
**IN THE COURT OF CRIMINAL APPEALS**
**OF TEXAS**

**NO. PD-0623-16**

**The State of Texas**

**v.**

**ROSA ELENA ARIZMENDI, Appellee**

**ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW**
**FROM THE SEVENTH COURT OF APPEALS**
**POTTER COUNTY**

**NEWELL, J., filed a concurring opinion, in which KEASLER, HERVEY and YEARY, JJ., joined.**

For well over a hundred years, trial judges in Texas have had the authority to grant a new trial, but for the past fourteen, advocates in criminal cases have used the phrase "interest of justice" from our precedent to argue that a new trial is warranted even though there is no

legal basis for granting a new trial.[1] This case is a good example of why we should get away from treating "interest of justice" as a justification for relief or a standard of review. The phrase "interest of justice" is better understood as a recognition of a court's authority to act rather than a reason for acting or a standard to evaluate that action. Requesting a new trial "in the interest of justice" provides no guidance to a trial court regarding a basis for relief. And reviewing whether the trial court properly granted a new trial "in the Interest of justice" is invariably answered by resorting to other legal standards and justifications. We should just cut out the middle man and hold that granting a new trial "in the interest of justice" refers to the trial court's power or authority to grant a new trial and not the basis for granting it. Our sister court, the Texas Supreme Court, has already reached this conclusion, and we should follow suit.

**Where Did We Get "In the Interest of Justice"?**

Courts have repeatedly noted the long history of trial courts' exercising their discretion to grant new trials "in the interest of justice." When doing so, courts typically rely upon "oft-quoted language in *State*

[1] *See e.g., State v. Thomas*, 428 S.W.3d 99, 107 (Tex. Crim. App. 2014) (holding that trial court improperly granted a new trial "in the interest of justice" where there was no valid legal claim upon which to base the grant of a new trial).

*v. Gonzalez*" that points to the genesis of this phrase.[2]

> For more than one hundred and twenty years, our trial judges have had the discretion to grant new trials in the interest of justice. In *Mullins v. State*, the Supreme Court, which at the time had criminal jurisdiction held: . . . The discretion of the District Court, in granting new trials, is almost the only protection to the citizen against the illegal or oppressive verdicts of prejudiced, careless, or ignorant juries, and we think the District Court should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts.[3]

But in *Mullins v. State*, this language referenced a challenge, in a motion for new trial, to the sufficiency of the evidence.[4] Mullins, who had been convicted of horse thievery, filed a motion for new trial claiming that there was insufficient evidence of his felonious intent.[5] The Court agreed with Mullins and expressed its opinion that, had the jury followed its oath and the jury instructions, it would not have convicted the defendant.[6] So the language relied upon by a plurality of the Court in *Gonzalez* is not referring to a reason or a ground for granting a new trial, but rather to the trial court's ability or power to grant a new trial.

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[2] *Thomas*, 428 S.W.3d at105 .

[3] *Id.* at 104 (quoting *State v. Gonzalez*, 855 S.W.2d 692, 694 (Tex. Crim. App. 1993) (plurality opin.)).

[4] *Mullins v. State*, 37 Tex. 337, 339 (1872).

[5] *Id.*

[6] *Id.*

The plurality opinion in *State v. Gonzalez* blurred this important distinction. We granted review in *Gonzalez* to determine primarily whether the grounds for granting a new trial had to be specifically enumerated under the Rules of Appellate Procedure.[7] We held, as we had in *Reyes v. State*, that the list of grounds for granting a new trial was illustrative, not exhaustive, and that a trial judge has the discretion to consider additional grounds for granting a new trial.[8] Then, we broadly proclaimed that "[f]or more than one hundred and twenty years, our trial judges have had the discretion to grant new trials in the interest of justice" in reliance upon the language in *Mullins* quoted above.[9] We did not specifically say that "interest of justice" was a ground unto itself, but in the context of the issue under review, the implicit suggestion was hard to miss.

