-05-00385-CR & 01-05-00386-CR, 2006 WL 2886260, at *1 (Tex. App.—Houston [1st Dist.] Oct. 12, 2006, no pet. h.).

207. *Id.*

208. *Id.*

defendant tried to run.[209] The court of appeals, relying heavily upon *Aguilera*, determined that the trial judge had simply vacated his initial sentence when he said it was not finalized yet, which was within his power to do, since the trial court had not yet adjourned for the day.[210] This opinion introduces a new host of questions concerning when a sentence is actually pronounced and may allow a trial judge to increase his plenary power over a case simply by adding a few qualifying statements during pronouncement.

2. Double Jeopardy Implications

The *Aguilera* court's decision to synchronize sentence commencement with the trial court's adjournment is a judicial interpretation that avoids the broad sweep of double jeopardy[211] under current Texas law.[212] Under the *Aguilera* court's decision, the trial judge has full power to modify the original sentence up or down within the constraints of the crime's statutory range at any time from when the sentence is first pronounced until adjournment, provided that the defendant, the defendant's counsel, and the State's attorneys are present.[213] If, however, the trial

209. *Id.*

210. *Id.* at *2-3.

211. TEX. CONST. art. I, § 14 (giving Texas's double jeopardy rule that "[n]o person, for the same offense, shall be twice put in jeopardy of life or liberty"); Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482, 486 (1943) (per curiam) (holding that trial courts are powerless to modify a sentence that has been accepted and partly performed by the defendant); Powell v. State, 124 Tex. Crim. 513, 63 S.W.2d 712, 713 (1933) (per curiam) (agreeing with the defendant in ruling that a court cannot amend a sentence once the defendant has "endured punishment under the first sentence" because doing so would violate the rule against double jeopardy); Turner v. State, 116 Tex. Crim. 154, 31 S.W.2d 809, 810 (1930) (per curiam) (holding that altering the defendant's sentence, under which he had already suffered punishment, would be a double jeopardy violation).

212. *See Aguilera*, 165 S.W.3d at 702-03 (Cochran, J., joined by Price, J., concurring) (admitting that while the Double Jeopardy Clause disallows any sentence increase after a defendant begins serving under the prescribed sentence, the majority opinion bypasses this problem because the defendant's sentence is not considered to have commenced until after the trial court adjourns on the day of the original sentencing). In *United States v. DiFrancesco*, 449 U.S. 117 (1980), the United State Supreme Court explained that the legislature can create law that defines when double jeopardy violations occur. *Id.* at 139. The Texas Legislature has decided that a sentence must begin on the day of its pronouncement. TEX. CODE CRIM. PROC. ANN. art. 42.09, § 1 (Vernon Supp. 2006). Thus, the *Aguilera* court's interpretation of the statute making commencement begin at adjournment follows the syntax of the statute and avoids double jeopardy problems.

213. *See Aguilera*, 165 S.W.3d at 697-98 (majority opinion) (stating that the trial court has the power to resentence as long as the modified sentence stays within the sentencing range authorized by statute and the modification occurs before the court adjourns on the day of the original sentencing and in the defendant's, his attorney's, and the State's presence).

court instead modifies the sentence on its own motion on the day following pronouncement, a violation of double jeopardy occurs because the defendant began serving the sentence as of the court's adjournment the day before.[214] Therefore, the double jeopardy difficulties envisioned by *Ex parte Lange*[215] and later by *Grisham v. State*[216] are avoided.

In coming to its ruling, the *Aguilera* majority failed to address double jeopardy concerns any further than pointing out that its previous case, *Harris v. State*, violated double jeopardy because the trial judge attempted to alter "a valid and authorized sentence."[217] In *Harris*, the defendant was resentenced the day after the original sentence, but in *Aguilera* the defendant was resentenced on the same day.[218] The *Aguilera* majority opinion also overlooked those Texas cases which hold that a "valid and proper" sentence, accepted by the defendant, cannot be modified upward by the trial judge without an "impermissible increase in the punishment assessed."[219] Consequently, while the *Aguilera* court was certainly within its rights in interpreting Rule 49.13 in such a way as to

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214. *See id.* at 699-702 (Cochran, J., joined by Price, J., concurring) (explaining how the majority opinion, as carefully written, sidesteps double jeopardy implications). Judge Cochran's concurring opinion states that the majority's rule means that the sentence may be both decreased and increased any time before adjournment because double jeopardy is not a bar. *Id.* at 702-03.

215. 85 U.S. 163, 168 (1873) (declaring that manifest injustice would occur if a trial judge was able to add more punishment to a defendant who has already served the initial sentence).

216. 19 Tex. Ct. App. 504, 514 (1885) (applying double jeopardy law in holding that trial courts lose their power to alter sentences once the defendant has suffered some punishment under the original sentence).

217. *See* Harris v. State, 153 S.W.3d 394, 397 (Tex. Crim. App. 2005) (concluding that the trial judge's second sentencing hearing, in which he found the prior convictions evidence true, violated double jeopardy because the original sentence was valid).

218. State v. Aguilera, 165 S.W.3d 695, 697 (Tex. Crim. App. 2005) (en banc) (majority opinion). While not discussing double jeopardy any further, *Aguilera* does find a similarity in the procedural status between the facts in its case and those of *Harris*. *Id.*

219. *See Aguilera*, 165 S.W.3d at 705-06 (Keasler, J., joined by Hervey, J., dissenting) (reviewing the majority's failure to properly address the pertinent Texas case law (citing State v. Dickerson, 864 S.W.2d 761, 762-63 (Tex. App.—Houston [1st Dist.] 1993, no pet.); Tooke v. State, 642 S.W.2d 514, 516 (Tex. App.—Houston [14th Dist.] 1982, no pet.))); *Dickerson*, 864 S.W.2d at 762 (holding that the trial judge's modification was null and void because the initial sentence was valid and proper and had been accepted by the defendant); *Tooke*, 642 S.W.2d at 518 (ruling that the judge's sentence modification after the defendant had already accepted the valid initial sentence was null and void (citing Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482 (1943) (per curiam))). The *Tooke* court agreed with the defendant's argument that the judge's sentence increase of the original valid and accepted sentence was "an impermissible increase in the punishment assessed." *Tooke*, 642 S.W.2d at 518.

avoid double jeopardy concerns, there is once again a lack of discussion or disapproval of the precedent that contradicts the court's holding.

