APPENDIX A

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

9/15/2022

SCHMITT, ROBERT JOSEPH Tr. Ct. No. W296-81160-00 (HC)(2)WR-60,272-02

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

ROBERT JOSEPH SCHMITT
TERRELL UNIT - TDC # 1061867
1300 FM 655
ROSHARON, TX 77583

DENIED
PER CURIAM
09/15/2022

60,272-02

RECEIVED IN
COURT OF CRIMINAL APPEALS

IN THE TEXAS COURT OF CRIMINAL APPEALS

FEB 22 2022

AUSTIN, TEXAS

Deana Williamson, Clerk

Writ No. 60-272-02

Ex parte Robert Joseph Schmitt

Applicant

SUGGESTION THAT THE COURT, ON ITS OWN MOTION, RECONSIDER IT'S ORDER DISMISSING WITHOUT A WRITTEN ORDER SCHMITT'S HABEAS CLAIM

Robert Joseph Schmitt, the Applicant, respectfully requests that the Court, on its own motion, reconsider its decision denying, without a written order, Schmitt's habeas allegation. Schmitt alleges that the trial court committed statutory error by cumulating his sentences, when the indictment alleges that he committed both offenses before the effective date of the statute authorizing cumulation.

This is an extraordinary case that justifies the Court's invocation of its power to reconsider prior dispositions. By refusing to act, this Court may cause Schmitt to remain unlawfully restrained via unlawful sentence.

1. Power To Reconsider

The Court is empowered, on its own motion, to reexamine its prior disposition of an 11.07

application. Under Texas R. App. Proc. 79.2(d), it may reexamine the disposition of an application for writ of habeas corpus filed pursuant to Article 11.07. See Tex. R. App.

Proc. 79.2(d). ("The Court may on its own initiative reconsider [denial of an 11.071 application]."); *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008) (electing to reconsider the applicant's previously rejected Penry claim). The Court has been particularly inclined to reconsider a previously disposed of 11.07 application when intervening state or federal court decisions call into question the correctness of the earlier determination. See, e.g., *Ex Parte Moreno*, 245 S.W. 3d at 420. The litigation here involves such a situation. When a defendant complains the trial court erred, by cumulating his sentences, where the judgment does not reflect that he might have committed some of these offenses *after* the effective date of the statute, must the trial court find and enter in the judgment, "there is some evidence indicating that the defendant committed the crime(s) he was convicted of after September 1, 1997" [1]

2. Argument

The grounds for reconsideration are evident.

First, this Court's decision to dismiss Schmitt's habeas application (See Footnote #1) was premised on the fact that, "there was some evidence that [Count 1] offense occurred after September 1, 1997." The two-count indictment alleged that on or about June 9, 1997[2] and on or about November 1, 1996.[3] Schmitt sexually assaulted a child.

This Court dealt with a similar case in *Bonilla vs. State*, 452 S.W. 3d 811 (Tex Cr App 2014). There, the Court dealt with the task deciding who bears the burden of showing that the trial judge erred in cumulating indecency with a child sentence when

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[1] The two instances of sexual assault were joined in a single indictment. At trial, complaining witness testified the sexual assaults began in the fall of 1996 and concluded in the summer of 1998.
[2] Count 1
[3] Count 2

some sexual abuse took place before the 1997 Penal Code amendments permitting cumulation of sentences for child sexual offenses and some took place after that date.

Bonilla and its progeny, *Ex parte Bahena,*[4] notes that several courts of appeals had upheld the trial judge's cumulation order if "some evidence" showed that the offenses occurred after September 1, 1997, (citing *Bates v. State*, 164 S.W.3d 928, 930-31 (Tex. App.—Dallas 2005, no pet.); *Dale v. State*, 170 S.W.3d 797, 800-01 (Tex. App.—Fort Worth 2005, no pet.); *Hendrix v. State*, 150 S.W.3d 839, 852-54 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd); *Owens v. State*, 96 S.W.3d 668, 671-72 (Tex. App.—Austin 2003, no pet.); *Yebio v. State*, 87 S.W.3d 193, 195-96 (Tex. App.—Texarkana 2002, pet. ref'd)).

Texas appellate courts have used *Miller's*[5] "some evidence" language when addressing the trial judge's discretion to cumulate sentences in child sexual abuse cases in which the offenses were alleged to have occurred before or after September 1, 1997. The appellate courts suggest it's the evidence which determines whether the trial judge has discretion to cumulate sentences.

Schmitt ask the Court to revisit *Miller*, supra. There, this Court stated before a judge can exercise his discretion to cumulate, the defendant must be eligible for cumulative sentence. In order to be eligible for cumulative sentencing, a defendant must have been convicted in "two or more cases." However, the record must contain *some evidence* that links the defendant to the prior convictions. Art. 42.08(a), Texas Code of Criminal Procedure.

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[4] 195 S.W. 3d 704 (Tex Cr App 2006)

[5] 33 S.W. 3d 257 (Tex Cr App 2000).

Schmitt contends the Court should decide and determine, what constitutes sufficient evidence for the, "some evidence," standard and find that in child sexual abuse cases in which the offenses were to have occurred *before* and *after* September 1, 1997, a trial court must find and enter in the judgment that there is some evidence in the record to cumulate sentences.

Respectfully, the Court should reconsider its Order dismissing Schmitt's habeas claim and reopen the habeas claim to decide whether the trial court must find and enter in the judgment that there is some evidence that Schmitt committed sexual abuse after September 1, 1997.

3. Conclusion

In the interest of justice, Schmitt ask the Court to entertain this issue.

Daniel Willingham
Attorney at Law
1207 Coggin Ave
Brownwood, Texas 76801
daniel@d-laws.net
(325) 232-0567

Signed and dated 2-15 2022

Case:

WR-60,272-02

Date Filed:

10/02/2009

Case Type:

11.07 HC

Style:

SCHMITT, ROBERT JOSEPH

v.:

APPELLATE BRIEFS

Date	Event Type	Description	Document
No briefs.			

CASE EVENTS

Date	Event Type	Disposition	Document	
09/15/2022	SUGGESTION TO RECONSIDER ON COURTS OWN MOTION - DISP	DENIED	[PDF/323 KB] [PDF/100 KB]	MOTION Notice
09/12/2022	SUGGESTION TO RECONSIDER ON THE COURTS OWN MOTION			
02/22/2022	SUGGESTION TO RECONSIDER ON THE COURTS OWN MOTION			
05/29/2013	SUGGESTION TO RECONSIDER ON COURTS OWN MOTION - DISP	DENIED		
05/22/2013	SUGGESTION TO RECONSIDER ON THE COURTS OWN MOTION			
10/21/2009	ACTION TAKEN	Dismissed -- See Art. 11.07, Sec. 4		
10/08/2009	WRIT RECEIVED			
10/02/2009	OBJECTION TO REPLY			

CALENDARS

Set Date	Calendar Type	Reason Set
10/21/2009	STORED	WRIT STORED

PARTIES

Party	PartyType	Representative
SCHMITT, ROBERT JOSEPH	Applicant (writs)/Appellant's (cases)	Daniel Willingham

COURT OF APPEALS INFORMATION:

COA Case

Disposition

Opinion Cite

COA District

TRIAL COURT INFORMATION

Court

366th District Court

County

Collin

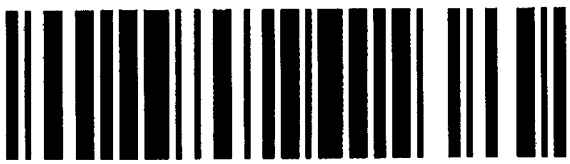
Court Judge

Court Case

W296-81160-00 (HC)(2)

Reporter

Scanned Oct 21, 2009 ***CCA Scanning Cover Sheet***



CaseNumber: WR-60,272-02
EventDate: 10/08/2009
Style 1: SCHMITT, ROBERT JOSEPH
Style 2:
Event code: WRIT RECEIVED

EventID: 2386267
Applicant first name: ROBERT
Applicant last name: SCHMITT
Offense: 22.011
Offense code: Sexual Assault
Trial court case number: W296-81160-00 (HC)(2)
Trial court name: 366th District Court
Trial court number: 320430366
County: Collin
Trial court ID: 902
Event map code: FILING
Event description: Application for Writ of Habeas Corpus - 11.07
Event description code: WRIT
Remarks:

☐ *Document Scanned* ☐ *Created or* ☐ *Appended*

Scanned by *date* *Image ID*

Comment

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printed on 10/8/2009 4:28:52 PM

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APPLICANT ROBERT JOSEPH SCHMITT APPLICATION NO. 60,272-02

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

DISMISSED, SUBSEQUENT APPLICATION. TEX. CODE CRIM. PROC. art. 11.07, § 4(a)-(c).

Chan. R. Holcomb 21 Oct 2009

JUDGE DATE

W296-81160-00(HC)(2)

EX PARTE: ROBERT JOSEPH SCHMITT

VS

THE STATE OF TEXAS

IN THE 366TH DISTRICT COURT

OF

COLLIN COUNTY, TEXAS

T R A N S C R I P T

SENT TO THE COURT OF CRIMINAL APPEALS IN AUSTIN, TEXAS ON THIS THE 6TH DAY OF OCTOBER, 2009.

HANNAH KUNKLE DISTRICT CLERK

BY: _____ DEPUTY

DISTRICT COURT COLLIN COUNTY, TEXAS

CAUSE NO. W296-81160-00(HC)(2)

EX PARTE: ROBERT JOSEPH SCHMITT	IN THE 366TH JUDICIAL DISTRICT COURT
VS	OF
THE STATE OF TEXAS	COLLIN COUNTY, MCKINNEY, TEXAS

INDEX

EX PARTE:

ROBERT JOSEPH SCHMITT

APPLICATION FOR WRIT OF HABEAS CORPUS
FROM COLLIN COUNTY TEXAS
366TH JUDICIAL DISTRICT COURT

TRIAL COURT WRIT NO. 296-81160-00(HC)(2)

CLERK'S SUMMARY SHEET

APPLICANT'S NAME :
(AS REFLECTED ON THE JUDGMENT)
ROBERT JOSEPH SCHMITT

OFFENSE:
(AS REFLECTED ON THE JUDGMENT)
SEXUAL ASSAULT OF A CHILD

CAUSE NO:
(AS REFLECTED ON THE JUDGMENT)
296-81160-00

PLEA: _____
(GUILTY///NOT GUILTY///NOLO CONTENDRE)
NOT GUILTY

SENTENCE:
(AS DESCRIBED ON THE JUDGMENT)
20 YEARS TDCJ (COUNT I); 20 YEARS TDCJ (COUNT II) CONSECUTIVE WHEN SENTENCE OF COUNT I CEASES TO OPERATE.