The *Gonzalez* plurality exacerbated this confusion in the way it addressed the State's argument that allowing a grant of a new trial "in

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[7] *Gonzales*, 855 S.W.2d at 693-94 ("The Collin County District Attorney's sole ground for review and the State Prosecuting Attorney's fourth ground for review contend that the trial judge erred in granting the motions for new trial which were based on a ground not specifically enumerated in Rule 30(b)."). At the time, Rule 30(b) governed motions for new trial. The current rule governing the grounds for new trial is Rule 21.3 and is not substantively different than Rule 30(b).

[8] *Gonzalez*, 855 S.W.2d at 694 (citing *Reyes v. State*, 849 S.W.2d 812 (Tex. Crim. App. 1993)).

[9] *Gonzalez*, 855 S.W.2d at 694.

the interest of justice" might render the State's right to appeal meaningless. Stepping over the obvious pleading and proof problems attendant to a claim as nebulous as "interest of justice" the plurality focused upon the abuse of discretion standard.[10] The plurality simply proclaimed that the "abuse of discretion" standard of review has provided meaningful appellate review of decisions on motions for new trial.[11] So, in a feat of appellate sleight-of-hand, *Gonzalez* appeared to transform "the interest of justice" into a basis for granting a new trial by palming the difficulties necessarily surrounding the evaluation of such claims and diverting attention to the abuse of discretion standard of review.

**How Did We Get To "A Valid Legal Claim"?**

As the United States Supreme Court has acknowledged, any attempt to provide a general definition of the phrase "interests of justice" is unlikely to be helpful because the standard contemplates a peculiarly context-specific inquiry.[12] Texas experience with requests for new trials "in the interest of justice" after *Gonzales* bears this out. For example,

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[10] *Id.* at 696-97.

[11] *Id*.

[12] *Martel v. Clair*, 565 U.S. 648, 652, 663 (2012) (analyzing the request for counsel for federal capital defendants under the same "interests of justice" standard used for appointment of counsel for federal non-capital defendants).

when intermediate courts of appeals addressed whether a trial court could grant a new trial "in the interest of justice," some based their decisions upon the legal standards associated with the underlying legal claim.[13] But other courts of appeals have upheld the grant of a new trial by watering down the applicable legal standards, resorting to "interest of justice" as a unique basis for granting a new trial.[14] And in two instances, courts of appeals appeared to uphold the grant of a new trial "in the interest of justice" based upon errors in trial that did not necessarily require relief under any applicable legal standard.[15]

To clear up this confusion, we attempted to place some limits on what "in the interest of justice" means in *State v. Herndon*. We sought

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[13] *See e.g. State v. Belcher*, 183 S.W.3d 443, 449-50 (Tex. App.–Houston [14th Dist.] 2005, no pet.) (holding that a new trial was justified where trial counsel admitted error in failing to exercise peremptory challenges); *State v. Trevino*, 930 S.W.2d 713, 715-16 (Tex. App.–Corpus Christi 1996, pet. ref'd.) (holding that a new trial was warranted "in the interest of justice" based upon a lack of an accomplice witness jury instruction); *State v. Dixon*, 893 S.W.2d 286, 288 (Tex. App.–Texarkana 1995, no pet.) (upholding a trial court's order granting a new trial based upon *Batson* error and ineffective assistance of counsel).

[14] *See e.g. State v. Gill*, 967 S.W.2d 540, 542-43 (Tex. App.–Austin 1998, pet. ref'd.) (upholding the grant of a new trial "in the interest of justice" in light of counsel's failing physical and mental health even though it was a close call as to whether representation amounted to ineffective assistance of counsel).