3. Effect on Victim Allocution

Another problem of *Aguilera*, mentioned in the State's brief, is that granting the trial judge the authority to amend a sentence after it has been pronounced allows the victim's allocution statement to affect the judge's decision of whether to modify the sentence.[220] This problem, left unresolved because it was not preserved for appeal,[221] will need to be addressed by the court[222] because there is a risk that sentences will be inappropriately affected by victim allocutions.[223]

In *Aguilera*, the court used the phrase "victim impact statement" to address the issue of victim allocution.[224] However, there is a difference between the victim-impact statement and victim allocution.[225] Victim-im-

220. *See Aguilera*, 165 S.W.3d at 697 (majority opinion) (mentioning one of the State's arguments to the court was that allowing sentence modification during the remainder of the day of pronouncement "could permit victim-impact statements to affect the fact finder at punishment in contravention of the Legislature's intent that such statements not affect the punishment").

221. *Id.* at 697 n.2 (noting that the state failed to assert on appeal any "improper consideration of the victim-impact statement" by the trial judge).

222. *Id.* at 706 (Keasler, J., joined by Hervey, J., dissenting) (stating that this is a problem that "warrants mentioning"). Judge Cochran's concurring opinion agreed with the dissent in saying that this problem needs to be addressed. *Id.* at 703 n.16 (Cochran, J., joined by Price, J., concurring); *cf.* John W. Stickels, *Victim Impact Evidence: The Victims' Right That Influences Criminal Trials*, 32 TEX. TECH L. REV. 231, 237 (2001) (noting the influence of victim-impact testimony during the criminal punishment phase and how prosecutors try to take advantage of this fact).

223. *Cf.* Nikki Morton, *Cleaning Salt from the Victim's Wound: Mandamus As a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 103 (2000) (reporting that "one in every five victims . . . exercise their opportunity to make a [victim allocution] statement"). Thus, under the *Aguilera* rule, twenty percent of the time there is the risk that a victim allocution statement may affect the trial judge's decision on whether to modify a defendant's sentence.

224. *See Aguilera*, 165 S.W.3d at 697 n.2 (majority opinion) (using the term "victim-impact statement" to describe what the state failed to assert on appeal). The dissenting opinion titled one of its sections "Victim Impact Statement." *Id.* at 706 (Keasler, J., joined by Hervey, J., dissenting). Using the term "victim impact statement" when "victim allocution" is at issue is a common mistake; courts and "[m]any commentators have made this mistake." Nikki Morton, *Cleaning Salt from the Victim's Wound: Mandamus As a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 104 n.93 (2000).

225. *See* Fryer v. State, 993 S.W.2d 385, 387 (Tex. App.—Fort Worth 1999) (announcing that the victim-impact statement and the victim post-sentence statement "each serve[ ] a distinct purpose" and that "each . . . specif[y] the time for introduction in relation to sentencing and list[ ] examples of the type of information contemplated by each"), *aff'd*, 68 S.W.3d 628, 632 (Tex. Crim. App. 2002). The *Fryer* case was mainly concerned with an-

pact statements are governed by Texas Code of Criminal Procedure article 56.03.[226] "The victim-impact statement is a form that a victim or relative of a deceased victim completes to provide the prosecutor and judge with information about the impact of an offense on the victim and his or her family."[227] If a victim-impact statement is given, the trial court must consider the information it contains *prior to sentencing*.[228] Victim allocution is a separate process provided in Texas Code of Criminal Procedure article 42.03,[229] and it refers to the victim's opportunity to make a *post-sentence* statement about the crime's effects to the court and the defendant.[230] These statements are one-sided affairs that may not be tran-

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other type of statement called the "presentence investigation report." *See id.* (showing that the issue of the case was whether "the trial court erred by considering the portion of [the] presentence investigative report . . . that included the victim's sentencing recommendation"). *See generally* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9 (Vernon Supp. 2006) (outlining the elements of a presentence investigation report).

226. TEX. CODE CRIM. PROC. ANN. art. 56.03 (Vernon Supp. 2006).

227. Nikki Morton, *Cleaning Salt from the Victim's Wound: Mandamus As a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 98 (2000). Victim impact statements give "details about any physical, psychological, or financial injuries suffered by the victim." *Id.*; *see also* Fryer v. State, 68 S.W.3d 628, 632 (Tex. Crim. App. 2002) (describing victim impact statements as a mandatory "form designed to collect information regarding the impact of crimes on victims").

228. *See* TEX. CODE CRIM. PROC. ANN. art. 56.03(e) (Vernon Supp. 2006) (providing that "[p]rior to the imposition of a sentence by the court in a criminal case, the court, if it has received a victim impact statement, shall consider the information provided in the statement").

229. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2006).