TRIAL DATE:
(DATE UPON WHICH SENTENCE WAS IMPOSED)
AUGUST 9, 2001

JUDGE'S NAME:
(JUDGE PRESIDING AT TRIAL)
RICHARD MAYS

APPEAL NO:
(IF APPLICABLE)
12-01-00306-CR

CITATION TO OPINION: _____ S.W. 2d_____
(IF APPLICABLE)

HEARING HELD _____YES _____NO
(PERTAINING TO THE APPLICATION FOR WRIT)

FINDINGS & CONCLUSIONS FILED:_____ YES _____ NO
(PERTAINING TO THE APPLICATION FOR WRIT)

RECOMMENDATION: _____ GRANT _____DENY _____ NONE
(TRIAL COURT'S RECOMMENDATION REGARDING APPLICATION)

JUDGE'S NAME:
(JUDGE PRESIDING OVER HABEAS PROCEEDING)

Trans. to 366th

11.07 WHC (2)

CIVIL DOCKET

NUMBER OF CASE	NAMES OF PARTIES	ATTORNEYS	OFFENSE
296-81160-00 (HC2)	THE STATE OF TEXAS	DISTRICT ATTORNEY	Sexual Asslt Child F2
DATE OF FILING: MONTH 09 DAY 27 YEAR 00	vs.		
	EX PARTE: ROBERT JOSEPH SCHMITT		DEFENDANT

DATE OF ORDERS MONTH	DAY	YEAR	ORDERS OF COURT	INFORMATION OR INDICTMENT
8	25	09	11.07 WRIT OF HABEAS CORPUS (2) FILED	

2

Case No. W296-81160-00 (HC2)
(The Clerk of the convicting court will fill this line in.)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

NAME: Robert Joseph Schmitt

DATE OF BIRTH: 06-15-61
PLACE OF CONFINEMENT: William P. Clements Unit

TDCJ-CID NUMBER: 1061867 **SID NUMBER:**

(1) This application concerns (check all that apply):

- ☐ **a conviction**
- ☒ **a sentence**
- ☐ **time credit**
- ☐ **parole**
- ☐ **mandatory supervision**
- ☐ **out-of-time appeal or petition for discretionary review**

(2) What district court entered the judgment of the conviction you want relief from? (Include the court number and county.)

296th Collin County

(3) What was the case number in the trial court?

296-81160-00

(4) What was the name of the trial judge?

Richard Mays

Revised: March 5, 2007

FILED
09 AUG 25 AM 10:50
HAN[illegible] KUNKLE
DISTRICT CLERK
COLLIN COUNTY, TEXAS
BY [illegible] DEPUTY

1

3

(5) **Were you represented by counsel? If yes, provide the attorney's name:**

Mark Bragg Wayne Ames

(6) **What was the date that the judgment was entered?**

August 9,2001

(7) **For what offense were you convicted and what was the sentence?**

Two Counts Sexual Assault

(8) **If you were sentenced on more than one count of an indictment in the same court at the same time, what counts were you convicted of and what was the sentence in each count?**

Count One- 20 years confinement

Count Two- 20 years confinement

(9) **What was the plea you entered?** (Check one.)

□ **guilty-open plea** □ **guilty-plea bargain**
☒ **not guilty** □ ***nolo contendere*/no contest**

If you entered different pleas to counts in a multi-count indictment, please explain:

N/A

(10) **What kind of trial did you have?**

□ **no jury** □ **jury for guilt and punishment**

☒ **jury for guilt, judge for punishment**

(11) **Did you testify at trial? If yes, at what phase of the trial did you testify?**

NO

(12) **Did you appeal from the judgment of conviction?**

☒ **yes** □ **no**

If you did appeal, answer the following questions:

(A) What court of appeals did you appeal to? 12th Court of Appeals

(B) What was the case number? 12-01-00306-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name:
Wayne Ames

(D) What was the decision and the date of the decision? Affirmed

(13) Did you file a petition for discretionary review in the Court of Criminal Appeals?

☐ yes ☒ no

If you did file a petition for discretionary review, answer the following questions:

(A) What was the case number? _____

(B) What was the decision and the date of the decision? _____

(14) Have you previously filed an application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure challenging *this conviction*?

☒ yes ☐ no

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number? W296-8116-00 (HC)

(B) What was the decision and the date of the decision? Denied

(C) Please identify the reason that the current claims were not presented and could not have been presented on your previous application.

Applicant's trial attorney was ineffective and did not recognize the void sentence the trial court judge handed down as punishment to applicant and therefore did not

5

object or correct the sentence. Applicant just became aware that the sentence is invalid. (Cont. on Page 13).

(15) Do you currently have any petition or appeal pending in any other state or federal court?

□ yes ☒no

If you answered yes, please provide the name of the court and the case number:

(16) If you are presenting a claim for time credit, have you exhausted your administrative remedies by presenting your claim to the time credit resolution system of the Texas Department of Criminal Justice? (This requirement applies to any final felony conviction, including state jail felonies)

□ yes □ no

If you answered yes, answer the following questions:

(A) What date did you present the claim? _____

(B) Did you receive a decision and, if yes, what was the date of the decision?

If you answered no, please explain why you have not submitted your claim:

(17) Beginning on page 6, state *concisely* every legal ground for your claim that you are being unlawfully restrained, and then briefly summarize the facts supporting each ground. You must present each ground on the form application and a brief summary of the facts. *If your grounds and brief summary of the facts have not been presented on the form application, the Court will not consider your grounds.*

If you have more than four grounds, use page 10 of the form, which you may copy as many times as needed to give you a separate page for each ground, with each ground numbered in sequence.

You may attach a memorandum of law to the form application if you want to present legal authorities, but the Court will *not* consider grounds for relief in a memorandum of law that were not stated on the form application. If you are challenging the validity of your conviction, please include a summary of the facts pertaining to your offense and trial in your memorandum.

GROUND ONE:
Statutory exception renders the cumulation order invalid and thus, applicant's sentence is void. Counsel was ineffective for not objecting or correcting the stacking order.

FACTS SUPPORTING GROUND ONE:
An improper cumulation order is a void sentence , and error may be raised at any time. Applicant puts forth that statutory exception enacted on September 1, 1997 , allowing for imposition of consecutive sentences for crimes arising out of the same criminal episode did not apply to allow imposition of consecutive sentences for offenses committed prior to effective date of statute, as in applicant's cause. Applicant contends the trial court erred by ordering his sentences to run consecutively rather than concurrently. If multiple offenses arising out of a single criminal episode are tried together, the court must order the sentences to run concurrently in accordance to Texas Penal Code 3.03. An exception was enacted by the legislature, section 3.03 (b), effective September 1,1997; the exception provides that the court may direct sentences for certain crimes to run consecutively or concurrently. The exception, however, is not applicable to offenses committed in advance of September 1,1997.

Applicant's primary complaint regarding cumulation order in his cause is that the indictment and judgments each recite offense dates of

GROUND: Error One Continued.

FACTS SUPPORTING GROUND:

November 1,1996 and June 9,1997, both prior to the exception in section 3.03 (b) allowing for cumulation, and that the pre-September 1,1997 date, renders the cumulation order invalid.

Applicant understands that the indictment dates are an approximation, but also recognizes that the state must prove and provide at least some evidence that the offenses occurred after the statutory exception enacted on September 1,1997. In applicant's case, no evidence, either physical or witness testimony leads one to believe any offenses ensued after June 1,1997. The witness testified under oath that the last time she was "with" applicant was "June of 1997." She does not speak of another date "with" applicant past June of 1997, therefore, the trial court had no discretion to cumulate sentences under 3.03 (b), when there was no evidence presented that the offenses took place on or after September 1,1997.

In this state of evidence, the statute mandates that the trial court apply the prior statute. The trial court thus erred by ordering that applicant's sentences run concurrently. The proper remedy for a void

WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT APPLICANT RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING.

GROUND:

Error One Continued

FACTS SUPPORTING GROUND:

cumulation order is to reform the judgment to delete the cumulation order. Applicant asks the court to reform the judgments to provide that the sentences be run concurrently. (See Attached Memorandum of Law).

WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT APPLICANT RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING.

GROUND TWO:

FACTS SUPPORTING GROUND TWO:

GROUND THREE:

FACTS SUPPORTING GROUND THREE:

GROUND FOUR:

FACTS SUPPORTING GROUND FOUR:

VERIFICATION

(Complete EITHER the "oath before a notary public" OR the "inmate's declaration.")

OATH BEFORE NOTARY PUBLIC

STATE OF TEXAS, COUNTY OF _____.

_____, BEING FIRST DULY SWORN, UNDER OATH, SAYS:

THAT HE/SHE IS THE APPLICANT IN THIS ACTION AND KNOWS THE CONTENT OF THE ABOVE APPLICATION AND ACCORDING TO APPLICANT'S BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE.

_____

Signature of Applicant

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____ DAY OF _____.

_____

Signature of Notary Public

INMATE'S DECLARATION

I, Robert Joseph Schmitt #1061867, BEING PRESENTLY INCARCERATED IN Potter County , Texas, DECLARE UNDER PENALTY OF PERJURY THAT, ACCORDING TO MY BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE AND CORRECT.

SIGNED ON August 21, 2009.

_____

Signature of Applicant

_____
Signature of Attorney

Attorney Name: _____

SBOT Number: _____

Address: _____

_____

_____

Telephone: _____

Continued from Page 3,

14 (C). Although applicant has previously filed a post-conviction habeas corpus application under the cause number, (12-01-00306-CR), this instant application is not a challenge to the integrity of the conviction, rather, it is a challenge to the legality of the sentence the trial court imposed under the numbered cause, (296-81160-00), is legally void because the sexual assault offense for which applicant now stands convicted of under the above numbered cause, occurred on November 1, 1996 (count one), and June 9, 1997 (count two), and punishment for said offense is governed by the Texas Penal Code section 3.03 effective date, September 1, 1995, and not by the amended version of the Texas Penal Code 3.03 (b), which took effect on September 1, 1997. This being a structural error, applicant submits that subsection 14 (a, b) of 11.07 is not applicable to this instant application. As a structural error, in sentencing, 'legally void sentences' can be challenged at any time.

Applicant understands that habeas corpus is an extraordinary remedy and, consequently, is available when there is no other adequate remedy at law. As a general rule, a post-conviction writ of habeas corpus is reserved for those instances in which there was a jurisdictional defect in trial court which renders judgment void or for denials of fundamental or constitutional rights. Ex Parte, 883 S.W. 2d 213 (Tex. Crim. App. 1994); see also Holmes v Third Court of Appeals, 885 S.W. 2d 389, 397 (Tex. Crim. App. 1994). Habeas relief is underscored by elements of fairness and equity.

Previously litigated issues are subject to collateral attack where courts prior judgment is subsequently rendered void or where a court decides to apply relief retroactively after a subsequent change in law. Previous litigation of an issue does not necessarily bar its reconsideration on habeas corpus.