[15] *See e.g. State v. Stewart*, 282 S.W.3d 729, 736-38 (Tex. App.–Austin 2009, no pet.) (upholding grant of new trial in the interest of justice where trial court mistakenly relied upon a misstatement in the pre-sentence investigation report even though the defendant could not adequately support an Eighth Amendment disproportionality claim); *State v. Moreno*, 297 S.W.3d 512, 522-23 (Tex. App.–Houston [14th Dist.] 2009, pet. ref'd.) (holding that trial counsel's failure to introduce known, exculpatory evidence during the guilt phase of trial supported claim that new trial was warranted "in the interest of justice.")

to bring our understanding of "in the interest of justice" in line with federal courts so that we could have some standards for evaluating a trial court's decision on a motion for new trial. Otherwise, we explained, the phrase "interest of justice" would amount to a mere platitude with no substantive legal content covering a multitude of unreviewable rulings.[16] Similar to practice in federal court, we explained that a trial court will not abuse its discretion in granting a motion for new trial so long as the defendant: (1) articulated a valid legal claim in his motion for new trial; (2) produced evidence or pointed to evidence in the trial record that substantiated his legal claim; and (3) showed prejudice to his substantial rights under the standards in Rule 44.2 of the Texas Rules of Appellate Procedure.[17]

But the federal rule governing motions for new trial specifically incorporates the phrase "interest of justice" into its strictures.[18] The Texas rules governing motions for new trial do not.[19] Moreover, the list of grounds for granting a new trial originated with a statutory provision

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[16] *State v. Herndon*, 215 S.W.3d 901, 908 (Tex. Crim. App. 2007).

[17] *Id.* at 909.

[18] FED. R. CRIM. P., Rule 33(a) ("Upon the defendant's motion the court may vacate any judgment or grant a new trial if the interest of justice so requires.").

[19] TEX. R. APP. P. 21.3; TEX. R. APP. P. 21.9.

that was exhaustive.[20] We held in *State v. Evans* that the grounds listed for a new trial in the Rules of Appellate Procedure were illustrative rather than exhaustive because the rule governing motions for new trial did not contain the restrictive language found in the former statute.[21] Yet, this Court cannot abridge, enlarge, or modify the substantive rights of a litigant through its rule-making authority.[22] So, while the federal rule governing new trials has always been expansive, the Texas rule regarding criminal cases was limited in its inception. And, as discussed above,"in the interest of justice" was never an independent ground for granting a motion for new trial nor a standard for reviewing the granting of one.

**The Texas Supreme Court Has Already Reached This Conclusion**

In civil cases, trial courts have traditionally been afforded broad discretion in granting new trials.[23] But unlike in criminal cases, the authority to grant new trials in civil cases is a product of the rules of civil procedure, and, by extension, the rule-making authority of the Texas

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[20] *State v. Evans*, 843 S.W.2d 576, 578-79 (Tex. Crim. App. 1992).

[21] *Id.*

[22] TEX. GOV'T. CODE ANN. § 22.108(a).

[23] *In re Bent*, 487 S.W.3d 170, 175 (Tex. 2016).

Supreme Court.[24] In 1941, the Texas Legislature granted "full rule-making power in civil judicial proceedings" while simultaneously repealing all laws and parts of laws governing the practice and procedure in civil actions.[25] But, unlike in criminal cases, there appears to have only been two substantive limits placed upon a trial court's authority to grant a new trial in civil cases.[26] This stands in contrast to the former provisions of the Code of Criminal Procedure that provided an exclusive list of specific claims that could provide a basis for a trial court to grant a new trial in criminal cases.

In 1985, the Texas Supreme Court considered in a mandamus proceeding whether a trial court has the discretion to grant a new trial "in the interest of justice" in a civil case.[27] The Court answered that question affirmatively by noting the broad discretion trial courts have in granting new trials in civil cases and then explaining that there were only two

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[24] *Id.* ("Our rules of civil procedure vest trial courts with broad authority to order new trials 'for good cause' and 'when the damages are manifestly too small or large'.") (quoting TEX. R. CIV. P. 320); *see also* TEX. GOV'T. CODE ANN. § 22.004 (a) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.").

[25] *Garrett v. Mercantile Nat. Bank*, 168 S.W.2d 636, 637 (Tex. 1943).