230. *See id.* (describing allocution as "a statement of the person's views about the offense, the defendant, and the effect of the offense on the victim" presented to "the court and to the defendant"). In decreeing the appropriate time for the statement, the statute says it must be given after punishment is assessed, the sentence's terms and conditions have been announced, and the sentence is pronounced. *Id.* § 1(b)(1)-(3); *see also* Nikki Morton, *Cleaning Salt from the Victim's Wound: Mandamus As a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 98 (2000) (stating that victim allocution "is the oral statement of a victim or close relative of a deceased victim delivered after sentencing"). Morton further described the types of allocution statements, including statements of the amount of pain caused, expressions of frustration, stories of the victim's life, chastisement of the defendants, and even offerings of forgiveness towards the defendant. *Id.* at 98-99; *see also Fryer*, 68 S.W.3d at 632 (explaining that victim allocution "gives the victim a right to deliver personally a statement to the defendant and the court in the courtroom"). *But see* Brown v. State, 875 S.W.2d 38, 40 (Tex. App.—Austin 1994, no pet.) (per curiam) (holding that article 42.03, section 1(b) statements about a victim's injury may be used during the punishment stage provided that the fact finder can logically trace moral culpability for the injury to the defendant). While this holding seems to go against the post-sentencing mandate of the statute, it is later explained by another court of appeals as being allowable only because the victim statement in *Brown* was sworn. *See* Gifford v. State, 980 S.W.2d 791, 792-93 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (distin-

scribed by the court reporter.[231] Thus, while victim-impact statements actually play a role in the punishment phase of the trial, the victim allocution statement simply provides the crime's victims an ability to address the court after the sentence is pronounced.

The reason for allowing victim allocution is that it gives the victims of a crime "a greater sense of participation in the justice system."[232] These statements also provide some rehabilitative[233] and deterrent functions.[234] When initially sponsored as House Bill 520,[235] the Bill's intention was to allow crime victims to give such a statement before sentence pronouncement.[236] However, there was concern expressed at the legislative hear-

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guishing its non-sworn pre-punishment phase victim statement, which was held inappropriate, from *Brown*'s sworn pre-punishment statement).

231. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2006) (dictating that the allocution statement may not be transcribed by the court reporter); *see also* Blevins v. State, 884 S.W.2d 219, 231 (Tex. App.—Beaumont 1994, no pet.) (ruling that victims have "the right to give unrecorded impact testimony to the court following assessment of punishment and . . . sentencing").

232. Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1105 (1995). Those victims that feel "they have participated in the disposition of a case generally have a greater sense of confidence in the criminal justice system." *Id.* at 1117; *see also* Nikki Morton, *Cleaning Salt from the Victim's Wound: Mandamus As a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 97 (2000) (noting that victim impact statements were created for the purpose of giving "victims a sense of participation in the legal process"); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 23 (1987) (describing a study which found that the victim's participation in the criminal justice process is associated with the level of satisfaction they have with the process).

233. *See* Nikki Morton, *Cleaning Salt from the Victim's Wound: Mandamus As a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 103 (2000) (stating that victim allocution "can be rehabilitative for defendants" because it may be the last time they hear about the impact of their acts from the lips of their victims or their victims' families); Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1119-20 (1995) (suggesting that the personal and emotional nature of victim allocution statements could be rehabilitative because "they make the victims more human in the defendant's mind, thus forcing the defendant to consider the effects of his actions").

234. *See* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1120-21 (1995) (arguing that forcing defendants to listen to the pain and suffering they have caused may lead them to avoid committing the crime again).

235. Tex. H.B. 520, 72d Leg., R.S. (1991).

236. *See* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1114-15 (1995) (explaining that when Representative Pete Gallego sponsored House Bill 520, he believed the statement should be given between the assessment of punishment and sentence pronouncement).

ings that victim allocution statements might have an impact on sentencing.[237] Legislators amended the proposed Bill by allowing allocution only after sentence pronouncement.[238] Thus, the legislature intended to place victim allocution statements after the trial judge's pronouncement of the sentence to avoid any chance that the statement would affect the sentence given.[239]

It is unknown whether the victim allocution statement given in *Aguilera* had any effect on the trial judge's decision to modify the sentence.[240] However, as Judge Cochran emphasized in her concurring opinion in *Aguilera*, judges are not emotionless robots immune to the sorrow and pain of others.[241] One does not have to try hard to imagine the heart-wrenching statement of pain and grief given by a murdered child's parent

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237. *Id.* at 1115. (showing that the Bill's House Committee was aware of pre-sentence allocution's possible effects of sentence pronouncement).

238. *See id.* (recounting that the committee amended House Bill 520 to allow the victim statements only after sentencing). Interestingly, House Bill 520 sponsor Representative Pete Gallego disagreed with this change, believing that such statements would not have an effect upon trial judges' sentencing decisions. *Id.* at 1115 n.36 (citing Interview by Keith D. Nicholson with Pete Gallego, Texas State Representative, in Austin, Tex. (Jan. 23, 1995)); *see also* Garcia v. State, 16 S.W.3d 401, 408 (Tex. App.—El Paso 2000, pet. ref'd) (noting that article 42.03 was enacted to allow allocution only after pronouncement in order to prevent the risk of a victim statement affecting a judge's partiality).

239. *Cf.* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1137-38 (1995) (discussing allocutions that are directed at the judge instead of the defendant). Nicholson's comment shows that there is a possibility for the victim allocution statement to affect a judge's sentencing decision even if it is given *after* sentencing. *Id.* at 1138. For example, if a judge knows that angry victims will have the opportunity to chastise the judge if he gives the defendant a lesser sentence, he will be more prone to sentence the defendant excessively. *Id.*

240. *See* State v. Aguilera, 130 S.W.3d 134, 137 (Tex. App.—El Paso 2003) (mem. op.) (pointing out that the record is mute as to the judge's reasons for altering the initial sentence), *rev'd*, 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc). *But see* State v. Aguilera, 165 S.W.3d 695, 701 n.7 (Tex. Crim. App. 2005) (en banc) (Keasler, J., joined by Hervey, J., dissenting) (pointing out the implausibility of the trial judge's statement in her bill of exceptions that says the victim allocution had no effect on her decision to modify the sentence); *cf.* Harris v. State, 153 S.W.3d 394, 397 n.8 (Tex. Crim. App. 2005) (suggesting that just because the trial judge says he or she is acting or ruling because of a certain reason does not necessarily mean that is really the reason for the action or ruling).