A second writ of habeas corpus will not be considered to be abuse if applicant can show cause for raising new point after one writ of habeas corpus has already been filed. A good cause exist for hearing second writ of habeas corpus where failure of defense counsel to object to illegal sentence at trial, applicant should be allowed to raise issue in his subsequent writ of habcas corpus. Ex Parte Barber, 879 S.W. 2d 889 (Tx. Crim. App. 1994). Applicant presents compelling circumstances for the court to entertain applicant's second writ of habeas corpus where first writ fails to raise an issue that, through no fault of applicant's own, is not adjudicated.

While applicant's cause clearly establishes good cause, there are also compelling circumstances that absolve applicant from blame for delay in reaching point raised in applicant's current pro-se writ.

In this application for writ of habeas corpus filed pursuant to Texas Code of Criminal Procedure Ann. Art. 11.07, applicant seeks to have the judgment reformed so that all sentences run concurrently.

NO:_____

IN RE: ROBERT JOSEPH SCHMITT

FROM THE 296TH DISTRICT COURT

OF COLLIN COUNTY, TEXAS

MEMORANDUM OF LAW

Appellant's attorney provided ineffective assistance of counsel by not being knowledgeable in criminal law as to the courts discretion to cumulate sentences. Appellant's attorney was ineffective for not recognizing, objecting to, or correcting an illegal stacking order, which is in essence, a void sentence.

Appellant puts forward that statutory exception allowing for imposition of consecutive sentences for crimes arising out of the same criminal episode did not apply in his cause to allow imposition of consecutive sentences for offenses committed prior to effective date of statute.

Appellant was charged with two offenses of sexual assault, both involving the same victim. The jury convicted appellant on both counts and set punishment at twenty years confinement and a $10,000 fine on each count. At sentencing, the trial court visiting judge Richard Mays ordered that the sentences be served consecutively. Appellant does not attack the sufficiency of the evidence to support his conviction

Appellant asserts that statutory exception to sentencing provision allowing for imposition of consecutive sentences for crimes arising out of the same criminal episode did not apply in his cause to allow imposition of two twenty year sentences for sexual assault to run consecutively, where offenses occurred prior to statutes effective date. V.T.C.A., Penal Code § 3.03 (Vernon Supp. 2002); see also, Yebio v State, 87 S.W. 3d 193 (Tex. App. – Texarkana 2002). Appellant holds first that the trial erred by ordering his sentences to run consecutively rather than concurrently. If multiple offenses arising out of a single criminal episode are tried together, the court must order the sentences to run concurrently. Tex. Pen. Code Ann. § 3.03 (Vernon Supp. 2003); see also, Hendrix v State, 150 S.W. 3d 839 (Tex. App. – Houston (14th Dist.) 2004). In September 1, 1997, the Texas Legislature carved out several exceptions to this general rule, Tex. Pen. Code Ann., § 3.30 (b). However, these exceptions apply only to offenses committed on or after the effective date of September 1, 1997:

a) The change in law made by this Act applies only to an offense committed on or after the effective date [September 1, 1997] of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

b) An offense committed before the effective date of the Act is covered by the law in effect when the offense was committed and the former law is continued in effect for that purpose.

Act of June 13, 1997, 75th Leg., R.S., 667, § 7, 1997. Tex. Gen. Laws 2250, 2250-2253; see also, Hendrix v State, 150 S.W. 3d 852 (Tex. App. – Houston (14th Dist.) 2004); and, Malone v State, 163 S.W. 3d 785 (Tex. App. – Texarkana 2005). These

exceptions were enacted in 1997 when the legislature amended Section 3.03 of the Texas Penal Code and were made specifically non-retroactive. Owens II v State, 96 S.W. 3d 671 (Tex. App. – Austin 2003).

Appellant argues that the pre-September 1, 1997 offense date recited on the indictment and judgments, in his cause, bars cumulation of the two sentences. Both instruments document that the offenses occurred on or about November 1, 1996 and June 9, 1997. In support of appellant's assertion, Nicholas v State, 56 S.W. 3d 76 (Tex. App. – Houston (14th Dist) 2001), states that prior to 1997, the legislature required multiple convictions arising out of the "same criminal episode" and "prosecuted in a single action" as in appellant's cause, to run concurrently. See also, Tex. Pen. Code Ann. § 3.03 (Vernon 1994).

The trial courts general authority under Texas Code of Crim. Proc., art. 42.08 to order consecutive sentences is statutorily limited by Texas Penal Code Section 3.03. See LaPorte v State, 840 S.W. 2d 412, 415 (Tex. Crim. App. 1992); see also, Tex. Code Crim. Proc. Ann. Art. 42.08 (a) (Vernon Supp. 2003); Baker v State, 107 S.W. 3d 672 (Tex. App. – San Antonio 2003). Section 3.03 of the Penal code provides as follow: "When the accused is found guilty of more than one offense arising out of the same criminal episode and prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except provided by subsection (b), the sentences shall run concurrently." Tex. Pen. Code Ann. § 3.03 (a) (Vernon Supp 2002). None of the exceptions listed in subsection (b) apply in appellant's cause as the offenses occurred prior to the Legislative Act allowing for the imposition of cumulative sentences for such offenses.

The Penal Code defines "same criminal episode" as "the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances: (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan, or (2) the offenses are the repeated commission of the same or similar offenses. "Id § 3.01 (Vernon 1994). The Texas Legislature intended a "single criminal episode" to refer to a single trial or plea proceeding. LaPorte v State, 840 S.W. 2d at 415; Tex. Code of Crim. Proc. art. 42.08 (a); Tex. Penal Code Ann § 303 (a). As such, a defendant is prosecuted in a "single criminal action" when allegations and evidence of more than one offense arising out of the same criminal episode are presented in a single trial. LaPorte v State, 840 S.W. 2d at 415. Appellant, unmistakably was tried in a single trial for both offenses at the same time; thus the "single criminal action" requirement of Section 3.03 is satisfied.

Under Section 3.03, the dates that appellant committed the offenses determines whether the sentences are to be run consecutively or concurrently. If the evidence shows that appellant committed the offenses before the enactment of the September 1, 1997 Act, the sentences for these offenses may not be cumulated and the trial court acted outside of its authority to cumulate the sentences. In appellant's cause, each count states an offense date prior to the exception in Section 3.03 allowing for cumulation, and that the pre-September 1, 1997 date renders the cumulation order invalid and thus, the sentence void. Because "[a] an improper cumulation order is, in essence, a void sentence, and such error cannot be waived,"

we examine whether it was error for the trial court to cumulate these two sentences. See LaPorte v State, 840 S.W. 2d 412, 415 (Tex. Crim. App. 1992); Nicholas v State, 56 S.W. 3d 760, 764 (Tex. App. – Houston (14th Dist) 2001); see also, Levy v State, 818 S.W. 2d 801, 802 (Tex. Crim. App. 1991); see also Ex Parte Rich, 194 S.W. 3d 508 (Tex. Crim. App. 2006), (holding sentences not authorized by law are void and that a defect which renders a sentence void may be raised at any time). Hendrix v State, 150 S.W. 3d 852 (Tex. App. – Houston (14th Dist.) 2004). The trial court therefore in appellant's cause, abused its discretion to cumulate the two sentences under section 3.03 (b), as the prosecution witnesses, nor the State presented any evidence that the offenses occurred or continued to occur on or after September 1, 1997.

Appellant understands that typically, the date alleged in the indictment is an approximation that allows the State to prosecute a defendant for acts occurring within the limitations period. See Sledge v State, 953 S.W. 2d 253, 256 (Tex. Crim. App. 1997). The "on or about" language of an indictment allows the state to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitations period. "Where an indictment alleges that some relevant event transpired 'on or about' a particular date, the accused is put on notice to prepare for proof that the event happened at any time within the statutory period of limitations. Thomas v State, 753 S.W. 2d 688, 693 (Tex. Crim. App. 1988). The State in appellant's cause, failed to present any proof, physical evidence or through oral witness testimony, that any offenses took place on or after September 1, 1997.

The victim's testimony was very clear delineating specific dates she called "episodes," as to when the assaults came to pass and none of the dates testified under oath by the victim, were to have taken place past the June 9, 1997 date on appellant's indictment. The victim testified under oath that she had kept a "very detailed" diary of "each episode" she had encountered with appellant. In this written diary, the victim refers to "four specific episodes" with somebody by the name of "A," which was later erroneously attributed as a pseudonym she contrived to describe appellant. It is consequentially remarkable to acknowledge that all of the documented "four episodes" with appellant by her own written confession occurred on or prior to June 9, 1997. That was the last date she documented in her diary as being "with" appellant, along with her oral testimony under oath confirmed, that the last time she was "with" appellant was "June of 1997."

Throughout her testimony on the witness stand, led by the district attorney, she was prompted and cued to testify that she and appellant engaged in sexual behavior over "50 times," which unmistakably controverts what she herself had substantiated in her own "very detailed" personal diary, and presents an unrealistic and perjured perspective regarding her reality of the truth. This is the result of the states influence and is a strained and unnatural construction of the victim's testimony. The State failed to present any reasonable evidence and equally failed to prove beyond a reasonable doubt that any further offenses transpired after June 9, 1997, or any date prior to the indictment through physical evidence or witness testimony. Even though the state is not bound by the specific date that the offense, if any, is alleged in the indictment to have been committed, the State must provide

proof beyond a reasonable doubt, or at least, some evidence that the offense, if any, was committed at any time within the period of limitations. Hendrix v State, 150 S.W. 3d 853 (Tex. App. – Houston (14th Dist.) 2004). The State failed to prove any offense occurred past June 9, 1997 with any substantial proof, or even some evidence.

The trial court had no discretion to cumulate sentences under Section 3.03 (b), when there is no evidence presented at trial that offenses occurred on or after September 1, 1997. See Yebio v State, 87 S.W. 3d 193, 195 (Tex. App. – Texarkana 2002); also, Owens II v State, 96 S.W. 3d 668 (Tex App. – Austin 2003).

Background concerning appellant's cause includes that the victim did attend outpatient counseling with appellant. Appellant's case notes and Dr. Michael Wolf's expert witness corroborates, (Dr. Wolf was out of town at the time of appellant's trial and appellant was denied an extension of time to allow Dr. Wolf to testify, but he did submit a notarized affidavit filed with appellant's direct appeal) that the victim was diagnosed with Dysthymia and Borderline Personality Disorder. She did attend weekly counseling sessions from the Fall of 1996 through early Spring of 1998. She was experiencing significant depression and was compulsively divorced from reality, living from one emotional disaster to the next. She displayed a pervasive pattern of instability in interpersonal relationship, self-image, affects, and marked impulsivity in a variety of contexts as indicated by the following:

1) frantic efforts to avoid real or imagined abandonment
2) pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation

3) identity disturbance, persistent unstable self-image or sense of self

4) self damaging impulsivity in these areas: substance abuse, promiscuous sexual activity, binge eating

5) recurrent suicidal ideation, gestures, threats, self-mutilation, self cutting

6) affective instability, episodic dysphoria, anxiety, depression

7) chronic feelings of emptiness.