[26] *Johnson v. Court of Civil Appeals for the Seventh Supreme Judicial Dist. Of Texas*, 350 S.W.2d 330, 331 (1961) (noting two instances when a Texas appellate court has overturned the trial court's grant of a new trial: 1) when the trial court's order was wholly void as where it was not rendered in the term in which the trial was had; and 2) where the trial court has granted a new trial specifying in the written order the sole ground that the jury's answers to special issues were conflicting).

[27] *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex. 1985).

recognized instances in which a Texas appellate court had overturned a trial court's grant of a new trial.[28] The Court reaffirmed that holding in 1988.[29] But in 2009, the Court disavowed these holdings when they decided *In re Columbia Medical Center of Las Colinas*.

> However, for the reasons stated above, we believe that such a vague explanation in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of the parties and the public when a lawsuit is tried to a jury. Parties and the public generally expect that a trial followed by a jury verdict will close the trial process. Those expectations may be overly optimistic, practically speaking, but the parties and public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried. To the extent statements or holdings in our prior cases conflict with our decision today, we disapprove of them.[30]

If there was any doubt following *Columbia*, the Court made "indisputably clear" in *In re United Scaffolding, Inc.* that a trial court could not grant a new trial in a civil case based solely on "the interest of justice." There, the Court considered a trial court's order granting a new trial listing four reasons for granting a new trial including "in the interest of justice."[31]

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[28] *Id.* at 917.

[29] *Champion Int'l. Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988).

[30] 290 S.W.3d 204, 213 (Tex. 2009).

[31] *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 689 (Tex. 2012).

Each reason was preceded or followed by "and/or."[32] The Court held that the trial court's order granting a new trial was insufficient because a trial court lacks the authority to grant a new trial in a civil case based solely upon a claim that a new trial is warranted "the interest of justice and fairness."[33] According to the Court, "interest of justice and fairness" is never an independently sufficient reason for granting a new trial.[34]

Not surprisingly, the Court fashioned a two-pronged test for determining whether a trial court abused its discretion by granting a new trial in a civil case.

> In light of these considerations, we hold that a trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articualted reasons from the particular facts and circumstances of the case at hand.[35]

This standard is largely consistent with our own articulation of the boundaries of a trial court's discretion in *Herndon* which we had

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 689-90.

[35] *Id.* at 688-89.

announced five-years earlier.[36]

This trajectory of the Texas Supreme Court's understanding of a trial court's authority to grant motions for new trial has paralleled its limitation on the consideration of untimely amendments to motions for new trial. In 1983, the Court held in *Jackson v. Van Winkle* that a trial court has the discretion to consider a late filed motion for new trial in a civil case.[37] In reaching this decision, the Court relied upon *Independent Life Insurance Co. of America v. Work* which recognized a trial court's inherent authority to consider an amendment to a motion for new trial regardless of statutory provisions limiting the timing for filing the amendment.[38]

But in 2003, the Court held that grounds in an untimely amendment to a motion for new trial cannot provide the basis for appellate review.[39] In *Moritz v. Preiss*, the Court was faced with a medical malpractice case.[40] Preiss lost at trial and timely filed a motion for new trial alleging juror

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[36] *Herndon*, 215 S.W.3d at 909 (noting that a defendant must state a valid legal claim and allege sufficient facts to support that claim); *see also Scaffolding*, 377 S.W.3d at 689 ("For example, an order granting a new trial may amount to a clear abuse of discretion if the given reason, specific or not, is not one for which a new trial is legally valid).

[37] 660 S.W.2d 807, 808 (Tex. 1983).

[38] *Id.* (citing *Independent Life Insurance Co. of America v. Work*, 77 S.W.2d 1036 (1934)).

[39] *Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003).

[40] *Id.* at 717.

misconduct.[41] Then, Preiss sought to amend his motion to allege that an additional juror was also disqualified for misconduct.[42] The trial court denied the motion for new trial, but the court of appeals reversed the denial of the motion for new trial based upon the grounds contained in the untimely amended motion for new trial.[43] The Court held that the court of appeals could not consider the grounds in the untimely amendment as a basis for granting a new trial because doing so would not give full effect to the Court's procedural rules that limit the time to file new trial motions.[44] In doing so, the Court overruled *Jackson*.