241. *See Aguilera*, 165 S.W.3d at 701 n.7 (Cochran, J., joined by Price, J., concurring) (stating that "[c]ourts, being human, cannot avoid occasional lapses characteristic of humanity . . ." (quoting Rowley v. Welch, 114 F.2d 499, 503 (D.C. Cir. 1940))). Judge Cochran also points out that "judges . . . occasionally make mistakes or misstatements in speaking." *Id.* at 700; *see also* Appellee Angel Aguilera's Brief, State v. Aguilera, 165 S.W.3d 695 (Tex. Crim. App. 2005) (en banc) (No. PD-0024-04) (arguing that "[j]udges are human and are subject to all the emotions and passions which affect the layperson").

causing a trial judge to reconsider and increase the sentence.[242] The prospect of victim allocution causing a judge to alter the originally pronounced sentence, and the resulting consequences, should be addressed. The following section offers suggestions to help prevent potential problems from materializing.

C. *Solutions*

One of the reasons the *Aguilera* dissenting opinion disagrees with the majority opinion is because the majority failed to properly address the existing case law dealing with trial courts' plenary power to change sentences.[243] In fact, Judge Hervey, who joined the dissent for this reason, had previously expressed her desire that both *Powell* and *Williams* be overturned on account of the majority's reliance upon *Ex parte Lange*, which she argued has been limited by the *United States v. DiFrancesco* decision.[244]

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242. *See, e.g.*, Taylor v. State, No. 10-01-00109-CR, 2004 WL 444531, at *9 (Tex. App.—Waco Mar. 10, 2004, pet. ref'd) (not designated for publication) (reviewing an extremely emotional statement given by the twenty-eight year old widow of a murder victim during the punishment phase of trial); Blevins v. State, 884 S.W.2d 219, 231 (Tex. App.—Beaumont 1994, no pet.) (allowing the victim's mother to tender into evidence a poem she wrote to her son following his death); John W. Stickels, *Victim Impact Evidence: The Victims' Right That Influences Criminal Trials*, 32 TEX. TECH L. REV. 231, 237-46 (2001) (describing several pre-sentence pronouncement victim impact statements given by victims of horrific crimes, including some by the families of murder victims); Nikki Morton, *Cleaning Salt from the Victim's Wound: Mandamus As a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 115-17 (2000) (including a copy of an actual, heartbreaking victim allocution statement written by the mother of a girl killed by a drunk driver).

243. *See Aguilera*, 165 S.W.3d at 704 (Keasler, J., joined by Hervey, J., dissenting) (pointing out that the majority failed to look at the Texas cases which recognized the general rules of trial courts' power over their orders and the exceptions to the rule that disallow modification when the initial sentence has commenced (citing Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482, 486 (1943) (per curiam); Powell v. State, 124 Tex. Crim. 513, 63 S.W.2d 712, 713 (1933) (per curiam))). The dissenting opinion concludes that if the majority opinion believes the decisions of *Powell* and *Williams* and their followers should be overruled, then they should explain why, and because they did not, the dissenters cannot join the majority. *Id.* at 707.

244. *See* McClinton v. State, 121 S.W.3d 768, 777 (Tex. Crim. App. 2003) (per curiam) (Hervey, J., joined by Johnson, J., dissenting) (arguing that both *Powell* and *Williams* should be overruled because they have their basis in *Ex parte Lange*, which has been undermined in part by *DiFrancesco* (citing United States v. DiFrancesco, 449 U.S. 117, 346-47 (1980), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc)). Judge Hervey supported this proposition in part by distinguishing *Lange*, where the defendant had fully served his sentence before the sentence modification was made, with *Powell*, where the defendant had only just started serving his sentence. *Id.* at 776; *see Lange*, 85 U.S. at 164 (reciting the facts and noting that the defendant had paid in full the fine pronounced to him by the trial judge prior to being recalled for sentence modifica-

According to Judge Hervey, *DiFrancesco* holds that double jeopardy is not necessarily a bar to sentence increases, and the holding of *Lange* never said that trial courts cannot increase sentences once they have begun.[245] However, because of the differences between *DiFrancesco*, which involved statutory authority to increase the final sentence, and *Lange*, which concerned no such statutes,[246] the *DiFrancesco* interpretation of this issue has been called dicta,[247] which would make Judge Hervey's argument to overrule *Powell* and *Williams* moot.[248] Thus, because the foundation of the *Powell* and *Williams* holdings in *Lange* is still sound,

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tion); *Powell*, 63 S.W.2d at 713 (stating that the defendant had only endured some punishment under the initial sentence). However, Texas is not the only state that has interpreted sentence modification this way; many states have held that once a defendant served any part of the initial, valid sentence, the trial judge cannot increase the sentence's severity. *See generally* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, §§3-9 (1983 & 2006 Supp.) (enumerating those states that do not allow trial judges to increase a defendant's sentence once the defendant has begun serving the sentence, and describing the variations of such a rule among the states).

245. *McClinton*, 121 S.W.3d at 776-77 (Hervey, J., joined by Johnson, J., dissenting).

246. *See Lange*, 85 U.S. at 166 (presenting the case's issue to be whether a circuit court has the authority to modify, reverse, or vacate its own judgments). The facts of *Lange* show that the defendant's sentence was modified after he already completed one of the alternative sentences he was allowed to be given, and thus, the trial judge could no longer impose another punishment without violating double jeopardy. *Id.* at 164, 175.