The victim made marked progress in the 16 months of the counseling process. She attended weekly individual counseling sessions, often times her father would be asked to participate in the sessions due to the level of stress incorporated in their relationship. Victim was discharged in early 1998, following three months of nearly exclusive family therapy meeting every other week. Appellant did not see or have any further contact with victim following her discharge, but did have sporadic telephone conversations with her father to address situational issues and stressors. It was three years following victims discharge from counseling with appellant that she came forth with allegations of sexual assault, all based on her exclusive report.

Based on the victims own personal testimony, it undeniably reveals that none of the "episodes occurred past June 9, 1997. The victim refers to "June of 1997," but not once bears witness or concedes to any further contact with appellant beyond that date offering no oral testimony or physical evidence that any offenses occurred after June 9, 1997, well before the enactment of statutory exceptions of September 1, 1997. Therefore, the trial court erred in ordering appellant's sentences to run consecutively. Appellant, according to the law in effect at the time of his conviction, should have been sentenced accordingly under, Act. 1995, 74th Leg., 596 § 1.01 Eff.

September 1, 1995, which precludes the stacking of appellant's sentences. In this state of evidence, the statute mandates that the trial court apply the prior statute. Yebio v State, 87 S.W. 3d 196 (Tex. App. – Texarkana 2002), also Guidry v State, 883 S.W. 2d 275 (Court of App. – Corpus Christi 1994).

The indictment alleged that the offenses took place on or about November 1, 1996 and June 9, 1997. At the trial, the state put forward, nor presented any evidence of frequent or multiple episodes. There is no evidence and none was presented at trial, or witness corroboration that the alleged offenses continued unabated and nothing entered into evidence that would lead one to believe that any offense occurred following the enactment of the amended Section 3.03 of the Texas Penal Code authorizing the trial court to impose consecutive sentences. As a practical matter, in sentencing matters, an abuse of discretion generally will be found only if the trial court imposes consecutive sentences where the law requires concurrent sentences, as in appellant's cause, sentences where the court imposes concurrent sentences but the law requires consecutive ones, or where the court otherwise fails to observe the statutory requirements pertaining to sentencing. Nicholas v. State, 56 S.W. 3d 760 (Tex. App. – Houston (14th Dist) 2001). Unless the statutory subsection providing that a court has discretion to stack sentences where a defendant is found guilty of multiple offenses, the sentences are statutorily required to run concurrently, if they arise out of the same criminal episode and are prosecuted in a single criminal prosecution. Nicholas v State, 56 S.W. 3d 760 (Tex. App. – Houston (14th Dist) 2001); see also, V.T.CA., Penal Code §§ 3.03 (a) (b).

A trial court abuses its discretion when it applies an erroneous legal standard or when no reasonable view of the record supports the trial courts conclusion under the correct law and facts viewed in the light most favorable to its legal conclusion. Dubose v State, 915 S.W. 2d 493, 497-498 (Tex. Crim. App. 1996). The proper remedy for a void sentencing cumulation order is to reform the judgment to delete the cumulation order. Beedy v State, 194 S.W. 3d 595, 603 (Tex. App. – Houston (1st Dist) 2006); see also, Robbins v State, 914 S.W. 2d 582 (Tex. Crim. App. 1996); also, Baker v State, 107 S.W. 3d 673 (Tex. App – San Antonio 2003); also Ex Parte Sims, 868 S.W. 2d 803 (Tex. Crim. App. 1993); also, Guidry v State, 909 S.W. 2d 585 (Tex. App. – Corpus Christi 1995).

In appellant's case, there is no evidence that suggests the trial courts exercise of discretion under penal code 3.03 (b), therefore, the trial court had no authority to order consecutive sentences. Appellant asks the court to reform the judgment to provide that the cumulation order is deleted and the sentences run concurrently.

CITES INDEX

1) Baker v State, 107 S.W. 3d 672 (Tex. App. – San Antonio 2003)
2) Beedy v State, 194 S.W. 3d 595, 603 (Tex. App. – Houston (lst Dist) 2006)
3) Ex Parte Sims, 868 S.W. 2d 803 (Tex. Crim. App. 1993)
4) Guidry v State, 883 S.W. 2d 275 (Court of App. – Corpus Christi 1994)
5) Guidry v State 909 S.W. 2d 585 (Tex. App. – Corpus Christi 1995)
6) Hendrix v State, 150 S.W. 839 (Tex. App. – Houston (14th Dist) 2004)
7) LaPorte v State, 840 S.W. 2d 412, 415 (Tex. Crim. App. 1992)
8) Levy v. State, 818 S.W. 2d 801, 802 (Tex. Crim. App. 1991)
9) Malone v State, 163 S.W. 3d 785 (Tex. App. – Texarkana 2005)
10) Nicholas v State, 56 S.W. 3d 76 (Tex. App. – Houston (14th Dist) 2001)
11) Owens II v State, 96 S.W. 3d 671 (Tex. App. – Austin 2003)
12) Robbins v State, 914 S.W. 2d 582 (Tex. Crim. App. 1996)
13) Sledge v State, 953 S.W. 2d 253, 256 (Tex. Crim. App. 1997)
14) Thomas v State, 753 S.W. 2d 688, 693 (Tex. Crim. App. 1988)
15) Yebio v State, 87 S.W. 3d 193 (Tex. App. – Texarkana 2002)

LEGISLATIVE ACTS

1) Act of June 13, 1997, 75th Leg., R.S., § 7, 1997. Tex. Gen. Laws 2250, 2252-53

CODE OF CRIMINAL PROCEDURE

1) Article 42.08

TEXAS PENAL CODE

1) Section 3.03 (1994, 2003)
2) Section 3.03 (a)
3) Section 3.03 (b)

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J. M. (A) BRAGG $100,000.00
2512 BOLL STREET
DALLAS, TEXAS 75204

CRIMINAL DOCKET

NUMBER OF CASE	NAMES OF PARTIES	ATTORNEYS	OFFENSE
296-81160-00	THE STATE OF TEXAS	DISTRICT ATTORNEY	Sexual Assault F2
DATE OF FILING: MONTH 09 DAY 27 YEAR 00	vs.		
	SCHMITT, ROBERT JOSEPH	J. MARK BRAGG Wayne Ames	DEFENDANT

DATE OF ORDERS MONTH	DAY	YEAR	ORDERS OF COURT	INFORMATION OR INDICTMENT
9	28	00	BOND SET AT $ 100,000 ~~bc~~ bc	
9	28	00	CASE SET FOR FIRST APPEARANCE ON OCTOBER 18, 2000 AT 9:00 AM	
10	18	00	PASS TO 11-15-00 FOR ARRNO/TP	
11	15	00	PASS TO 12-19-00 FOR ARRNO/TP	
12	19	00	PASS TO 12-27-00 FOR ARRNO/TP	
12	27	00	Pass to 2-1-01 for Arr.	
2	1	01	PASS TO 6-18-01 FOR JURY TRIAL/TP	
4	9	01	Def present w/counsel. State present. Evidence. Bond found insufficient. New Bond $150,000.00 Conditions on E/L/M & prohibition of contact w/any witness or alleged victim of Case. or being within 1000 feet of any witness or the alleged victim. BC Cato	
4	11	01	Order granting M + AC's BC Cato	
5	3	01	Def is ordered as further condition of his bond to be physically present in his residence @ 1601 Dorchester Dr. #105, Plano, Tx. for a period of 1 hour between the hours of 1AM + 11AM and	

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DATE OF ORDERS Schmitth 296-81160-00

MO	DAY	YR.	
5	9	01	Violation of any condition of bond requires instantly arrest of Defendant with no bond to be set except by Judge of the 296th District Court.
5	25	01	MOTION FOR CONT. ; PRE-TRIAL SET 6-5-01 @ 9:00/TP
6	5	01	Hearing on M for Cont. granted Reset to Aug 6, 2001 9 AM. Formal discovery waived.
7	2	01	MTN TO COMPEL ; MTN TO MODIFY ; REDUCE BOND 7-15-01 @ 9:00
7	3	01	D's SECOND MTN FOR DISCOVERY 7-19-01 9:00
7	10	01	HRG ON DISCOVERY ; MTN TO MODIFY BOND RESET TO 7-20-01 @ 9:00
7	20	01	Mot — not heard at request of movant.
7	23	01	MTN FOR CONT., MTN FOR PSYCH EVAL, MTN FOR NOTICE OF INTENT TO CALL CORROBORATION WITNESSES SET 7-30-01 @ 9:00/TP MTN TO SUPPRESS 8-6-01 @ 9:00/TP
7	30	01	Hearing on M for Cont. Evidence. M for Cont denied.
8	6	01	Defendant's Mot for continuance heard — Motion for continuance denied. Case called for trial — Both sides announced ready — Jury selection — Jury empaneled & Sworn Defendant arraigned — Plea of Not Guilty —
8	7	01	Indictment presented to Jury — Plea of Not Guilty — Evidence presented —

See Docket Sheet #2

CRIMINAL DOCKET #2

NUMBER OF CASE	NAMES OF PARTIES	ATTORNEYS	OFFENSE
296-81160-00	THE STATE OF TEXAS	DISTRICT ATTORNEY	Sexual Assault F2
DATE OF FILING: MONTH 09 DAY 27 YEAR 00	vs.		
	SCHMITT, ROBERT JOSEPH	~~KEITH SORE~~ Mark Bragg ~~1413 HARROUN~~ Wayne Ames DEFENDANT ~~MCKINNEY, TX 75069 (972) 529-1115~~	

DATE OF ORDERS MONTH	DAY	YEAR	ORDERS OF COURT	INFORMATION OR INDICTMENT
8	7	01	Defendant leaves courtroom and has absented himself from the Courthouse. and ~~[redacted]~~ his car is no longer in parking lot. Bond is forfeited New Bond set at $1,000,000.00 Trial continues in absence of defendant. Evidence continues — State Rests —	
8	8	01	Defendant taken into Custody last night at about 1 AM — Brought to Court by authorities this date at 10:15 AM Jury brought into Court — Defense rests — & both sides close — Charge read to jury — Arguments — Jury deliberations Jury Verdict — Defendant found guilty in Counts I and II of sexual assault.	
CT				

Schmitt 296-81160-00

DATE OF ORDERS

MO	DAY	YR.	
8	8	01	8/8/01 BP set asside 15
8	9	01	Testimony on punishment — Both sides close Charge read to jury — Arguments — Jury deliberations — Jury verdict — Jury fixes punishment on Count I at Twenty years confinement in the TDTDCJ and a $10,000.00 fine is imposed. Jury fixes punishment on Count II at Twenty years confinement in the TDTDCJ and a $10,000. is imposed Defendant sentenced. The sentence in Count I begins this date with all of defendant's backtime credited. The judgment and sentence in Count II of this indictment will begin when the judgment and sentence in Count I hereof is satisfied or otherwise discharged in accordance with law. So ordered.
8	21	01	M for Arrest of Jdgmt. denied. Order's B Cator
8	21	01	Notice of Appeal filed by defendant. BC
9	4	01	Motion for New Trial filed by defendant. BC
9	12	01	M for NT overruled + denied. B Cator
9	21	01	J & S's B Cator
10	22	01	Chambers Conf. w/ Wayne Ames wherein he advised he is representing Def. pro bono on appeal, but is pursuing free record + transcript, which is so ordered, relying upon Def's aff. of indigency. B Cator Order's B Cator