The Court did observe, however, that a trial court could consider an untimely motion for new trial for guidance in the exercise of its inherent power to grant a new trial.[45] Yet, it is unclear whether the other party to the lawsuit ever objected to the untimely amendment at issue in *Moritz*. Moreover, the Court was not asked to uphold the grant of a new trial based upon an allegation presented in an untimely amendment to the motion for new trial. Thus, the Court never considered whether a trial

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[41] *Id.* at 718.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 720-21.

[45] *Id.* at 720.

court would abuse its discretion by granting a new trial based upon an allegation in an untimely motion for new trial over an objection by one of the parties.

Whether a court of appeals can uphold a trial court's order granting a new trial upon a basis alleged in an untimely amendment appears to be an open question for our sister court.[46] Given the Court's movement towards establishing more reliable standards for evaluating a trial court's grant of a new trial as well as the recognized need to give full effect to its procedural rules, it is too early to suggest that the Texas Supreme Court would handle this case any differently than we have were our roles reversed. Indeed, our sister court's jurisprudence in this regard seems to mirror our own even though the authority to grant a new trial in civil cases has historically been much broader than in criminal cases.

**What Does This Have To Do With This Case?**

In this case, Appellee filed a "Motion for New Trial and Motion In Arrest of Judgment" within thirty days of sentencing. The only legal claim alleged in the motion is that "the verdict is contrary to the law and the evidence." We have consistently held that "allegations that a verdict [is]

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[46] *See e.g., In re Toyota Motor Sales, U.S.A., Inc.,* 407 S.W.3d 746, 754 n. 4 (Tex. 2013) (declining to consider the propriety of the trial court's consideration of an allegation in an untimely amendment to a motion for new trial over one party's objection where the trial court based its ruling exclusively upon grounds contained in the original motion for new trial).

against the law and the evidence raises a sufficiency challenge and *only* a sufficiency challenge."[47] And, at the end of the motion, Appellee noted the trial court's discretion to grant a new trial "in the interest of justice."

As evidentiary support for her legal sufficiency claim, Appellee referred to "new evidence" that was not available or known at the time Appellee entered her plea of guilty. According to Appellee, the trial court had, subsequent to Appellee's plea, considered a motion to suppress filed in a co-defendant's case and based upon the same evidence surrounding the traffic stop in Appellee's case. Appellee alleged that the police officer's testimony at the suppression hearing and the DVD recording of the stop amounted to new evidence supporting Appellee's claim that no violation of the law had been committed by the suspect vehicle. Appellee's counsel also attached an affidavit reciting the same facts alleged in the motion.

At the hearing on the motion, Appellee's counsel sought to argue a new legal ground for granting a new trial. In addition to relying upon the allegations in the motion and the affidavit supporting the motion, Appellee's counsel also sought to claim she was ineffective for her decision not to file a motion to suppress. The following exchange took

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[47] *State v. Zalman*, 400 S.W.3d 590, 594 (Tex. Crim. App. 2013) (citing *Bogan v. State*, 180 S.W. 247, 248 (1915)).

place:

> MR. MARTINDALE: Your Honor, I'm going to object to this line; that's not part of this Motion.
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> MS. MCCOY: Your Honor, I'm entitled to bring things outside of the motion. In fact, the motion itself says based on – my Motion itself says based on these facts, as well as anything else that may come out at the hearing, we would request the Motion for New Trial be granted.
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> MR. MARTINDALE: She is –
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> THE COURT: I'll let her continue.

The trial court heard the State's objection that this was outside the scope of the motion, and the trial court overruled that objection by informing the parties that it would allow trial counsel to continue.[48] The trial court ultimately granted the motion for the new trial "in the interest of justice."