247. *See* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, 910 n.5 (1983) (announcing that the *DiFrancesco* interpretations of *Lange* and *United States v. Benz*, 282 U.S. 304, 307 (1931), appear to be dicta, because the real issue in *DiFrancesco* was whether an increase pursuant to a "special defender statute" was allowable under double jeopardy). Even the federal circuits are split as to the scope of *DiFrancesco*. *Compare* United States v. Henry, 709 F.2d 298, 309-10 (5th Cir. 1983) (failing to adopt *DiFrancesco* as overruling the double jeopardy rule of *Lange*, and pointing to the uncertainty of the scope of *DiFrancesco*), *with* United States v. Busic, 639 F.2d 940, 949-50 (3d Cir. 1981) (relying in part upon *DiFrancesco* in holding that an increase during resentencing was not a double jeopardy violation, even though it was not expressly allowed by a specific statute), *cert. denied*, 452 U.S. 918 (1981).

248. *See McClinton*, 121 S.W.3d at 777 (Hervey, J., joined by Johnson, J., dissenting) (suggesting that *Powell* and *Williams* should be overruled because of their reliance on *Lange* "which has been undermined by *DiFrancesco*"). Obviously, if *DiFrancesco* only spoke to *Lange*'s holding in dicta, the *Lange* holding is still good law, and the Texas cases that are based upon it are also still sound. *See* Powell v. State, 124 Tex. Crim. 513, 63 S.W.2d 712, 713 (1933) (per curiam) (discussing *Lange* in supporting its ruling that the trial court lacked jurisdiction to amend the original sentence under which the defendant had already suffered some punishment); Turner v. State, 116 Tex. Crim. 154, 31 S.W.2d 809, 809-10 (1930) (per curiam) (referencing *Lange* in ruling that double jeopardy would be violated if the defendant's modified sentence was allowed to stand after the defendant had started serving the first sentence); Grisham v. State, 19 Tex. Ct. App. 504, 514 (1885) (relying upon *Lange* in concluding that because the defendant had suffered some punishment

simply addressing the pertinent case law is not the best option for remedying deficiencies in the *Aguilera* rule (which also fails to mention any statute explicitly authorizing resentencing).[249] Consequently, merely overruling the cases that oppose *Aguilera* would still leave the potential problems of some trial judges having the ability to modify sentences, depending on the time of day the sentence is pronounced, and of victim allocution affecting a judge's decision to resentence.

The best solution to the potential problems not addressed by *Aguilera* is actually given within the dissenting opinion itself. Briefly stated, because a defendant's sentence should, and logically does, begin to run from the moment it is pronounced,[250] the trial court has no authority to make modifications sua sponte because of the longstanding proposition that once a defendant has endured punishment under a sentence, a judge may not make any further modifications.[251] Those in opposition may argue that this detracts from the authority of trial judges over the sentences they prescribe and prevents them from being able to remedy mistakes made in sentencing.[252] However, such a rule would preserve the impor-

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prescribed by the initial sentence, the trial court no longer had power to alter or modify the sentence on its own).

249. *See* State v. Aguilera, 165 S.W.3d 695, 697-98 (Tex. Crim. App. 2005) (en banc) (majority opinion) (citing to several Texas statutes, none of which specifically announce that sentence modifications may be made after sentencing).

250. *See id.* at 704 (Keasler, J., joined by Hervey, J., dissenting) (agreeing with the State's argument that "it is only logical that the sentence begin to run, not just on the day it is pronounced, but at the moment that it is pronounced"); *cf., e.g.*, Tooke v. State, 642 S.W.2d 514, 518 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (holding that once a lawful sentence has been pronounced and accepted by the defendant, the defendant can no longer be resentenced). *See generally* Lee R. Russ, Annotation, *Power of State Court, During Same Term, to Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R.4TH 905, 920, 924 (1983 & Supp. 2006) (reviewing cases that have held sentences cannot be increased once they have been orally pronounced and stating that "Texas cases appear to have adopted a variation of the rule prohibiting the increase of a valid sentence once it has been orally pronounced").

251. *See Aguilera*, 165 S.W.3d at 704 (Keasler, J., joined by Hervey, J., dissenting) (believing that the defendant's "sentence began running the moment the trial judge pronounced it," and thus *Powell* and *Williams* take away any power of the trial judge to change the sentence); *see also* Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482, 486 (1943) (per curiam) (expressing that when a defendant accepts the judgment and has suffered punishment under it, the court becomes powerless to modify the sentence); *Powell*, 63 S.W.2d at 713 (holding that because the defendant had suffered punishment under the initial sentence, the sentence could not be made to run cumulatively with another); *Turner*, 31 S.W.2d at 810 (stating that since the defendant had suffered punishment under the original sentence, the original sentence could no longer be set aside); *Grisham*, 19 Tex. Ct. App. at 515 (ruling that it was beyond the court's power to change or vacate the defendant's sentence because he had suffered punishment under it already).

252. *Cf. Aguilera*, 165 S.W.3d at 700-01 (Cochran, J., joined by Price, J., concurring) (attacking the proposition that a defendant's sentence starts at the moment of pronounce-

tance Texas extends to the oral pronouncement[253] while having a minimal effect on the trial judge's plenary power. A trial judge would still have plenary power to rule on motions for new trial and motions in arrest of judgment.[254] The judge would also be allowed to remedy any clerical mistakes with a nunc pro tunc judgment.[255] In fact, such a rule would actually give judges a greater incentive for announcing the correct and proper sentence the first time.[256] The only authority that would be denied would be the ability to alter a valid sentence after it is pronounced and before court adjournment.[257] However, such minimal power-stripping is necessary if the oral pronouncement of a sentence is to have the same finality, regardless of the time of day it is given.

For example, in the post-*Aguilera* decision *Swartzbaugh v. State*,[258] the defendant was initially given a valid eight-year sentence, only to be pulled back into the courtroom before he left the building and resentenced to a

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ment by pointing out the inflexibility of such a rule in that it will keep judges from being able to correct occasional mistakes or misstatements).

253. *See Ex parte* Madding, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002) (explicating the importance of the moment of sentence pronouncement); Stokes v. State, 688 S.W.2d 539, 541 (Tex. Crim. App. 1985) (en banc) (explaining that "[w]ith the pronouncement of a sentence the court breathes life into the judgment. The sentence is the catalyst which enables the execution of the judgment.").