CRIMINAL DOCKET

NUMBER OF CASE	NAMES OF PARTIES	ATTORNEYS	OFFENSE
296-81160-00	THE STATE OF TEXAS	DISTRICT ATTORNEY	Sexual Assault F2
DATE OF FILING: MONTH 09 DAY 27 YEAR 00	vs. SCHMITT, ROBERT JOSEPH		DEFENDANT

DATE OF ORDERS MONTH	DAY	YEAR	ORDERS OF COURT	INFORMATION OR INDICTMENT
11	30	01	No hearing will be set. Bills of exception not timely filed or presented to Court. No extension sought or granted by appellate Court. B Elton Request for Hearing presented to Court on 11-28-09. B Elton	
12	11	03	Appeal Mandate: Affirmed. (2)	

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DEFENDANT SCHMITT, ROBERT JOSEPH CHARGE S/A/C F2

ADDRESS 3101 TOWNBLUFF #223, PLANO, TX CAUSE# 296-81160-00

DESCRIPTION 6/15/61, WM, 5'10, 180, BRO/BRO AGENCY/# PLANO 00-25949

ARREST INFORMATION 4/6/00 ON 2000-P-216 MCCARTHY

C/C N/A

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS: The Grand Jury of Collin County, State of Texas, duly organized at the JULY Term, A.D., 2000 of the 296 th District Court of said county, in said court at said term, do present that

ROBERT JOSEPH SCHMITT HEREINAFTER CALLED DEFENDANT

on or about the 9TH day of JUNE in the year of our Lord One Thousand Nine Hundred NINETY-SEVEN , in said county and State, did then and there

COUNT I

intentionally and knowingly cause the penetration of the female sexual organ of Lindsay Huffhines, a child then younger than seventeen (17) years of age, and not the spouse of the defendant, by means of defendant's male sexual organ;

intentionally and knowingly cause the penetration of the female sexual organ of Lindsay Huffhines, a child then younger than seventeen (17) years of age, and not the spouse of the defendant, by means of defendant's finger;

intentionally and knowingly cause contact with the female sexual organ of Lindsay Huffhines, a child then younger than seventeen (17) years of age, and not the spouse of the defendant, by means of defendant's male sexual organ;

intentionally and knowingly cause contact with the female sexual organ of Lindsay Huffhines, a child then younger than seventeen (17) years of age, and not the spouse of the defendant, by means of defendant's mouth;

intentionally and knowingly cause the contact of the mouth of Lindsay Huffhines, a child then younger than seventeen (17) years of age, and not the spouse of the defendant, by means of defendant's male sexual organ;

intentionally and knowingly, with the intent to arouse and gratify the sexual desire of said defendant, engage in sexual contact by touching the breast of Lindsay Huffhines, a child younger than seventeen (17) years of age and not the spouse of the defendant, by means of defendant's hand;

intentionally and knowingly, with the intent to arouse and gratify the sexual desire of said defendant, engage in sexual contact by touching the breast of Lindsay Huffhines, a child younger than seventeen (17) years of age and not the spouse of the defendant, by means of defendant's mouth;

COUNT II

and it is further presented in and to said court that the said defendant on or about the 1st day of November, A.D., 1996, in Collin County, Texas, did then and there

intentionally and knowingly cause the penetration of the female sexual organ of Lindsay Huffhines, a child then younger than seventeen (17) years of age, and not the spouse of the defendant, by means of defendant's male sexual organ;

intentionally and knowingly cause the penetration of the female sexual organ of Lindsay Huffhines, a child then younger than seventeen (17) years of age, and not the spouse of the defendant, by means of defendant's hand;

intentionally and knowingly cause contact with the female sexual organ of Lindsay Huffhines, a child then younger than seventeen (17) years of age, and not the spouse of the defendant, by means of defendant's male sexual organ;

intentionally and knowingly, with the intent to arouse and gratify the sexual desire of said defendant, engage in sexual contact by touching part of the genitals of Lindsay Huffhines, a child younger than seventeen (17) years of age and not the spouse of the defendant, by means of defendant's hand;

against the peace and dignity of the State.

Betty Lucas Wolff
Foreman of the Grand Jury

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COLLIN COUNTY, TEXAS
BY [illegible] DEPUTY

NO. 296-81160-00 - Count I

THE STATE OF TEXAS	§	IN THE 296TH JUDICIAL
VS.	§	DISTRICT COURT OF
ROBERT JOSEPH SCHMITT	§	COLLIN COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY - PUNISHMENT FIXED BY COURT OR JURY - NO COMMUNITY SUPERVISION GRANTED

Judge Presiding: **Richard Mays**	Date of Judgment: **August 9, 2001**
Attorney for State: **Danette Alvarado/Lisa Milasky King**	Attorney for Defendant: **J. Mark Bragg/Wayne Ames**
Offense Convicted of: **Sexual Assault of a Child**	Date Offense Committed: **June 9, 1997**
Degree: **Felony 2nd**	
Charging Instrument: **Indictment**	Plea: **Not Guilty**
Jury Verdict: **Guilty**	Presiding Juror: **William L. Peoples**
Plea to Enhancement Paragraphs(s): **Not Applicable**	Findings on Enhancement: **Not Applicable**
Findings on Use of Deadly Weapon: **None**	
Punishment Assessed by: **Jury**	
Date Sentence Imposed: **August 9, 2001**	Costs: $469.71 **as a term and condition of parole**
Punishment and Place of Confinement: **$10,000 fine and twenty (20) years** confinement in the Texas Department of Criminal Justice, Institutional Division	Date to Commence: **August 9, 2001**
Time Credited: **41 days**	Total Amount of Restitution/Reparation: **-0- as a term and condition of parole**
Concurrent Unless Otherwise Specified: **Sentence of twenty years confinement in the Texas Department of Criminal Justice, Institutional Division in Cause No. 296-81160-00 – Count II to run consecutive with said sentence**	Restitution to Be Paid To: Name: **Not Applicable** Address:

ON THIS DAY, set forth above, this case was called for trial. The State of Texas appeared by the above-named attorney, and the defendant appeared in person in open court with the above-named counsel for the defendant; or, as shown above that the defendant is not represented by counsel, the

defendant upon examination by the court, knowingly, intelligently, and voluntarily waived the right to representation by counsel; and the defendant having been duly arraigned and it appearing to the court that the defendant was mentally competent, and having pleaded as shown above to the indictment herein, both parties announced ready for trial. Thereupon, a jury, that is, the above-named presiding juror and eleven others, were duly selected, impaneled, and sworn, who, having heard the indictment read and the defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer to consider the verdict, and afterward, were brought into court by the proper officer, the defendant and counsel for the defendant, if one is noted above, being present, and returned in open court the verdict set forth above, which was received by the court and is now entered upon the minutes of the court as shown above.

THEREAFTER, the defendant elected to have punishment assessed by the court or jury, as shown above. When shown above that the indictment contains one or more enhancement paragraphs which were not waived by the State of Texas, and allege the defendant to have been convicted previously of any felony or other offenses which are used for the purpose of enhancement of punishment, the court asked the defendant if such allegations were true or not; and the defendant answered as shown above. When shown above that the defendant elected to have the jury assess punishment, the same jury was called back into open court and in the presence of the defendant and the attorney for the defense, if one is shown above, heard evidence relative to the question of punishment; and having been thereafter duly charged by the court, they retired with proper officer to consider such question. After having deliberated, the same jury returned in court with the proper officer the verdict shown above punishment. When shown above that the defendant elected to have punishment fixed by the court, in due form of law and in the presence of the defendant and the attorney for the defendant, if one is shown above, further evidence was heard by the court relative to the question of punishment; and the court fixed the punishment of the defendant as shown above.

THEREUPON, the defendant was asked by the court if the said defendant had anything to say in law why sentence should not be pronounced against the defendant; and the defendant answered nothing in bar thereof. It appeared to the court that the defendant is mentally competent and understanding of the English language, either by the defendant's own hearing and knowledge or through a proper translator, the court proceeded to pronounce sentence against the defendant.

IT IS THEREFORE CONSIDERED AND ORDERED by the court, in the presence of the defendant, that the said judgment be, and the same is hereby in all things approved and confirmed, that the defendant is adjudged guilty of the offense set forth above, said offense having been committed on the date set forth above, as found by the verdict of the jury as set forth above, and that the said defendant be punished in accordance with the jury's verdict or the court's finding as shown above, and that the defendant is sentenced to a term of imprisonment or fine or both, as set forth above; and that said defendant be delivered by the Sheriff of Collin County to the Director of the Texas Department of Criminal Justice, Institutional Division or other person legally authorized to receive such convict for the particular punishment assessed herein.

THE COURT FURTHER FINDS, if shown above, that the defendant used or exhibited a deadly weapon during the commission of the offense shown above, or during immediate flight therefrom.

IT IS FURTHER ORDERED that the State of Texas do have and recover of the defendant all costs in this proceeding expended which costs are set forth above, for which execution may issue as necessary.

FURTHER, AS TO RESTITUTION, if it be shown above by an amount in dollars and cents that the defendant should pay one or more persons restitution or reparation for the commission of the above-named offense, the court FURTHER FINDS, after considering all of the evidence in this case from both the guilt and punishment phase, that said amount of restitution or reparation or both, as shown above is due and owing by the defendant.

IT IS FURTHER ORDERED that the judgment is entered as of the date of judgment shown above;; and credit is given for time defendant has already served, if any, as shown above, for the above offense.

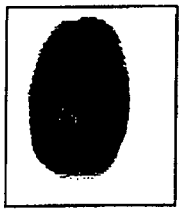
FURTHER, the defendant herein having been convicted in two counts, and punishment assessed in each count by confinement in an institution operated by the Texas Department of Criminal Justice, Institutional Division, judgment and sentence in the second conviction herein shall begin when the judgment and sentence has ceased to operate in the preceding conviction, which is styled "The State of Texas vs. ROBERT JOSEPH SCHMITT," Cause No. 296-81160-00 – Count I, in the 296th Judicial District Court of Collin County, Texas, wherein the defendant was charged with the offense of Sexual Assault of a Child, alleged to have been committed on June 9, 1997, and wherein the defendant was found guilty by the jury of Sexual Assault of a Child as charged therein, and punishment was assessed by the jury of twenty (20) years confinement in the Texas Department of Criminal Justice, Institutional Division, and a fine of $10,000.00, with sentence to commence on August 9, 2001.