In *State v. Zalman*, we held that when a defendant states a valid legal claim, he must point to evidence that supports the same legal

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[48] In the context presented here, the trial court's statement "I'll let her continue" is not any different than "I'll allow it." A trial court's ruling on a matter need not be expressly stated if its actions or other statements otherwise unquestionably indicate a ruling." *See e.g.*, *Ramirez v. State*, 815 S.W.2d 636, 650 (Tex. Crim. App. 1991) (trial judge "implicitly overruled" defendant's objection to State's question by directing witness to answer question). I do not read *State v. Moore* as obviating the State's need to obtain an adverse ruling from the trial court regarding its objection to an untimely amendment to a motion for new trial. 225 S.W.3d 556 (Tex. Crim. App. 2007) (holding that State must make a timely objection to any untimely amendment of a motion for new trial). Nor do I think the Court does. Rather, I understand *Moore* as holding that the State must preserve the right to complain on appeal that the trial court abused its discretion in granting a new trial based upon an allegation contained in an untimely amendment to a motion for new trial. In this case the State did so. Appellee does not argue otherwise.

claim.[49] To hold otherwise would defeat the notice requirements of the motion.[50] There, the defendant raised a claim in his motion for new trial that the verdict was "contrary to the law and the evidence" but he sought to raise additional claims regarding evidentiary suppression issues in a memoranda of law in support of the motion.[51] We held that the trial court abused its discretion in granting the new trial because the memoranda of law was untimely and did not support the legal claim presented in the motion.[52]

Here, Appellee raised facts in the motion for new trial, but those facts do not support the legal claim for relief. Rather than articulate another legal claim for relief in her motion that might find support in the the alleged facts, Appellee simply relied upon "the interest of justice." Under *Zalman*, the trial court could have denied Appellee's motion without a hearing because the alleged facts did not support the stated claim for relief.

Of course, the trial court granted the motion, and we must uphold

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[49] *Zalman*, 400 S.W.3d at 594-95.

[50] *Id.*

[51] *Id.* at 592.

[52] *Id.* at 595.

the trial court's ruling if it is correct under any theory of law.[53] But, as discussed above, "interest of justice" is not a legal claim unto itself. And treating it as a magic portal through which we simply look at the facts alleged in the motion to see if they satisfy an unarticulated legal claim undermines the pleading requirements for motions for new trial.

The Court liberally construes the motion as also including a "new evidence" claim based upon the factual allegations contained within the motion. The Court's approach is consistent with the general practice of construing Rules of Appellate Procedure liberally.[54] And I agree with the Court's holding that the evidence adduced at the co-defendant's motion to suppress is not "new evidence." I also agree with both the Court and the concurrence, that even under a liberal reading of the pleadings, Appellee's involuntary plea and ineffective assistance claims were not included in Appellee's original pleadings. Saying that these legal claims are subsumed within an "interest of justice" claim continues the myth that we have ever held that "the interest of justice" provides an independent legal basis for a new trial.[55] Moreover, it fails to give full

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[53] *Alford v. State*, 400 S.W.3d 924, 929 (Tex. Crim. App. 2013).

[54] *See e.g. Fulgham v. Fischer*, 349 S.W.3d 153 (Tex. App.–Dallas 2011) (noting that Texas appellate court's must construe the Texas Rules of Appellate Procedure reasonably, yet liberally).

[55] As discussed above, our sister court would agree. *See Scaffolding*, 377 S.W.3d at 689-90 (holding that "in the interest of justice and fairness" is never an independently

effect to our procedural rules setting a time limit on filing amendments to a motion for new trial.[56] Because the State properly objected to Appellee's untimely grounds for a new trial at the hearing and obtained an adverse ruling, these new legal claims do not provide a basis to support the trial court's ruling.[57]

With these thoughts I join the Court's opinion.

Filed: May 17, 2017

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sufficient reason for granting a new trial).

[56] *See* TEX. R. APP. P. 21.4(b) ("*To Amend*. Within 30 days after the trial court imposes or suspends sentence in open court but before the court overrules any preceding motion for new trial, a defendant may, without leave of court, file one or more amendent motions for new trial.").

[57] *Moore*, 225 S.W.3d at 570 .