254. *See Aguilera*, 165 S.W.3d at 697-98 (majority opinion) (announcing that trial courts have the authority to grant motions for new trial and motions in arrest of judgment); *see also* TEX. R. APP. P. 21.8 (discussing the procedures trial courts are to use in ruling on a motion for new trial); TEX. R. APP. P. 22.4 (discussing the procedures the trial court must use in ruling on a motion in arrest of judgment).

255. *See* TEX. R. APP. P. 23.1 (announcing that the criminal trial judge's nunc pro tunc authority exists so long as no motion for new trial or motion in arrest of judgment has been granted); *see also* State v. Bates, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) (en banc) (noting that judgments nunc pro tunc "may be used only to correct clerical errors in which no judicial reasoning contributed to their entry").

256. *Cf., e.g.*, State v. Dickerson, 864 S.W.2d 761, 762 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (sentencing the defendant initially to a valid two-year term, but later resentencing him to twenty-five years in prison after finding enhancements true). Such a dramatic difference between the initial sentence and the modified sentence should be avoided, and would have in this case if the judge had carefully examined and found enhancements true when he originally sentenced the defendant. *See id.* (showing that the judge did not realize he had not found the enhancements true or what minimum sentence was required). *Aguilera* perpetuates such behavior in trial judges because they can now simply recall the defendant and remedy any mistakes or lapses in memory.

257. *See Aguilera*, 165 S.W.3d at 700-01 (Cochran, J., joined by Price, J., concurring) (noting that having sentence commencement begin at pronouncement "fails to allow for a sudden change of heart" in the trial judge on the day he gives his sentence).

258. No. 13-04-067-CR, 2005 WL 1845764 (Tex. App.—Corpus Christi Aug. 4, 2005, no pet.) (mem. op.).

ten-year term.[259] Under *Aguilera*, such a sentence modification is proper, but it is clear such an option would not be available in all situations; if the defendant in *Swartzbaugh* had been sentenced just prior to court adjournment, and the court closed its doors before he could be haled back for resentencing, he would not have been able to be brought back the next day and resentenced.[260] Thus, under *Aguilera*, the difference in punishment severity between two, otherwise similarly situated, defendants may come down to what time of day their sentence was pronounced. By making sentence commencement begin at the sentence's pronouncement, such irregularities are a non-issue.

Aguilera supporters will also argue that its rule puts a halt to the problem of deciding whether a sentence begins when a defendant is just leaving the courtroom, exiting the courthouse, or upon traveling to prison.[261] However, this problem is likewise solved by making the moment a sentence is pronounced and accepted by the defendant as the moment that it begins; it would not matter where the defendant is since his sentence has already commenced.

In offering the moment of pronouncement as the bright line starting point of a defendant's sentence, it is not suggested that the defendant's sentence should begin the very instant the judge finishes speaking with no remedy for any sentencing mistakes. Precedent clearly holds that the defendant must "accept" the sentence, which means that he has not made an objection to it or given notice of appeal.[262] Thus, the parties should be

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259. Swartzbaugh v. State, No. 13-04-067-CR, 2005 WL 1845764, at *1 (Tex. App.—Corpus Christi Aug. 4, 2005, no pet.) (mem. op.) (recounting that a valid sentence of eight years was initially pronounced in the defendant's presence, and that the defendant was brought back into the courtroom before he had left the building and was resentenced to a ten-year term).

260. *See Aguilera*, 165 S.W.3d at 698 (majority opinion) (allowing trial judges to have sua sponte modification power over a sentence until court adjournment on the day the sentence is pronounced).

261. *See id.* at 701-02 & nn.10-12 (Tex. Crim. App. 2005) (en banc) (Cochran, J., joined by Price, J., concurring) (defending the majority's rule in saying that it "avoids the ticklish technicalities of deciding whether the defendant may be returned to the bench" when he is no longer in the courtroom, and citing decisions from around the country that show the various places defendants have been when they have been recalled by the court); *see, e.g.*, Rowley v. Welch, 114 F.2d 499, 500 (D.C. Cir. 1940) (showing that the defendant was in the courthouse elevator when he was recalled for sentence modification); State v. Dickerson, 864 S.W.2d 761, 761-62 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (describing a scenario in which the defendant was resentenced less than a minute after the initial sentence).

262. *See* Romero v. State, 712 S.W.2d 636, 638 (Tex. App.—Beaumont 1986, no pet.) (pointing out that because "appellant gave no notice of appeal, he accepted his sentence"). There is also an opportunity for the State to make objections to the pronounced sentence. *See* Dickerson v. State, 864 S.W.2d 761, 763 (Tex. App.—Houston [1st Dist.] 1993, no pet.)

allowed an opportunity to object to the sentence before it becomes final, and during this time, the judge should be allowed to quickly remedy any mistakes in pronouncement.

Treating sentence pronouncement as its starting point also eliminates the chance that victim allocution will affect a judge's decision to modify a sentence.[263] Thus, the victim allocution statement abides by its legislative purpose[264] and assures the defendant and the State that the sentence will be based upon the fact finder's contemplation of the parties' arguments and evidence, instead of the emotional outbursts of the victim—after all, "the central goal of a trial is to provide the defendant with a fair hearing."[265] While the trial judge in *Aguilera* stated she did not modify the defendant's sentence because of what was said during victim allocution, the dissenting opinion finds the excuse hard to believe.[266] When the victim allocution house bill was in committee, there was a fear of the possibility for allocution to affect the sentence determination of the trial judge.[267] Therefore, the time for giving an allocution statement was spe-

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(discussing the prosecutor's mistake in failing to object to the defendant's sentence: "The prosecutor said nothing. Instead the prosecutor stood mute while the trial court afforded appellee his right of allocution, his opportunity to state any reason why sentence should not be pronounced against him. Appellee was apparently (and understandably) quite willing to accept the sentence about to be imposed; he stated for the record that he had nothing to say. The prosecutor still said nothing").