IT IS FURTHER ORDERED that the defendant shall be confined for the above-named term, if such a term of confinement be shown above, in accordance with the provisions of law governing such punishment; and execution may issue, as necessary, and the defendant is remanded to jail until the Sheriff of Collin County can obey the direction of this judgment.

Fingerprint from

Rt Index

finger of Defendant:



Betty Cotter

PRESIDING JUDGE

9-21-01

DATE SIGNED

NOTICE OF APPEAL

NO. 296-81160-00 - Count II

THE STATE OF TEXAS	§	IN THE 296TH JUDICIAL
VS.	§	DISTRICT COURT OF
ROBERT JOSEPH SCHMITT	§	COLLIN COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY - PUNISHMENT FIXED BY COURT OR JURY - NO COMMUNITY SUPERVISION GRANTED

Judge Presiding: **Richard Mays**	Date of Judgment: **August 9, 2001**
Attorney for State: **Danette Alvarado/Lisa Milasky King**	Attorney for Defendant: **J. Mark Bragg/Wayne Ames**
Offense Convicted of: **Sexual Assault of a Child**	Date Offense Committed: **November 1, 1996**
Degree: **Felony 2nd**	
Charging Instrument: **Indictment**	Plea: **Not Guilty**
Jury Verdict: **Guilty**	Presiding Juror: **William L. Peoples**
Plea to Enhancement Paragraphs(s): **Not Applicable**	Findings on Enhancement: **Not Applicable**
Findings on Use of Deadly Weapon: **None**	
Punishment Assessed by: **Jury**	
Date Sentence Imposed: **August 9, 2001**	Costs: **-0- as a term and condition of parole**
Punishment and Place of Confinement: **$10,000 fine and twenty (20) years** confinement in the Texas Department of Criminal Justice, Institutional Division	Date to Commence: **August 9, 2001**
Time Credited: **41 days**	Total Amount of Restitution/Reparation: **-0- as a term and condition of parole**
Concurrent Unless Otherwise Specified: **Sentence to run consecutively when twenty year sentence in Cause No. 296-81160-00 - Count I ceases to operate**	Restitution to Be Paid To: Name: Not Applicable Address:

ON THIS DAY, set forth above, this case was called for trial. The State of Texas appeared by the above-named attorney, and the defendant appeared in person in open court with the above-named counsel for the defendant; or, as shown above that the defendant is not represented by counsel, the defendant upon examination by the court, knowingly, intelligently, and voluntarily waived the right to

representation by counsel; and the defendant having been duly arraigned and it appearing to the court that the defendant was mentally competent, and having pleaded as shown above to the indictment herein, both parties announced ready for trial. Thereupon, a jury, that is, the above-named presiding juror and eleven others, were duly selected, impaneled, and sworn, who, having heard the indictment read and the defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer to consider the verdict, and afterward, were brought into court by the proper officer, the defendant and counsel for the defendant, if one is noted above, being present, and returned in open court the verdict set forth above, which was received by the court and is now entered upon the minutes of the court as shown above.

THEREAFTER, the defendant elected to have punishment assessed by the court or jury, as shown above. When shown above that the indictment contains one or more enhancement paragraphs which were not waived by the State of Texas, and allege the defendant to have been convicted previously of any felony or other offenses which are used for the purpose of enhancement of punishment, the court asked the defendant if such allegations were true or not; and the defendant answered as shown above. When shown above that the defendant elected to have the jury assess punishment, the same jury was called back into open court and in the presence of the defendant and the attorney for the defense, if one is shown above, heard evidence relative to the question of punishment; and having been thereafter duly charged by the court, they retired with proper officer to consider such question. After having deliberated, the same jury returned in court with the proper officer the verdict shown above punishment. When shown above that the defendant elected to have punishment fixed by the court, in due form of law and in the presence of the defendant and the attorney for the defendant, if one is shown above, further evidence was heard by the court relative to the question of punishment; and the court fixed the punishment of the defendant as shown above.

THEREUPON, the defendant was asked by the court if the said defendant had anything to say in law why sentence should not be pronounced against the defendant; and the defendant answered nothing in bar thereof. It appeared to the court that the defendant is mentally competent and understanding of the English language, either by the defendant's own hearing and knowledge or through a proper translator, the court proceeded to pronounce sentence against the defendant.

IT IS THEREFORE CONSIDERED AND ORDERED by the court, in the presence of the defendant, that the said judgment be, and the same is hereby in all things approved and confirmed, that the defendant is adjudged guilty of the offense set forth above, said offense having been committed on the date set forth above, as found by the verdict of the jury as set forth above, and that the said defendant be punished in accordance with the jury's verdict or the court's finding as shown above, and that the defendant is sentenced to a term of imprisonment or fine or both, as set forth above; and that said defendant be delivered by the Sheriff of Collin County to the Director of the Texas Department of Criminal Justice, Institutional Division or other person legally authorized to receive such convict for the particular punishment assessed herein.

THE COURT FURTHER FINDS, if shown above, that the defendant used or exhibited a deadly weapon during the commission of the offense shown above, or during immediate flight therefrom.

IT IS FURTHER ORDERED that the State of Texas do have and recover of the defendant all costs in this proceeding expended which costs are set forth above, for which execution may issue as necessary.

FURTHER, AS TO RESTITUTION, if it be shown above by an amount in dollars and cents that the defendant should pay one or more persons restitution or reparation for the commission of the above-named offense, the court FURTHER FINDS, after considering all of the evidence in this case from both the guilt and punishment phase, that said amount of restitution or reparation or both, as shown above is due and owing by the defendant.

IT IS FURTHER ORDERED that the judgment is entered as of the date of judgment shown above; the sentence is to commence as of the date shown above; and credit is given for time defendant has already served, if any, as shown above, for the above offense.

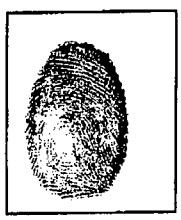
FURTHER, AS TO PUNISHMENT, if it be shown above that the defendant has been duly and legally convicted of a prior offense by showing the place and court, cause number and offense, together with the punishment for such offense and date defendant as sentenced for such offense in accordance with such conviction, then it is also ORDERED AND ADJUDGED that the punishment herein adjudged against said defendant shall begin when the judgment in such prior offense as shown above shall have ceased to operate.

IT IS FURTHER ORDERED that the defendant shall be confined for the above-named term, if such a term of confinement be shown above, in accordance with the provisions of law governing such punishment; and execution may issue, as necessary, and the defendant is remanded to jail until the Sheriff of Collin County can obey the direction of this judgment.

Fingerprint from

R Fender

finger of Defendant:



Betty Caton

PRESIDING JUDGE

9-21-01

DATE SIGNED

NOTICE OF APPEAL

NO. 12-01-00306-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ROBERT JOSEPH SCHMITT, APPELLANT	§	*APPEAL FROM THE 269TH*
V.	§	*JUDICIAL DISTRICT COURT OF*
THE STATE OF TEXAS, APPELLEE	§	*COLLIN COUNTY, TEXAS*

MEMORANDUM OPINION

Appellant Robert Joseph Schmitt appeals from his convictions for two counts of sexual assault of a child. After finding him guilty, the jury assessed the maximum punishment available, twenty years of confinement and a $10,000.00 fine in each case. Appellant assails the convictions in twenty-three issues. We affirm.

BACKGROUND

Due to difficulty dealing with her parents' divorce and her mother's illness, thirteen-year-old L.H. began counseling at the end of September 1996. Appellant was her counselor. Soon after she began going to Appellant for counseling, he initiated sexual contact. Not long after L.H.'s fourteenth birthday, which was October 24, 1996, he exposed his erect penis. Shortly thereafter, Appellant went to L.H.'s school and, without anyone's knowledge or permission, took her to his apartment where they engaged in sexual acts. Their sexual relationship continued for almost two years. In the spring of 2000, one of L.H.'s friends told L.H.'s dad about the abuse. He and L.H. then notified the police and this prosecution followed. The jury found Appellant guilty of sexual assault of a child occurring on or about June 9, 1997 and sexual assault of a child occurring on or about November 1, 1996. It assessed punishment at twenty years of confinement and a $10,000.00 fine for each

offense.

AFFIDAVITS IN SUPPORT OF WARRANTS

In his first and second issues, Appellant contends the trial court erred in failing to suppress the affidavit of probable cause and arrest warrant dated April 6, 2000. In his sixth issue, he contends the trial court erred in refusing to suppress the affidavit of probable cause and search warrant dated April 10, 2000. In his fourteenth issue, Appellant asserts that the trial court erred in failing to quash the indictment because of perceived flaws in the affidavit supporting the arrest warrant. In his eleventh issue, Appellant contends, without elaboration, that "the trial court erred in permitting the State to go forward with the trial based on the Court's finding that the finding of the Grand Jury in filing the indictment resolved the problem of probable cause." He asserts that both affidavits were improperly based solely on hearsay information provided by L.H. and do not contain any supporting facts within the personal knowledge of the officer who prepared the affidavits.

When the State produces a warrant valid on its face, the defendant must go forward to establish the invalidity of the warrant on some ground. ***Belton v. State***, 900 S.W.2d 886, 893 (Tex. App.–El Paso 1995, pet. denied). The standards used to judge the showing of probable cause are the same for both arrest and search warrants. ***Ware v. State***, 724 S.W.2d 38, 40 (Tex. Crim. App. 1986). Whether an affidavit in support of a warrant is sufficient to show probable cause must be determined from the four corners of the affidavit itself. ***Tolentino v. State***, 638 S.W.2d 499, 501 (Tex. Crim. App. 1982). The magistrate should be able to determine from the affidavit that there is a fair probability that the contraband or evidence will be found in a particular place, or with regard to arrest warrants, that an offense has been committed and that the person named in the affidavit committed the offense. ***Ware***, 724 S.W.2d at 40; ***Belton***, 900 S.W.2d at 893. The appellate court determines whether the magistrate, viewing the totality of the circumstances, had a substantial basis for concluding that probable cause existed. ***Illinois v. Gates***, 462 U.S. 213, 230-31, 103 S. Ct. 2317, 2328-29, 76 L. Ed. 2d 527 (1983).

The affidavit must contain sufficient facts supporting the officer's personal knowledge or belief of the alleged facts such that a neutral and detached magistrate may determine whether probable cause exists. ***Gordon v. State***, 801 S.W.2d 899, 914 (Tex. Crim. App. 1990). Where the

victim or eyewitness to the offense is the direct source of the information conveyed to the magistrate via a police officer, neither facts independently corroborative of the occurrence nor the basis for the claimed reliability of the victim need be recited. ***Belton***, 900 S.W.2d at 894.

