

## **CRIMINAL APPEALS BY THE STATE**

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### **I. Introduction: The State Has a Limited Right to Appeal.**

Until 1987, the State had no independent right to appeal from trial court rulings, either pre-trial or post-trial. *See Pfeiffer v. State*, 363 S.W.3d 594, 599 (Tex. Crim. App. 2012). In 1987, the State obtained a limited right to appeal certain trial-court orders and rulings, when the Legislature enacted Article 44.01 of the Code of Criminal Procedure. *See generally* Tex. Code Crim. Proc. Ann. art. 44.01.

### **II. Article 44.01 of the Texas Code of Criminal Procedure.**

#### **A. Types of “Orders” the State May Appeal Under Subsection (a).**

Article 44.01(a) enumerates the various types of “orders” that the State may appeal, and appealable “orders” under paragraph (a) include various pre-trial orders and some post-trial orders. *See Pfeiffer*, 363 S.W.3d at 600, n. 23. Article 44.01(a) provides that the State is entitled to appeal an order of a court in a criminal case if the order:

- (1) dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint;
- (2) arrests or modifies a judgment;
- (3) grants a new trial;
- (4) sustains a claim of former jeopardy;
- (5) grants a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case; or
- (6) is issued under Chapter 64.

*See* Tex. Code Crim. Proc. Ann. art. 44.01(a)(1)-(6).

**B. An Illegal Sentence and a Question of Law: The State May Appeal Under Subsections (b) and (c), Respectively.**

**1. The State May Appeal An “Illegal” Sentence Under Subsection (b).**

Article 44.01(b) provides that the State may appeal an illegal sentence. *See Pfeiffer*, 363 S.W.3d at 600; Tex. Code Crim. Proc. Ann. art. 44.01(b). (“The state is entitled to appeal a sentence in a case on the ground that the sentence is illegal.”). But, a credit for time served is not part of the sentence, as the Houston [14<sup>th</sup> Dist.] court of appeals recently held. *See The State of Texas v. Manuel R. Garcia*, No. 14-20-00801-CR, 2022 Tex. App. LEXIS 6140, at \* 2, 2022 WL 3589210, at \* 1 (Tex. App.—Houston [14<sup>th</sup> Dist.] Aug. 23, 2022, n.p.h.) (designated for publication) (concluding the court had no jurisdiction to address the State’s attempted appeal).

**2. The State May Appeal a Question of Law Under Subsection (c).**

Article 44.01(c) allows the State to appeal a ruling on a question of law if the defendant is convicted and he (or she) appeals the judgment. *See Pfeiffer*, 363 S.W.3d at 600; Tex. Code Crim. Proc. Ann. art. 44.01(c) (“The state is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment.”).

**III. Time to File the Notice of Appeal and the Certification in the Notice.**

**A. Twenty (20) Days to File Notice of Appeal Under Subsection (d).**

Paragraph (d) of Article 44.01 explicitly requires the State to file a notice of appeal within 20 days after the trial court’s order, ruling, or sentence if the State is appealing under either Article 44.01(a) or (b). *See Pfeiffer*, 363 S.W.3d at 602; Tex. Code Crim. Proc. Ann. art. 44.01(d).

**B. An Appeal From an Order Granting a Motion to Suppress Evidence, A Confession, or An Admission Requires a Certification by a “Prosecuting Attorney.”**

For purposes of the “certification” in Article 44.01(a)(5), a “prosecuting attorney” means the county attorney, district attorney, or criminal district attorney who has the primary responsibility of prosecuting cases in the court hearing the case and does not include an assistant prosecuting attorney. *See* Tex. Code Crim. Proc. Ann. art. 44.01(i). The “certification” is necessary to confer jurisdiction on the court

of appeals. *See State v. Redus*, 445 S.W.3d 151, 152 (Tex. Crim. App. 2014). In *Redus*, the elected district attorney simply signed a document that quoted the statute, which resulted in the court of appeals dismissing the State’s appeal. *See id* at 157. The Court of Criminal Appeals affirmed. *See id* at 157-58.

In *Redus*, the Court held that “no special form is necessary” but the statute required a written and signed assertion of two necessary facts—that (1) the appeal is not taken for delay and (2) the evidence is of “substantial importance.” *See id* at 156. Usually, the certification begins with the phrase, “I, John Doe, the District Attorney of XYZ County, certify that . . .” but other forms are equally acceptable as long as the elected prosecutor vouches for these two facts. *See id*.

Since *Redus*, the court of appeals held in *State v. Villegas*, 460 S.W.3d 168 (Tex. App.—El Paso 2015, no pet.) that jurisdiction was sufficiently conferred by:

The State of Texas hereby gives written notice of appeal to the Court of Appeals for the Eighth District of Texas at El Paso, from the pretrial order, signed on January 5, 2015, excluding the State’s evidence as irrelevant and inadmissible, specifically, audio recordings of the defendant’s jail and prison telephone conversations, which contain incriminating evidence. The State is entitled to appeal from the order of the trial court. *See* Tex. Crim. Proc. Code art. 44.01(a)(5) (article setting out the State’s entitlement to appeal an order granting a motion to suppress evidence); *see also* *State v. Medrano*, 67 S.W.3d 892, 903 (Tex. Crim. App. 2002) (holding that the State may appeal an adverse pretrial ruling that seeks to exclude evidence as inadmissible rather than to suppress evidence as illegally obtained). *The State certifies that jeopardy has not attached in this case, the appeal is not taken for the purpose of delay, and the evidence is of substantial importance in the case.*

*See Villegas*, 460 S.W.3d at 170 (italics added for emphasis). Another example:

I, \_\_\_\_\_, the elected “prosecuting attorney” of \_\_\_\_\_ County, Texas certifies that (1) this appeal is not taken for the purpose of delay, and (2) the evidence is of “substantial importance” to the case.

/s/ Prosecuting Attorney (not an assistant)

*Redus*, 445 S.W.3d at 156; Tex. Code Crim. Proc. Ann. art. 44.01(i).

#### IV. **Notice of Cross-Appeal or Cross-Issue.**

In *Pfeiffer*, the Court of Criminal Appeals resolved a conflicting split in the courts of appeals on whether the State must file a separate notice of appeal when a defendant appeals his/her conviction and the State wishes to appeal a ruling of law under Article 44.01(c). *See Pfeiffer*, 363 S.W.3d at 597. In *Pfeiffer*, the Court held that the State need not file its own notice of appeal when it raises a cross-point concerning a ruling on a question of law under Article 44.01(c). *See Pfeiffer*, 363 S.W.3d at 597.

#### V. **Conclusion.**

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