263. *See* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1115 (1995) (providing that the Texas Legislature believed that allowing for victim allocution only after the sentence pronouncement helps to alleviate the risk of victim allocution influencing the trial court's decisions).

264. *See id.* at 1105 (describing victim allocution as the victim's opportunity to express the crime's impact, as long as it is given after sentence pronouncement); *see also* 43 GEORGE E. DIX ET AL., TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 38.84 (2d ed. 2004) (expressing that victim allocution "is intended to have no effect on decisions made in the criminal process").

265. Stahl v. State, 749 S.W.2d 826, 830 (Tex. Crim. App. 1988) (en banc) (finding that "the central goal of a trial is to provide the defendant with a fair hearing" and not to guarantee the victim's family the chance to testify). This case dealt with the emotional outburst of a mother identifying a picture of her murdered son which the trial judge instructed the jury to disregard. *Id.* at 828.

266. *See Aguilera*, 165 S.W.3d at 706 (Keasler, J., joined by Hervey, J., dissenting) (disbelieving the trial judge's bill of exceptions in which she said that the allocution statement did not affect her decision to resentence the defendant because "[i]t is remarkably coincidental that the judge chose to reduce Aguilera's sentence right after hearing the victim's statement").

267. *See* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1115 (1995) (expressing that the panel members were concerned "that victim statements could influence the judge and change the degree of punishment before the pronouncement of sentence").

cifically placed after sentencing had occurred to avoid any such effects.[268] The *Aguilera* rule directly undermines such legislative intent by allowing resentencing to occur after victim allocution.[269] By making sentence pronouncement the common beginning point for sentence commencement, the wishes of the legislature are honored, and the victims are allowed to give their rightful statements without the possibility of persuading a judge to modify a sentence.[270]

An alternative, but less corrective, solution would be for the trial judge to have to provide his specific reason for modification for the record during resentencing.[271] Such a procedural rule might protect against a change due to the victim allocution statement.[272] However, merely requiring the judge to give his reason for resentencing does little to protect the importance of the initial oral pronouncement and would still allow for varying modification opportunities depending on the time of day the sentence is pronounced. Therefore, the best solution for solving the problems that spring from *Aguilera* is to make sentence pronouncement the point when a defendant begins to serve his sentence.

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268. *See id.* at 1115 (noting that allocution was made allowable only after sentencing to avoid influencing the court); *see also* Garcia v. State, 16 S.W.3d 401, 408 (Tex. App.—El Paso 2000, pet. ref'd) (admitting that the legislature purposefully made the time for allocution after sentencing to avoid affecting the partiality of the trial judge); Fryer v. State, 993 S.W.2d 385, 387 (Tex. App.—Fort Worth 1999) (describing Texas Code of Criminal Procedure article 42.03 as allowing victim allocution "*only after*" the trial's punishment phase and the sentence has been pronounced), *aff'd*, 68 S.W.3d 628, 632 (Tex. Crim. App. 2002).

269. *See Aguilera*, 165 S.W.3d at 706 (Keasler, J., joined by Hervey, J., dissenting) (stating that the majority's rule is "an obvious attempt to circumvent Art. 42.03").

270. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2006) (mandating that the "court *shall* permit a victim, close relative of a deceased victim, or guardian of a victim" to give a victim allocution statement) (emphasis added); *see also* Blevins v. State, 884 S.W.2d 219, 231 (Tex. App.—Beaumont 1994, no pet.) (noting the right to allocution article 42.03 gives to victims and close relatives of a deceased).

271. *Cf.* State v. Aguilera, 130 S.W.3d 134, 137 (Tex. App.—El Paso 2003) (mem. op.) (noting that the record was silent as to the precise reasons for the trial judge's sudden decision to modify the defendant's sentence), *rev'd*, 165 S.W.3d 695 (Tex. Crim. App. 2005).

272. *See* State v. Aguilera, 165 S.W.3d 695, 706 (Tex. Crim. App. 2005) (en banc) (Keasler, J., joined by Hervey, J., dissenting) (mentioning that the trial judge supported her resentencing by submitting a bill of exceptions that stated the modification was made after a reconsideration of the trial evidence and was in no way affected by the victim allocution statement). However, Judge Keasler replies that such an excuse "defies credibility," since it is hard to believe a modification made right after allocution was not influenced by the victim's statements. *Id.* Perhaps if the judge is required to state the specific reason why he chose to modify the sentence, instead of merely reiterating that reconsideration was the cause for the change, those judges whom might have modified because of the victim allocution statement will refrain from doing so.

IV. CONCLUSION

Criminal prosecutions are serious situations; we all hope that those who commit crimes are convicted and those that are free from guilt are found innocent. Likewise, we want to believe that judges meticulously and carefully come to their sentencing decisions. But when judges decide to resentence a defendant only moments after the initial sentence has been given merely because of a reconsideration of the trial evidence, they appear less the arbitrator of justice and more like indecisive amateurs who cannot quite seem to make sense of the evidence before them.[273] Of course it is irrational and impossible to expect every judge to make the correct sentencing decision every time, but just because judges are prone to make mistakes does not mean they should be given plenary powers that are unfair to the other parties to a trial. Texas already allows judges the power to correct their sentence should an illegal sentence be given,[274] and this makes sense because such a sentence is void and unenforceable.[275] But a perfectly valid and statutorily prescribed sentence, pro-

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273. *Cf., e.g., id.* at 706 (Keasler, J., joined by Hervey, J., dissenting) (disbelieving the trial judge's assurance that the victim allocution statement did not affect her decision to modify the sentence); Harris v. State, 153 S.W.3d 394, 397 n.8 (Tex. Crim. App. 2005) (narrowing down the judge's decision to change the initial sentence to a judicial mistake or a mere change of heart, neither of which would have allowed for sentence modification). In these scenarios, the Texas Court of Criminal Appeals judges have insinuated that the trial judges were dishonest about their reasons for sentence modification. It goes without saying that judicial integrity is damaged when such assumptions are made.

