



**IN THE
TENTH COURT OF APPEALS**

No. 10-08-00169-CR

KEITH ALLEN PORTER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

**From the 54th District Court
McLennan County, Texas
Trial Court No. 2006-320-C2**

**CONCURRING OPINION TO DENIAL
OF MOTION FOR REHEARING**

On original submission the Court, in an unpublished opinion, affirmed the trial court's judgment. I concurred without a separate opinion. In a separate order the Court is now ordering their prior unpublished opinion to be published. I therefore find it necessary to explain why I join the judgment but not the opinion. I believe the trial court abused its discretion under the test for when the State must elect the offense it is trying before it rests. I do not think the test has changed, nor has the Court clarified it, but if a defendant is entitled to know the offense for which he is being tried, and I think

he is, the State, on the facts of this case, should have been made to elect the offense well before it rested its case-in-chief. I determined, however, that the trial court's error was harmless and can therefore concur in the judgment to the extent that it affirms the trial court's judgment.

TOM GRAY
Chief Justice

Concurring opinion delivered and filed October 28, 2009
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