Both affidavits were prepared by Beth Chaney, the investigating officer. They set out specific facts regarding the offenses. Officer Chaney obtained these facts directly from L.H. Officer Chaney also obtained invoices and insurance forms from L.H.'s father showing dates L.H. received counseling from Appellant. This documentation shows Appellant had access to L.H. on the dates alleged in the indictment. Thus, the affidavits provided the magistrate with enough information to determine that probable cause existed to arrest Appellant and search his office. *See Marx v. State*, 953 S.W.2d 321, 336 (Tex. App.– Austin 1997), *aff'd*, 987 S.W.2d 577 (Tex. Crim. App. 1999). The trial court did not err in failing to suppress the affidavits in support of the arrest warrant and search warrant. Further, the trial court did not err in refusing to quash the indictment or stop the prosecution on this basis. We overrule Appellant's first, second, sixth, eleventh, and fourteenth issues.

JOINDER

In his third, fourth, and fifth issues, Appellant asserts the trial court erred in failing to quash the indictment because the affidavit in support of the arrest warrant does not establish that the two counts are based on a single criminal episode. He further argues that there are no supportive facts in the affidavit within the officer's personal knowledge.

Our search of the record reveals no motion to quash the indictment presented to the trial court, but we shall briefly address the merits of this complaint. Assuming the affidavit is pertinent to disposition of these issues, we reject Appellant's argument that the affidavit is insufficient for the reasons stated above.

Two or more offenses may be joined in a single indictment, with each offense stated in a separate count, if the offenses arise out of the same criminal episode as defined by Texas Penal Code Section 3.01. TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon 1989). "Criminal episode" means the commission of two or more offenses under the following circumstances: 1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or 2) the offenses are the repeated commission

of the same or similar offenses. TEX. PENAL CODE ANN. § 3.01 (Vernon 2003).

Count I of the indictment alleged that Appellant, on or about the 9th day of June 1997, sexually assaulted L.H. in five different ways. Count II of the indictment alleged that Appellant, on or about the 1st day of November 1996, sexually assaulted L.H. in five different ways. L.H. testified that the sexual assaults began in the fall of 1996 and concluded in the summer of 1998. The two instances of sexual assault specified in the indictment constitute "repeated commission of the same or similar offenses." ***O'Hara v. State***, 837 S.W.2d 139, 142 (Tex. App.–Austin 1992, pet. ref'd). Therefore, the offenses were properly joined in a single indictment. The trial court did not err in failing to quash the indictment for improper joinder. We overrule issues three, four, and five.

ADMISSIBILITY OF EVIDENCE

In his tenth issue, Appellant asserts the trial court erred by "allowing into evidence any testimony in regard to Counts One and Two of the indictment because upon the affidavit of probable cause there was [sic] no supporting facts within the affiant police officer's personal knowledge to establish that the alleged offenses on November 1, 1996 and April 9, 1997 grew out of the same criminal episode." In his thirteenth issue, Appellant contends "the trial court erred in allowing into evidence any testimony in regard to Count One and Two of the indictment because the Appellant by his plea of 'not guilty,' which was never withdrawn preserved his constitutional error under the Constitution of the United States, amendments 4 and 14 and the Constitution of the State of Texas, Article 1, Section 9 without further objection as to its admissibility."

Appellant grouped issues seven through sixteen in one multifarious argument. We find no argument explaining his contentions named in issues ten or thirteen, arguing his position, or citing to authority in support of his position. When a party raises an issue without citation of authority or argument, the party presents nothing for appellate review. ***State v. Gonzales***, 855 S.W.2d 692, 697 (Tex. Crim. App. 1993). Further, to the extent the sufficiency of the affidavit in support of the arrest warrant has any impact on admissibility of evidence, we have already determined that the affidavit is sufficient and that the offenses grew out of the same criminal episode. We overrule issues ten and thirteen.

PSYCHOLOGICAL EVALUATION

In his seventh issue, Appellant asserts the trial court erred in denying his motion for a psychological and/or psychiatric evaluation of L.H. and an evaluation of her diary. That denial, he claims, deprived him of due process. Appellant states that the decision to grant or deny his motion was within the trial court's discretion but does not argue his position. In the motion he filed with the trial court, Appellant insinuated that the allegations against him were false reports made by an emotionally disturbed teenager. He argued there that, if he is unable to obtain a psychological evaluation of L.H., he will be deprived of the presumption of innocence and the ability to prepare a defense.

The record shows that a hearing on the motion was set for July 30, 2001. On the first day of trial, reference was made to that hearing. However, the record on appeal does not include a reporter's record of the July 30 proceedings.

There is no general right to discovery in a criminal case under either the federal or Texas constitutions. ***State v. Stephens***, 724 S.W.2d 141, 143 (Tex. App.– Dallas 1987, orig. proceeding). A criminal defendant's right to discovery under the United States Constitution is limited to exculpatory or mitigating evidence in the State's possession, custody, or control. ***In re State***, No. 08-03-00004-CR, 2003 Tex. App. LEXIS 7430, at *12 (Tex. App.– El Paso August 28, 2003, orig. proceeding).

Article 39.14 of the Texas Code of Criminal Procedure provides the defendant with a limited right of discovery. TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon Supp. 2003). That statute requires the defendant to show good cause, materiality, and possession of the discoverable item by the State. ***Id.*** That statute does not give the defendant a general right to discovery. ***Stephens***, 724 S.W.2d at 144. It merely provides that judges may order the State to allow discovery of tangible objects that are not privileged. ***Id.*** It allows discovery of some written documents but specifically excepts from discovery written statements of witnesses. TEX. CODE CRIM. PROC. ANN. art. 39.14(a). The decision about what is discoverable is committed to the discretion of the trial court. ***State v. Williams***, 846 S.W.2d 408, 410 (Tex. App.– Houston [14th Dist.] 1992, pet. ref'd). However, the trial judge is not free to order discovery more extensive than that authorized by the statute. ***Stephens***, 724 S.W.2d at 144.

The diary was written by L.H., a witness, and therefore not discoverable. TEX. CODE CRIM. PROC. ANN. art. 39.14(a). The diary is not in the appellate record. However, L.H. testified that she wrote in her diary that she and Appellant had sex during June of 1997. This is not exculpatory evidence. Further, during his cross-examination of L.H., Appellant asked if she had her diary with her at the trial. Later, he stated, "In your diary there is a fellow that you talk about all the time. His name started with an 'A.'" Later, he asked her who she referred to in her diary when she referred to Joseph. This would indicate that Appellant had read the diary. Finally, in a pretrial motion, Appellant mentioned that, although the District Attorney would not allow it to be copied, he allowed "some examination" of the diary.

Appellant has no constitutional or statutory right to have L.H. examined. *See* ***Stephens***, 724 S.W.2d at 144 (Trial court not empowered to order witness to submit to physical examination for purpose of providing criminal defendant with discovery.). Because the trial court was not authorized to order a psychological evaluation, and the diary was not discoverable, the trial court did not err in denying Appellant's motion for psychological evaluation. We overrule issue seven.

MOTION FOR CONTINUANCE

In his eighth issue, Appellant asserts the trial court erred in denying his motion for continuance filed prior to trial because a two-day delay would have occasioned no hardship on the State and the denial effectively prevented him from properly presenting evidence on his own behalf. He explains that, because his motion for psychological examination was denied, he needed to call Dr. Michael Wolf, a psychologist, as his expert witness. However, Dr. Wolf was out of town on August 6, 2001, the day the trial was scheduled to begin.

Appellant's motion for continuance was filed at 9:39 a.m. on August 6, 2001. He asked for a thirty-day continuance to obtain the presence of his expert, Dr. Wolf, who would be out of town until August 10, 2001. The motion does not comply with the statutory requirements for motions for continuance based on an absent witness. *See* TEX. CODE CRIM. PROC. ANN. art. 29.06, 29.07 (Vernon 1989). Further, it is not sworn to by a person having personal knowledge of the facts relied on for continuance. TEX. CODE CRIM. PROC. ANN. art. 29.08 (Vernon 1989). A motion for continuance is a matter left to the sound discretion of the trial court. TEX. CODE CRIM. PROC. ANN.

art. 29.06. Due to Appellant's lack of compliance with the statute, the trial court did not abuse its discretion in denying the motion. Further, to preserve error and challenge a trial court's refusal of a motion for continuance made because of an absent witness, Appellant must file a sworn motion for new trial, stating the testimony he expected to present by the witness. ***Ashcraft v. State***, 900 S.W.2d 817, 834 (Tex. App.– Corpus Christi 1995, pet. ref'd). A showing under oath by means of an affidavit of the missing witness or some other source as to what that witness would testify must accompany the motion for new trial. ***Id.*** While Appellant did mention this complaint in his unsworn motion for new trial, he did not make a showing under oath as to what Dr. Wolf would have testified. We overrule Appellant's eighth issue.

PRETRIAL BOND

In his ninth issue, Appellant contends that the trial court erred in granting a pretrial bond increase because the amount was excessive and it imposed a condition that deprived him of due process. Issues concerning pre-trial bail are moot after the defendant is convicted. ***Oldham v. State***, 5 S.W.3d 840, 846 (Tex. App.– Houston [14th Dist.] 1999, pet. ref'd) (op. on remand). We overrule Appellant's ninth issue.

ABSENCE OF APPELLANT

In his twelfth issue, Appellant asserts that the trial court erred in allowing the trial to proceed in Appellant's absence without an evidentiary finding reflected on the record that his absence was voluntary. Article 33.03 of the Code of Criminal Procedure provides that, when the defendant voluntarily absents himself after the jury has been selected, the trial may proceed to its conclusion. TEX. CODE CRIM. PROC. ANN. art. 33.03 (Vernon 1989).

On August 6, 2001, a jury was empaneled and sworn. On the morning of August 7, 2001, the State called L.H. to the stand. She testified until the trial court stopped for a lunch break. After the lunch recess, the court stated:

> All right. For the record, we were having some discussions in the Court's chambers with regard to some procedural matters and the Defendant absented himself from the courtroom and continues to absent himself from the courtroom for some hour. And therefore, this court has – and I've been told by the sheriff deputies that they have been looking for him for that length of time and he has not been found.

The jury was then brought in and seated. The court explained: "Ladies and gentlemen, in the State of Texas, the law says that when a person is on trial and voluntarily absents himself from the Court, that the jury trial will continue on." Direct examination of L.H. continued. The following morning, in the jury's absence, the court announced that Appellant had been arrested the night before. He was brought to the courthouse from the jail. The trial court had sufficient facts before it at the time it made the ruling to continue with the trial to conclude that Appellant's absence was voluntary. *See* ***Moore v. State***, 670 S.W.2d 259, 261 (Tex. Crim. App. 1984) (en banc). We overrule Appellant's twelfth issue.

MOTION IN ARREST OF JUDGMENT

In his fifteenth issue, Appellant asserts the trial court erred in summarily denying his motion in arrest of judgment. His scant argument regarding this issue merely states that the motion "relates to the probable cause inadequacy and required a hearing when so requested." His written motion in arrest of judgment argued that the sentence and judgment cannot be legally rendered upon the indictment because the affidavits of probable cause upon which the arrest and search warrants were based are insufficient as a matter of law because they are based on hearsay and fail to establish the credibility of the informant. Further, he argued that the search was illegal.