274. It is important to note that an "illegal" sentence includes more than those that extend beyond the statutorily prescribed boundaries for a particular conviction. Where the prosecutor and the defendant enter into a plea agreement which results in a sentence beyond what the defendant has agreed to, the defendant may appeal this "illegal sentence," even if it falls within the statutory range of punishment, and if successful, may receive specific performance of his plea agreement or be allowed to withdraw his plea. *See, e.g.*, Bass v. State, 576 S.W.2d 400, 401 (Tex. Crim. App. 1979) (determining that the prosecutor breached his part of the plea agreement with the defendant). In *Bass*, the prosecutor promised not to recommend the sentence as a part of his plea bargain with the defendant. *Id.* The prosecutor, nonetheless, recommended that the trial judge give the maximum sentence allowed. *Id.* Even though a valid sentence was given, because the prosecutor breached its agreement with the defendant, rendering the guilty plea involuntary, the Court of Criminal Appeals remanded the case to the trial court. *Id.*; *see also* Shannon v. State, 708 S.W.2d 850, 851-52 (Tex. Crim. App. 1986) (allowing the defendant to seek specific performance or withdraw his plea where he and the prosecutor agreed to an illegal sentence as part of the plea agreement). The proposed resolution to the problems caused by *Aguilera* does not prevent a trial judge from correcting or modifying a sentence he realizes violates the defendant's plea agreement.

275. *See* Mizell v. State, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (en banc) (stating that "[a] trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence"). *Mizell* also noted that "[t]here has never been anything in Texas law that prevented *any* court with jurisdiction over a criminal

nounced in open court, and accepted by the defendant, should not be placed in the same category with an illegal sentence.[276] Much like a contract becomes enforceable when all of the right elements are met, even if one person, after deeper contemplation, later believes greater consideration would be more appropriate,[277] a valid sentence should not be voidable merely because a judge decided to take a deeper look at the evidence after pronouncing the sentence.

The fears that result from *Aguilera* affect both defendants and prosecutors equally, because it is just as easy for a judge to change his mind and lower the defendant's sentence, as in *Aguilera*, as it is for the judge to increase the severity of the punishment.[278] And while judges undoubtedly must worry about making mistakes in determining sentences, they also have control of the trial situation and the opportunity to review evidence presented in order to make an intelligent decision.[279] On the other hand, the defendant and the prosecutor must wait after sentencing to see if the sentence pronounced will become final or will be modified. This

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case from noticing and correcting an illegal sentence." *Id.* *See generally* Lee R. Russ, Annotation, *Power of Court to Increase Severity of Unlawful Sentence—Modern Status*, 28 A.L.R.4TH 147 (1984 & Supp. 2006) (discussing cases that consider the question of whether a court may resentence a defendant in a way that increases the punishment when the initially pronounced sentence was unlawful).

276. *See* McClinton v. State, 121 S.W.3d 768, 771-72 (Tex. Crim. App. 2003) (per curiam) (Cochran, J., concurring) (explicating that a trial judge "does not have the inherent authority to modify, alter, or vacate a valid sentence orally imposed solely by means of a later written judgment or docket entry"), *abrogated by* State v. Aguilera, 165 S.W.3d 695, 700 (Tex. Crim. App. 2005) (en banc); *see also* Meineke v. State, 171 S.W.3d 551, 555 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (stating that "changing a valid sentence after it already has been entered and making entries which correct an otherwise invalid sentence are two different issues").

277. *See* Fort Worth Indep. Sch. Dist. v. City of Fort Worth, 22 S.W.3d 831, 846 (Tex. 2000) ("In general, a contract is legally binding only if its terms are sufficiently definite to enable a court to understand the parties' obligations."); Hill v. Heritage Res., Inc., 964 S.W.2d 89, 114 (Tex. App.—El Paso 1997, pet. denied) ("One party alone cannot modify a contract after it has been entered into and all parties to the agreement must assent to the modification for the modification to be valid." (citing Mandril v. Kasishke, 620 S.W.2d 238, 244 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.))); Kitten v. Vaughn, 397 S.W.2d 530, 533 (Tex. Civ. App.—Austin 1965, no writ) (announcing that a party may not unilaterally modify a contract between two parties).

278. *See Aguilera*, 165 S.W.3d at 702 (Cochran, J., joined by Price, J., concurring) (clarifying that the majority's rule allows the trial judge to both decrease and increase a sentence).

279. *See, e.g.*, TEX. GOV'T CODE ANN. § 21.001(a) (Vernon Supp. 2006) (stating that a court has "all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders"); *cf.* William G. Reid, *The Texas Code of Criminal Procedure*, 44 TEX. L. REV. 983, 1009 (1966) (listing the fact that judges have more information by which to reach decisions and that they are "less affected by emotion and prejudice" as reasons for wanting judges to assess punishment as opposed to the jury).

scenario is similar to that of a game show contestant who has won whatever is behind door number three, but must wait to see if it is a new car or an old donkey; while it is true the wait is not very long, anxiety runs high and there is a broad possibility of outcomes. Sentencing should not be a "wait-and-see" game. The initial sentence pronounced in open court is what should be given to the convicted, and parties should make their decisions to appeal, file a motion, or accept the punishment from there. Simply put, if a judge still needs to consider the trial's evidence to come to a final sentencing decision, he is not ready to pronounce a sentence.[280]

280. *See Aguilera*, 165 S.W.3d at 706 (Keasler, J., joined by Hervey, J., dissenting) (explaining that resentencing the defendant occurred after reconsidering the trial testimony).