A motion in arrest of judgment is a defendant's oral or written suggestion to the trial court that the judgment rendered was contrary to law. TEX. R. APP. P. 22.1. The motion may be based on the ground that the indictment is subject to an exception on substantive grounds, that in relation to the indictment a verdict is substantively defective, or that the judgment is invalid for some other reason. TEX. R. APP. P. 22.2. A motion in arrest of judgment, which reaches only errors of substance in the indictment, is essentially a post-trial motion to quash the indictment. ***Crittendon v. State***, 923 S.W.2d 632, 634 (Tex. App.– Houston [1st Dist.] 1995, no pet.). However, the defendant is required to file a pre-trial motion to quash the indictment to avoid waiving such a complaint. ***State v. Borden***, 787 S.W.2d 109, 110-11 (Tex. App.– Houston [14th Dist.] 1990, no pet.).

Appellant did not file a pre-trial motion to quash the indictment. He therefore waived any complaint that the judgment rendered was contrary to law as contemplated by Rule 22.1. *Id.*

Additionally, his complaint goes to the affidavits in support of the arrest and search warrants. It does not address any alleged substantive errors in the indictment. Accordingly, the trial court did not err in denying his motion in arrest of judgment. To the extent Appellant is complaining of the trial court's failure to hold a hearing on the motion, that complaint has no merit. The rule does not require a hearing and anticipates the trial court's failure to formally rule on a motion in arrest of judgment by explicitly deeming as denied a motion not timely ruled on. TEX. R. APP. P. 22.4. We conclude that no hearing is required. We overrule Appellant's fifteenth issue.

COMMUNICATION BETWEEN JUDGE AND JURY

In his sixteenth issue, Appellant contends that the trial court erred in responding to a written note from the jury during their deliberations without notice in open court. Appellant wholly failed to argue this issue, therefore raising nothing for review. ***Gonzales***, 855 S.W.2d at 697. We overrule issue sixteen.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his issues seventeen through twenty-three, Appellant contends his trial counsel was ineffective in the following ways: (17) he failed to consult with Appellant for a seventeen-month period from the date he was hired until the date of trial, (18) he failed to object to inadmissible hearsay statements set forth in the affidavit of probable cause and the arrest warrant, (20) he made no independent investigation of the facts, (21) he failed to consult Appellant prior to trial as to a plan of defense or witnesses to be interviewed or subpoenaed to testify, (22) he had a conflict of interest with Appellant, (23) he failed to secure a signed discovery order and obtain discovery items for trial preparation, and (19) his conduct fell below an objective standard of reasonableness in such a way as to undermine confidence in the outcome of the trial.

His list of the issues is followed by slightly more than one page of argument. He has not argued issues nineteen, twenty-two, or twenty-three at all. The arguments concerning issues seventeen, eighteen, twenty, and twenty-one are meager, providing insufficient facts or discussion for a proper review. Accordingly, he has presented no ineffective assistance complaints for review. ***Gonzales***, 855 S.W.2d at 697. To the extent we are able to review these complaints, they fail on the merits.

The United States Supreme Court has established a two-part test, also adopted by Texas courts, to determine whether the representation of counsel was effective. The defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. ***Strickland v. Washington***, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Counsel is presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065. The appellant has the burden of proving ineffective assistance of counsel claims by a preponderance of the evidence. ***Jackson v. State***, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). Claims of ineffective assistance of counsel must be supported by the record. *See* ***Mercado v. State***, 615 S.W.2d 225, 228 (Tex. Crim. App. [Panel Op.] 1981).

The record shows that the arrest warrant issued on April 6, 2000. The first surety bond was signed by counsel on April 11, 2000. Thereafter, he signed several docket settings. He appeared at the second bond hearing and signed the new bond. Toward the end of May 2001 he filed several motions. The trial began on August 6, 2001, with counsel in attendance. The depth and breadth of counsel's pre-trial investigation is not reflected in the record. The record is silent with regard to whether or when counsel consulted with Appellant and what they discussed. This court cannot assume a lack of diligent preparation. ***Sanders v. State***, 715 S.W.2d 771, 774 (Tex. App.– Tyler 1986, no pet.). As explained above, it was not error for counsel to fail to object to the affidavit of probable cause and the arrest warrant. Therefore, the failure to object cannot be ineffective assistance. ***Cooper v. State***, 707 S.W.2d 686, 689 (Tex. App.– Houston [1st Dist.] 1986, pet. ref'd). Appellant has failed to show that his counsel's performance fell below the objective standard of reasonableness.

Further, even if we agreed that trial counsel's performance was deficient, Appellant has failed to make any showing that he was prejudiced as a result. Therefore, Appellant has failed to show that there is a reasonable probability that the result of the proceeding would have been different but for the alleged error made by counsel. ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068. Appellant has failed to meet his burden of proving ineffective assistance of counsel. ***Jackson***, 973 S.W.2d at 956. Accordingly, we overrule issues seventeen through twenty-three.

CONCLUSION

After considering Appellant's twenty-three issues, we determine that none have merit and he has raised no error. We affirm the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered October 22, 2003.
Panel consisted of Worthen, C.J., Griffith, J., and DeVasto, J.

(DO NOT PUBLISH)

In the 416th Judicial District Court
of the State of Texas
Chris Oldner, Judge Presiding

No. 296-81160-00

THE STATE OF TEXAS
VS. Robert Joseph Schmitt

Administrative Order of Assignment

After the above styled and numbered cause having come before the Honorable Judge Chris Oldner, it is the opinion that the most efficient management of this case necessitates it be transferred to the 366th Judicial District Court.

IT IS ORDERED this _____ day of AUG 2 7 2009, 2009

Chris Oldner, Judge Presiding
416th District Court
Administrative Judge
Collin County, Texas

COLLIN COUNTY

District Clerk
P.O. Box 578
McKinney, Texas 75070
(972) 548-4320
972-424-1460 Ext. 4320 (Metro)

August 26, 2009

Mr. John Roach
District Attorney
Collin County Courthouse
McKinney, Texas 75069

RE: Ex Parte: Robert Joseph Schmitt – W296-81160-00 (HC2)

Dear Mr. Roach:

Enclosed herewith is an "Application for Writ of Habeas Corpus (11.07 V.A.C.C.P.)" on the above captioned case. Please acknowledge receipt of same by returning the original of this letter with your signature where indicated.

Thanking you in advance, I remain,

Sincerely yours,

HANNAH KUNKLE DISTRICT CLERK

BY: Rebecca Henegar DEPUTY

DISTRICT COURT OF COLLIN COUNTY, TEXAS

RECEIVED ON THE 2nd DAY OF Sept, 2009, A.D.

BY: _____ DISTRICT ATTORNEY'S OFFICE

CAUSE NO. W296-81160-00(HC2)

EX PARTE	§	IN THE 296TH JUDICIAL
	§	DISTRICT COURT OF
ROBERT JOSEPH SCHMITT	§	COLLIN COUNTY, TEXAS

STATE'S RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

The State responds to the following application for Writ of Habeas Corpus in summary fashion only. The State requests that the trial court and Court of Criminal Appeals reject the claim(s) for the reason(s) asserted below:

☐ Failure to state sufficient facts which if true could entitle Applicant to relief.

☒ Failure to meet an exception to Article 11.07, Section 4.

Applicant's failure to raise his claim on appeal or in his previous habeas challenge to the merits of his conviction prevents him from establishing an exception allowing consideration of a subsequent application for writ of habeas corpus. *See Ex parte Townsend*; 137 S.W.3d 79 (Tex. Crim. App. 2004); *Ex parte McJunkins*, 954 S.W.2d 39 (Tex. Crim. App. 1997).

☐ Failure to utilize time credit dispute resolution office or meet exception.

☐ Direct appeal pending.

☐ Moot.

☐ Other:

Jeffrey Garon
Assistant Criminal District Attorney
210 S. McDonald Street, Suite 324
McKinney, Texas 75069
State Bar Number: 00790746
(972) 548-4729

September 11, 2009
Date

55

CERTIFICATE OF SERVICE

A true copy of the State's Response to Application for writ of Habeas Corpus has been mailed to Robert Joseph Schmitt, Texas Department of Criminal Justice, TDC # 1061867, Clements Unit, 9601 Spur 591, Amarillo, Texas 79107-9606, on this the 11th day of September, 2009.

JEFFREY GARON

CAUSE NO. W296-81160-00(HC2)

EX PARTE	§	IN THE 296TH JUDICIAL
	§	DISTRICT COURT OF
ROBERT JOSEPH SCHMITT	§	COLLIN COUNTY, TEXAS

ORDER

On this date came to be heard Applicant's Application for Post-Conviction Writ of Habeas Corpus and the State's Response thereto. Having considered same, the Court adopts the assertions of the State and finds that Applicant has not established an exception permitting this Court to address the merits of his subsequent application for writ of habeas corpus. *See* TEX. CODE CRIM. PROC. art. 11.07, § 4. This Court recommends that the Court of Criminal Appeals **DISMISS** Applicant's application.

IT IS ORDERED that the Clerk of this Court is directed to send copies of this Order to Robert Joseph Schmitt, Texas Department of Criminal Justice, TDC # 1061867, Clements Unit, 9601 Spur 591, Amarillo, Texas 79107-9606, or his last-known address, and the Appellate Division of the Collin County District Attorney's Office.

IT IS FURTHER ORDERED that the District Clerk shall immediately transmit to the Court of Criminal Appeals a copy of Applicant's Application, the State's Response, and this Order.

SIGNED this 16th day of September, 20 09.

JUDGE PRESIDING

THE STATE OF TEXAS

COUNTY OF COLLIN

I, HANNAH KUNKLE, CLERK OF THE DISTRICT COURTS, IN AND FOR COLLIN COUNTY, STATE OF TEXAS, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING CONTAINS A TRUE AND CORRECT COPY OF ALL THE PROCEEDINGS DIRECTED TO BE INCLUDED IN THE TRANSCRIPT ON THE WRIT OF HABEAS CORPUS IN CAUSE NO. W296-81160-00(HC)(2) STYLED:

EX PARTE: ROBERT JOSEPH SCHMITT

AS IT APPEARS FROM THE ORIGINALS NOW ON FILE AND OF RECORD IN THIS OFFICE.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, AT MY OFFICE IN THE CITY OF MCKINNEY, TEXAS, ON THIS THE 6TH DAY OF OCTOBER, 2009.

HANNAH KUNKLE DISTRICT CLERK
COLLIN COUNTY, MCKINNEY, TEXAS

BY: Carolyn [illegible]
DEPUTY

DISTRICT COURT
COLLIN COUNTY, TEXAS

Additional material from this filing is available in the Clerk's Office.